IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D", MUMBAI

BEFORE SHRI G.S. PANNU, VICE PRESIDENT AND
SHRI RAM LAL NEGI, JUDICIAL MEMBER

ITA NO. 4826/MUM/2016 : A.Y : 2010-11

M/s. Pfizer Limited 1802/1901, The Capital, Plot No. C-70, G Block, Bandra Kurla Complex, Bandra (E), Mumbai 400 051. **PAN : AAACP3334M** (Appellant)	Vs.	JCIT - 14(2), Mumbai. (Respondent)

Appellant by	**:**	**Shri P.J. Pardiwala &** **Shri Jeet Kamdar**
Respondent by	**:**	**Shri Chaitanya Anjaria**
Date of Hearing	**:**	**24/06/2019**
Date of Pronouncement	**:**	**30/08/2019**

O R D E R

PER G.S. PANNU, VICE PRESIDENT

The captioned appeal filed by the assessee is directed against an order passed by the CIT(A)- 57, Mumbai dated 29.04.2016 pertaining to assessment year 2010-11, which in turn, has arisen from an order dated 27.06.2014 passed by the Assessing Officer under Section 143(3) of the Income Tax Act, 1961 (in short 'the Act').

2. In this appeal, assessee has raised the following Grounds of appeal :-

"DISALLOWANCE OF PAYMENTS MADE TO DOCTORS IN ALLEGED VIOLATION OF PURPOSE UNDER INDIAN MEDICAL COUNCIL (PROFESSIONAL CONDUCT, ETIQUETTE AND ETHICS) REGULATIONS, 2002 - Rs. 3,51,65,661

1. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) ['CIT(A)'] erred in upholding the disallowance of (a) Rs. 3,09,01,508 out of expenses on brand reminders and (b) Rs, 42,64,153 out of expenses incurred on purchase of medical books and journals provided to HealthCare Professionals ('HCPs').

2. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding the action of the AO in holding that the aforesaid expenses are disallowable under the Explanation to section 37(1) of the Act in view of Circular no. 05/2012 dated 1 August 2012 issued by the Central Board of Direct Taxes ('CBDT') read with the amendment made by the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 ('IMC Regulations') on 10 December 2009.

3. Without prejudice to the above grounds of appeal and in the alternative, the learned CIT(A) erred in ignoring the contentions of the appellant that the IMC Regulations which were issued under the Indian Medical Council Act, 1956 do not apply to pharmaceutical companies.

4. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in holding that the CBDT Circular dated 1 August 2012 is applicable to expenditure incurred during the previous year relevant to AY 2010-11.

5. Without prejudice to the above grounds of appeal and in the alternative, the learned CIT(A) erred in ignoring the contention of the appellant that Circulars issued by the CBDT are not binding on the assessee.

6. Without prejudice to the above grounds of appeal and in the alternative, the learned CIT(A) erred in concluding that the transaction of purchase of brand reminders

and medical books and journals from the manufacturers/ suppliers and provision of the same to the HCPs is unethical under the IMC Regulations.

7. Without prejudice to the above grounds of appeal and in the alternative, the learned CIT(A) whilst accepting that it is a process of advertising, erred in holding that the provision of the brand reminders having insignificant commercial value and bearing the logo of the appellant, influences the choice making process of the HCPs.

8. Without prejudice to the above grounds of appeal and in the alternative, the learned CIT(A) erred in holding that the provision of medical books and journals by the appellant in the therapeutic field in which it operates so as to disseminate knowledge in the field of medicine influences the choice making process of the HCPs.

ADDITION OF ALLEGED UNRECONCILED TRANSACTIONS APPEARING IN THE ANNUAL INFORMATION RETURN ('AIR')

9. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in holding that if the appellant cannot reconcile the amounts appearing in the AIR statement, it would be considered as income of the appellant.

10. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in ignoring that the reconciliation of transactions reported in the AIR could not be accomplished by the appellant in the absence of details and information from the third parties."

3. Briefly put, the relevant facts are that the assessee is a company incorporated under the provisions of Companies Act, 1956 and filed its return of income for assessment year 2010-11 on 13.10.2010 declaring total income at Rs. 2,46,14,96,651/-. Subsequently, assessee revised its return of income on 30.03.2012 declaring total income of Rs. 2,46,26,78,569/-. The assesee is engaged in the business of trading, manufacturing of drugs, pharmaceuticals and

consumer healthcare products. The assessee was subject to a scrutiny assessment and an order under Section 143 r.w.s. 144C(3) of the Act was passed after making various additions/ disallowances which, *inter alia*, included disallowance on account of payment made to doctors in violation of Indian Medical Council (Professional conducts, Etiquette and Ethics) Regulations, 2002 of Rs. 3,51,65,661/- and addition of Rs.8,10,370/- on account of un-reconciled amounts as per Individual Transaction Statement ("ITS"). In the course of assessment proceedings, the Assessing Officer noted that assessee has debited Rs.3,09,05,508/- under the head 'Brand Reminders' and Rs. 42,64,153/- under the head 'Purchase of Medical Books and Journals'. It is the case of the Assessing Officer that these payments are in violation of the IMC Regulations issued in 2009 and are also subsequently specifically stated to be disallowed by the CBDT Circular 05/2012. As per the Assessing Officer, assessee should not have made these expenditure in promoting its own brand, with respect to the medicines sold by it, amongst the Medical Practitioners. The Assessing Officer has held that the guidelines and regulations issued by the Indian Medical Council state that such a conduct would be unethical and, therefore, once it is classified as unethical, the same cannot be allowed as a deduction while computing total income. The assessee, on the other hand, submitted that the Circular of the CBDT was not binding on it; that the expenditure was not a gift in terms of the definition of '*gift*'; that it was not against the public policy; that it was only a part of creating awareness about its drugs, and, therefore, it should be allowable as advertising and business promotion expenses. On appeal, CIT(A) upheld the action of the Assessing Officer. Aggrieved by the order of the CIT(A), assessee is in appeal before us.

4. The summary of various arguments raised by the assessee before the lower authorities and the reasons assigned by the lower authorities while rejecting the same are enumerated as under:-

i. The first argument of the assessee was that while Medical Professionals are prohibited from taking any gift, but the Pharmaceutical companies are not barred from making gift. In this regard, the Assessing Officer held that this argument of the assessee has no substance in view of the decision of the Hon'ble Punjab & Haryana High Court in the case of *CIT vs. Kap Scan & Diagnostic Centre Pvt. Ltd., (2012) 344 ITR 476* wherein the court held that paying commission to the doctors is unethical and against the public policy and forbidden by law and thus the same was disallowed under Section 37(1) of the Act.

ii. Secondly, the assessee questioned the legal validity of the Circular No. 05/2012 issued by the CBDT. In this regard, Assessing Officer relied on the decision of Hon'ble Himachal Pradesh High Court wherein Circular No. 05/2012 was challenged by Confederation of Indian Pharmaceutical Industry in the case of Confederation of Indian Pharmaceutical Industry vs. CBDT & Another (CWP No. 10793 of 2013), and the Hon'ble High Court vide its order dated 26.12.2012 upheld the validity & legality of the Circular No. 05/2012.

iii. The third argument put forth by the assessee was whether there is any contravention of the IMC Regulations or not is a matter which can be decided by the MCI itself and not by the Income-tax Department. In this

regard, the Assessing Officer relied on the decision of Hon'ble Supreme Court in the case of *Maddi Venkataraman & Co. (P) Ltd vs. CIT (1998) 229 ITR 534 (SC)* and held that it would be against public policy to allow under one statute the benefit of deduction of expenditure incurred in violation of the provisions of another statute. He further relied on the decision of the Hon'ble Madras High Court in the case of *CIT vs. India Cements Ltd (2000) 241 ITR 62 (Mad)* wherein it was held that while making the assessment under the Act, the authorities under the Act are not required to close their eyes to the infraction of other applicable laws by the assessee and render such other laws and the penal provisions therein meaningless by allowing a trader or an owner of a business to reap the benefit of the violation of the law.

iv. The fourth argument of the assessee was that expenditure incurred by the assessee does not amount to freebies as per Circular No. 05/2012. In this regard, the Assessing Officer observed that the question whether the payment made by the assessee falls within the meaning of the term "*freebies*" or not is not relevant.

v. Fifthly, it was argued by the assessee that gifts given to the Medical Practitioner are in the form of pens, notepads, USB pen drives, mobile holders, which has significant advertisement value for the assessee, whereas the same do not have any significant commercial value for the Medical Practitioners. Also, all gifts are capped at Rs. 1,000 per article. In this regard, Assessing Officer observed that the IMC does not lay down any monetary value for gift. All kind of gifts are prohibited. Further,

though the gifts are in the form of pens, notepad, etc., the same are capable of influencing the decisions of the doctors as every time doctors will pick up the pen, the same will remind him of the assessee's brand and will affect their decision while giving prescription to the patient.

vi. Sixthly, it was argued that the term '*gift*' is not defined under the IMC Regulations and under the Act. As brand reminders are not given out of any affection towards doctors, the same do not fall within the meaning of term '*gift*'. In this regard, the Assessing Officer observed that the assessee donor transferred the brand reminders voluntarily and without consideration (for free) to the donee (doctors) and thus, these brand reminders are "*gifts*" within the meaning of Section 122 of the Transfer of Property Act, 1882.

vii. Lastly, it was argued that the textbooks/ journals to Medical Practitioners in the therapeutic field, in which the assessee operates, are given with a view to disseminate knowledge and education. In this regard, it was observed by the Assessing Officer that the IMC Regulations, 2002 prohibits any gifts to be accepted by Medical Practitioners.

5. Before us, the learned Representative for the assessee submitted that during the year under consideration, assessee had debited Rs. 38,09,12,000/- as Advertisement & Promotion Expenses in its Profit and Loss account. The assessee was asked to submit the nature and details of said expenditure. In response to the same, assessee submitted the breakup of the Advertisement & Promotion Expenses which, *inter-alia*, included Rs. 3,09,05,508/- incurred for purchase of gift

articles bearing logo of the assessee company and are given to the doctors for brand reminders. It also included Rs. 42,64,153/- incurred for purchase of Medical Books and Journals, which are given to the doctors for imparting knowledge in the medical field. The Assessing Officer in his order at Para. 9.6.2 has discussed the amendment made to India Medical Council (Professional Conduct, Etiquettee and Ethics) Regulations, 2002 ("IMC Regulations") w.e.f. 10.12.2009 wherein certain guidelines were laid down for the Medical Practitioner while dealing with the Pharmaceutical companies. As per the said Guidelines, in dealing with Pharmaceutical and allied health sector industry, a medical practitioner shall not:

a) Receive any gift from any pharmaceutical or allied health care industry and their sales people or representative.

b) Accept any travel facility inside the country or outside, including rail, air, ship, cruise, tickets, paid vacations, etc, from any pharmaceutical or allied health care industry or their representative for self and family members for vacation or for attending conferences, seminars, workshops, CME programme etc. as a delegate.

c) Accept individually any hospitality like hotel accommodation for self and family members under any pretext.

d) Receive any cash or monetary grants from any pharmaceutical and allied healthcare industry for individual purpose in individual capacity under any pretext.

6. The Assessing Officer thus concluded that as per the amended IMC Regulations, a doctor shall not receive any freebies in the form of gifts, travel facility, hospitality and cash or monetary grants from the Pharmaceutical companies under any pretext. He thus proceeded to hold that even the assessee pharmaceutical company is prohibited from making any such payments mainly for the purpose of maintaining professional autonomy.

7. The learned Representative for the assessee submitted that IMC Regulations are applicable to the Medical Practitioner and not to the Pharmaceutical companies like assessee. Further, the CBDT Circular extending the scope of IMC Regulations to the Pharmaceutical companies is mis-conceived and, therefore, the same cannot be relied upon. In this regard, the learned Representative for the assessee relied on the following decisions:

1) DCIT vs. PHL Pharma (P.) Ltd ITA No. 4605/Mum/2014 (Mumbai-Trib.)
2) Solvey Pharma India Ltd. PCIT ITA No. 3585/Mum/2016 (Mumbai-Trib.)
3) Emcure Pharmaceuticals Ltd. vs. DCIT ITA No. 1532/Pun/2015 (Pune-Trib.)

8. It was further argued that the concerned assessment year is assessment year 2010-11, whereas Circular was issued only on 01.08.2012, i.e. after the end of the assessment year and thus, the same cannot be applied to assessment year 2010-11. Secondly, the learned Representative made us go through the sample copies of invoices and photographs of the articles purchased by the assessee company having logo of the assessee company and argued that the assessee distributes pen, notepads, USB pen drives, mobile holders, plastic holders, writing

boards, jute carry bags, etc. to the doctors which have insignificant value for the doctors and are not in the nature of the freebies of the nature enumerated in the IMC Regulations. The IMC Regulations prohibits freebies in the nature of gifts, hospitality, travel facility or any other cash or monetary consideration. As can be seen from the items list down by the IMC Regulations, the intent of the IMC Regulation is to prohibit the facilities to the Medical Professional which hold significant value to the Medical Professional and thus can influence their decision, whereas the items distributed by the assessee are of nominal value to the Medical Practitioners and are not high value items, which can anyway influence the decision of the Medical Practitioners. Moreover, these items are not distributed frequently, which can lead to influence the decision of the Medical Practitioners and, as such, cannot be said to be against the public policy.

9. It was further argued that the term "*gift*" has not been defined in IMC Regulation, but in general parlance '*gift'* means something which is given for the benefit of the receiver and without any consideration. The items/ articles given by the assessee for brand reminder cannot be equated with the gift as the same is not given for the exclusive benefit of the receiver. As for doctors, they will derive little or no material benefit out of it. Secondly, it cannot be said that the same is given without consideration. By way of such gift, the assessee is creating brand awareness among the doctors and amongst the general public and that is the consideration the assessee company is getting in return of the items. Thus, it will be wrong to equate the same with the '*gift'* which is without consideration. It is more akin to the advertisement and business promotion expenditure.

10. As regards books and journals distributed by the assessee, it was submitted that such books are distributed only in the field in which Pfizer operates and are distributed with a view to disseminate knowledge and education. The Pharmaceutical industry in which assessee operates requires the Medical Practitioners to constantly stay abreast of developments on various medicines and cures available for diseases. Such distribution of medical books and journals are for imparting knowledge amongst the general public and Medical Practitioner which will help the patients to get better treatment are not barred by the Circular No. 05/2012.

11. *Per Contra*, learned DR relied on the orders of the lower authorities and argued that the expenditure incurred by the assessee is in violation of the IMC Regulation and, therefore, the same is required to be disallowed. The learned DR further relied on the order of the co-ordinate bench in the case of *ACIT vs. Liva Healthcare Ltd. [2016] 161 ITD 63 (Mumbai- Trib)* wherein it was held that the expenditure incurred by the Pharmaceutical companies on overseas tours of Doctors to increase their sales and profitability was not an allowable expenditure as oversea trip were directed towards leisure and entertainment of Doctors and their spouses rather than being directed towards seminar for product information dissemination as no details of seminar and its course content were brought on record. Further, it was held in that case that expenditure incurred towards free samples distributed to physicians will be allowable only if free samples of pharmaceutical products are distributed to physicians/ doctors at initial stage of introduction to test efficacy of products and same are incurred wholly and exclusively for purpose of business.

12. We have carefully considered the rival submissions and pursued the material on record. The relevant facts and the stand of the rival parties have been extensively enumerated in the earlier part of the order. Ostensibly, the limited issue for our consideration is whether the brand reminder expenses and expenditure incurred on distribution of textbook and free journals pertaining to assessee's business is an allowable expenditure under Section 37(1) of the Act in view of the IMC Regulations and CBDT Circular No. 05/2012.

13. We find that a similar issue arose before our co-ordinate bench in the case of *DCIT vs. PHL Pharma (P.) Ltd. ITA No. 4605/Mum/2014*. The question before the bench in that case was as under:

> *"1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of Rs.22,99,72,607/- being freebies given by the assessee to doctors, ignoring the fact that such payments are specifically prohibited w.e.f. 10.12.2009 by the Medical Council of India (MCI), which is the competent authority, and therefore, the said expenses are illegal and consequently not allowable as per the Explanation to Section 37(1) of the Income-tax Act, 1961?*

In this regard, the Tribunal held as under:

> *"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. <u>Nowhere the regulation or the notification mentions that such a</u>*

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. *On the contrary, before us the learned senior counsel, Shri Mistry brought to our notice the judgment of Hon'ble Delhi High Court in the case of Max Hospital vs. MCI in WPC 1334/2013 judgment dated 10.01.2014, 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. Relevant portion of the said judgment reads as under:*

> *"6. The Petitioner's grievance is two fold. Firstly, that since the Medical Council of India(Professional Conduct, Etiquette and Ethics) Regulations, 2002 (the Regulations) have been framed in exercise of the power conferred under Section 20-A read with Section 33 (m) of the Indian Medical Council Act, 1956, these regulations do not govern or have any concern with the facilities, infrastructure or running of the Hospitals and secondly, that the Ethics Committee of the MCI acting under the Regulations had no jurisdiction to pass any direction or judgment on the infrastructure of any hospital which power rests solely with the concerned State Govt. The case of the Petitioner is that the Petitioner hospital is governed by the Delhi Nursing Homes Registration Act, 1953. It is urged that in fact, an inspection was also carried out on22.07.2011 by Dr. R.N. Dass, Medical Superintendent (Nursing Home) under the Directorate of Health Services, Govt. of NCT of Delhi and the necessary equipments and facilities were found to be in order which negates the observations dated 27.10.2012 of the Ethics Committee of the MCI. It is also the plea of the Petitioner hospital that the Petitioner was not provided an opportunity of being heard and thus the principles of natural justice were violated.*
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> *7. In the counter affidavit filed by the Respondents, it is not disputed that the MCI under the2002 Regulations has jurisdiction limited to taking action only against the registered medical practitioners. Its*

plea however, is that it has not passed any order against the Petitioner hospital therefore; the Petitioner cannot have any grievance against the impugned order.

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8. It is clearly admitted by the Respondent that it has no jurisdiction to pass any order against the Petitioner hospital under the 2002 Regulations. In fact, it is stated that it has not passed any order against the Petitioner hospital. Thus, I need not go into the question whether the adequate infrastructure facilities for appropriate post-operative care were in fact in existence or not in the Petitioner hospital and whether the principles of natural justice had been followed or not while passing the impugned order. Suffice it to say that the observations dated27.10.2012 made by the Ethics Committee do reflect upon the infrastructure facilities available in the Petitioner hospital and since it had no jurisdiction to go into the same, the observations were uncalled for and cannot be sustained."

[Emphasis added is ours]

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. <u>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.</u> The relevant provisions of section "37(1) reads as under:

"37(1)…

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. 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.

8. From a perusal of above amendment/notification in the MCI regulation, it is quite clear again that same is applicable for medical practitioners only and the censure/action which has been suggested by it is only on medical practitioners and not for pharmaceutical companies or allied health sector industries. The violation of the aforesaid regulation would not only ensure a removal of a doctor from the Indian Medical Register or State Medical Register for a certain period of time and it does not impinge upon the conduct of pharmaceutical companies. This important distinction has to be kept in mind that regulation issued by Medical Council of India is qua the doctors/medical practitioners and not for the pharmaceutical companies. As a logical corollary to it, if there is any violation or prohibition as per MCI

regulation in terms of section 37(1) r.w.Explanation1, then it is only meant for medical practitioners and not for pharmaceutical company (Assessee Company) for claiming the expenditure.

9. Adverting to the contention of the Ld. CIT DR that CBDT is well empowered to issue such clarification, it is seen that the CBDT Circular dated 01.08.2012 (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 same CBDT circular had come up for consideration before the co-ordinate Bench of the ITAT, Mumbai Bench in the case of Syncom Formulations (I) Ltd. (in ITA Nos. 6429

> *&6428/Mum/2012 for A.Ys. 2010-11 and 2011-12, vide order dated 23.12.2015), wherein Tribunal heldthat CBDT circular would not be not be applicable in the A.Ys. 2010-11 and 2011-12 as it was introduced w.e.f. 1.8.2012."*
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> (underlined for emphasis by us)

14. We further find that the Pune Bench of the Tribunal in the case of *Emcure Pharmaceuticals Ltd vs. DCIT in ITA No. 1532/Pun/2015,* on identical facts, following the decisions of our co-ordinate bench in the case of *DCIT vs. PHL Pharma Pvt. Ltd., 49 CCH 0124* and in the case of *Solvay Pharma India Ltd. ITA No. 3585/Mum/2016,* held as under:

> *"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."*
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> (underlined for emphasis by us)

As is evident from above, the pharmaceutical companies are outside the scope of the Circulars by the Medical Council of India or the CBDT. As such, the reliance of the Assessing Officer and CIT(A) on the CBDT circular is misplaced. Once it is clear that the said Circulars are not applicable to the assessee, the question of contravention of the said Circular does not arise; and, as such, no disallowance under Section 37(1) of the Act is warranted.

15. As can be seen from above, the case of the assessee is squarely covered by the decision of our co-ordinate bench in the case of *DCIT vs. PHL Pharma Pvt. Ltd. (supra).*

16. As regards the argument of the Assessing Officer and learned DR that the payment is against the public policy, we find that there is no written or oral agreement between the assessee and the Medical Practitioner which binds the Medical Practitioner to prescribe only assessee's medicines and no other medicine can be prescribed by the Medical Practitioner. If that was the case, then the position would have been different. Here, in the present case, the Medical Practitioners are not under any binding obligation after receiving the brand reminder from the assessee company bearing logo of the assessee. This fact clearly reveals that the distribution of articles by the assessee is unconditional and does not go against the public policy. Mere distribution of the articles and other items having logo of the company without casting any burden upon the person receiving the items is merely an advertisement expenditure incurred by the company to promote the brand of the assessee. The Assessing Officer has mentioned that free items might influence the decision of the Doctors. In this regard, we find that the articles are of nominal value and are not capable of influencing the decision of such highly skilled Medical Practitioners. Further, there is no burden upon them. So this argument of the Assessing Officer has no substance. The expenditure incurred by the assessee is thus akin to advertisement and sales promotion expenditure incurred in any other businesses and cannot be disallowed for the reasons assigned by the Assessing Officer. Further, the Assessing Officer misses the point that the advertisement

expenditure, by its very nature, is not spent for a crystallized *quid pro quo* or against any services rendered to the payer. Once it is found that the expenditure is in the nature of advertisement expenditure, the question raised by the Assessing Officer loses significance.

17. Before parting, we may also notice that the case law relied on by the learned DR is distinguishable on facts. The question in the case of *Liva Healthcare Ltd. (supra)* was pertaining to allowance of expenditure incurred on overseas travelling of the doctors and distribution of free samples, whereas in the present case, the question pertains to allowance of expenditure incurred by the assessee on brand reminder in the form of distribution of articles containing logo of the assessee having maximum value of Rs. 1,000/-. As such, the facts of both the case are different and thus, the ratio laid down in that case is not applicable to the facts of the present case.

18. In light of the above discussion, we hereby set-aside the order of the CIT(A) and direct the Assessing Officer to delete the addition. Accordingly, this Ground of appeal raised by the assessee is allowed.

19. The next issue pertains to addition on account of un-reconciled amounts as per Individual Transaction Statement (“ITS”). In the course of assessment proceedings, the assessee was asked to reconcile the entries reflecting in ITS with books of account, which was furnished by the assessee on various dates. On going through the same, the Assessing Officer observed that assessee could not reconcile three receipts reflected in Form 26AS amounting to

Rs.6,06,427/- and two payments aggregating to Rs. 2,03,943/-. The Assessing Officer, without any further discussion, proceeded to add the un-reconciled amounts to the income of the assessee and held that it was for the assessee to have proved that the transactions reported in ITS statement are recorded in the books of account of the assessee.

20. In this regard, the learned Representative for the assessee drew our attention to the various letters addressed by the assessee to various parties who have reported the transactions in ITS of the assessee seeking details of the transactions carried out by them with the assessee alongwith the copy of ledger account of the assessee in their books of account and supporting evidences. However, none of the parties have replied so far except Bank of India who have confirmed the fact that PAN of the assessee was erroneously linked with some other customer and thus, the transaction was wrongly reported in ITS due to human error.

21. The learned Representative further argued that the Assessing Officer has not carried out any exercise to prove that the transactions reflected in ITS are correct and belong to the assessee apart from shifting the burden on the assessee to prove why said transactions do not belong to the assessee. The assessee has taken sufficient measures in the form of writing letters to the concerned parties to provide details of such transactions with the assessee and has discharged the burden wrongly casted upon it. It was thus argued that no addition should be made in respect of un-reconciled amount as per ITS as the same do not belong to the asseessee and the Assessing Officer has not proved that the transactions are,

in fact, correct and the assessee has derived any benefit out of the said transactions. It was also brought to our notice that a similar issue arose in assessee's own case for earlier years and the Tribunal vide its order in ITA No. 8739/Mum/2011 has remanded the matter back to the file of the Assessing Officer.

22. We have carefully considered the rival submissions and perused the material on record. The limited issue is whether the un-reconciled amount of ITS / AIR can be added to the total income of the assessee when the assessee denies having carried out any such transaction. We find that the details in the ITS statement are uploaded by the third party and assessee does not exercise any control on the same. There is no authenticity of such details nor are such details verified by any independent authorities as to its correctness and truthfulness. Such details could be the preliminary basis for the Assessing Officer to estimate the income and expenditure of the assessee but certainly not the sole basis to arrive at the conclusion that the income reported in the ITS belongs to the assessee. This becomes more relevant when the assessee denies having carried out any such transaction reported in the ITS statement. In such cases, the burden shifts on the Assessing Officer to prove with supporting evidence to establish that the income was, in fact, earned by the assessee or that the expenditure pertains to the assessee.

23. In the present case, the assessee denied to have carried out the un-reconciled transactions of ITS. To prove its *bona fide*, the assessee also addressed letters to the concerned parties to get the details of the transactions which the

other parties claim to have carried out by them with the assessee. However, none of the parties, except Bank of India, replied to the letters addressed by the assessee; the bank accepted the fact that there was human error and the PAN of the assessee was wrongly linked to other customer data and the transaction was not pertaining to the assessee.

24. The above factual position clearly raises the doubt on the authenticity and correctness of the data reported in the ITS. The Assessing Officer has also not brought on record any concrete evidence to establish that the contents of the ITS were correct. In this scenario, we do not find any reason why the contents of the ITS report should be relied upon to the hilt. We, accordingly, set-aside the order of the CIT(A) and direct the Assessing Officer to delete the addition on account of un-reconciled amount. Accordingly, this Ground of appeal is allowed.

25. In the result, appeal of the assessee is allowed, as above.

Order pronounced in the open court on 30th August, 2019.

Sd/-	Sd/-
(RAM LAL NEGI)	**(G.S. PANNU)**
JUDICIAL MEMBER	**VICE PRESIDENT**

Mumbai, Date : 30th August, 2019

SSL

Copy to :

1) The Appellant
2) The Respondent
3) The CIT(A) concerned
4) The CIT concerned
5) The D.R, "D" Bench, Mumbai
6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai