

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

**BEFORE SHRI RAJESH KUMAR, ACCOUNTANT MEMBER AND
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER**

**ITA No.4164/M/2019
Assessment Year: 2013-14**

| | | |
|---|-----|---|
| ACIT 9(3)(1), Room No.215, 2 nd Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020 | Vs. | M/s. Dosch Pharmaceuticals Pvt. Ltd., 15-C, Laxmi Industrial Estate, New Link Road, Andheri (W) Mumbai - 400 020 PAN: AAACD2320F |
| (Appellant) | | (Respondent) |

Present for:

Assessee by : Shri Harsh Shah, A.R.
Revenue by : Shri Sajit V. Nair, Sr.A.R

Date of Hearing : 21.01.2021
Date of Pronouncement : 01.02.2021

ORDER

Per Rajesh Kumar, Accountant Member:

The present appeal has been preferred by the Revenue against the order dated 28.03.2019 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2013-14.

2. The only issue raised by the Revenue is against the deletion of addition of Rs.6,10,76,573/- by Ld. CIT(A) as made by the AO by disallowing claim of the assessee on account of expenses incurred in giving free samples of veterinary medicines.

3. The facts in brief are that the assessee filed the return of income declaring an income of Rs.96,15,700/- which was

revised on 06.01.2014 declaring total income of Rs.96,02,250/- which was processed under section 143(1) of the Act. Thereafter, statutory notices were issued and served upon the assessee.

4. The assessee is engaged in the business of manufacturing, trading and export of animal health care products, bulk drugs and formulations etc. During the course of assessment proceedings, the AO noticed that assessee has charged to the profit & loss account a sum of Rs.6,10,76,573/- as sample distribution cost under the head "Marketing Development Cost". The AO observed on the basis of details furnished by the assessee that these expenses are mostly incurred to give free samples to veterinary doctors and these veterinary doctors are further supposed to distribute the same to their patients so that the business of the assessee flourishes. The AO vide order sheet entry dated 22.03.2016 issued a show cause notice to assessee as to why the said expenses should not be disallowed and added to the income of the assessee as these samples are only given to vet. Doctors by referring to the notification of Veterinary Council of India published in official gazette on 01.04.1992. The AO also referred to circular No.5/2012 issued by CBDT on 01.08.2012 and held that Medical Council of India has imposed a prohibition on incentives to doctors by the pharmaceutical companies, providing freebies to medical practitioners and their professional associates in violation of regulation issued by Medical Council of India under Medical Council Act, 1956 and accordingly the Medical Council of India in exercise of its statutory powers amended the Indian Medical Council (professional conduct, etiquette and ethics) Regulations, 2002 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. The AO observed that the said expenses are not allowable and admissible under section 37(1) of the Act as the same are prohibited by the Medical Council of India Act. Finally, the AO observed that these samples were given to veterinary doctors for distribution to prospective customers are very high which is evident from the quantum of expenses debited to the P&L account of the assessee, which is almost 9 to 10% of the total turnover of the assessee. Thus, the assessee has adopted unethical practice of impressing the doctors to prescribe their medicines by giving freebies/ samples which is in violation of guidelines issued by Veterinary Council of India and therefore not allowable under section 37(1) of the Act and consequently added the same to the income of the assessee by framing the assessment under section 143(3) dated 31.03.2016.

5. In the appellate proceedings, the Ld. CIT(A) allowed the appeal of the assessee after taking into account the contentions and submissions of the assessee by holding and observing as under:

“4. Decision :

I have carefully perused the assessment order of the AO and the submissions made by the AR of the Appellant in support in his arguments. After taking into consideration, the AO's findings and the Appellant's oral and written submissions made during the course of hearing and the facts of the case, decision on various grounds are adjudicated as under: -

4.1. Ground of appeal 1 to 5: AH grounds of appeal relates to disallowance of Rs. 6,10,76,5737- u/s 37(1) by the Assessing Officer which were claimed as sample distribution cost under "Marketing and Development Cost. The appellant company

is in the business of manufacturing, trading and export of animal health care products, bulk drugs and formulations. During the year under consideration the appellant has claimed an expenditure of Rs.6,10,76,573/- towards sample distribution expenses.

4.1.1. The Assessing officer has disallowed the said claim considering that it is in violation of code of conduct for veterinary doctors. Also the Assessing officer has referred circular no 5/2012 which prohibits medical practitioners and companies from providing any Gift, travel facility, hospitality, cash or monetary grant to the healthcare professionals.

4.1.2. During the course of appellate proceedings the appellant company has submitted before me the modus operandi for distribution of samples and also relied on following case laws:

- i) Max Hospital vs. MCI in Writ Petn. Case No. 1334/2013, judgment dt. 10th Jan., 2014,
- ii) Eskayef (Now Known as Smithkline Beecham) Pharmaceuticals (India) Ltd. vs. CIT (2000) 162 CTR (SC) 89 : (2000) 111 Taxman 561 (SC)
- iii) DCIT VS PHIL PHARMA. 55 ITR 168.

4.1.3. The appellant further stated that the company is in the business of manufacturing and marketing veterinary pharmaceuticals which includes drugs and feed used for cattle, pet and poultry. The appellant had distributed free samples to increase its sales. The marketing team known as medical representatives carries the samples and gives it free to their customers who are the end user, they also give it to their stockiest for free distribution, the medical representatives go to different villages, towns, cities to display their product and also show the benefits to its customers. The medical representatives also go to medical camps of vets and animal fairs to distribute their samples free of costs for promoting their product. These samples were not given to any vet doctors as freebies the marketing person use to put up displays at the doctors clinics, so that when any customer would visit the doctor the medical representative would educate the people about their product and offer them free samples to use. The medical representative would remain there for a week and then on the response of the customers and looking at the results on the animals and birds the sale of medicine would increase. The marketing man informs the doctor about the result of his product and in which places it is used and by whom. The customer if they get good result buy from the appellant company's stockiest and do not buy from doctors. The samples given have a label with clear reading stating "sample not for sale". In this entire process there is no relation of assessee and doctor as the recommendation is done only on the basis of the end users verdict and information of gathered by the medical representative. Doctor cannot sell the product and also cannot earn any income by selling samples as no free samples are given to them. Thus from the above fact it can be seen that no freebies is given to doctors. Further, no gift, travel facility, hospitality, cash or monetary grant is given to the doctors. Board circular No 5/2012, dated 1.08.2012 is clear on this fact and it mentions that only if any gift, travel facility, hospitality, cash or monetary grant is given to the doctors the same shall be disallowed, In the case of the appellant company nothing of such is given. The board circular is not

applicable in the case of appellant company at all. The appellant company has demonstrated his method of distributing free samples and also the method of promoting his product without approaching doctors and by not providing any freebies. Nowhere can it be said that appellant company has taken help of doctors by providing any freebies. The restriction imposed by the board circular has been strictly followed by the appellant company. The appellant company has not violated the rules of the circular and there are no such expenses incurred.

4.1.4. I have considered the submissions and contentions made by the appellant company. The appellant has stated that the said samples are carried by its Medical representatives to villages and distributed directly to farmers free of cost without involvement of the veterinary doctors. MCI regulations and board circular speaks about prohibition on grant of Gifts, travel facilities, hospitality, cash or monetary grants. The MCI regulations or the board circular does not prohibit distribution of samples to doctors or otherwise. Also as per the data on record the said samples are marked as not for sale and hence does not provide any monetary benefit to the doctors. Hence distribution of samples are not prohibited under the MCI guidelines or the boards circular. Further distribution of samples is a necessary activity in pharmaceutical world 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 Also as per the data available on record the said samples have not been distributed to the doctors, in fact the samples have been distributed to the end customers to make them aware about the benefits of the product.

4.1.5. Therefore based on above discussion and on the basis of material on record it is held that distribution of samples is a necessary activity to promote the product and to ascertain the efficacy of medicine and introduce it in the market for circulation. Nothing contrary about incurring these expenses is reported. Hence the Assessing officer is directed to delete the addition made in respect of sample distribution.

5. In the result appeal of the assessee is Allowed.”

6. We have heard the rival submissions of both the parties and perused the material on record. The undisputed facts are that the assessee is engaged in manufacturing of veterinary products, selling and exporting thereof. During the year the assessee has distributed free samples of Rs.6,10,76,573/- in order to promote its business and charged the same to the profit & loss account. According to the AO the said expenses are

not allowable under section 37(1) as the same are prohibited by the regulation as issued by the Veterinary Council of India. The AO also referred to the circular issued by Medical Council of India No.5/2012 F.No.225/M/142/2012-ITA.II) dated 01.08.2012 and observed that similar restriction has been placed by the Medical Council of India on the medical professionals and their associates from taking any gift, travel facility, hospitality, cash or monetary grant from the pharmaceutical and allied health sector industries. The Ld. CIT(A) allowed the appeal of the assessee after taking into consideration the detailed submissions and contentions of the assessee which has been reproduced by the Ld. CIT(A) in para 3 of the appellate order. In para 4.1.3 of the appellate order the Ld. CIT(A) has observed that these samples were given to the marketing team of the assessee who in turn give these samples to their customers who are the end users. Similarly, these samples are given to the stockiest for free distribution which is overseen by the medical representatives who go to the villages, town, cities to display their products and also show to the customers the benefit of these medicines. The Ld. CIT(A) observed that these samples are not given to veterinary doctors as freebies but they are displayed at the doctors' clinics so that the customers visiting the doctors can educate themselves from the displayed products and offered them to use these products. In the whole process, the medical representatives are constantly present in the market to see the response of the customers and looking at the results on animals and birds, the effect of these medicines are collated so that these medical teams could inform the doctors about the result of these medicines on animal and

birds. The Ld. CIT(A) also noted that doctors can not sell these products and also can not earn any income from selling these samples. Therefore, these free samples in no way constitute any freebies to doctors or a gift or a travel facility or a hospitality or cash or money grants as has been contemplated by circular No.5/2012 dated 01.08.2012. The Ld. CIT(A) also observed that the medical guidelines issued by Medical Council of India or Veterinary Council of India are not applicable to the companies manufacturing and marketing these products but regulate the conduct of the professionals operating in that field. Therefore, assessee has not committed any violation in marketing its product by distributing free samples. We have perused the order of Ld. CIT(A) very carefully and found that the Ld. CIT(A) has passed a very reasoned and speaking order considering all the aspects of the matter and thus only thereafter allowed the appeal of the assessee. We are also of the same view that the sample distributed for marketing these products by the assessee is not in violation of any guidelines issued by the Veterinary Council of India or Medical Council of India. Besides the said regulations are applicable to the doctors and their associate professionals and not to the company engaged in manufacturing of these veterinary products. In fact these expenses are incurred wholly and exclusively for the purpose of increasing the sale of the company by making these samples available to the end user and also studying the effect of those products on animal and birds. Moreover the case of the assessee is supported by the decisions as referred and relied before the ld CIT(A) by the assessee. In the case of Max Hospital Vs MCI Supra), the Hon'ble Delhi High Court has held that regulations issued by

MCI are applicable to medical professional and not to the pharmaceutical companies. Hon'ble Apex Court in the case of Eskayel Pharmaceutical s India Ltd Vs CIT(supra) has held that physician samples are must in order to ascertain the efficiency and efficacy of the medicine and introduce the same in the market for circulation. Under these circumstances and facts and inview of the ratio laid down by the Hon'ble Apex Court and Hon'ble Delhi High Court, we are in agreement with the conclusion drawn by the Ld. CIT(A) on this issue. Accordingly, we uphold the order of Ld. CIT(A) by dismissing the appeal of the revenue.

7. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 01.02.2021.

Sd/-
(Pavan Kumar Gadale)
JUDICIAL MEMBER

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Mumbai, Dated: 01.02.2021.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.