

आयकर अपीलीय अधिकरण "ए" न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

श्री डी. करुणाकरा राव, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA Nos.3033 & 3034/PUN/2017
निर्धारण वर्ष / Assessment Years : 2012-13 & 2013-14

Gennova Biopharmaceuticals Ltd.,
Emcure House, T - 184, MIDC,
Bhosari, Pune - 411026

PAN : AABCE0008Q

.....अपीलार्थी / Appellant

बनाम / V/s.

Assistant Commissioner of Income Tax,
Circle - 9, Pune

Assessee by : Shri Nikhil Pathak
Revenue by : Mrs. Shabana Parveen

सुनवाई की तारीख / Date of Hearing : 15-07-2019
घोषणा की तारीख / Date of Pronouncement : 06-08-2019

आदेश / ORDER

PER VIKAS AWASTHY, JM :

These two appeals by the assessee are directed against the order of Commissioner of Income Tax (Appeals)-6, Pune dated 17-10-2017 for the assessment years 2012-13 and 2013-14. Since, issue involved in both the appeals is identical and germinates from same set of facts, these appeals are taken up together and are decided vide this common order. We will first take up the appeal in ITA No. 3033/PUN/2017.

ITA No. 3033/PUN/2017 (A.Y. 2012-13)

2. Shri Nikhil Pathak appearing on behalf of the assessee submitted that the assessee is engaged in manufacturing and sales of bio-pharmaceutical products. The ld. AR submitted that the solitary issue in the appeal by the assessee is addition in respect of marketing and sales promotion expenditure (free gifts to the Doctors) by the assessee company. The issue in appeal is squarely covered in favour of the assessee by the decision of Pune Bench of Tribunal in the case of Emcure Pharmaceuticals Ltd. Vs. DCIT in ITA No. 1532/PUN/2015 for the assessment year 2010-11 decided on 29-01-2018.

3. On the other hand Mrs. Shabana Parveen representing the Department vehemently defended the impugned order and prayed for dismissing the appeal of assessee.

4. Both sides heard. Orders of the authorities below perused. The only issue in appeal is against disallowance of expenditure amounting to Rs.92,71,344/- towards gifts to the Doctors. We observe that the Co-ordinate Bench of Tribunal has considered identical issue in the case of Emcure Pharmaceuticals Ltd. Vs. DCIT (supra). In the aforesaid case the Tribunal has held that the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002 and CBDT Circular No. 5/2012 dated 01-08-2012 does not apply to pharmaceutical companies. For the sake of completeness, the relevant extract of the findings of Tribunal in the above said case are reproduced here-in-below :

“8. We heard both the parties on the issue of requirement of making disallowance u/s.37(1) of the Act in respect of the companies, the giver of the gifts and the articles and others to the medical professionals. There is no

dispute on the fact that claim of Rs.76,28,622/- was by the assessee on the gifts and other benefits passed on to the medical professionals. There is also no dispute on the taxability of the same in the hands of the said medical professionals. The only dispute relates to the correct legal position with regard to disallowability of the same u/s.37(1) of the Act in the cases of Pharmaceutical companies. We find this issue is now squarely covered by the decisions of Mumbai Bench of the Tribunal in the case of DCIT Vs. PHL Pharma Pvt. Ltd. decided on 12-01-2017 and in the case of M/s. Solvay Pharma India Ltd. Vs. Pr.CIT decided on 11-01-2018. For the sake of completeness of the order, we proceed to extract the operational finding from the aforesaid orders of the Tribunal.

Finding from PHL Pharma Pvt. Ltd.

“6. On a plain reading of the aforesaid notification, which has been heavily relied upon by the department, it is quite apparent that the code of conduct enshrined therein is meant to be followed and adhered by medical practitioners/doctors alone. It illustrates the various kinds of conduct or activities which a medical practitioner should avoid while dealing with pharmaceutical companies and allied health sector industry. It provides guidelines to the medical practitioners of their ethical codes and moral conduct. Nowhere the regulation or the notification mentions that such a regulation or code of conduct will cover pharmaceutical companies or health care sector in any manner. The department has not brought anything on record to show that the aforesaid regulation issued by Medical Council of India is meant for pharmaceutical companies in any manner.....

The aforesaid provision applies to an assessee who is claiming deduction of expenditure while computing his business income. The Explanation provides an embargo upon allowing any expenditure incurred by the assessee for any purpose which is an offence or which is prohibited by law. This means that there should be an offence by an assessee who is claiming the expenditure or there is any kind of prohibition by law which is applicable to the assessee. Here in this case, no such offence of law has been brought on record, which prohibits the pharmaceutical company not to incur any development or sales promotion expenses. A law which is applicable to different class of persons or particular category of assessee, same cannot be made applicable to all. The regulation of 2002 issued by the Medical Council of India (supra), provides limitation/curb/prohibition for medical practitioners only and not for pharmaceutical companies.....

10. From the perusal of the nature of expenditure incurred by the assessee, it is seen that under the head "Customer Relationship Management", the assessee arranges national level seminar and discussion panels of eminent doctors and inviting of other doctors to participate in the seminars on a topic related to therapeutic area. It arranges lectures and sponsors knowledge upgrade course which helps pharmaceutical companies to make aware of the products and medicines manufactured and launched by it. Under Key Account

Management, the assessee makes endeavour to create awareness amongst certain class of key doctors about the products of the assessee and the new developments taking place in the area of medicine and providing correct diagnosis and treatment of the patients. The said activities by the assessee are to make the doctors aware of its products and research work carried out by it for bringing the medicine in the market and its results are based on several levels of tests and approvals. Unless the pharmaceutical companies make aware of such kind of products to key doctors or medical practitioners, then only it can successfully launch its products/medicines. This kind of expenditure is definitely in the nature of sales and business promotion, which has to be allowed.....

Finding from M/s. Solvay Pharma India Ltd.

“17. We have considered rival contentions and carefully gone through the orders of the authorities below. We had also deliberated on the judicial pronouncements cited by learned AR and DR during the course of hearing before us as well as referred by CIT in his order passed u/s.263 of the IT Act, in the context of factual matrix of the case. In this case, we found from record that the assessee is engaged in the manufacturing of pharmaceutical products. In the course of its business it has incurred expenditure on advertisement and publicity. While framing the assessment, AO has called for the detail of expenditure so incurred and examined the nature of expenditure and thereafter only AO has allowed the expenditure as having been incurred for the purpose of business. We had also carefully gone through the notification dated 11/03/2002 notifying the regulations issued by the Medical Council of India (MCI). The code of conduct laid down in the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 ('MCI Regulations') issued with effect from 10th December 2009 applies only to doctors and not to Pharmaceutical and Medical device companies. Accordingly, MCI Regulations are not applicable to assessee, the question of assessee incurring expenditure in alleged violation of the regulations does not arise.

18. On the plain and simple reading of the provision of the Indian Medical Council Act, 1956, it is apparent that the ambit of statutory provisions relating to professional conduct of registered medical practitioners under the Indian Medical Council Act, 1956 is restricted only to persons registered as medical practitioners with the State Medical Council and whose names are entered into the Indian Medical Register maintained u/s 21 of the Act. 'Under the scheme of the Act.

19. Furthermore, there is no ambiguity of any kind in the scheme of the Indian Medical Council Act, 1956 that it neither deals with nor provides for any conduct of any association / society and deals only with the conduct of individual registered medical practitioners. There is no other interpretation, which is possible under the Act.

20. The intent of the applicability of the MCI Regulations was always to cover only individual medical practitioners, and not the pharmaceutical and medical device companies. Whether there is any contravention of the MCI Regulations or not is a matter which can be decided by the MCI itself and not by the Income-tax Department. Furthermore, the MCI has itself admitted that it has no jurisdiction whatsoever over any association/ society etc and its jurisdiction is confined only to the conduct of the registered medical practitioners. Furthermore, since the said MCI Regulations 2002 contains punitive 'provisions, it has to be read strictly and consequently it can apply only to Medical Practitioners and Physicians and not to the pharmaceutical companies. Further, MCI Act, 1956 does not apply pharmaceutical companies and consequently MCI Regulations 2002 cannot apply to such companies.

21. CBDT Circular no. 5 of 2012 seeks to disallow expenditure incurred by pharmaceutical companies inter-alia in providing 'freebies' to doctors in violation of the MCI Regulations. The term 'freebies' has neither been defined in the Income-tax Act nor in the MCI Regulations'. However, the expenditure so incurred by assessee does not amount to provision of 'freebies' to medical practitioners. The expenditure incurred by it is in the normal course of its business for the purpose of marketing of its products and dissemination of knowledge etc and not with a view to giving something free of charge to the doctors. The act of giving something free of charge is incidental to the main objective of product awareness. Accordingly, it does not amount to provision of freebies. Consequently, there is no question of contravention of the MCI Regulations and applicability of Circular no. 5 of 2012 for disallowance of the expenditure.

22. The department has not brought anything on record to show that the aforesaid regulation issued by Medical Council of India is meant for pharmaceutical companies in any manner. On the contrary, the assessee has brought to the notice of the bench the judgment of the Delhi High Court in the case of Max Hospital v. MCI in [WPC 1334 of 2013, dated 10-1-2014], wherein the Medical Council of India admitted that the Indian Medical Council Regulation of 2002 has jurisdiction to take action only against the medical practitioners and not to health sector industry. From the aforesaid decision, it is ostensibly clear that the Medical Council of India has no jurisdiction to pass any order or regulation against any hospital or any health care sector under its 2002 regulation. So once the Indian Medical Council Regulation does not have any jurisdiction nor has any authority under law upon the pharmaceutical company or any allied health sector industry, then such a regulation cannot have any prohibitory effect on the pharmaceutical company like the assessee. If Medical Council regulation does not have any jurisdiction upon pharmaceutical companies and it is inapplicable upon Pharma companies like assessee then, where is the violation of any of law/regulation? Under which provision there is any offence or violation in incurring of such kind of expenditure.

23. Now coming to the Explanation to Section 37(1) invoked by the CIT, the Explanation provides an embargo upon allowing any expenditure incurred by the assessee for any purpose which is an offence or which is prohibited by law. This means that there should be an offence by an assessee who is claiming the expenditure or there is any kind of prohibition by law which is applicable to the assessee. Here in this case, no such offence of law has been brought on record, which prohibits the pharmaceutical company not to incur any development or sales promotion expenses. A law which is applicable to different class of persons or particular category of assessee, same cannot be made applicable to all. The regulation of 2002 issued by the Medical Council of India (supra), provides limitation/curb/prohibition for medical practitioners only and not for pharmaceutical companies. Here the maxim of 'Expressio Unius Est Exclusio Alterius' is clearly applicable, that is, if a particular expression in the statute is expressly stated for particular class of assessee then by implication what has not been stated or expressed in the statute has to be excluded for other class of assessee. If the Medical Council regulation is applicable to medical practitioners then it cannot be made applicable to Pharma or allied health care companies. If section 37(1) is applicable to an assessee claiming the expense then by implication, any impairment caused by Explanation 1 will apply to that assessee only. Any impairment or prohibition by any law/regulation on a different class of person/assessee will not impinge upon the assessee claiming the expenditure under this section.

24. We observe that the CBDT Circular dated 1-8-2012 (supra) in its clarification has enlarged the scope and applicability of 'Indian Medical Council Regulation 2002' by making it applicable to the pharmaceutical companies or allied health care sector industries. Such an enlargement of scope of MCI regulation to the pharmaceutical companies by the CBDT is **without any enabling provisions** either under the provisions of Income Tax Law or by any provisions under the Indian Medical Council Regulations. The CBDT cannot provide casus omissus to a statute or notification or any regulation which has not been expressly provided therein. The CBDT can tone down the rigours of law and ensure a fair enforcement of the provisions by issuing circulars and by clarifying the statutory provisions. CBDT circulars act like 'contemporanea expositio' in interpreting the statutory provisions and to ascertain the true meaning enunciated at the time when statute was enacted. However the CBDT in its power cannot create a new impairment adverse to an assessee or to a class of assessee without any sanction of law. The circular issued by the CBDT must confirm to tax laws and for purpose of giving administrative relief or for clarifying the provisions of law and cannot impose a burden on the assessee, leave alone creating a new burden by enlarging the scope of a different regulation issued under a different act so as to impose any kind of hardship or liability to the assessee. In any case, it is trite law that the CBDT circular which creates a burden or liability or imposes a new kind of imparity, same cannot be reckoned retrospectively. The beneficial circular may apply retrospectively but a circular imposing a

burden has to be applied prospectively only. Here in this case the CBDT has enlarged the scope of 'Indian Medical Council Regulation, 2002' and made it applicable for the pharmaceutical companies. Therefore, such a CBDT circular cannot be reckoned to have retrospective effect. The free sample of medicine is only to prove the efficacy and to establish the trust of the doctors on the quality of the drugs. This again cannot be reckoned as freebies given to the doctors but for promotion of its products. The pharmaceutical company, which is engaged in manufacturing and marketing of pharmaceutical products, can promote its sale and brand only by arranging seminars, conferences and thereby creating awareness amongst doctors about the new research in the medical field and therapeutic areas, etc. Every day there are new developments taking place around the world in the area of medicine and therapeutic, hence in order to provide correct diagnosis and treatment of the patients, it is imperative that the doctors should keep themselves updated with the latest developments in the medicine and the main object of such conferences and seminars is to update the doctors of the latest developments, which is beneficial to the doctors in treating the patients as well as the pharmaceutical companies."

9. *The above judgmental laws are relevant for the proposition that the circular issued by the CBDT enlarging the scope of disallowance to the pharmaceutical companies is without any enabling notification or circular of the Medical Council of India. Considering the settled legal position on the issue, we are of the opinion that the issue now stands covered in favour of the assessee. **The pharmaceutical company like the assessee is outside the scope of the circulars by the Medical Council of India or the CBDT. Therefore, the conclusions of the AO/CIT(A) in this regard are reversed. Thus, the grounds raised by the assessee are required to be allowed.***

10. *In the result, appeal of the assessee is allowed."*

5. The Revenue has not brought before us any judgment of Hon'ble High Court or Hon'ble Apex Court to controvert the findings of Tribunal. Hence, for the parity of reasons, the impugned order is set aside and the appeal of assessee is allowed.

ITA No. 3034/PUN/2017 (A.Y. 2013-14)

6. The grounds raised by the assessee in appeal for assessment year 2013-14 are identical to the one adjudicated by us in assessment year 2012-13. Since, the issue in both the appeals are identical, the findings

given by us while adjudicating assessee's appeal in ITA No. 3033/PUN/2017 would *mutatis mutandis* apply to the present appeal, as well. For the detailed reasons given above, the appeal of the assessee is allowed for the assessment year 2013-14, as well.

7. In the result, both the appeals of assessee are allowed.

Order pronounced on Tuesday, the 06th day of August, 2019.

Sd/-	Sd/-
(डी. करुणाकरा राव/D. Karunakara Rao)	(विकास अवस्थी / Vikas Awasthy)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 06th August, 2019

RK

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-6, Pune
4. The Pr. Commissioner of Income Tax-5, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच,
पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति // True Copy//

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary,
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune