

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” Bench, Mumbai**

**Before Shri Rajesh Kumar, Accountant Member
and Shri Ravish Sood, Judicial Member**

**ITA Nos.2775 & 2776/Mum/2019
(Assessment Years: 2012-13 & 2013-14)**

DCIT, Circle-2(1)(1)
Room No. 561, 5th Floor,
Aayakar Bhavan, M.K.Road,
Mumbai – 400 020

M/s Aristo Pharmaceuticals Pvt. Ltd.
3rd Floor, Merchantile Chamber,
Vs. 12 J N Heredia Marg,
Mumbai – 400 001

PAN – AAACA4495N

(Appellant)

(Respondent)

Appellant by: Shri Rajeev Harit, D.R.
Respondent by: Shri Ajay Kumar Rastogi, A.R.

Date of Hearing: 27.10.2020

Date of Pronouncement: 28.10.2020

ORDER

PER BENCH:

The captioned appeals filed by the revenue are directed against the respective orders passed by the CIT(A)-4, Mumbai, dated 19.02.2019 & 18.02.2019 for A.Y. 2012-13 and A.Y. 2013-14, respectively, which in turn arises from the respective orders passed by the A.O under Sec. 143(3) r.w.s 263 of the Income Tax Act, 1961 (for short 'Act'), dated 29.09.2017. As the issue involved in the captioned appeals is inextricably interlinked or in fact interwoven, the same, therefore are being taken up and disposed off together by way of a consolidated order. We shall first take up the appeal of the revenue for A.Y. 2012-13, wherein the impugned order has been assailed before us on the following ground of appeal:

“Whether on the facts and in the circumstances of the case and in law, the ITAT erred in holding that there is no prohibition by law within the meaning of Explanation 1 to Sec.37(1) of the Income Tax Act on claiming sales promotion expenses as deduction

u/s.37(1) without appreciating the fact that providing freebies by pharmaceutical companies is a natural corollary violation of the provisions of MCI Regulations, 2002.”

2. Briefly stated, the assessee company which is engaged in the business of manufacturing and sale of pharmaceuticals and allied products had filed its return of income for A.Y. 2012-13 on 21.09.2012, declaring its total income at Rs.270,68,80,787/-. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec.143(2) of the Act. Original assessment under Sec.143(3) was framed by the A.O vide his order dated 06.01.2015, determining the total income of the assessee company at Rs.282,06,25,970/-. After the culmination of the assessment proceedings the Principal Commissioner of Income Tax-2, Mumbai, (for short 'Pr.CIT') in exercise of the powers vested with him under Sec.263 of the Act called for the assessment records of the assessee company. On a perusal of the assessment records, it was observed by the Pr.CIT that the A.O had disallowed sales promotion expenses of Rs.11,37,45,179/-. However, as observed by the Pr.CIT the A.O had not applied his mind and had wrongly allowed the assessee's claim of expenses, viz. Medical Conference Expenses of Rs.31.18 crores, despite the fact that the same was prohibited by the Medical Council of India (MCI) vide its notification dated 10.12.2009. Observing, that the A.O while framing the assessment had vide his order passed under Sec.143(3), dated 06.01.2015 failed to disallow the aforesaid expenses of Rs.31.18 crores, the Pr.CIT being of the view that the order so passed by the A.O was erroneous insofar it was prejudicial to the interest of the revenue, thus, called upon the assessee to explain as to why the same may not be disallowed as per 'Explanation 1' to Sec.37 of the Act. In reply, the assessee vide its submissions dated 25.05.2018 tried to impress upon the Pr.CIT that its claim of the aforesaid expenditure was in order, and thus, the assessment framed by the A.O was not erroneous. However, the reply of the assessee did not find favour with the Pr.CIT. Observing, that the order passed by the A.O allowing the assessee's claim for deduction of Medical Conference Expenses which were prohibited by the Medical Council of India (MCI), vide its

notification dated 10th December, 2009, had rendered the same as erroneous to the extent it was prejudicial to the interest of the revenue, the Pr.CIT vide his order passed u/s 263, dated 31.03.2017 set aside the assessment order passed by the A.O under Sec.143(3), dated 06.01.2015, and directed him to reframe the assessment afresh after giving due opportunity to the assessee and considering the CBDT Circular No. 5/2012.

3. The A.O pursuant to the aforesaid order passed by the Pr.CIT under Sec. 263, therein framed the assessment under Sec.143(3) r.w.s 263, vide his order dated 29.09.2017. The A.O while giving effect to the aforesaid directions of the Pr.CIT, therein disallowed under Sec.37(1) the assessee's claim for deduction of Rs.31.18 crores that was debited under the head sales promotion expenses. Accordingly, the A.O assessed the income of the assessee company vide his order passed under Sec.143(3) r.w.s 263, dated 29.09.2017 at Rs.302,64,23,203/-.

4. Aggrieved, the assessee assailed the assessment framed by the A.O under Sec.143(3) r.w.s 263, dated 29.09.2017 before the CIT(A). Observing, that the Tribunal while disposing off the assessee's appeal against the order passed by the Pr.CIT-2, Mumbai, under Sec.263 of the Act, had quashed the order passed by the Pr.CIT under Sec.263, dated 31.03.2017, the CIT(A) concluded that the assessment framed under Sec.143(3) r.w.s 263 could not be sustained and was liable to be quashed.

5. The revenue being aggrieved with the order passed by the CIT(A) has carried the matter in appeal before us. It is the claim of the revenue that the CIT(A) had erred in vacating the disallowance of the assessee's claim of sales promotion expenses loosing sight of the fact that freebies expenses booked by the assessee being in clear violation of the provisions of the MCI Regulations, 2002, was hit by the 'Explanation 1' to Sec. 37(1) of the Act. The Id. Authorized Representative (for short 'A.R') for the assessee at the very outset of the hearing of the appeal submitted, that now when the order passed by the Pr. CIT-2, Mumbai, under Sec.263 of the Act had been quashed

by the Tribunal vide its order passed in ITA No. 554/Mum/2018, dated 07.12.2018, therefore, the consequential assessment framed by the A.O under Sec. 143(3) r.w.s 263, dated 29.09.2016, having been rendered as unsustainable, had thus, rightly been quashed by the CIT(A). It was submitted by the Id. A.R that as no infirmity did emerge from the order of the CIT(A), therefore, the appeal filed by the revenue being devoid and bereft of any force of law was liable to be dismissed.

6. Per contra, the Id. Departmental Representative (for short 'D.R') relied on the order passed by the A.O under Sec. 143(3) r.w.s 263 of the Act. However, the Id. D.R. on being confronted with the fact that now when the order passed by the Pr.CIT-2, Mumbai, under Sec. 263, had been quashed by the Tribunal, vide its aforesaid order dated 07.12.2018, then on what basis the assessment order passed under Sec.143(3) r.w.s 263 could be sustained, failed to rebut the same.

7. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. As is discernible from the order passed by the CIT(A), dated 19.02.2019, the order of the Pr.CIT-2, Mumbai, under Sec.263, dated 31.03.2017 had been quashed by the Tribunal vide its order passed in ITA No.554/Mum/2018, dated 07.12.2018 (copy placed on record). On a perusal of the aforesaid order, we find that the order passed by the Pr.CIT-2, Mumbai, dated 31.03.2017 under Sec. 263 had been quashed by the Tribunal, observing as under:

“13. We have heard the counsel and perused the records. The learned counsel of the assessee submitted that the A.O. in these cases has examined the issues and has duly applied his mind. He submitted that as a result of this application of mind, the A.O. has disallowed the sales promotion articles, which were found to be covered under freebies to doctors, prohibited under MCI guidelines and CBDT Circular. He submitted that the expenditure on medical conferences has been examined and found to be for the business of the assessee and the assessing officer has rightly allowed the same. In this regard, the Id. Counsel of the assessee placed reliance upon following case laws:

- “1. M/s. Aristo Pharmaceuticals Pvt. Ltd. (in ITA No. 6680/M/012 & others vide order dated 26.07.2018);
2. M/s. Solvacy Pharma India Ltd. now merged with Abbott India Ltd. (in ITA No. 3585/Mum/2016 vide order dated 11.01.2018);
3. D. D. Pharmaceutical (P.) Ltd. vs. Asst. CIT (in ITA No.772/JP/2014 vide order dated 12.12.2017);
4. Asst. CIT vs. M/s. Geno Pharmaceuticals Ltd. (in ITA No. 12/PNJ/2014 vide order dated 30.05.2014);
5. Ensure Pharmaceuticals Ltd. vs. DCIT (in ITA No.1532/Pun/2015 vide order dated 29.01.2018) “

14. Per Contra, the Id. Departmental Representative (Id. DR for short) relied upon the order's of the Id. CIT. He further relied upon the following case laws:

- “1. Bisakha Sales (P.) Ltd. vs. CIt [2014] 52 taxmann.com 205 (Kol – Trib);
2. CIT vs. Abad Constructions (P.) Ltd. [2014] 44 taxmann.com 319 (Kerala)”

15. Upon careful consideration, we note that the CBDT circular, the medical counsel of India guideline which dealt with disallowance of freebies to doctors have been duly considered by the A.O. The A.O. has elaborately dealt with these items and has rejected the assessee's contention to the contrary. Thereafter, the A.O. has made the disallowance of the sales promotion expenses. The case of the Id. CIT is that the A.O. has not examined the details of medical conference expense. He has rejected the contention that this aspect has been examined by holding that the concerned ledger account is not in assessment records. Thereafter, the Id. CIT has dwelt upon the MCA guideline and the CBDT circular. The assessee has duly submitted the decision of ITAT, Mumbai in the case of DCIT vs. PHL Pharma Pvt. Ltd. (in ITA No. 4605/Mum/2014 vide order dated 12.01.2017), wherein similar expenditure on medical conference has been allowed. The Id. CIT has totally ignored this by mentioning that the department has filed the appeal against this decision in Hon'ble Bombay High Court.

16. Upon careful consideration, we note that the Id. CIT observed that the A.O. has not applied his mind is totally not sustainable. The A.O. has duly applied his mind in the course of assessment. He has shown his adherence to the MCA guideline and the CBDT Circular in this regard. In the assessment order, he has disallowed the sales promotion expenses of Rs.11,37,45,179/- in A.Y. 2012-13 and Rs.15,68,10,431/- in A.Y. 2013-14 being in the nature of freebees to doctors. Hence, the Id. CIT's observation that the A.O. has not followed these MCA Guideline and CBDT Circular is totally misplaced. As regards the examination of conference expense is concerned, the Id. CIT has held that the same were not examined by the A.O. by holding that the concerned ledger accounts were not available in assessment record. This, in our considered opinion, is not at all sustainable in view. There is no rule that the A.O. is supposed to obtain and keep in the assessment records, the copy of all the ledger account which he has examined. Furthermore, the Id. CIT is fully aware of the case law cited by the assessee before him wherein similar expenses were allowed by the ITAT. He has not followed the same holding that it has been appealed against in High Court. Just because the ITAT order has been appealed before High Court, it will not cease to have binding effect

on the Id. CIT. It will always be considered to be a permissible view. Hence, if the A.O. adopts a legally permissible view the same cannot be the subject to revision u/s. 263 of the Act.

17. Furthermore while concluding, the Id. CIT has observed that the A.O. shall take into account the binding judicial precedence which may become available on the subject. In this connection, we note that in assessee's own case the ITAT in ITA Nos. 5479 & 5747/Mum/2015 and others for A.Y. 2012 - 13 and others vide order dated 26.07.2018 has allowed the assessee's appeals and dismissed the Revenues appeals. The issue involved was the allowability of similar expenses. In this view of the matter, we find that admittedly the decision of tribunal is binding upon the A.O. Hence the order u/s. 263 of the Act by the Id. CIT will be of no consequence. Further, we note that the A.O. has already made the necessary enquiries in this regard. Here it is a case that the A.O. has made some enquiry and the Id. CIT is not satisfied and he wants another enquiry to be done. This direction u/s. 263 is not sustainable legally. This proposition draws support from the decision of the Hon'ble jurisdictional High Court in the case of CIT vs. Gabriel India Ltd. 203 ITR 108 (Bom-HC).

18. As regards the case law relied by the Id. Departmental Representative (Id. DR) in the case of Bisakha Sales (P.) Ltd. (supra) is concerned, we find that the same was rendered in connection with bogus capital share accepted as genuine without enquiry. Hence, the same is not at all applicable here. Similarly the decision of Abad Constructions (P.) Ltd. (supra) also not applicable in the light of Hon'ble jurisdictional High Court decision in the case of Gabriel India Ltd.(supra).

19. In this view of the matter, we are of the considered opinion that firstly the A.O. has made the examination and in his opinion these expenditures were allowable. Hence, he has not made any disallowance. This is a legally permissible view. In any case, as held by the Hon'ble Apex Court in the case of Malabar Industrial Co. Ltd. vs. CIT (2000) 243 ITR 83 (SC) and CIT vs. Max India Ltd. (2007) 295 ITR 282 (SC) if there are two views possible and the A.O. has adopted one view, with which the Id. CIT is not in agreement, the order cannot be said to be liable to be visited with the revisionary order by the Id. CIT. Accordingly, the order under 263 passed by the Id. CIT is hereby quashed. Accordingly, we decide the issue in favour of the assessee.”

In the backdrop of the aforesaid facts, now when the order passed by the Pr.CIT-2, Mumbai, under Sec. 263 of the Act, dated 31.03.2017 had been quashed by the Tribunal, and thus, is no more in existence, therefore, the consequential assessment framed by the A.O under Sec.143(3) r.w.s 263 cannot be sustained and has to meet the same fate. In the backdrop of our aforesaid deliberations, we herein, finding no infirmity in the view taken by the CIT(A) who in our considered opinion had rightly vacated the assessment

framed by the A.O under Sec.143(3) r.w.s 263, dated 29.09.2017, therefore, uphold his order. The **Ground of appeal No.1** filed by the revenue is dismissed.

8. The appeal of the revenue is dismissed.

ITA No. 2776/Mum/2019
A.Y.2013-14

9. As the facts and the issue involved in the captioned appeal remains the same as were there before us in the appeal of the revenue for the immediately preceding year i.e A.Y. 2012-13 in ITA No. 2775/Mum/2019, therefore, our order therein passed shall apply *mutatis mutandis* for the purpose of disposal of the present appeal of the revenue in ITA No.2776/Mum/2019 for A.Y.2013-14. Accordingly, in terms of our observations recorded while disposing off the revenues appeal for A.Y. 2012-13 in ITA No. 2775/Mum/2019, the captioned appeal of the revenue for A.Y.2013-14 in ITA No. 2776/Mum/2019 is dismissed.

10. The appeal filed by the revenue is dismissed.

11. The appeals filed by the revenue for A.Y.2012-13 in ITA No.2775/Mum/2019 and A.Y.2013-14 in ITA No. 2776/Mum/2019 are dismissed.

Order pronounced in the open court on 28.10.2020

Sd/-

Rajesh Kumar
(ACCOUNTANT MEMBER)

Mumbai, Date: 28.10.2020
R. Kumar

Sd/-

Ravish Sood
(JUDICIAL MEMBER)

Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "G" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,

Dy./Asst. Registrar
ITAT, Mumbai