आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ - अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD - BENCH 'B'

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

ITA No.2458/AHD/2017
निर्धारण वर्ष/ Asstt.Year: 2010-11

Troikaa Pharmaceuticals Ltd. Commerce House Opp: Rajvansh Apartment Judges Bungalow Road Ahmedabad 380 015 PAN : AABCT 0228 K	Vs.	DCIT, Cir.4(1)(2) Ahmedabad.

(Applicant)		(Responent)

Assessee by :	Shri Dhiren Shah, AR
Revenue by :	Shri Kishan Vyas, CIT-DR

सुनवाई की तारीख/**Date of Hearing : 27/09/2019**
घोषणा की तारीख /**Date of Pronouncement: 15/10/2019**

आदेश/O R D E R

PER RAJPAL YADAV, JUDICIAL MEMBER:

Assessee is in appeal before the Tribunal against order of ld.CIT(A)-8, Ahmedabad dated 18.9.2017 passed for the Asstt.Year 2010-11.

2. Assessee has taken five grounds of appeal along with sub-grounds which are running into 9 pages, and thus not in consonance with Rule 8 of Income Tax (Appellate Tribunal) Rules, 1963. However, at the end of the grounds, the assessee has made a prayer clause, which reads as under:

> *"1. The disallowance u/s.37(1)of the Act of Rs.3,55,20,081/- on account of expenses classified as freebies confirmed by the ld.CIT(A) may kindly be deleted.*

2. The disallowance of expenditure claimed as 'Non-freebies' u/s.37(1) of the Act of Rs.1,00,67842/- under various heads i.e.

a) Business convening expenses of Rs.11,76,363/- confirmed by the ld.CIT(A) by enhancement of Rs.11,000/- may kindly be deleted.
b) Disallowance of CME expenses of Rs.8,88,202/- confirmed by the ld.CIT(A) may kindly be deleted.
c) Disallowance on account of MCM Expenses of Rs.11,26,680/- confirmed by the ld.CIT(A) may kindly be deleted.
d) Disallowance on account of promotional material treating the same as freebies to Doctors of Rs.60,46,495/- confirmed by the ld.CIT(A) may kindly be deleted.
e) Disallowance on account of sales promotion expenses of Rs.8,41,100/- confirmed by the ld.CIT(A)may kindly be deleted."

3. Brief facts of the case are that the assessee has filed its return of income on 28.9.2010 declaring total income at Rs.2,38,60,129/- and book profit under section 115JB of the Act at Rs.7,01,13,079/-. This return was subsequently revised by the assessee. The case of the assessee was selected for scrutiny assessment and assessment order was passed under section 143(3) on 22.3.2013 whereby its total income was determined at Rs.4,00,76,180/-. The ld.Commissioner took cognizance under section 263 of the Income Tax Act, 1961 and harboured a belief that the assessment order passed by the AO was erroneous and prejudicial to the interest of the Revenue, and therefore, it is to be set aside for adjudication afresh on particular issue. Accordingly, an order was passed under section 263 on 25.3.2015. The ld.Commissioner has set aside the assessment order with the following directions:

"To examine the issue of expenditure raised in notice u/s. 263 dated 25.06.2014 with reference to the details filed by the assessee during the assessment proceedings in response to the show, cause notice issued by the Assessing Officer on 24.01.2013 and 'details filed on

26.08.2013 during the proceedings u/s. 263 and'make1 disallowance of expenditure not allowable, as per CBDT's Circular No.5/2012 dated 01.08.2012 being in violation to the provisions of Indian Medical Council (Profession conduct, Etiquette and Ethics) Regulations Act, 2002 issued by the Medical Council of India and Notification dated 10.12.2009 issued by the Medical Council of India after providing an opportunity of being heard to the assessee."

4. Armed with the above directions, the ld.AO had issued notice under section 143(2) r.w.s. 263 on 10.7.2015 directing the assessee to submit requisite details. It is pertinent to note here that the order passed under section 263 was not challenged and became final. In response to the notice of the AO, the assessee has compiled details in tabular form exhibiting the expenses debited by it in the profit & loss account under different heads under this issue. Such details have been reproduced in the assessment order as well as in the impugned order of the ld.CIT(A). We take note of these details from order of the ld.CIT(A) in order to appreciate the controversy in more scientific and fundamental manner. They read as under:

Sr No	Nature of expenditure	Total	Gifts	Hospitality	Travel Facility	Monetary Grants	Total Freebies to doctors	Non-freebies to doctors
1	Business convention	14,26,925	-	89,440	4,000	-	93,440	13,33,485
2	CME Expenses	59,21,348	-	-	-	-		59,21,348
3	MCM Expenses	45,06,717	-	-	13,672	-	13,672	44,93,045
4	Promotional Material	4,46,29,897	1,43,97,423	-	-	-	1,43,97,423	3,02,32,474
5	Patron Networking Expenses	1,61,80,203	1,56,74,305	33,406	4,000	60,000	1,57,71,711	4,08,492
6	Sales promotion expenses	71,91,609	43,814	29,37,485	3,809	1,000	29,86,108	42,05,501
7	Travelling Expenses for Doctors	22,74,606		5,15,849	17,41,878		22,57,727	16,879

	Total	8,21,31,305	3,01,15,542	35,76,180	17,67,359	61,000	3,55,20,081	4,66,11,224

Sr no.	Nature of expenditure	Non-freebies to doctors	Percentage	Intended disallowance	Actual disallowance mentioned in order
1	Business convention	13,33,485	100%	13,33,485	11,65,365
2	CME Expenses	59,21,348	15%	8,88,202	8,88,202
3	MCM Expenses	44,93,045	25%	11,23,261	11,26,680
4	Promotional Material	3,02,32,474	20%	60,46,495	60,46,495
5	Patron Networking Expenses	4,08,492	0%	0	0
6	Sales promotion expenses	42,05,501	20%	8,41,100	8,41,100
7	Travelling Expenses for Doctors	16,879	0%	0	0
	Total	4,66,11,224		1,02,32,543	1,00,67,842

5. A perusal of the above details would indicate that the assessee has debited under different heads viz. business convention, CME expenses, MCM expenses, promotional material, patron networking expenses, sales promotion expenses, travelling expenses. In the first column, it has shown the nature of expenditure. Thereafter, shown total quantum of expenditure and thereafter bifurcated this expenditure under heads, gifts, hospitality, travel facility, etc. The ld.AO on an analysis of both these tables arrived at a conclusion that freebies given to the doctors at Rs.3,55,20,081/- is an unallowable expenditure under section 37(1). Similarly, certain expenditure, which were not in the nature of freebies, but in the opinion of the AO, these are equated to freebies, and he worked out a disallowance at Rs.1,02,32,543/-.

6. Dissatisfied with this disallowance, the assessee carried the matter in appeal before the ld.CIT(A). It has filed written submissions, but could not meet approval of the ld.CIT(A). The ld.CIT(A) has concurred with the AO and the basic reason operated in the mind of the ld.CIT(A) was being noticed in para 9 and 10 of the impugned order, which reads as under:

> *"9. It is to be appreciated that many unscrupulous doctors are working only for the benefit of pharmaceutical industry rather than for the benefit of patients and society for which they are educated to work. Only those doctors are considered successful who have maximum influence over the pharmaceutical industry and can extract maximum benefit from them. Doctors have become so much demanding that many times the medical representative who visits them has to incur expenditure for the benefit of doctors from their own salary. By such conduct these doctors get a feeling of false ego, of power and pelf, and in the process, they get completely dehumanized and behave like old aristocrats in most demeaning manner. They do not prescribe generic medicine, rather they prescribe the costliest medicine of the Pharma company which provides the maximum freebies. The medicines which are not at all required for the patient, are also prescribed just to benefit the pharma industry or company. These people keep interests of pharmaceutical company as paramount rather than interest of the patients. These were the reasons for which Indian medical council (IMC) came out with regulations referred above.*
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> *10. Now saying that only bribe seeker is guilty and not the payer of bribe is a travesty of logical thinking. Even under Indian penal code, the Abettor of crime is equally punishable on the same footing as the actual perpetrator of crime. Saying that the company is acting in its commercial interest in making these expenses for the business even though these may be illegal but same should be allowed on commercial principles. How the advance society or any educated person accept such an argument? The murder of a competitor may also be in the commercial interest of the businessmen but the expenses incurred for the murder cannot be allowed. If we start allowing such expenses in the name of commercial interest, it is better for the society not to have any such commerce."*

7. Apart from the above philosophy, the ld.CIT(A) has referred to the decision of Hon'ble Allahabad High Court in the case of CIT Vs. Pt. Vishwanath Sharma, 316 ITR 419 (All) as well as judgment of Hon'ble Punjab & Haryana High Court in the case of CIT Vs. Kap Scan and Diagnostic Centre P.Ltd., 344 ITR 476. Before the Hon'ble Allahabad High Court, the issue was whether expenditure incurred by an assessee on the ground that commission paid to Government doctors incurred by the assessee is in contravention of the public policy and not allowable as expenditure. The Hon'ble High Court has replied this question against the assessee and held that commission paid to Government doctors is against the public policy and immoral. For that purpose, Hon'ble High Court has made reference to the decision of Hon'ble Supreme Court as well as its earlier decisions. Similarly, Hon'ble P&H High Court has also not upheld the allowance of claim of expenditure by a diagnostic centre for giving commission to those doctors who have referred patients to such diagnostic centre for investigation. Dissatisfied with the order of the ld.CIT(A), the assessee is in appeal before the Tribunal.

8. The ld.counsel for the assessee at the very outset contended that this issue has been debated in series of judgment at the end of the ITAT, Benches not only at Ahmedabad but in Mumbai also. He has placed on record copies of twelve decisions, and latest is in the case of Aristo Pharmaceuticals P.Ltd. Vs. ACIT. Copies of the decisions have been placed on paper book and citations are as under:

a) M/s. Cadila Pharmaceuticals Ltd vs. DCIT, 51 CCH032 (2017) (ITAT, Ahmedabad)
b) ITO vs. Sunflower Pharmacy, 51 CCH0575 (2017) (ITAT, Ahmedabad)
c) DCIT vs. Esaote India (NS) Ltd, 53 CCH0648 (201 8) (ITAT, Ahmedabad)

d) M/s. Unicure Remedies Pvt. Ltd vs. ACIT-4, Vadodara, ITA No. 3058/AHD/2014(ITAT, Ahmedabad)
e) J.B. Chemicals & Pharmaceuticals Ltd, ITA No. 6075/Mum/2014, Date of Order: 16.04.2019 (ITAT, Mumbai)
f) Solvay Pharma India Ltd vs. PCIT, (2018) 52 CCH 0053 (ITAT, Mumbai)
g) Eisai Pharmaceuticals India Pvt. Ltd vs. DCIT, ITA No. 1381/Mum/2016, Date of Order: 30.05.2018 (ITAT, Mumbai)
h) DCIT vs. PHL Pharma Pvt. Ltd., (2017) 49 CCH 0124, (ITAT, Mumbai)
i) UCB India Ltd. vs. The ITO in ITA no. 6681/Mum/2013, Date of Order: 18.05.2016 (ITAT, Mumbai)
j) Macleods Pharmaceuticals Ltd. Vs. ACIT, (2016) 48 CCH 0298 (ITAT, Mumbai)
k) Syncom Formulations Ltd. Vs. DCIT, ITA No.6249 & 6428/Mum/2012 dated 23.12.2015 (ITAT, Mumbai)

9. He further contended that in the case of ITO Vs. Sunflower Pharmacy and M/s.Unicure Remedies P.Ltd. Vs. ACIT, (one of us i.e. Accountant Member is party to the decision). He further contended that in the case of Cadilan Pharmaceuticals Ltd. Vs. DCIT (supra) took note of decision in the case of ACIT Vs. Liva Healthcare Ltd., 161 ITD 63(Mum) wherein such disallowance in the case of pharmaceutical companies was upheld. However, thereafter the Bench has observed that in subsequent decisions viz. Macleods Pharmaceuticals Ltd. Vs. ACIT, 161 ITD 291 (Mum) and DCIT Vs. PHL Pharma P.Ltd., 184 TTJ 1 (Mum), ITAT has held that Board Circular dated 1.8.2012 cannot be applied with retrospective effect and deleted such disallowance. ITAT, Ahmedabad concurred with subsequent decision of the ITAT, Mumbai on this issue. On the strength of these decisions on identical issue, and on the similar nature of expenditure, the deduction has been given to the assessee by treating the expenditure as for the purpose of business. The ld.counsel for the assessee also pointed out that the assessee is small organization in comparison to Cadila and other big pharmaceutical companies, where the expenditure under these heads have been incurred in crores of rupees, because these companies have higher volume of turnover. He prayed that

the ld.CIT(A) has erred in not appreciating the nature of assessee's business, and how a circular issued by the CBDT after the circular of Medical Council of India under Medical Council Act, 1956 can be given a retrospective effect. He further contended that impact of both these circulars have been discussed elaborately in these decisions.

10. On the other hand, the ld.DR relied upon the orders of the Revenue authorities. He contended that a short question in this appeal is, whether gifts in the shape of hotel accommodation, travel concession, hospitality and valuables given by pharmaceutical companies to medical professional should be treated as genuine business expenditure or it should be appreciated while considering medical profession and needs of the society in India. He pointed out that the ld.CIT(A) has emphasized this aspect in para-9 and 10 which has been extracted in earlier part of this order. He basically relied upon this basic foundation for supporting the order of the ld.CIT(A).

11. We have considered rival submissions and gone through the record carefully. Though we have noted citations of all the case laws referred by the ld.counsel for the assessee, but we need not to recite and recapitulate all the decisions on this aspect, but suffice to say that core of all these decisions of the ITAT is to the effect, whether the circular issued by the Medical Council and also CBDT Instruction NO.5 of 2012 is applicable with retrospective effect, and in the light of circular of CBDT, the transaction of the assessee are required to be visualized or not. We find that Co-ordinate Benches have noticed this circular in their discussion and we cannot do much better than to extract such decisions herein. It has been elaborately taken note in the decision of Aristo Pharmaceuticals P.Ltd.

(supra) reported in 107 taxmann.com 119 (Mum-Trib). It is a decision rendered on 28.6.2019. Bench has reproduced the discussion made in the assessee's own case for earlier years. It reads as under:

> ***"9.*** *We have heard both the parties, perused the material available on record and gone through the orders of authorities below. The issue involved in the present appeal, i.e. whether freebies distributed to medical professionals by a pharmaceutical company is allowable u/s 37(1) of the Act or not in light of circular issued by MCI was subject matter of deliberations by the co-ordinate bench of ITAT, Mumbai Bench "A" in assessee's own case for A.Y. 2011-12. The co-ordinate bench, after considering various aspects including the circular issued by MCI and also circular of CBDT vide circular No.5 of 2012 held that the assessee was entitled for claim of sales promotion expenses incurred on distribution of articles to the stockists, distributors, dealers and doctors. The relevant findings of the Tribunal are as under:—*
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> > *'21. We have deliberated at length on the issue under consideration and after perusing the regulations issued by the Medical Council of India, find that the same lays down the code of conduct in respect of the doctors and other medical professionals registered with it, and are not applicable to the pharmaceuticals or allied health sector industries. Rather, a perusal of the provisions of the Indian Medical Council Act, 1956, reveals that the scope and ambit of statutory provisions relating to professional conduct of registered medical practitioners under the Indian Medical Council Act, 1956 is restricted only to the persons registered as medical practitioners with the State Medical Council and whose name are entered in the Indian Medical Register maintained under Sec. 21 of the said Act. We are of the considered view that the scheme of the Indian Medical Council Act, 1956 neither deals with nor provides for any conduct of any association/society and deals only with the conduct of individual registered medical practitioners. In the backdrop of the aforesaid facts, it emerges that the applicability of the MCI regulations would only cover individual medical practitioners and not the pharmaceutical companies or allied health sector industries. Interestingly, the scope of the applicability of the MCI regulations was looked into by the Hon'ble High Court of Delhi in the case of Max Hospital, Pitampura v. Medical Council of India (CWP No. 1334/2013, dated 10.01.2014). In the aforementioned case the MCI had filed an 'Affidavit' before the High Court, wherein it was deposed by the council that its jurisdiction is limited only to take action against the registered medical professionals under the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, and it has no jurisdiction to pass any order affecting the rights/interest of the petitioner hospital. We are of the considered view that on the basis of the aforesaid deposition of MCI that its jurisdiction stands restricted to the registered medical professionals, it can safely be concluded that the MCI*

regulations would in no way impinge on the functioning of the assessee-company which is engaged in the business of manufacturing and sale of pharmaceutical and allied products. We thus, in the backdrop of our aforesaid deliberations are of the considered view that the code of conduct enshrined in the MCI regulations are solely meant to be followed and adhered by medical practitioners/doctors, and such a regulation or code of conduct would not cover the pharmaceutical company or healthcare sector in any manner. We are further of the view that in the backdrop of our aforesaid observations, as the Medical Council of India does not have any jurisdiction under law to pass any order or regulation against any hospital, pharmaceutical company or any healthcare sector, then any such regulation issued by it cannot have any prohibitory effect on the manner in which the pharmaceutical company like the assessee conducts its business. On the basis of our aforesaid observations, we are unable to comprehend that now when the MCI has no jurisdiction upon the pharmaceutical companies, then where could there be an occasion for concluding that the assessee-company had violated any regulation issued by MCI. We thus, in terms of our aforesaid observations are of the considered view that even if the assessee had incurred expenditure on distribution of "freebies" to doctors and medical practitioners, the same though may not be in conformity with the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (as amended on 10.12.2009), however, as the same only regulates the code of conduct of the medical practitioners/doctors, therefore, in the absence of any prohibition on the pharmaceutical companies in incurring of such sales promotion expenses, the latter cannot be held to have incurred an expenditure for a purpose which is an offence or is prohibited by law. In this regard we are reminded of the maxim "Expressio Unius Est Exclusio Alterius", which provides that if a particular expression in the statute is expressly stated for a 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 assesses. Thus, now when the MCI regulations are applicable to medical practitioners registered with the MCI, then the same cannot be made applicable to pharmaceutical companies or other allied healthcare companies.

22. We shall now advert to the CBDT Circular No. 5/2012, dated 01.08.2012. We find that the aforesaid CBDT Circular reads as under:—

"Inadmissibility of expenses incurred in providing freebees to medical practitioner by pharmaceutical and allied health sector industry

Circular No. 5/2012 [F.No. 225/142/2012-ITA.II], dated 1-8-2012

It has been brought to the notice of the Board that some pharmaceutical and allied health sector Industries are providing freebess (freebies) to medical practitioner and their professional associations in violation of the

regulations issued by Medical Council of India (the 'Council') which is a regulatory body constituted under the Medical Council Act, 1956

2. The council in exercise of its statutory powers amended the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (the regulations) on 10-12-2009 imposing a prohibition on the 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.

3. Section 37(1) of Income Tax Act provides for deduction of any revenue expenditure (other than those failing under sections 30 to 36) from the business income if such expense is laid out/expended wholly or exclusively for the purpose of business or profession. However, the explanation appended to this sub-section denies claim of any such expenses, if the same has been incurred for a purpose which is either an offence or prohibited by law.

Thus, the claim of any expense incurred in providing above mentioned or similar freebees in violation of the provisions of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 shall be inadmissible under section 37(1) of the Income Tax Act being an expense prohibited by the law. This disallowance shall be made in the hands of such pharmaceutical or allied health sector Industries or other assessee which has provided aforesaid freebees and claimed it as a deductible expense in its accounts against income.

4. It is also clarified that the sum equivalent to value of freebees enjoyed by the aforesaid medical practitioner or professional associations is also taxable as business income or income from other sources as the case may be depending on the facts of each case. The assessing officers of such medical practitioner or professional associations should examine the same and take an appropriate action.

This may be brought to the notice of all the officers of the charge for necessary action."

We may herein observe that a perusal of the aforesaid CBDT Circular reveals that the "freebies" provided by the pharmaceutical companies or allied health sector industries to medical practitioners or their professional associations in violation of the provisions of Indian Medical Council (Professional Conduct, Etiquette and Ethics) regulations, 2002 shall be inadmissible under Sec. 37(1) of the Income-Tax Act, 1961, as the same would be an expense prohibited by the law. We are of the considered view that as observed by us hereinabove, the code of conduct enshrined in the notifications issued by MCI though is to be strictly followed and adhered by medical practitioners/doctors registered with the MCI, however the same cannot impinge on the conduct of the pharmaceutical companies or other healthcare sector in any manner. We find that nothing has brought

on record which could persuade us to conclude that the regulations or notifications issued by MCI would as per the law also be binding on the pharmaceutical companies or other allied healthcare sector. Rather, the concession made by the MCI before the Hon'ble High Court of Delhi in the case of Max Hospital v. MCI (CWP No. 1334/2013, dated 10.01.2014) fortifies our aforesaid view that MCI has no jurisdiction to pass any order or regulation against any hospital, pharmaceutical company or any healthcare sector. We further find that MCI had by adding Para 6.8.1 to its earlier notification issued as "Indian Medical Council Professional (Conduct, Etiquette and Ethics) Regulations, 2002" had even provided for action which shall be taken against medical practitioners in case they contravene the prohibitions placed on them. We find from a perusal of Para 6.8.1 that in case of receiving of any gift from any pharmaceutical or allied healthcare industry and their sales people or representatives, action stands restricted to the members who are registered with the MCI. In other words the censure/action as had been suggested on the violation of the code of conduct is only for the medical practitioners and not for the pharmaceutical companies or allied health sector industries. We are thus of the considered view that the regulations issued by MCI are qua the doctors/medical practitioners registered with MCI, and the same shall in no way impinge upon the conduct of the pharmaceutical companies. As a logical corollary to it, if there is any violation or prohibition as per MCI regulation in terms of Explanation to Sec. 37(1), then the same would debar the doctors or the registered medical practitioners and not the pharmaceutical companies and the allied healthcare sector for claiming the same as an expenditure.

23. We find that the CBDT as per its Circular No. 5/2012, dated 01.08.2012 had enlarged the scope and applicability of Indian Medical Council Regulation, 2002, by making the same applicable even to the pharmaceutical companies or allied healthcare sector industries. We are of the considered view that such an enlargement of the scope of MCI regulation to the pharmaceutical companies by the CBDT is without any enabling provision either under the Income Tax Act or under the Indian Medical Council Regulations. We are of a strong conviction that the CBDT cannot provide casus omissus to a statute or notification or any regulation which has not been expressly provided therein. Still further, though the CBDT can tone down the rigours of law in order to ensure a fair enforcement of the provisions by issuing circulars for clarifying the statutory provisions, however, it is divested of its power to create a new impairment adverse to an assessee or to a class of assessee without any sanction or authority of law. We are of the considered view that the circulars which are issued by the CBDT must confirm to the tax laws and though are meant for the purpose of giving administrative relief or for clarifying the provisions of law, but the same cannot impose a burden on the assessee, leave alone creating a new burden by enlarging the scope of

a regulation issued under a different act so as to impose any kind of hardship or liability on the assessee. We thus, are unable to persuade ourselves to subscribe to the rigours contemplated in the CBDT Circular No. 5/2012, dated 01.08.2012, which we would not hesitate to observe, despite absence of anything provided by the MCI in its regulations issued under the Medical Council Act, 1956, contemplating that the regulation of code of conduct would also cover the pharmaceutical companies and healthcare sector, however provides that in case a pharmaceutical or allied health sector industry incurs any expenditure in providing any gift, travel facility, cash, monetary grant or similar freebies to medical practitioners or their professional associations in violation of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, the expenditure incurred on the same shall be disallowed in the hands of such pharmaceutical or allied health sector industry. We are of the considered view that the burden imposed by the CBDT vide its aforesaid Circular No. 5/2012, dated 01.08.2012 on the pharmaceutical or allied health sector industries, despite absence of any enabling provision under the Income Tax law or under the Indian Medical Council Regulations, clearly impinges on the conduct of the pharmaceutical and allied health sector industries in carrying out its business. We thus, in the absence of any sanction or authority of law on the basis of which it could safely be concluded that the expenditure incurred by the assessee-company on sales promotion expenses by way of distribution of articles to the stockists, distributors, dealers, customers and doctors, is in the nature of an expenditure which had been incurred for any purpose which is either an offence or prohibited by law, thus conclude that the same would not be hit by the Explanation to Sec. 37(1) of the Act.

24. Alternatively, we are of the considered view that it is a trite law that a CBDT Circular which creates a burden or liability or imposes a new kind of imparity, cannot be reckoned retrospectively. We are of the considered view that though a benevolent circular may apply retrospectively, but a circular imposing a burden has to be apply prospectively only. Our aforesaid view is fortified by the judgment of the Hon'ble Supreme Court in the case of Director of Income-tax V. S.R.M.B Dairy Farming (P.) Ltd. (2018) 400 ITR 9 (SC). The Hon'ble Apex Court in its aforesaid judgment has held that beneficial circulars had to be applied retrospectively, while oppressive circulars had to be applied prospectively, observing as under:

"25. It is in this context, the question arises, when the instruction expressly states that the benefit of the said policy is prospective, still can the courts place a construction on such instruction so as to make it retrospective. In this context, the Apex Court in the case of CCE v. Mysore Electricals Industries Ltd. reported in [2006] 204 ELT 517 (SC) : [2007] 8 RC 1, dealing with the question how a beneficial circular is to be construed, has approached this question in the following manner. At paragraph 13 of the

judgment, it is stated that the learned counsel further submitted that the circular being oppressive and against the respondent, has to apply only prospectively and cannot be applied retrospectively. In other words, a beneficial circular has to be applied prospectively. Thus, when the circular is against the assessee they have a right to claim the enforcement of the same prospectively. It is further submitted that for the period in question, trade notices had been issued classifying the circuit breakers under heading No. 85.35 or 85.36. When the approved classification was proposed to be revised to reclassify the single panel circuit breakers under heading No.85.37 of the tariff, such re-classification can take effect only prospectively from the date of communication of the show-cause notice proposing reclassification."

We find that the aforesaid CBDT Circular No. 5/2012, dated 01.08.2012 had came up for consideration before a coordinate bench of the Tribunal in the case of DCIT v. PHL Pharma (P) Ltd. [2017] 49 CCH 124 (Mum), wherein the Tribunal after deliberating at length on two aspects viz. (i) validity of the circular in the backdrop of enlargement of scope of MCI regulation to the pharmaceutical companies by the CBDT, without any enabling provisions either under the Income Tax Law or under the Indian Medical Council Regulations; and (ii). the prospective applicability of the circular, had observed as under:

12. It is pertinent to mention that the assessment year involved is 2010-11. The circular prohibiting such expenditure was issued by the CBDT on 1.8.2012. Therefore, this circular cannot be construed as applicable with retrospective effect and with help of this circular, no expenditure could be disallowed; more so, on the basis of circular chargeability to tax with retrospective effect cannot be created. It should be provided in the Act though *Explanation* 1 to section 37 is already there which prohibits allowance of any expenditure, if incurred in infringement of any law. ITAT, Mumbai Bench has considered this aspect elaborately in the above judgments and held that on the basis of regulations of Medical Council of India, disallowance in the hands of pharmaceutical companies cannot be made because these regulations were laid down for the medical professionals and not pharmaceuticals companies.

13. We have examined each item of expenditure debited by the assessee, which has been disallowed partly by the AO and confirmed by the CIT(A) viz. a sum of Rs.13,33,485/- was shown as expenditure incurred towards business convention. According to the assessee, it is non-freebies to doctors. The AO has made disallowance of Rs.11,65,365/-. The ld.CIT(A) has enhanced this expenditure by a sum of Rs.11,000/-. These expenses were incurred by the assessee for accommodation of doctor. Similarly, MCM expenditure was incurred for conference. The stand of the assessee was that conferences were being organized for the purpose of business. When a large number of doctors assembled, they share their experience in day-to-day professional life and what type of hurdles they faced while treating patients, either by use of equipments or by pharma products. If a pharma-company wants to organize such type of conference or seminars then it will be quite reasonable to understand the deficiency in its products, and if the doctors were required to pay from their pockets, then probably some of them would not like to participate. At this stage, it is pertinent to visualize the provisions under the Income Tax Act for allowance of business expenditure. In order to claim expenditure under section 37(1) of the Income tax Act, the assessee is required to fulfill certain conditions viz. (a) there must be expenditure, (b) such expenditure must not be of the nature described in sections 30 to 36, (c) the expenditure must not be in the nature of capital expenditure or personal expenditure of the assessee, and (d) expenditure must be laid out or expended wholly and exclusively for the purpose of business or profession. The expression "wholly" employed in section 37 refers to quantification of expenditure while expression "exclusively" refers to the motive, objective and purpose of the expenditure.

14. Thus, if the nature of this expenditure is being viewed with angle of commercial organization, then it would reveal that these were essential expenditure for the purpose of a pharmaceutical industry. The only caveat for their non-disallowance is *Explanation* 1 appended to section 37, which is applicable on the expenditure which are incurred for infringement of any law. This aspect has been elaborately discussed by the Co-ordinate Bench in the above cases, and therefore, respectfully following the decision of the ITAT in the case of Aristo Pharmaceuticals P.Ltd. (supra) we allow the appeal of the assessee, and delete the disallowances.

15. In the result, appeal of the assessee is allowed.

Order pronounced in the Court on 15th October, 2019 at Ahmedabad.

Sd/-	**Sd/-**
(AMARJIT SINGH)	**(RAJPAL YADAV)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad; Dated 15/10/2019