

IN THE INCOME TAX APPELLATE TRIBUNAL

AHMEDABAD “C” BENCH

**(BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER
& SHRI WASEEM AHMED, ACCOUNTANT MEMBER)**

**ITA. No: 62/AHD/2016
(Assessment Year: 2012-13)**

DCIT Circle-1(1)(2), Ahmedabad	V/S	M/s. Liva Healthcare Ltd. (now Cadila Healthcare Ltd. since amalgamated), Zydus tower, Satelliter Cross Road, Sarkhej- Gandhinagar Highway, Ahmedabad-380015
(Appellant)		(Respondent)

PAN: AAACL0709Q

**Appellant by : Shri Lalit P. Jain, Sr. D.R.
Respondent by : Shri Mukesh M Patel, A.R.**

(आदेश)/ORDER

Date of hearing : 28 -11-2018
Date of Pronouncement : 28 -12-2018

PER MAHAVIR PRASAD, JUDICIAL MEMBER

1. This appeal by the Revenue is directed against the order of the Ld. CIT(A)-IV, Ahmedabad dated 12.10.2006 pertaining to A.Y. 2005-06 and following grounds have been taken:

(1) The Id.CIT(A) has erred in law and on facts in deleting the disallowance of Rs.1,42,44,447/- (being 70% of Rs.2,03,49,211/-) made by the AO on account of physician samples distributed at free of cost.

(2) The Id.CIT(A) has erred in law and on facts in deleting the disallowance of Rs.1,17,53,365/- made by the AO on account of sponsorship of doctors'9 overseas tours.

(3) The Id.CIT(A) has erred in law and on facts in deleting the disallowance of Rs.61,28,797/- made by the AO on account of sales promotion expenses.

(4) The Id.CIT(A) ought to have taken note of Board's Circular No.5/2012 while considering the appeal of the assessee on above grounds.

(5) The Id.CIT(A) has erred in law and on facts in deleting the disallowance of Rs.50,00,000/- made by rejecting the assessee's claim of deduction u/s 54EC of the Act

2. Ground no. 1 is relating to deleting the disallowance of Rs. 14244447/- (being 70% of Rs. 20349211/-) made by the A.O. on account of Physician Samples distributed free of cost.
3. In this case, ld. A.O. disallowed the amount of Rs. 14244447/- being purchases of Physician's Sample (not for sale) distributed to the Physicians free of cost treating it as non-business expenditure. Ld. A.O. made the disallowance on account of that assessee is unable to produce the detail the difficult its claim for liability of the alleged expenses.
4. In appeal, assessee contention was accepted by the ld. CIT(A) holding that an identical addition is being made in the appellant case since assessment year 2008-09 and ITAT, Mumbai Bench in appellant's own case for assessment year 2008-09 has decided the issue in favour of assessee in ITA No. 843/Mum/2012 dated 31.03.2015.

5. Apart from the above said, assessee also submitted a copy of jurisdictional High Court in assessee's own case in Tax Appeal No. 478 of 2016 dated 21.06.2016 wherein assessee appeal was allowed and relevant order of the Hon'ble High Court is reproduced:

1. The Revenue is in appeal against the judgment of Income Tax Appellate Tribunal raising following substantial question of law

"Whether the Appellate Tribunal was right in law and on facts, in deleting the disallowance of Rs.44,61,400/- being 70% of the expenditure in respect of Physicians' Sample?"

2. The issue pertains to disallowance of Rs.44.61 lacs (rounded off) representing 70% of the expenditure claimed by the assessee in respect of free Physicians' samples. The respondent assessee is in the business HC-NIC Page 1 of 3 Created On Thu Jun 23 02:32:25 IST 2016 O/TAXAP/478/2016 ORDER of manufacturing pharmaceutical drugs. In the course of business, it supplies free samples to the Doctors. Expenditure relatable to such free samples was claimed as an business expenditure. The Assessing Officer disallowed 70% thereof upon which the assessee appealed to the Commissioner of Income Tax (Appeals), who deleted the disallowance. The Revenue approached the Tribunal. By the impugned judgment, the Tribunal upheld the decision of Commissioner of Income Tax (Appeals). In the process, the Tribunal made following observations:

"4. We have gone through the well reasoned order passed by the Id. CIT(A). It is a known fact that the free sample of medicines supplied to the doctors is done for the promotion of the product of the company. Even when a new product is launched, the doctors are given necessary inputs regarding the use and effects etc.

of the product and which also contributes imparting knowledge to the doctors about the new medicine/product coming into the relevant for practice of their profession. The genuineness of the transactions has not been doubted by the A.O. We do not find any infirmity in the well reasoned order passed by the Id. CIT(A) holding that the expenses were incurred for the business promotion activity of the assessee. We therefore do not find any merit in the appeal filed by the Revenue and accordingly dismiss the same."

3. Perusal of the orders on record would demonstrate HC-NIC Page 2 of 3 Created On Thu Jun 23 02:32:25 IST 2016 O/TAXAP/478/2016 ORDER that the issue is primarily in the realm of appreciation of material on records. Even the Assessing Officer allowed part of the expenditure, thereby indicating that he would not averse to the expenditure in the nature of free samples being related to assessee's business. He only disputed the quantification. When Commissioner of Income Tax (Appeals) concurrently found sufficient reason to accept the assessee's claim, we do not see any question of law arising.

4. Tax Appeal is therefore dismissed.

6. Respectfully following the ITAT Mumbai Bench decision and Hon'ble Gujarat High Court order in assessee's own case, we dismiss this ground of appeal of the revenue.
7. Now we come to ground relating to disallowance of Rs. 1,17,53,365/- on account of Sponsorship of Doctor's Overseas Tours.

8. Ld. A.O. has discussed the issue at page no. 4 to 10 and made the disallowance on the ground that in view of the CBDT Circular No. 5/2012 that any medical practitioner or their professional associates is prohibited from accepting any gift, travel facility, hospitality, cash or monetary grant from any pharmaceutical and allied health sector Industries as per the Medical Council regulations and such expenses are not allowable u/s 37(1) of the Income Tax Act.
9. In appeal, ld. CIT(A) granted the relief to the assessee with following observation:

5.2 I have considered the assessment order and the submissions made by the appellant. During the assessment proceedings, the appellant disallowed an amount of Rs.1,17,53,365/-on account of the appellant sponsoring overseas tours of doctors. The AO, relying on CBDT Circular No.5 of 2012, disallowed this amount holding that the same was not incurred wholly and exclusively for the purpose of the appellant's business. A perusal of the submission made by the appellant shows that an identical issue was before the Hon'ble ITAT, Mumbai Bench in appellant's own case for Asst. Year 2008-09 and the Hon'ble Bench vide its order in ITA No. 847/Mum/2012 dated 31.3.2015 decided the issue in favour of the appellant, holding as under:

"The assessee is in the business of manufacturing and marketing of medicines and skin care products. There is a stiff competition in the market for the sale of the identical products manufactured by other companies.It is commonly known that the medicine companies sponsor the trips of the doctors to overseas so as to influence them to prescribe the medicines manufactured by their company. The assessee had produced a set of photographs to show that by sponsoring of the foreign trips, the product awareness exercise wasalsodone.It is not the case of the Revenue that the persons/doctors whose overseas trip was sponsored were otherwise in any manner related to the assessee company. The only purpose of the assessee company to sponsoer the foreign trip of the doctors was for the purpose of promotion and sale of the products of the assessee company. It may be unethical practice for the doctors to accept such type of incentives, however, so far as the assessee is concerned, sponsorship was purely on account of business angle of the assessee company. We, therefore, do not find any justification on the part of lower authorities in disallowing the said expenditure."

5.2.1 Respectfully following the decision of the Hon'ble ITAT, Mumbai, the disallowance of Rs.1,17,53,365/- made by the Assessing Officer is deleted. This ground of appeal is allowed,

10. Before us, Id. A.R. argued that matter has been decided in favour of the assessee's own case and cited an order of ITAT Mumbai Bench in assessee's own case in ITA No. 847/Mum/2012. The relevant paras of the ITAT is reproduced:

5. Now, coming to the appeal filed by the assessee being ITA No. 388/Mum/2012, the sole ground taken by the assessee is in relation to the disallowance of Rs. 42,53,924/- on account of claim of expenditure incurred by the assessee on oversea travel of doctors for attending seminar etc. and to encourage product awareness and sales promotion of the products manufactured by the assessee.

6. Admittedly, the assessee is engaged in the manufacturing of drugs and pharmaceuticals. The A.O. noted that the assessee had debited a sum of Rs. 42,53,924/- for sponsoring doctors for overseas tour. On being asked to explain in this aspect, the assessee submitted the required details. The A.O. did not doubt the genuineness of the transactions, however, held that sponsoring overseas trip of the doctors was not an activity relating to the business of the assessee. In appeal, the Id. CIT(A) also upheld the findings of the A.O. The assessee has thus come in appeal before us.

7. The Id. Counsel for the assessee while inviting our attention to the impugned order, has submitted before us that the detailed reply was submitted to the lower authorities explaining that the assessee sponsors various events and seminars at various places to encourage product awareness programs. As a part of sales promotion and product awareness program, the foreign tours of the selected doctors were sponsored and this was combined with the product awareness campaign by the assessee. This was also done to create good relationship with the doctors. The assessee had also furnished a list of doctors who had been sponsored along with the visit photographs. The lower authorities had not doubted the incurring of expenses but were of view that the said expenditure was not directly relating to the business activity of the assessee. In our view, the said opinion of the lower authorities is misplaced. The assessee is in the business of manufacturing . and marketing of medicines and skin care products. There is a stiff competition in the market for the sale of the identical products manufactured by other companies. It is commonly known that

the medicine companies sponsor the trips of the doctors to overseas, so as to influence them to prescribe the medicines manufactured by their company. The assessee had produced a set of photographs to show that by sponsoring of the foreign trips, the product awareness exercise was also done. It is not the case of the Revenue that the persons/doctors whose overseas trip was sponsored were otherwise in any manner related to the assessee company. The only purpose of the assessee company to sponsor the foreign trip of the doctors was for the purpose of promotion and sale of the products of the assessee company. It may be unethical practice for the doctors to accept such type of incentives, however, so far as the assessee is concerned, sponsorship was purely on account of business angle of the assessee company. We, therefore, do not find any justification on the part of lower authorities in disallowing the said expenditure. Accordingly, the order of the Ld. CIT(A) is set aside the addition made on this issue is deleted and the appeal of the assessee is allowed.

6. In the result, the appeal filed by the Revenue is dismissed and that of the assessee is allowed.

11. And also cited an order of ITAT, Ahmedabad Bench in assessee's own case for assessment year 2010-11 in ITA No. 2204/Ahd/2014 and relevant para of the judgment is reproduced:

2. Relevant facts of the case are in a very narrow compass. This assessee is being manufacturing drugs and pharmaceuticals. It distributed samples free of cost to physicians under the pretext of its business requirements. It pleaded in the course of scrutiny that its marketing staff visits various doctors to update them about product as well as healthcare information. The said field marketing staff was claimed to have given free physicians samples to the doctors. The Assessing Officer framed the impugned assessment on 04.01.2013 to disallow 70% of the expenditure in question of Rs. 1 crore; coming to Rs.70,00,000/- on the ground that there was no evidence indicating business expediency in giving such -free samples to physicians. He thereafter adopted his reasoning as in preceding assessment year 2009- 10.

3. The CIT(A) reverses Assessing Officer's findings as under:-

"1.1 Briefly stated, material facts of the issue in dispute as revealing from the impugned order are that the A.O. observed that the appellant used to claim huge expenses on account of free samples distributed to Physicians every year under the pretext that it is the business requirement of the appellant. According to the

A.O., similar type of expenses were disallowed in other cases of his charge and, therefore, he asked the appellant to explain as to why 70% of the expenditure incurred on free samples distributed to the physicians should not be disallowed and added back to its total income. In response, the appellant explained in detail, relying upon certain judicial pronouncements, which are reproduced in the impugned order itself. However, the A.O. did not accept the explanation of the appellant and disallowed 70% of the expenditure incurred on this count amounting to Rs.70,00,000/-. The operative part of conclusion of the A.O. is reproduced hereunder for the purpose of proper appreciation of merits of findings of the A.O.

"... Therefore, in line with the conclusion drawn in the case of other pharma companies in this charge namely -GlaxoSmithKline and Merck India Ltd, and also in the assessed s own case where there was a disallowance of 70% of this expenditure in A.Y. 2008-09 and 25% in A.Y. 2009-10, it is held that the assessee has not been able to prove the business expediency of the expenditure incurred under this head. However, since the matter is sub-judice, I see no reason to disallow only 25% of this expenditure, as done by the A.O. in A.Y. 2009-10 and thus proceed to disallow 70% of the total expenditure under this head i.e. 70% of Rs.1,00,00,000/-amounting to Rs.70,00,000/-, as done by A.O. in assessment years prior to A.Y. 2009-10. Accordingly, a sum of Rs.70,00,000/- is disallowed and added back to the total income of the assessee. ... "

1.2 During the appellate proceedings, the learned ARs vehemently protested the adhoc and lump sum disallowance made by the A.O., reiterating the arguments put forth before the A.O. and also submitting necessary particulars as to free samples like bills, vouchers and transportation/distribution of free samples to different physicians, etc... They also furnished a copy of the Id.CIT(A)'s orders in the appellants case for the preceding two years.

1.3 On careful consideration of arguments of the learned ARs as well as the facts averred in the impugned order and also the appellate orders for the preceding two years, it immensely transpires that the issue in dispute is squarely covered by two appellate orders of the learned predecessor in office wherein the appellant has been allowed relief on this issue. For ease of reference, the relevant portion of the Id.CIT(A)'s order dated 15.11.2011 in the appellants case for A.Y. 2008-09 is reproduced hereunder:

"5. The 1st ground of appeal is regarding an adhoc disallowance of 70% expenses incurred on physicians sample as claimed.

5.1 During the course of assessment proceeding, the A.O. had noticed that the appellant has claimed a huge expense against free samples distributed to

physicians. It was stated by the appellant that this is a business requirement. ... [page 2 & 3]

5.2 ...[page4&5]

5.3 ... [pages 6, 7 & 8]

5.4 ... [page 9] Under the circumstances, I find as the appellant has been able to prove the genuineness of expense, proper recording in its books of accounts of the expenses, and the relationship of the expense with the business of the appellant, I find there is no need to make the said disallowance simply because in some other case, a disallowance made had been upheld. The case laws relied by the appellant also helps its case. The addition made is, therefore, deleted and the ground of appeal allowed."

Moreover, the Id.CIT(A) has followed her decision taken in the appellate order for A.Y. 2008-09 in the appellants case for A.Y. 2009-10 vide order dated 08.11.2012. In view of the categorical findings of the Id. CIT(A)s in the appellants case for A. Ys. 2008-09 & 2009-10, I find no reason to disagree with the same. Accordingly, the action of the A.O. of making adhoc disallowance on this count stands deleted and, thus, Ground No. 1 stands allowed."

4. Both the learned representatives reiterate their respective stands in support and against the impugned addition during the course of hearing. There is hardly any dispute that the CIT(A) has followed his order for assessment years 2008-09 and 2009-10, for deleting the impugned ad-hoc disallowance @ 70%. We sought to know about final outcome of the very issue in said earlier assessment year. Learned counsel representing the assessee files before us copy of hon'ble jurisdictional high court's decision in preceding assessment year in tax appeal No.478 of 2016 decided on 21.06.2016 upholding this tribunal's order dated 31.08.2015. No rebuttal to these legal developments has come at Revenue's behest. Case records comprise of the said hon'ble jurisdictional high court's decision as well that of learned co-ordinate bench pertaining to preceding assessment year. We, therefore, adopt judicial consistency to affirm the CIT(A)'s findings under challenge. This Revenue's appeal is dismissed.

12. Respectfully following the aforesaid judgment and after going through the impugned order, we are of the considered opinion, that Id. CIT(A) has passed detailed and reasoned order and same does not need any kind of interference at our end. Thus, we dismiss this ground of appeal.

13. Now we come to ground relating to disallowance of Rs. 61,28,797/- on account of Sales promotion

14. Id. A.O. has discussed the issue in his order from page Nos. 10 to 18 and Para 5.3 to 5.5 and held that assessee cannot be allowed the expenses as deduction u/s. 37 of the Act as claimed by the assessee as it does not fulfill the criteria laid down u/s. 37.

15. In appeal before the Id. CIT(A) who allowed the appeal of the assessee and relevant para of the same is reproduced:

6.2 I have considered the assessment order and the submissions made by the appellant. During the assessment proceedings, the AO noted that the appellant had debited the amount of Rs.61,28,797/- as sales promotion expenses which included –

- (i) Rs.26,04,22/- on gifts to doctors;*
- (ii) Rs.13,32,615/- on scientific promotional articles to doctors; and*
- (iii) Rs.21,91,953/- on dermatology books to doctors.*

After a detailed discussion in his order, the AO held that this amount had not been incurred wholly and exclusively for the purpose of business and was hence not allowable u/s. 37 of the LT. Act. He accordingly disallowed the same. The appellant submitted that the expenditure incurred on sales promotion was integral to the business and was incurred out of commercial expediency.

6.2.1 As regards the disallowance of Rs.21,91,953/- incurred on dermatology books to doctors, a perusal of the submission made by the appellant shows that the books that have been distributed to doctors are medical notebooks which provide coverage of latest medication and procedures in respect of dermatology. The same are related to the business of the appellant and the expenditure incurred is not in the nature of cash or gifts given to medical practitioners which is covered by Circular No.5/2012 relied upon by the AO. It is seen from the details filed that the expenditure is purely for the purpose of education and guidance to the medical fraternity. Further, an identical disallowance on sales promotion expenses incurred on distribution of books to doctors has been decided in favour of the appellant for Asst. Year 2011-12 by my learned predecessor vide his order No. CIT(A)-VIII/DCIT(OSD)-I/Cir.4/455/13-14 dated 26.08.2014. In view of the facts of the case and the decision of Id. CIT(A) for Asst. Year 2011-12, the disallowance of Rs.21,91,953/- is deleted.

6.2.2 As regards the disallowance of Rs.26,04,229/- in respect of expenditure on gift articles and Rs.13,32,615/- on distribution of scientific promotion articles to doctors, a perusal of the submission made by the appellant shows that these expenses have been incurred on promotional activities in order to facilitate better application of the appellant company's products among the medical fraternity. It is seen from the details filed by the appellant that these expenses have not been incurred on any items of personal nature.

Section 37 of the Income-tax Act reads as under:

"(1) Any expenditure (not being expenditure of the nature described in sections 30 to 36.3[* * *] and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession ".

Condition for allowance under section 37

Such expenditure should not be covered under the specific section i.e. sections 30 to 36.

Expenditure should not be of capital nature.

The expenditure should be incurred during the previous year,

The expenditure should not be of personal nature.

The expenditure should have been incurred wholly or exclusively for the purpose of the business or profession.

The business should be commenced.

6.2.3 In the instant case, the expenditure incurred is not capital in nature or in the nature of personal expenses of the appellant. In fact, it has been incurred on account of commercial expediency and has facilitated the appellant in carrying on its business. A perusal of the accounts of the earlier years shows that the total turnover and net profit of the appellant company have been increasing over the years which shows that the sales promotion activities have led to higher sales and better financial results for the company.

6.2.4 Considering the discussion above, I am of the view that the expenditure claimed by the appellant was entitled to deduction u/s. 37(1) and the disallowances of Rs.26,04,229/- and Rs.13,32,615/- are accordingly deleted.

16. Now we come to ground relating to Rs. 50,00,000/- by rejecting the assessee's claim of deduction u/s. 54EC.

17. Ld. A.O. had discussed the issue at page no. 18 to 20 and Para no.6 & 7 and held that exemptions u/s. 54EC against deemed Short Term Capital gain is not allowable.
18. In appeal before the ld.CIT(A) who allowed the claim of the assessee and he granted the relief to the assessee.
19. Before us, ld. A.R. Mukesh M. Patel cited an order of Jurisdictional High Court in the matter of CIT vs. Aditya Medisales [2013] 38 taxmann.com 244 (Guj.).

“Section 54EC, read with section 50, of the Income-tax Act, 1961 - Capital gains - Not to be charged on investment in certain bonds [Section 54EC v. Section 50] - Assessee-company sold automatic electric monitoring system - It invested gain amount in rural electrification bonds and claimed exemption under section 54EC - Assessing Officer found that short term capital gain was offered by assessee under section 50 and disallowed exemption under section 54EC claimed by assessee on ground that same was not available on short-term capital gain - Whether since capital gain arose out of long term capital asset and same was invested in specified assets, exemption under section 54EC could not be denied on account of fact that deeming fiction of short-term capital gain was created under section 50 - Held, yes [Para 7] [In favour of assessee]”

20. In this case, assessee transferred an asset held by it for more than 36 months i.e. a long term capital asset and invested an amount of Rs. 50 lakhs in bonds issued by NHAI which is long term specified asset as per clause (b) sub clause (i) of the explanation to section 54EC.
21. In the above said case, in similar circumstances, Hon'ble Gujarat High court granted relief in favour of the assessee. Therefore, in such circumstances, we

do not want to interfere in the order passed by the ld. CIT(A). In our considered opinion, ld. CIT(A) has passed detailed and reasoned order and same does not require any kind of interference at our end. Therefore, same is dismissed.

22. In the result, appeal filed by the Revenue is dismissed.

Order pronounced in Open Court on	28- 12- 2018
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Sd/-

(WASEEM AHMED)
ACCOUNTANT MEMBER True Copy
Ahmedabad: Dated 28/12/2018

Sd/-

(MAHAVIR PRASAD)
JUDICIAL MEMBER

Rajesh

Copy of the Order forwarded to:-

1. The Appellant.
2. The Respondent.
3. The CIT (Appeals) –
4. The CIT concerned.
5. The DR., ITAT, Ahmedabad.
6. Guard File.

By ORDER

Deputy/Asstt.Registrar
ITAT,Ahmedabad