

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“C” BENCH, AHMEDABAD**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER &  
Ms. MADHUMITA ROY, JUDICIAL MEMBER**

ITA No. 362/Ahd/2018  
(Assessment Year : 2014-15)

M/s. Shine Pharmaceuticals Ltd., Vs. Dy. Commissioner of Income Tax,  
308-310, Dwarkesh Complex, Circle – 2(1)(1),  
Sun Pharma Road, Atladara, Baroda.  
Vadodara – 390 020.

[PAN No. AA ECS 2660 M]

(Appellant)

.. (Respondent)

**Appellant by** : Ms. Urvashi Sodhan, A.R.  
**Respondent by** : Shri Lalit P. Jain, Sr. D.R.

**Date of Hearing** 14.10.2019  
**Date of Pronouncement** 17.10.2019

O R D E R

**PER Ms. MADHUMITA ROY – JUDICIAL MEMBER:**

The instant appeal filed by the assessee is directed against the order dated 22.12.2017 passed by the Commissioner of Income Tax (Appeals) - 2, Vadodara arising out of the order dated 20.12.2016 passed by the DCIT, Circle – 2(1)(1), Baroda under section 143(3) of the Income Tax Act, 1961 (hereinafter referred as to “the Act”) for the Assessment Year (A.Y.) 2014-15 with the following grounds:

- 1) *“The learned found that the assessee has not made the Employee's Contribution payments towards ESIC before due date specified under section 36(1)(va) of the Act and hence made the addition of Rs. 3,79,404/- to the total income of the assessee. And commissioner of the income tax upheld the decision of the AO.*

*Your Appellant submits that same is not justified and therefore be deleted*

- 2) *The learned AO observed that the expenditure amounting to Rs. 19,45,443/- was incurred for the purposes like distributing gifts, providing hospitality to the doctors/ medical practitioners. The learned AO disallowed Rs.19,45,443/- by reasoning that the an amount of Rs. 14,45,443/- was incurred towards the purchase of laptop, mobile, watches, AC Machines, treadmill machines etc which is in the nature of gifts for doctors and practitioners, and an adhoc disallowance of Rs. 500000/- is made on account of having incurred on the lodging, boarding and travelling of the doctors/medical practitioners Explanation to section 37 of the IT Act, 1961 is invoked. And commissioner of income tax (appeal)-2 has dismissed the appeal. Your Appellant submits that same is not justified and therefore be deleted*

*Your Appellant craves leave to add to, alter, to amend or to delete any or all the grounds of appeal.”*

2. The first ground relates to addition of Rs.3,79,404/- on the ground that the assessee has not made the Employee's Contribution payments towards ESIC before due date specified under section 36(1)(va) of the Act, which has been added by the authorities below relying upon the judgment pronounced by the Hon'ble Jurisdictional High Court in the case of CIT-vs-Gujarat State Road Transport Corporation (2014) 223 Taxman 398 (Guj.) wherein it has been held that the assessee shall not be entitled to deduction of payments of Employee's Contribution to ESIC account if it is paid to the concerned account after the due date as specified u/s 36(1)(va), though he deposits the same before the due date prescribed under section 43B i.e., prior to filing of return u/s 139(1) of the Act which according to us is just and proper, without any infirmity. Hence, we find no merit in this ground of appeal preferred by the assessee. The same is thus, dismissed.

3. The second ground relates to disallowance of expenditure amounting to Rs.19,45,443/-, which was incurred for the purpose of distributing gifts, providing hospitality to the doctors and/or medical practitioners; out of which Rs.14,45,443/- was incurred towards the purchase of laptop, mobile, watches, AC Machines, treadmill machines etc in the nature of gifts for doctors and practitioners and the remaining balance of Rs.5,00,000/- has been disallowed on ad hoc basis on account of having been incurred

on the lodging, boarding and travelling of the doctors, medical practitioners upon invocation of section 37 of the I. T. Act, 1961 and the amended provision of Indian Medical Council (Professional conduct, etiquette and ethics) Regulations, 2002 on 10 December, 2009 whereby and whereunder the MCI imposed Prohibition on medical practitioners from inter alia, accepting gifts, travel facilities, hospitality, cash or monetary grants. The CBDT Circular being No. 5/2012 (F. No. 225/142/2012-ITA.II), dated 01.08.2012 has also been relied upon by the authorities below.

4. The Learned Advocate appearing for the assessee fairly submitted before us that the issue has already been decided by the Co-ordinate Bench in assessee's own case in ITA No.637/Ahd/2017 for A.Y. 2013-14 whereby and whereunder the disallowance made by the authorities below has been upheld copy whereof has also been submitted before us. The Learned DR also relied upon the order passed by the authorities below.

5. Heard the respective parties, perused the relevant materials available on record and also the order passed by the Co-ordinate Bench on the identical issue. The relevant portion of the same is as follows:

*“5.4. However, the Assessing Officer found that there are certain expenses incurred by the assessee towards the purchase of laptops, wrist watches, mobile phones, and camera, etc. amounting to Rs. 13,16,620/- which were like the gifts to the doctors/medical practitioners. These gifts items cannot be categorized as sales promotion expenses. Therefore, the same cannot be allowed as deduction as per the CBDT Circular and Medical Council of India.*

*5.5. The AO also observed that the assessee has not furnished the necessary details depicting the benefits in monetary/non-monetary benefit extended to the doctors/medical practitioners. The Assessing Officer also noted that there were not sufficient details furnished in support of traveling expenses to justify that the doctors and medical practitioners did not incur these expenses. In the absence of necessary evidence, the Assessing Officer made the disallowance of Rs.5,00,000/- for benefit extended to the doctors/medical practitioners in contravention to the provisions of CBDT Circular/Medical Council of India as discussed above. Therefore, the Assessing Officer proposed to make a disallowance of Rs.5,00,000/-*

*which was agreed by the ld. representative of the assessee and Managing Director of the assessee.*

*5.6. In view of the above, the Assessing Officer made the disallowance of Rs.18,16,120/- and added to the total income of the assessee. 6. The aggrieved assessee preferred an appeal to the Ld.CIT(A). The assessee before the Ld. CIT(A) submitted that the Circular issued by the CBDT dated 01/08/2012 which is prospective in nature. Therefore, there cannot be any disallowance of the expenses before the date of the issue of the Circular.*

*6.1. The necessary details were furnished to AO on account of sales promotion expenses. But the Assessing Officer without pointing out any specific defect has made the ad-hoc disallowance of Rs.5,00,000/- which is not permissible under the law.*

*6.2. The Circulars are binding on the Income Tax Authorities, but the same cannot be used against the assessee.*

*6.3. However, the Ld. CIT(A) confirmed the disallowance made by the Assessing Officer by observing that similar kind of disallowances was made in the earlier assessment years. The Managing Director of the assessee duly admitted the ad-hoc disallowance of Rs. 5,00,000/- during the hearing. Thus, the Ld. CIT(A) confirmed the order of the Assessing Officer.*

*7. Being aggrieved by the order of Ld. CIT(A), the assessee is in appeal before us.*

*8. The Ld.AR before us filed a paper book running from pages 1 to 25 and submitted that there was no benefit extended to the doctors/medical practitioners. All these expenses on the gift items were incurred to provide the benefit to the medical stores and chemist shops.*

*9. On the other hand, The Ld. DR submitted that the disallowance made by the lower authorities represent less than 1% of the total sales promotion expenses. The Ld. DR vehemently supported the orders of the authorities below.*

*10. We have heard the rival contentions and perused the materials available on record. In the instant case, the AO has made the addition to the total income of the assessee for two counts as discussed below.*

*i. The expenses incurred on the purchase of laptops, wrist watches, mobile phones, and cameras, etc. Rs.13,16,120/- was treated as gifts given to the*

*doctors/medical practitioners by the AO, though the assessee claimed that these items were given to the dealers. But the AO disbelieved the contention of the assessee by observing that the assessee failed to furnish the documentary evidence. The assessee also failed to furnish any scheme under which these items were given to the dealers.*

- ii. *There was no detail furnished by the assessee evidencing that the gift items were not given to the doctors/ medical practitioners. In the absence of the details of the actual recipient of the gift article, the AO made an ad-hoc disallowance of Rs. 5 lacs for which the assessee agreed.*

10.1. *The Ld. CIT-A subsequently confirmed the view taken by the AO. There is no dispute that the gifts, freebies and any other benefit to the doctors are prohibited as per explanation to section 37 of the Act. There is also a circular bearing number 5/2012 (F.No.225/142/2012-ITA.II) dated 1st August 2012 issued by the CBDT which prohibits such gifts of the doctors. According to the circular, the deduction to the pharmaceutical company in respect of such expenses will not be available. The Hon'ble Himachal Pradesh High Court also upheld the validity of the circular in the case of confederation of India pharmaceuticals Industry (SSI) Vs. CBDT reported in 353 ITR 388 wherein it was held as under:*

*“Shri Vishal Mohan, Advocate, on behalf of the petitioner contends that the circular goes beyond the section itself. We are not in agreement with this submission. The explanation to Section 37(1) makes it clear that any expenditure incurred by an assessee for any purpose which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession. The sum and substance of the circulars also the same. In case the assessing authorities are not properly understanding the circular then the remedy lies for each individual assessee to file appeals under the Income-tax Act but the circular which is totally in line with Section 37(1) cannot be said to be illegal. In fact paragraph 4 of the circular quoted hereinabove itself clarifies that the value of the freebies enjoyed by the medical practitioner is also taxable as business income or income from other sources depending on the facts of each case. Therefore, if the assessee satisfies the assessing authority that the expenditure is not in violation of the regulations framed by the medical council then it may legitimately claim a deduction, but it is for the assessee to satisfy the assessing officer that the expense is not in violation of the Medical Council Regulations referred to above.”*

10.2. During the hearing the Ld. Counsel for the assessee has not agitated for the applicability of the circular issued by the CBDT as discussed above. Accordingly, there remains no confusion that any expense incurred by the assessee to extend the benefit to the doctors will not be allowed as a deduction by the explanation of section 37 of the Act as well as the circular issued by the CBDT the as discussed above.

10.3. The argument of the Ld. Counsel for the assessee is that these benefits were given to the medical store/chemist shops. As per the ITA No.637/Ahd/2017 Shine Pharmaceuticals Ltd. vs. DCIT Asst.Year – 2013-14 - 9 - assessee, there were no benefits given by the assessee to the doctors/medical practitioner. However, from the order of the AO, we note that the assessee has not furnished sufficient documentary pieces of evidence suggesting that the dealers have not passed on these freebies to the doctors. Therefore the addition was made by the AO.

10.4. Even before us the Ld. Counsel for the assessee has not produced any evidence to prove that there was no benefit extended to the doctors/medical practitioners out of the purchases of laptops, wrist watches, mobile phones, cameras, etc. In the absence of any documentary evidence, we are not inclined to disturb the finding of the lower authorities.

10.5. Similarly, we also note that the assessee duly admitted the disallowance of Rs. 5 lacs made by the AO on an ad-hoc basis during the assessment proceedings. The AO made the addition by observing that the assessee failed to furnish the details of the actual recipient of these gift articles. The assessee has also incurred traveling expenses which were claimed by the assessee for the traveling of the medical representatives. But the assessee failed to file the requisite documents evidencing that there was no benefit extended to the doctors /medical practitioners out of such traveling expenses. Therefore the addition was made by the AO on an ad-hoc basis. In this regard, we also note that the Ld. Counsel for the assessee has also not produced any evidence before us to prove that the doctors were not the actual recipient of these gift articles. Thus in the absence of necessary documentary evidence the AO had no alternative except to make the disallowance on an ad-hoc basis. Thus we are inclined not to disturb the finding of the lower authorities. Accordingly, we dismiss the ground of appeal of the assessee.

11. In the result, the appeal of the assessee is dismissed.”

Respectfully relying upon the order passed by the Co-ordinate Bench, we find no reason to deviate from the finding made therein and hence the ground of appeal preferred by the assessee is dismissed.

6. In the result, assessee's appeal is dismissed.

**This Order pronounced in Open Court on**

**17/10/2019**

Sd/-  
( WASEEM AHMED )  
ACCOUNTANT MEMBER

Sd/-  
( Ms. MADHUMITA ROY )  
JUDICIAL MEMBER

Ahmedabad; Dated 17/10/2019

Priti Yadav, Sr.PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)-2, Vadodara.
5. विभागीय प्रतिनिधि अहमदाबाद ,आयकर अपीलीय अधिकरण / DR,  
ITAT, Ahmedabad
6. गार्ड फाईल /Guard file.

**आदेशानुसार/ BY ORDER,**

सत्यापित प्रति //True Copy//

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आयकर अपीलीय अधिकरणअहमदाबाद / ITAT, Ahmedabad