

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "B", MUMBAI

BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER  
AND  
SHRI RAJESH KUMAR, ACCOUNTANT MEMBER

ITA No. 6222/Mum/2018  
Assessment Year : 2011-12

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| DCIT, Circle-1<br>Thane | Vs. | M/s. Bayer Pharmaceuticals<br>Pvt. Ltd.,<br>Bayer House,<br>Central Avenue,<br>Hiranandani Estate,<br>Thane (West)<br>[PAN : AABCB3852F] |
| (Appellant)             |     | (Respondent)   |

Appellant by : Ms. Kavita P.Kaushik, DR  
Respondent by : Shri Harry Parikh, AR

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| Date of Hearing : 16-09-2019 | Date of Pronouncement : 18-09-2019 |
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**ORDER**

**PER RAJESH KUMAR, A.M:**

This appeal filed by the Revenue is directed against the order of the Commissioner of Income Tax(Appeals)-1, Thane, dated 28-08-2018.

2. The only issue raised by the Revenue in this appeal is against the order of Ld.CIT(A), deleting the addition made by the AO on account of giving freebies to the doctors in violation to Medical Counsel of India (MCI) circular as it amounts to inducement by assessee, bringing it within the sweep of the

provisions of the Explanation 1 to Section 37(1) of the Income Tax Act (Act).

3. The Facts in brief are that, assessee is engaged in the business of manufacturing and trading of pharmaceuticals and animal healthcare products. During the year, the assessee incurred a sum of Rs.2,22,44,555/- towards the said expenses. According to the Assessing Officer (hereinafter called AO), the said expenditure was incurred for the purposes which are prohibited by law and cannot be said to be incurred fully and truly for the purpose of business. According to the AO, the expenditure was incurred for advertisement and publicity in connection with malpractices and thus, were not allowable and consequently added the same to the income of the assessee.

4. At the outset, Ld.Counsel for the assessee submitted before the Bench that the issue involved in the present appeal is covered in favour of assessee and against the Revenue by the decision of the Co-ordinate Bench in assessee's own case in ITA No.2880/Mum/2016 (AY.2010-11), dt.06-04-2018. Ld.Counsel for the assessee submitted that since the issue is squarely covered in favour of assessee by the aforesaid decision, the appeal of Revenue may be dismissed.

5. Ld.DR, on the other hand, relied on the order of the authorities below.

6. After hearing both the parties and perusing the material on record, we observe that identical issue has been decided by

the Co-ordinate Bench of the Tribunal in favour of assessee in its own case. The operative portion of the said order is reproduced hereunder:

*“2.4. We have heard the rival submissions and perused the material before us. We find that the assessee had incurred expenditure of more than Rs.1 crore towards advertisement and publicity, that the AO had observed that it had gifted freebies to the medical practitioners, that the departmental authorities were of the view that expenditure incurred by the assessee in violation of MCI Guidelines was not allowable.*

*We find that issue of applicability of MCI guideline and Board Circular had been deliberated upon by the Hon'ble Delhi High Court in the case of Max Hospital Pitampura vs. Medical Council of India(Writ Petition No.1334 of 2013, dtd.10/01/2014). We would like to reproduce the judgment of the Hon'ble Delhi High Court and same reads as under :*

*“6. The Petitioner's grievance is twofold. 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 u/s.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 on 22.07.2011 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.*

*7. In the counter affidavit filed by the Respondents, it is not disputed that the MCI under the 2002 Regulations has jurisdiction limited to taking action only against the registered medical practitioners. It's 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. At the same time, it is stated that only simple observations were made by the Ethics Committee of the MCI about the state of affairs in the Petitioner hospital and the same did*

not harm any legal right or interest of the Petitioner. It will be apposite to extract the relevant paragraphs of the counter affidavit filed by the MCI as under:

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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 infact 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 dated 27.10.2012 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.”

We would also like to refer to the order of the Tribunal, delivered in the case of PHL Pharma P Ltd.(supra),wherein following grounds of appeal were raised by the AO:

“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?

2. 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 observing that the prohibition by IMA is on medical practitioners and not applicable to Pharma companies without appreciating that the Prohibition of IMA is to curb the malpractices in the medical profession and equally binding on both medical practitioners and Pharma companies?

3. The appellant prays that the order of the CIT (A) on the above ground be set aside and that of the A.O. be restored.”

Deciding the appeal, the Tribunal held as under:

2. The brief facts of the case qua the issue raised in the grounds of appeal are that, the assessee is a pharmaceutical company engaged

*in the business of providing Pharma marketing consultancy and detailing services to develop mass market for Pharma products. ....On further perusal of the details appearing in the ledger account furnished by the assessee, he further noted that there are certain expenses which has been debited by the assessee like, 'Customer Relationship & Management expenses' (CRM) of Rs.7,61,96,260/-; 'Key Account Management expenses'(KAM)of Rs.2,56,68,509/-; gift articles of Rs.9,20, 22,518/-; and cost of samples of Rs.3,60,85,320/-, which according to him are in the nature of freebies given to medical practitioners/doctors which are disallowable in terms of Explanation to section 37(1) as clarified by CBDT vide its Circular No.5/2012 dated 1.8.2012. In response to the show cause notice by the AO, firstly, as regard CRM expenses, assessee submitted that expenditure under this category includes activities like holding national level seminars on new medical researches and drugs for discussion panels of eminent doctors and inviting other doctors to participate in it; arranging lectures or sponsoring knowledge upgrade course, wherein eminent doctors are invited to speak on the selected topic related to the therapeutic area and also share their research and other latest knowledge updates; subscription of costly journals, information books etc.; and sponsoring travel and accommodation expenses of doctors for such important conferences. Under the KAM services, the assessee promotes ICCU range of products, which normally focuses on either single brand or a group of brands in one particular therapy area. This is done for certain key doctors, who are opinion leaders and has larger potential for sale of brands. Regarding gift articles, it was stated that this includes expenses for small value items given across the entire pool of doctors in India so as to maintain brand memory on a continuous basis. These small items include diaries, pen sets, injection boxes, calendars, table weights, postcard holders, stationery items, etc., wherein logo of the assessee company and the name of the medicine is advertised. This is important because in the same generic drug there are more than 40 to 60 brands, therefore, brand promotion is done through small value items. Lastly, for cost of samples, it was stated that these samples are distributed through various agents to doctors to prove the efficacy of the drug and to establish the trust of the doctors on quality of drugs. Free samples are given of smaller size, wherein it is marked as "physician sample not for sale". Various other expenditure under the aforesaid head, have been elaborately explained and illustrated by the assessee in its reply dated, 27.12.2012 before AO. The relevant portion of the reply has been incorporated by the AO from pages 3 to 6 of the assessment order. Regarding the applicability of CBDT Circular No.5 of 2012 (supra), wherein the CBDT has referred to amendment to the "Indian Medical Council Regulations, 2002", brought from*

10.12.2009, imposing prohibition of medical practitioner and their professional associations from taking any gift, travel facility, hospitality, cash or monetary grant from the pharmaceutical and allied health sector industries, the assessee submitted that firstly, cost of free samples, KAM expenses, CRM expenses are not prohibited under any law and, secondly, the CBDT Circular cannot have retrospective effect so as to be made applicable in the AY. 2010-11 as the Circular is dated 01.08.2012. As required by the AO, the assessee also segregated expenses incurred after 10.12.2009, i.e., the date of amendment brought in the Indian Medical Council Guidelines. After segregating the expenses, AO disallowed the expenditure aggregating to Rs.22,99,72,607/- (post 10.12.2009) on the ground that, firstly, the guidelines issued by the Medical Council of India is binding because it is a statutory body having been set up under the Act of the Parliament; secondly, the amended notification dated 10.12.2009, which has been reproduced by him in the order, clearly forbids medical practitioners to receive any kind of gift, travel facilities, hospitality and any kind of cash or monetary grants from any pharmaceutical or health care industries. Thus, such an expenses, he held that, is disallowable in terms of Explanation to section 37(1). 5. We have considered the rival contentions made by ld. CIT DR as well as ld. Sr. Counsel, Mr J.D. Mistry, perused the relevant finding given in the impugned orders and material referred to before us. The entire controversy revolves around, whether the expenditures in question incurred by the assessee (a pharmaceutical company) is hit by Explanation 1 below section 37(1) in view of CBDT Circular dated 01.08.2012, interpreting the amendment dated 10.12.2009 brought in Indian Medical Council Regulation 2002 or not. The break-up of sales promotion expenses, which has been disallowed by the AO, are as under: SN. Particulars of expenses Amount (in Rs.) 1 Customer Relationship Management expenses (CRM) 7,61,96,260 2 Key Account Management expenses(KAM) 2,56,68,509 3 Gift Articles 9,20,22,518 4 Cost of samples 3,60,85,320 Total 22,99,72,607 The nature of aforesaid expenses has already been explained above. Now whether the nature of such expenditure incurred by the assessee is to be disallowed in view of the CBDT Circular dated 01.08.2012. For the sake of ready reference, the said CBDT Circular No.5/2012 is reproduced hereunder:

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From the perusal of the aforesaid Board Circular, it can be seen that heavy reliance has been placed by the CBDT on the Circulars issued by the Medical Council of India, which is the regulatory body constituted under the 'Medical Council Act, 1956'. One such regulation has been issued is "Indian Medical Council Professional Conduct, Etiquette and Ethics) Regulations, 2002". The said

*regulation deals with the professional conduct, etiquette and ethics for registered medical practitioners only. Chapter 6 of the said regulation/notification deals with unethical acts, whereby a physician or medical practitioners shall not aid or abet or commit any of the acts illustrated in clause 6.1 to 6.7 of the said regulation which shall be construed as unethical. Clause 6.8 has been added (by way of amendment dated 10.12.2009) in terms of notification published on 14.12.2009 in Gazette of India. The said clause reads as under:-*

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*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. 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:*

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*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. The relevant provision of section 37(1) reads as under:

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*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.*

*7. Before us the learned CIT DR strongly relied upon the fact that CBDT Circular, while clarifying the applicability of Explanation 1 to section 37(1) on medical practitioners and pharmaceutical companies have interpreted that Indian Medical Council Regulation is applicable for pharmaceutical companies also. He also brought to our notice that another notification was issued by Indian Medical Council which was published on 01.12.2016 which further prohibits such kind of embargo on medical practitioners and have added para 6.8.1 and also given instances of action which shall be taken upon medical practitioners. The relevant clause of the said notification as relied upon by him is reproduced hereunder:*

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*From the aforesaid notification, ld. CIT DR submitted that so many violations and censures have been prescribed for any expenditures/ or benefit given to doctors, thus, violation of such guidelines for incurring such kind of expenditures cannot be held to be allowable expenditure. CBDT is well within its power to clarify and interpret the law and prohibit allowance of any expenditure which violates any statute or is in nature of offence. 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. 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.Explanation 1, 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 coordinate 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 held that 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. 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. Coming to the gift articles and free samples of medicines, it is seen that the assessee gives various kind of articles like, diaries, pen sets, calendars, paper weights, injection boxes etc. embossed with bold logo of its brand name and the product name so that the doctors remembers the brand of the assessee and also the name of the medicine. All the gift articles, as pointed out by the assessee before the authorities below and also before us are very cheap and low cast articles which bears the name of assessee and it is purely for the promotion of its product, brand reminder, etc. These articles cannot be reckoned as freebies given to the doctors. Even 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. Further as pointed out and concluded by the learned CIT(A) there is no violation by the assessee in so far as giving any kind of freebies to the medical practitioners. Thus, such kind of expenditures by a pharmaceutical companies are purely for business purpose which has to be allowed as business expenditure and is not impaired by EXPLANATION 1 to section 37(1). 11. Before us, the Ld. CIT DR has also much harped upon the decision of the Hon'ble Himachal Pradesh High Court in the case of Confederation of Indian Pharmaceutical Industry (SS) vs. CBDT (supra), in support of the argument that CBDT Circular has been approved and confirmed by the High Court and therefore, it has a huge binding precedence. From the perusal of the said judgment of the Hon'ble High Court, it is seen that in that case the validity of Circular No.5/12 dated 1.8.2012 was challenged. The Hon'ble High Court though upheld the validity of the said circular but with a rider that if the assessee satisfies the assessing authority that the expenditure is not in violation of the regulation framed by the medical council, then it may legitimately claim the deduction. The assessee has to satisfy the AO that the expenditure is not in violation of the Medical Council regulation. Thus, if the assessee brings out that the MCI regulation is not applicable to the assessee before the AO, the same cannot be applied blindly. 12. At the time of hearing, our attention was also drawn to the decision of Tribunal of our Co-ordinate Bench in the case of 'Liva Healthcare Limited ITA Nos. 904 & 945/Mum/2013', decided vide order dated 12.09.2016. In counter, to this decision the learned counsel, Shri JD Mistry distinguished the said judgment and submitted that the facts of the case in the Liva Healthcare (supra) were substantially different from the facts of the present case. In the case of Liva Healthcare, the Hon'ble Tribunal disallowed such expenses u/s. 37(1) of the Act on the ground that they were not incurred wholly and exclusively for the purpose of business as the same were incurred to create good relations with the doctors in lieu of expected favours from doctors for recommending to the patients the pharmaceutical products dealt with by the company to generate

more and more business and profits for the assessee company. The Tribunal also recorded the fact that the spouse of the doctors also accompanied the doctors for overseas trips to Istanbul and expenses were incurred for cruise travels to island, gala dinner, cocktails, gala entertainment etc. of such doctors. In assessee's case it is an admitted fact that expenses have not been incurred for the purpose personal benefit/enjoyment of the doctors or their spouses. In the case of Liva, the question as to whether such IMC Regulations can be applicable to Pharma Companies was not argued before the Hon'ble Bench. He reiterated that the Hon'ble Delhi High Court in the case of Max Hospital (supra) and the Jurisdictional Tribunal in the case of Syncom (supra) have held that such IMC Regulations apply only to medical practitioners. He further submitted that the Tribunal in the case of ACIT vs. Liva Healthcare Ltd. (ITA 847/Mum/2012) for A.Y. 2008-09, has decided similar issue in favour of the assessee. However, in A.Y. 2009-10, Hon'ble Tribunal while noting the fact that consistency has to be adopted, distinguished the order of A.Y. 2008-09 as under:

*“The assessee has contended that in the immediately preceding AY. the Tribunal has decided the issue in favour of the assessee in ITA NO. 388/Mum/2012 for AY. 2008-09. In our considered view, principles of Res judicata is not applicable to income tax proceedings although we are fully agreeable that principles of consistency is to be maintained (Hon'ble Supreme Court decision in Radha Soami Satsang v. CIT (1992) 193 ITR 321 (SC) but in the instant AY., we have observed that these overseas trips for Doctors and their spouses were organized by the assessee whereby no details of the contents of seminar, if any conducted by the assessee overseas has been brought on record and also even the spouses accompanied the Doctors to the overseas trip which included cruise visit to island, gala dinners, cocktail, gala entertainment etc. rather than being directed towards seminar for product information dissemination or directed towards knowledge enhancement or knowledge sharing oriented as no details of seminar and its course content is brought on record rather the trip is directed towards leisure and entertainment of Doctors and their spouses which in our view appears to be clearly a distinguishable feature in this year enabling us to take a divergent view and the expenses incurred by the assessee cannot be allowed as business expenditure u/s. 37 of the Act as it is clearly hit by explanation to Section 37 of the Act being against public policy as unethical prohibited by law. In view of the above, he pointed out that in the above decision for A.Y. 2009-10 in the case of Liva Healthcare, there was a specific finding of a fact that no details have been filed with respect to any seminar has been conducted for doctors and that the trips were directed towards leisure and entertainment of doctors*

and their spouses. This was a distinguishable feature for the Hon'ble Tribunal to take a contrary view from A.Y. 2008-09. He further submitted that the Hon'ble Tribunal in the case of Liva Healthcare Ltd. vs. ACIT (ITA No. 4791/Mum/2014) for A.Y. 2010-11 has followed the decision of Liva Healthcare (supra) for A.Y. 2008-09 and has decided this issue in favour of the assessee. This, further brings out the fact that the Hon'ble Tribunal disallowed the expenses u/s. 37(1) of the Act in the case of Liva Healthcare for A.Y. 2009-10 only on the ground that the same were not incurred wholly and exclusively for the purpose of business. Apart from the aforesaid distinguishing features as highlighted by the learned senior counsel, we find that on the facts itself in the case of Liva Healthcare (2009-2010) (supra), there was a clear cut material on record that the Doctors along with their spouses were taken to foreign tours and cruise travel etc., in lieu of expected favours from doctors. In the light of these facts and material the Tribunal has decided the issue against the assessee by not following the earlier year precedence and subsequent year orders of the same assessee. As brought on record before us, we find that similar issue of allowance of such expenditure in the case of pharmaceutical companies has been decided in favour of the assessee, in the case of UCB India Pvt. Ltd. v. ITO (ITA No. 6681/Mum/2013 order dated 13.05.2016, wherein it was held that CBDT circular cannot have a retrospective effect. This judgment was lost sight of by the bench. In any case on careful perusal of the Tribunal order in the case of Liva Healthcare (supra) we find that the Tribunal though has incorporated the relevant provisions and clauses of the 'Indian Medical Council Regulation 2002', however, has not elaborated or dwell upon as to how this MCI regulation which is strictly meant for medical practitioners and doctors can be made applicable to pharmaceutical companies. There has to be some enabling provision or specific clause in the said regulation whereby the pharmaceutical companies are barred from conducting seminars or conferences by sponsoring the doctors. The entire conduct relates to doctors and medical practitioners and lists out the censures and fines imposed upon them. What has not been provided in the MCI regulation cannot be supplied either by the court or by the CBDT. There has to be express provision under the law whereby pharmaceutical companies are prohibited to conduct conferences or seminar or give free samples. In the Tribunal decision of Liva Healthcare, strong reference has been made to Hon'ble Himachal Pradesh High Court (supra), that the said CBDT circular has been upheld. On this aspect we have already discussed in detail herein above that, firstly, High Court itself carves out a rider that assessee is free to demonstrate before the AO that this circular is not applicable on facts of the case; and secondly, CBDT circular which creates new impairment and imposes disallowability not envisaged in

*any of the Act or regulation cannot be reckoned to be retrospective. Another strong reference has been made to the decision of Hon'ble Punjab & Haryana High Court in the case of CIT vs. Kap Scan and Diagnostic Centre (P.) Ltd. [2012] 25 taxmann.com 92, wherein commission was paid to the private doctors for referring the patients for diagnosis to the assessee company. In background of these facts and issues involved, the Hon'ble High Court held that said payment of commission is wrong and is opposed to be a public policy. It should be discouraged as it is not a fair practice. The ratio of said decision cannot be applied on the facts of the present case because there is no violation of any law or anything which is opposed to public policy. Similarly, there is reference to the decision of Hon'ble Supreme Court in the case of Eskayef (Now Known as Smithkline Beecham) Pharmaceuticals (India) Limited v. CIT (2000) 111 Taxman 561(SC), which was given in context of Section 37(3A) of the Act. In the said case the assessee had claimed expenditure on distribution of physician's samples u/s. 37. In the background of such claim the Hon'ble Apex court held that, if the expenditure falls within the bare minimum it will not be caught by subsection (3A) of section 37. On the contrary, the Hon'ble Apex Court observed that physicians samples are necessary to ascertain the efficacy of medicine and introduce it in the market for circulation and it is only by this method the purpose is achieved. In such cases giving a physician samples for reasonable period is essential to the business of manufacture and sale of medicine. It is only if a particular medicine has been introduced by the market and its uses are established then giving of free samples could only be the measure of sale/ promotion and development would thus be hit by subsection (3A). Said decision no way prohibits the nature of expenditure which has been incurred in the case of the assessee. Therefore, such a reference to a Hon'ble Apex Court decision is not germane to the issue involved. Thus, in our opinion, the aforesaid decision of this Tribunal is clearly distinguishable and cannot be held to be applicable and also we have already given our independent finding as to allowability of expenses in the hands of the assessee as business expenditure. Accordingly, we uphold the order of the ld. CIT(A) deleting the disallowance aggregating to Rs.22,99,72,607/-."*

*We find that the case of Liva was decided in light of the peculiar facts, where necessary documents were not furnished. We are of the view that CBDT circular cannot apply retrospectively. Respectfully following the orders relied upon by the AR, we decide first effective ground of appeal in favour of the assessee ".*

6.1. Since the facts before us are identical to one as decided by the Co-ordinate Bench of the Tribunal, we, therefore,

respectfully following the same, dismiss the Grounds raised by Revenue.

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

*Order pronounced in the open court on 18<sup>th</sup> September, 2019*

Sd/-  
(VIKAS AWASTHY)  
न्यायिक सदस्य/JUDICIAL MEMBER

Sd/-  
(RAJESH KUMAR)  
लेखा सदस्य/ACCOUNTANT MEMBER

मुंबई/Mumbai; दिनांक/Dated : 18-09-2019

TNMM

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), Mumbai
4. आयकर आयुक्त / CIT, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /  
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asst. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai