

IN THE INCOME TAX APPELLATE TRIBUNAL

AHMEDABAD “C” BENCH

**(BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER
& SHRI AMARJIT SINGH, ACCOUNTANT MEMBER)**

**ITA. Nos: 3058/AHD/2014 & 2599/AHD/2016
(Assessment Years: 2011-12 & 2012-13)**

M/s. Unicure Remedies Pvt. Ltd. F-25, BIDD Estate, Gorwa, Vadodara- 390016	V/S	Assistant Commissioner of Income Tax Circle-4, Vadodara
(Appellant)		(Respondent)

PAN: AAACU2473J

**Appellant by : Shri Nirmal Mehta, CA
Respondent by : Shri Lalit P. Jain, Sr. D.R.**

(आदेश)/ORDER

Date of hearing : 08 -01-2019

Date of Pronouncement : 30-01-2019

PER MAHAVIR PRASAD, JUDICIAL MEMBER

1. These two appeals filed by the Assessee are directed against the order of the Ld. CIT(A)-IV, Ahmedabad dated 12.10.2006 pertaining to A.Y. 2011-12 & 2012-13. The assessee has taken following grounds of appeal for A.Y. 2011-12:

1. *The learned Commissioner of the Income Tax (Appeal) - III, Baroda ["the CIT(A)"] erred in fact and in law in confirming the action of the Assistant Commissioner of Income Tax, Circle-4, Baroda ("the AO") in disallowing Sales Incentive expenses of Rs. 24,14,742/-.*
2. *The learned CIT(A) erred in fact and in law in confirming the addition made by AO by rejecting the accounting method regularly employed by the Appellant.*
3. *The learned CIT(A) erred in fact and in law in confirming the action of AO in disallowing Sales Promotion expenses of Rs. 30,11,573/-.*
4. *Your Appellant craves the right to add to or alter, amend, substitute, delete or modify all or any of the above grounds of appeal.*

2. The AO in his order has stated as under:

Sales Incentives and Sales Promotion Expenses:

On perusal of the P& L account of the company It was gathered that the assesses had debited Rs 69,32, 808/- under the head Sales Incentive Expenses and Rs 30,11,574/- under the head Sales Promotion Expenses, The assesses was asked to sub/nit the details In respect of the said expenses, The assesses submitted the ledger account in respect of sales Incentive expenses and Sales promotion expenses.

4.1 Sales Incentive Expenses:

On verification of the Sales Incentive Expenses ledger (Submitted by the assesses vide letter dated 26.12.2013) It was gathered that part of the expenses pertains to the period not relevant to the current Assessment year, The same was verified by the bills submitted by the assessee (vide his, submission dated 22/01/2014) which carried the information that it-pertained to FY 2009-10.

The assesses representative vide order sheet entry dated 31.01,2014 was asked as .to why not the expenses of Rs 21,19,792/- debited In Sales Incentive expenses of FY 2009-10 be disallowed and added to the income.

In response to the same the authorized representative of the assesses company made a submission dated 03.02,2014 as under;;

1. Payment: of sales incentive for prior period:

Company has sales incentive system by which it pays to Its sales personnel Incentives on sales achieved by them. These are of the following types

<i>Type of Incentives</i>	<i>Method of payment</i>	<i>Followed since past several years</i>
<i>Sales Incentive paid to GM</i>	<i>Incentive Is paid In the following year for the preceding years performance</i>	<i>Yes</i>
<i>Sales Incentive to sales representative</i>	<i>Incentive Is calculated each quarter and paid at the end of the following quarter</i>	<i>Yes</i>
<i>Sales Incentive paid to star performer of the year</i>	<i>This Is based on last year's performance and paid In the beginning of the following year</i>	<i>Yes</i>
<i>Special Directors prize to best performer</i>	<i>This Is based on lest years performance and paid In the beginning of the following year</i>	<i>Yes</i>

You have raised a question about payment of Incentives to staff which pertains to prior period, As it has been clarified In the course of discussion during personal hearing, It has been a practice of the company for the past 15 years that sates Incentives for a quarter are always paid in the following quarter, Such practice Is adopted to ensure that the staff engaged In sales does not take short term measures where they dump material to earn incentive, collect their Incentive end

eventually leave the job. This works adversely to the Interest of the company as company would be booking sales which may result Into sales return or affect the sale In the following quarter, For this reason all Incentives are paid after a cooling period-of one quarter and paid at the -end of following quarter only, In case of. the senior most person In marketing Mr Chinoy, who Is also with the company for over 20 years It Is paid In the following year, All in all In a typical year Incentives for four quarter would be accounted uniformly so It will not violate profit of the year In any year."

4.1.1 I have considered the reply of the assessee, The same Is not tenable. The provisions of section 145 of the Income tax Act reads as under:

'[Method of accounting

145(1) Income chargeable under the head " Profits and gains of business or profession" or "Income from other sources" shall, subject to the provisions of sub section (2), be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee,

(2) The central Government may notify In the Official Gazette form time to time accounting standards to be followed by any class of assesseees or in respect of any class of income.

(3) Where the Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee, or where the method of accounting provided in sub section (1) or accounting Standards as notified under sub section (2), have not been regularly followed by the assessee, The assessing Officer may make an assessment In the manner provided in section 144]

The assessee is observing Mercantile System of accounting. Under the mercantile system of accounts the income and expenditure are required to be accounted for in the relevant assessment year. The expenditure Is allowable In the year to which It relates, It Is settled that deductions can be permitted in respect of only those expenses which are Incurred In the relevant accounting year for the purpose of computing. The claim of the assessee of expenses pertaining to prior period cannot be accepted no matter what practice has been followed by the assessee company.

It Is already enacted in section 37 of the Income tax Act 1961 which disallows the expenses which are not related to current year. Further the fact of the payments was already crystallised during the year on the basis of the sales booked. The liability In respect of payment of sales incentive on the sales booked during the year by the company was already known to the company. Therefore the expenses related to earlier year cannot be granted In the current financial year.

Further It Is also observed that TDS has not been deducted on , the said payment. Accordingly expenses to the tune of Rs 21,14,742/- pertaining to the period April 2009 to March 2010 are disallowed and added to the total income.

3. Against the said addition, assessee preferred first statutory appeal before the ld. CIT(A) but to no avail and ld. CIT(A) dismissed the appeal.
4. Now appellant is before us.

5. Appellant is a pharmaceutical company for the purpose of payment of sale incentives to employees and as per the system being regularly followed by the appellant incentive for a quarter is always paid to the General Manager Sales representative and Special Director price to best performer. And this system has been regularly followed by the appellant for the past 15 years. The appellant case is that it was having taxable income in previous and following years, so any such adjustments shall be tax neutral for a period of time. But the fact remains that the appellant was very well aware of the quantity of sales made by these persons at the time of finalization of accounts. Since, the incentives were being computed as a percentage of sales, hence such payment of incentive had accrued at the year end only.
6. On the other hand, ld. A.O. for disallowing payment is that the fact of the appellant was already crystallized during the year on the basis of sales booked and hence the liability in respect of payment of sales incentive on the sales booked during the year by the company and was already known to the company. Therefore, the expenses related to earlier year cannot be granted in the current financial year.
7. In support of its contention, ld. A.R. cited a judgment of Hon'ble Gujarat High Court in the matter of CIT-1 vs. Indian Petrochemicals Corporation Ltd. [2016] 74 taxmann.com 163 (Gujarat) wherein it has been held by the Hon'ble High Court:

"Section 37(1), read with section 145, of the Income-tax Act, 1961 - Business expenditure - Allowability of (Prior period expenses) - Assessment year 1999-2000 - Whether prior period expenses quantified and paid during current year would be allowed as business expenditure in relevant assessment year even though

assessee was following mercantile system of accounting - Held, yes [Para 3] [In favour of assessee]”.

8. Since the Hon’ble Gujarat High Court has granted relief in the same matter, we allow this ground of appeal.
9. Now we come to next ground related to confirming the action of A.O. in disallowing Sales Promotion expenses of Rs. 30,11,573/-.
10. In order to fact Sales Promotion, assessee incurred expenses of Rs. 30,11,573/- . On Ethical promotion- Propaganda, Over the counter i.e. advertisement of medicine and apart from that appellant company also distributed the Gift article, Gold coin saving kits etc. to the doctors and the other concerned person. But lower authorities cited a Circular of Medical Council of India pharmaceutical company cannot give the freebees to the doctors and others.
11. In support of its contention, ld. A.R. cited an order of our own bench in the matter of ITO vs. Sunflower Pharmacy [2017] 88 taxmann.com 326 [Ahmedabad-Trib] has justified these kind of expenses and relevant part of the same is reproduced:

“Section 37(1), read with section 271(1)(c) of the Income-tax Act, 1961 - Business expenditure - Allowability of (Illegal payments) - Assessment year 2011-12 - During relevant year, assessee-pharmaceutical company paid certain commission to doctors -Assessing Officer relying on Circular No. 5/2012. dated 1-8-2012, which prohibits pharmaceutical companies from giving any monetary benefits to doctors, disallowed said payments of commission - Assessing Officer also passed a penalty order under section 271(1)(c) in respect of said disallowance - It was noted that Co-ordinate Bench of Tribunal in a case involving similar issue had

held that Circular, dated 1-8-2012 was applicable from assessment year 2013-14 onwards and, thus, disallowance made in relevant year on basis of said circular was not justified - Whether in view of order passed by Co-ordinate Bench, impugned disallowance made by Assessing Officer was to be deleted - Held, yes - Whether as a consequence thereof, penalty order passed under section 271(1)(c) was also liable to be quashed - Held, yes [Paras 2.10 and 2.11] [In favour of assessee]"

12. Since our bench has already given relief to some pharmaceutical company, therefore, we allow this ground of appeal.

13. Now we come to ITA No. 2599/Ahd/2016 for A.Y. 2012-13 and confirming the disallowance of Employees Provident Fund of Rs. 2,23,110/- u/s. 36(1)(va).

14. This issue is already against the appellant for late deposit of Employees Provident Fund with the authority by the judgment of Hon'ble Gujarat High Court in the matter of GSRTC 366 ITR 170 wherein it is held:

"Section 43B, read with section 36(1)(va) of the Income-tax Act, 1961 - Business disallowance - Certain deductions to be allowed on actual payment (Employees contribution) - Whether where an employer has not credited sum received by it as employees' contribution to employees' account in relevant fund on or before due date as prescribed in Explanation to section 36(1)(va), assessee shall not be entitled to deduction of such amount though he deposits same before due date prescribed under section 43B i. e., prior to filing of return under section 139(1) - Held, yes - Assessee State transport corporation collected a sum being provident fund contribution from its employees - However, it had deposited lesser sum in provident fund account - Assessing Officer disallowed same under section 43B -

However, Commissioner (Appeals) deleted disallowance on ground that employees contribution was deposited before filing return - Whether since assessee had not deposited said contribution in respective fund account on date as prescribed in Explanation to section 36(1)(va), disallowance made by Assessing Officer was just and proper - Held, yes [Para 8] [In favour of revenue]

15. In the meanwhile, it is noticed that on this issue appeal is pending before the Hon'ble Supreme Court and recently Hon'ble Gujarat High Court in Tax Appeal No. 1186 of 2018 has held that two clear ways are possible to enable the appellant-assessee to get benefit of the judgment of the Supreme Court, in case the High Court judgment is reversed by the Hon'ble Supreme Court and relevant part of the said order of the High Court is reproduced:

"This Appeal is filed by the assessee to challenge the judgment of the Income Tax Appellate Tribunal, Ahmedabad {"Tribunal" for short} dated 22nd March 2018. The issue pertains to Assessment Year 2013-14 and the sole question raised by the assessee in this appeal concerns deductibility of a sum of Rs. 20,34,916/= which was the employees' contribution towards Provident Fund, ESI, etc. It appears that the assessee did deposit such amount of contribution towards PF & ESIC accounts, however, missed the deadline prescribed in the statutes for such purpose. On account of this, the Revenue C/TAXAP/1186/2018 ORDER did not permit deduction of such sum from the income of the assessee. Such disallowance thereupon became the subject matter of appeal before the Tribunal. The Tribunal dismissed the ground, relying upon the judgment of this Court in the case of [Commissioner of Income-tax vs. Gujarat State Road Transport Corporation Limited](#), reported in 366 ITR 170 [Gujarat].

Counsel for the appellant did not dispute that the issue on hands is squarely covered by this Court in the case of CIT v. GSRTC [Supra]. He, however, submitted that the appeal is pending against the judgment of the High Court before the Supreme Court and SLP has been granted. The amount involved is not very large and it would be extremely expensive for the assessee to carry this in appeal before the Supreme Court. He, therefore, suggested that the benefit of this

judgment of the Supreme Court may be made available to the assessee; as and when rendered and in case, the judgment of the High Court is reversed.

Two clear ways are possible to enable the appellant- assessee to get benefit of the judgment of the Supreme Court, in case the High Court judgment is reversed. One is to dismiss this C/TAXAP/1186/2018 ORDER appeal and allow the assessee to approach the Supreme Court; like some other assesses would have. The other way is to make some arrangement under which without filing the appeal, the assessee would also be able to claim the benefit of the judgment. Looking to the smallness of the disputed amount, we adopt the latter option by providing as under :

This appeal at this stage is dismissed. However, if the Supreme Court reverses the judgment in the case of CIT vs. GSRTC [Supra], it would be open for the appellant to revive this appeal by filing an application for such purpose within three months from the date of the judgment.

Appeal stands disposed of accordingly.”

16. At the outset, ld. A.R. requested that in view of the order passed by the Hon'ble Gujarat High Court as aforesaid therefore this matter may be restored to the file of the ld.CIT(A).

17. In view of the above and order passed by the Hon'ble Gujarat High Court, we set aside the matter to the file of the ld.CIT(A) to decide the matter after taking into account order of the Supreme Court as and when will be passed by the Hon'ble Supreme Court. Accordingly will decide the matter.

18. In the result, appeal is allowed for statistical purposes.

Order pronounced in Open Court on	30- 01- 2019
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Sd/-

Sd/-

(AMARJIT SINGH)
ACCOUNTANT MEMBER **True Copy**
Ahmedabad: Dated 30/01/2019

(MAHAVIR PRASAD)
JUDICIAL MEMBER