



ITA No.6014/Mum/2017
Shri Ramesh P. Budhwani
Assessment Year :2013-14

आयकर अपीलीय अधिकरण “डी” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“D” BENCH, MUMBAI

माननीय श्री महावीर सिंह, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON’BLE SHRI MAHAVIR SINGH, JM AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ I.T.A. No.6014/Mum/2017
(निर्धारण वर्ष / Assessment Year:2013-14)

DCIT-Circle-2 Kalyan, 2 nd Floor Mohan Plaza, Khadakpada Wayale Nagar Kalyan (W)-421 301.	बनाम/ Vs.	Shri Ramesh P. Budhwani Prop. M/s. P.K. marketing Shop No.1-2, Kailash Complex Nr. Basharam Society ESIS Road Ulhasnagar-421 002.
स्थायी लेखा सं./जी आइ आर सं./PAN/GIR No. AATPB-5167-C		
(पीलार्थी/ Appellant)	:	(प्रत्यर्थी/ Respondent)

Appellant by	:	Abhi Ram Kartikeyan - Ld. DR
Respondent by	:	Bhavya Goyal – Ld. AR

सुनवाई की तारीख/ Date of Hearing	:	18/03/2019
घोषणा की तारीख / Date of Pronouncement	:	06/06/2019

आदेश / ORDER

Per Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by revenue for Assessment Year [in short referred to as ‘AY’] 2013-14 contest the order of Ld. Commissioner of Income-Tax (Appeals)-3, Thane, [in short referred to as ‘CIT(A)’], *Appeal No.1082-THN/16-17* dated 05/07/2017 *qua* deletion of certain addition of Rs.173.59 Lacs made by Ld. AO on account of *Sales Promotion Expenses*.



2. The Ld. Authorized Representative for Assessee [AR], *Ms. Bhavya Goyal*, at the outset, submitted that the facts of the present case stood squarely covered in assessee's favor by the decision of this Tribunal rendered in the case of *DCIT Vs. Shri Vinod Naraindas Kishnani [ITA No. 6227/Mum/2016 dated 26/10/2018]*. The copy of the order has been placed on record. Although Ld. DR supported the stand of Ld. AO but failed to controvert the aforesaid submissions.

3 Facts *qua* the addition are that the assessee has been saddled with impugned disallowance on account of *Sales Promotion Expenses* in scrutiny assessment u/s 143(3) on 31/03/2016. These expenses represent purchase of tobacco products (cigarettes) which are claimed to be distributed as gift articles. The Ld. AO opined that free of cost distribution promotes the higher consumption of the said commodity which is prohibited u/s 5(3) of the '*The Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and commerce, production, supply and Distribution Act, 2003*' (COTP Act) and therefore, the same were to be disallowed in terms of Explanation to Section 37 of the Income Tax Act, 1961. Although the assessee defended its stand, however, not convinced, Ld. AO disallowed the same. 4. Aggrieved, the assessee agitated the same with success before Ld. first appellate authority vide impugned order dated 05/07/2017 wherein the matter was concluded in assessee's favor by making following observations: -

5.0 Ground No. 1 is directed against the addition of Rs. 1,73,59,411/- out of sales promotion expenses by applying the provisions of Explanation 1 to Section 37(1) of the Act.



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(i) I have carefully considered the submissions of the appellant, the observations of the AO in the assessment order, case laws relied upon by the appellant and the facts of the case.

(ii) On perusal of the above, the reasons given by the AO for disallowing an amount of Rs.1,76,13,187/- out of sales promotion expenses is not justifiable for the reasons discussed below: -

(a) In fact, section 5(3) of COTP Act, 2003 applies only where a person by contract or otherwise promotes or agrees to promote the consumption of tobacco products, whereas in the appellant's case no such contract has been entered. Further, the appellant has not promoted any specific brand or a specific manufacture.

(b) The appellant does not manufacture or deal in or advertises any such products i.e. tobacco or gutka. The meaning of 'advertise' to mean publicize a product in order to promote sales of those products. In the case of the appellant, there was no intention or interest in promoting the sale of tobacco products but to promote sales of only those liquor products which he deals as a distributor.

(c) In fact, the Govt. has not prohibited the manufacture of tobacco product and the appellant is also not a manufacturer, therefore the provisions of section 5(3) of COTP Act are not applicable. In the case of the appellant, it is not even concerned whether the products are consumed or not as they are distributed both to smokers and non-smokers alike. Mere distribution does not tantamount to promotion of consumption, unless the distributor actively promotes the product. If that is the meaning of the COTP Act, every shopkeeper who sells tobacco products will become an offender under this Act and what is prohibited by law, is only sale of tobacco products to minors and public advertisement.

(d) The explanation to section 37(1) speaks of any expenditure incurred for any purpose which purpose is an offence or which purpose is prohibited by law, no deduction shall be allowed. Therefore, there cannot be any dispute that the purpose for which the impugned expenditure is incurred is to promote sale of liquor products and therefore, it is neither an offence nor prohibited by any law. What is prohibited is only certain specified activities as sale to minors, advertisement in media etc but this is not in the case of the appellant.

(e) In CBDT Circular No. 772 dated 23rd December, 1998 in Para 20.1 speaks of the amendment which will result in disallowance of certain claims made by assessee in respect of payment of extortion money, hafta, bribes etc and unlawful expenditure is not an allowable deduction. Thus, in order to attract the Explanation, the payment by itself must constitute violation of law. The purchase of tobacco products is not a payment which violates any law.

(f) Therefore, the provisions of section 5(3) of COTP Act, 2003, are not applicable in the case of the appellant, therefore, explanation 1 to Section 37(1) of the Act are also not applicable as the distribution of tobacco and gutka for appellant's sales promotion of its business is not an offence and not prohibited by law.

(g) For the purpose of disallowance under Explanation to Section 37(1), the following basic principles are to be fulfilled : **a)** The expense should have been incurred in proceedings launched for infraction of law **b)** The AO should examine the relevant Act to find out whether the expense is in the nature of penalty **c)** Expense should be related to illegally not to irregularity or procedural formalities' Expenses



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having nexus with the offences are on the same footing and are hit by Explanation to section 37(1). Whereas, in the case of the appellant, the above conditions have not been violated as no offence has been committed under any law.

(iii) The AR of the appellant has placed reliance on various judicial pronouncements. The aforesaid similar arguments were considered by the Jurisdictional Hon'ble High Court in the case of Brihan Maharashtra Sugar Syndicate Ltd. vs. CIT reported in 320 ITR 658 and the High Court on page 661 observed as ...",..... cannot be said to be against public policy. It is submitted that right to trade in liquor may be a trade which is res-extra commercium. Nevertheless, the state allows sale of liquor. Once that be the case and trading the liquor is permitted the question of public policy would not arise. Public policy, it is submitted would be in the event of the contract is immoral or against the state interest. There is no immorality involved in the contract.

There is no bar in the military officers in the armed force drawing liquor or drinking. The very fact that they can purchase the same from CDS must result in rejecting that contention."

Therefore, the issue involved in the appeal was squarely covered in principle by the aforesaid decision of the jurisdictional Hon'ble Bombay High Court in the case of the appellant.

(iv) This issue has been examined and adjudicated in appellant's own case for other year A.Y. 2009-10, A.Y. 2010-11 and A.Y. 2012-13 wherein the same addition on same issue are already deleted.

In view of the above stated facts and legal position, the appeal of the appellant on this ground is allowed and the addition/disallowance of Rs. 1,73,59,411/- made by the AO is deleted.

Aggrieved, the revenue is in further appeal before us.

5. Upon careful consideration of factual matrix, we find that identical issue stood covered in assessee's favor by the cited decision of co-ordinate bench of this Tribunal. For ease of reference, the relevant observations as well as conclusion drawn by the bench may be extracted in the following manner: -

5. We have considered the rival submission of the parties and have gone through the orders of authorities below. During the assessment proceeding the assessing officer disallowed the sale promotion expenses holding that the expenditure incurred on purchase of cigarette and tobacco product is not allowable expenditure due to disabling provision in section 37(1) of Act as distribution of tobacco product is not allowed under section 5(3) of COTP Act. We have perused the provisions of section 5 & 6 of COTP Act, which is reproduced below:

5. Prohibition of advertisement of cigarettes and other tobacco products. -

(1) No person engaged in, or purported to be engaged in the production, supply or distribution of cigarettes or any other tobacco products shall advertise and no person having control over a medium shall cause to be advertised cigarettes or any other tobacco



products through that medium and no person shall take part in any advertisement which directly or indirectly suggests or promotes the use or consumption of cigarettes or any other tobacco products.

(2) No person, for any direct or indirect pecuniary benefit, shall-

(a) display, cause to display, or permit or authorise to display any advertisement of cigarettes or any other tobacco product; or

(b) sell or cause to sell, or permit or authorise to sell a film or video tape containing advertisement of cigarettes or any other tobacco product; or

(c) distribute, cause to distribute, or permit or authorise to distribute to the public any leaflet, hand-bill or document which is or which contains an advertisement of cigarettes or any other tobacco product; or

(d) erect, exhibit, fix or retain upon or over any land, building, wall, hoarding, frame, post or structure or upon or in any vehicle or shall display in any manner whatsoever in any place any advertisement of cigarettes or any other tobacco product:

Provided that this sub-section shall not apply in relation to-

(a) an advertisement of cigarettes or any other tobacco product in or on a package containing cigarettes or any other tobacco product;

(b) advertisement of cigarettes or any other tobacco product which is displayed at the entrance or inside a warehouse or a shop where cigarettes and any other tobacco products are offered for distribution or sale.

(3) No person, shall, under a contract or otherwise promote or agree to promote the use or consumption of- (a) cigarettes or any other tobacco product; or (b) any trade mark or brand name of cigarettes or any other tobacco product in exchange for a sponsorship, gift, prize or scholarship given or agreed to be given by another person.

6. Prohibition on sale of cigarette or other tobacco products to a person below the age of eighteen years and in particular area. -No person shall sell, offer for sale, or permit sale of, cigarette or any other tobacco product-

(a) to any person who is under eighteen years of age, and (b) In an area within a radius of one hundred yards of any educational institution

6. On careful perusal of section 5(1) of COTP Act makes it clear that advertisement of tobacco products are prohibited under the law on the purchases who are engaged in production, supply or distribution, directly or indirectly. Subsection (2) of section 5, further puts a condition that no person for any direct or indirect pecuniary benefit shall display, cause to display, or permit or authorise to display any advertisement of cigarettes or any other tobacco product; or for sale or cause to sale, or permit or authorise to sell a film or video tape containing advertisement of cigarettes or any other tobacco product or to distribute, cause to distribute, or permit or authorise to distribute to the public any leaflet, hand-bill or document which is or which contains an advertisement of cigarettes or any other tobacco product; or erect, exhibit, fix or retain upon or land, building, wall, hoarding, frame, post or structure or upon or in any vehicle or shall display in any manner whatsoever in any place an advertisement of cigarettes or any other tobacco product. The proviso attached with this sub-section further prescribes that an advertisement of cigarettes or any other tobacco product in or on a package containing cigarettes or any other tobacco product; advertisement of cigarettes or any other tobacco product which is displayed at the entrance or inside a warehouse or a shop where cigarettes and any other tobacco products are offered for distribution or sale. Sub section 3 of section 5 of this Act prescribe that no person, shall, under a contract or otherwise promote or agree to promote the use or consumption of cigarettes or any other tobacco product; or any



trade mark or brand name of cigarettes or any other tobacco product in exchange for a sponsorship, gift, prize or scholarship given or agreed to be given by another person. Further section 6 of the COTP Act put certain condition on sale of tobacco product to the person of below the age of 18 years or within radius of hundred metres of educational institutions.

7. We have seen that the assessing officer has not brought any material on record which may show that assessee has undertaken the promotion of specific tobacco product or sponsored them.

8. The learned Commissioner (Appeals) on considering the contention of assessee concluded that section 5(3) of COTP Act applies only where a person by contract or otherwise promote or agree to promote the consumption of tobacco products, however the assessee nowhere, has entered into a contract for any specified brand of tobacco product. The assessee is not manufacturer or dealer or advertiser of any such product of the assessee is promoting sale of liquor by distributing the tobacco items. The Government has not prohibited the manufacturing of tobacco product, the assessee is also not a manufacturer thereof, and therefore, the provision of section 5 of COTP Act are not applicable on the assessee. The learned Commissioner (Appeals) also observed that the assessee is not concerned whether the product distributed by assessee is consumed or not. Mere distribution does not tantamount to promotion of consumption, unless the distributor actively promotes the product. The learned Commissioner (Appeals) also observed that if the provision of COPT Act is interpreted in such a manner, every shopkeeper who sells tobacco product will become an offender. Therefore, we are also in agreement with the conclusion arrived by Learned Commissioner.

9. The Hon'ble Bombay High Court in the Maharashtra Sugar Syndicate Versus DCIT (supra) while considering the issue whether the reimbursement of the liquor drawn and paid by the regiment/unit on an occasion like celebrating the Regiment's annual day which is reimbursed can be said to be against the public policy or not. The Hon'ble Bombay High Court on the facts that assessee-company was manufacturer of Indian made foreign liquor (IMFL). It was depending to a large extent on orders from military canteen for the sale of its products. During the relevant assessment year, it offered samples of its products at various military functions so that the personnel could develop a taste for it and it could secure bigger orders from the CSD (Canteen Stores Department). The modus operandi of offering such samples was that the concerned defence establishment used to buy the requisite quantity of company's liquor from the army liquor shops on actual payment and later on the regiment or the defence establishment forwarded the cash memos to the assessee-company for reimbursement. The assessee claimed said amounts as business promotion expenses. The Assessing Officer disallowed such expenses on ground that it was clear entertainment of customers. On appeal, the Commissioner (Appeals) upheld the disallowance on the ground that such expenses were against the public policy. The Tribunal upheld the order of the Commissioner (Appeals), On appeal to the High Court it was held that the Tribunal was not justified in holding that the expenditure incurred by the assessee for sales promotion was not allowable. The Hon'ble Court concluded that the army unit could not directly purchase liquor from a manufacturer. Liquor had to be purchased through CSD. This was done by the army unit. The second aspect was that the amounts spent by the unit towards purchase of that liquor was reimbursed by the assessee not to any



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individual but to the army unit itself and which went into the coffers of the Government. There was no bar in taking such reimbursement as evidenced by receipt. In other words. such a contract was not prohibited by law nor was it in the nature of bribe to an officer. The public policy would involve that income and expenditure which is from an activity which is prohibited by law or is immoral. Only then, the expenditure could have been disallowed. In the instant case, the amount had been spent by way of commercial expediency for promoting the assessee's products. The finding was that it was by way of sales promotion. Such expenditure was not against public policy. Once that be the case, the deduction was allowable, 10. Considering the decision of Hon'ble jurisdictional High Court that and view of the discussion referred above, we do not find any illegality or infirmity in the order passed by learned Commissioner (Appeals), which we affirmed. Hence, the ground of appeal raised by revenue are dismissed.

The revenue is unable to bring on record any distinguishing features. Further, the genuineness of the expenditure is not under dispute. Facts and circumstances being *pari-materia* the same, respectfully following the binding judicial precedent, we confirm the stand of Ld. first appellate authority.

6. The appeal stands allowed in terms of our above order.

Order pronounced in the open court on 06th June, 2019.

Sd/-

(Mahavir Singh)

न्यायिक सदस्य / **Judicial Member**

मुंबई Mumbai; दिनांक Dated : 06/06/2019

Sr.PS : Jaisy Varghese

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / **Accountant Member**

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

**उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.**