IN THE INCOME TAX APPELLATE TRIBUNAL, MUMBAI BENCH "A", MUMBAI

BEFORE SHRI RAJESH KUMAR (ACCOUNTANT MEMBER)
AND SHRI RAVISH SOOD (JUDICIAL MEMBER)

ITA No.4784 & 4785/MUM/2019

(Assessment Years: 2015-16 & 2016-17)

M/s Ajanta Pharma Ltd. 98, Ajanta House, Govt. Industrial Area, Hindustan Naka, Charkop,Kandivli (west), Mumbai – 400 067. PAN No. AAACA5579P	Vs.	Dy. Commissioner of Income-tax-Central Circle 6(2),19th Floor, Air India Building, Nariman Point, Mumbai – 400 021.
(Appellant)		(Respondent)

Assessee by : Shri J.D. Mistri, Senior Advocate
Revenue by : Shri Rajeev Harit, CIT D.R

Date of Hearing : 02.03.2021
Date of pronouncement : 25.05.2021

ORDER

PER BENCH:

The present appeals filed by the assessee are directed against the respective orders passed by the CIT(A)-49, Mumbai. As common issues are involved in the aforementioned appeals, therefore, the same are being taken up and disposed off by a consolidated order. We shall first take up the appeal filed by the assessee viz. M/s Ajanta Pharma Ltd. for A.Y. 2016-17 in ITA No. 4784/Mum/2019. The assessee has assailed the impugned order on the following grounds before us:

"Deduction for Sales Promotion Expenses of Rs.36,92,20,070/- incurred on doctors prescribing Appellant Company's Products:

1. On the facts and in the circumstances of the case and in law the learned Commissioner of Income-tax (Appeals) ["CIT(A)"] has erred in upholding the action of the Asssessing Officer ["A.O"] in not allowing deduction of Rs.36,92,20,070/- incurred on sales promotin expenses under section 37(1) of the Act.

2. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in applying Explanation-1 to Section 37(1) to disallow the sales promotion expenses of Rs. 36,92,20,070/-

3. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding that once the appellant disallowed similar expenses in earlier years, it is not open to the appellant to make a claim for deduction in the relevant year.

4. On the facts and circumstances of the case and in law, the Appellant is entitled to deduction of Rs. 3,55,17,709/-, being the cess paid by the Appellant under the Act. The Appellant submits that the Assssing Officer be directed to allow the deduction of Rs. 3,55,17,709/-, in computing the income of the Appellant

The appellant craves leave, to add, to alter, to amend, to modify, and/or to deleted any above grounds of appeal as may be necessary."

Before adverting any further, we may herein observe that the assessee appellant vide a letter dated 04th January, 2021 has stated before us that it had raised "Ground of appeal No. 4" for the first time before the Tribunal. Elaborating further, it is stated by the assessee that as it had by raising the aforesaid ground sought adjudication of a legal issue that is borne from the facts available on record, therefore, the same may be admitted.

2. Per Contra, the ld. Departmental representative objected to the raising of the aforesaid ground of appeal by the assessee. It was submitted by the ld. D.R that as the aforesaid ground raised by the assessee for the first time did not arise from the impugned order passed by the CIT(A), therefore, it did not merit admission.

3. We have given a thoughtful consideration and find that the assessee vide 'Ground of appeal No. 4' has sought adjudication of its claim for deduction of "cess" that was paid during the year while computing its income for the year under consideration. As the assessee has sought our indulgence for adjudicating a legal issue that is based on the facts available on record, for which no new facts are required to be looked into, therefore, in light of the judgment of Hon'ble Supreme Court

in National Thermal Power Co. Ltd. Vs. CIT (1998) 229 ITR 383 (SC) we have no hesitation in admitting the same.

4. Briefly stated, the assessee company which is engaged in the business of manufacturing, marketing and distribution of a wide range of pharmaceutical products in India and across the globe had e-filed its return of income for A.Y. 2016-17 on 25.10.2016, declaring a total income of Rs. 423,82,80,956/-. Subsequently, the case of the assessee was taken up for scrutiny assessment under Sec. 143(2) of the Act. Notice(s) under Sec. 143(2) & 142(1) were thereafter issued and duly served upon the assessee company.

5. During the course of the assessment proceedings, it was observed by the A.O that the assessee company had in its computation of income disallowed the "Sales and promotion expenses" of Rs. 36,92,20,070/- that were otherwise claimed by it as an expense in the Profit & loss account. However, the assessee in the course of the assessment proceedings had vide a letter dated 13.08.2018 revised its computation of income and withdrawn its suo-motto offer for disallowance of the "Sales promotion expenses" of Rs. 36,92,20,070/-. On a perusal of the aforesaid letter dated 13.08.2018, it was observed by the A.O that the assessee had claimed that it had initially disallowed the sales promotion expenses pertaining to the freebies given to doctors in light of the CBDT Circular No. 5/2012 read a/w the Medical Council of India (MCI) Regulations, 2012. However, as stated by the assessee as the ITAT, Mumbai in the case of DCIT-8(2), Mumbai Vs. PHL Pharma Pvt. Ltd. in ITA No. 4605/Mum/2014 (2017) 78 taxmann.com 36, dated 12.01.2017 had thereafter held that the MCI guidelines were not applicable to pharmaceutical companies, therefore, for the said reason it had withdrawn the suo motto disallowance of sales promotion expenses that

was earlier offered in the return of income. The A.O was however not inclined to accept the aforesaid claim of the assessee. It was observed by the A.O that the CBDT vide its Circular No. 5/2012, dated 01.08.2012, had held, that the expenses claimed by the pharmaceutical companies on account of distribution of freebies being in violation of the provisions of Indian Medical Council (Professional conduct, etiquette and ethics) regulations, 2002 were inadmissible as an expense. Observing, that the assessee's claim for deduction of expenses incurred on distribution of freebies was in violation of the express provisions of the Indian Medical Council (Professional conduct, etiquette and ethics) regulations, 2002; and the CBDT Circular No.5/2012, dated 01.08.2012, the A.O was of the view that the same were inadmissible as per the 'Explanation' to Sec. 37(1) of the Act. As regards the reliance placed by the assessee on the order of the ITAT, Mumbai in the case of DCIT-8(2), Mumbai vs. PHL Pharma Pvt. Ltd., ITA No. 4605/Mum/2014 (2017) 78 taxmann.com 36, dated 12.01.2017, it was observed by the A.O that the department had not accepted the said order of the Tribunal and had carried the same before the Hon'ble High Court of Bombay by way of an appeal under Sec. 260A of the Act vide lodging No. ITXAL/1933/2017, which thereafter had been registered as ITXA/827/2018, dated 12.03.2018. It was, thus, observed by the A.O that the order passed by the Tribunal in the case of PHL Pharma Pvt. Ltd. (supra) had been assailed by the department and was on date subjudice before the Hon'ble High Court. Backed by his aforesaid deliberations, the A.O disallowed the assessee's claim for deduction of the sales promotion expenses of Rs. 36,92,20,070/- and vide his order passed u/s 143(3), dated 26.12.2018 assessed its income at Rs. 423,82,80,957/-.

6. Aggrieved, the assessee assailed the assessment order before the CIT(A). The CIT(A) found favour with the assessee's claim that the Medical Council of India (for short "MCI") regulations were applicable only to the doctors and medical professionals and not to the pharmaceutical companies. However, the CIT(A) was of the view that as the CBDT Circular No. 5 of 2012; dated 01.08.2012 contemplated inadmissility of expenses that were incurred by the pharmaceutical companies in providing freebies to medical practitioners, therefore, the claim for deduction of such expenses being in violation of the provisions of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 was not to be allowed while computing the assessee's income. Further, the CIT(A) rejected the assessee's claim that the aforesaid expenditure towards providing of freebies to the doctors was incurred by way of a business promotion expense. Rebutting the aforesaid claim, the CIT(A) was of the view that if the aforesaid expenditure was incurred by the assessee towards business promotion, then, there was no reason as to why such freebies were given by the assessee only to the doctors and not to the general public which was the final consumer of its products. It was observed by the CIT(A) that there was no justification on the part of the assessee to have claimed the freebies given to the doctors as a business expense. Also, the CIT(A) did not find favour with the alternative contention of the assessee for allowing its claim for deduction in so far the same pertained to freebies of a value of less than Rs. 1,000/-. As regards the support that was drawn by the assessee from the orders of the ITAT, Mumbai in the case of DCIT-8(2), Mumbai Vs. PHL Pharma Pvt. Ltd., ITA No. 4605/Mum/2014 (2017) 78 taxmann.com 36, dated 12.01.2017 AND Aristo Pharmaceuticals Pvt. Ltd., ITA Nos. 6680/5553 /5479/Mum, the CIT(A) was of the view that as the years involved in the said respective

cases before the Tribunal were prior to the CBDT Circular No. 5/2012, dated 01.08.2012, therefore, the Tribunal in the said cases had after taking cognizance of the fact that the Circular did not have a retrospective application decided the said appeals in favour of the aforesaid assessee's. As regards the order of the ITAT, Delhi in the case of Aishika Pharma Pvt. Ltd. Vs. ITO, ITA No. 732/Del/2019, the same was held by the Tribunal to be distinguishable on facts. Further, it was observed by the CIT(A) that the assessee had offered the sales promotion expenses as its income in the earlier years when survey was conducted in its case. It was observed by the CIT(A) that as the assessee had in the preceding year i.e A.Y 2014-15 not raised any claim for deduction of the sales promotion expenses, therefore, it was not permissible on its part to adopt an inconsistent approach and claim the said expense as a deduction during the year in question. Also, it was observed by the CIT(A) that the claim for deduction of the sales promotion expenses was not raised by the assessee in its return of income but only by way of a revised computation that was filed in the course of the scrutiny assessment. Backed by her aforesaid deliberations the CIT(A) upheld the view taken by the A.O that the sales promotion expenses claimed by the assessee were liable to be disallowed.

7. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The ld. Authorised representative (for short "A.R") for the assessee took us through the facts of the case. It was submitted by the ld. A.R that the assessee during the year under consideration had incurred sales promotion expenditure in the form of gifts etc. to doctors and medical practitioners. It was submitted by the ld. A.R that the specific issue in hand i.e as to whether the prohibition by

IMA on the doctors and medical practitioners qua receiving of freebies could be read into and regulate the providing of such freebies by the pharmaceutical companies, had at length been looked into by the ITAT, Mumbai in the case of DCIT-8(2), Mumbai vs. PHL Pharma (P) Ltd. (2017) 184 TTJ 1 (Mum). The ld. A.R taking us through the aforesaid order drew our attention to the 'Ground of appeal no. 2' as was raised before the Tribunal. It was submitted by the ld. A.R that the Tribunal in the aforementioned case of PHL Pharma (P) Ltd. (supra), had held, that the expenditure incurred by the assessee, a pharmaceutical company, for customer relationship management; key account management; gift articles; free medicine samples; advertisement and sales promotion etc. were purely for brand recognition, and thus, allowable as a business expenditure and not hit by the 'Explanation 1' to Sec. 37(1) of the Act. The ld. A.R further relied on the order of the ITAT, "D"Bench, Mumbai in the case of M/s Medley Pharmaceuticals Ltd. Vs. Dy. CIT, ITA No. 2344/Mum/2018 and drew our attention to the relevant observations therein recorded. Also reliance was placed on the order of the ITAT, "A" Bench in the case of M/s Aristo Pharmaceuticals Pvt. Ltd. Vs. DCIT-2(1)(1), Mumbai, ITA No. 1104/Mum/2018; ITAT, Delhi Bench "A" in the case of Aishika Pharma (P) Ltd. Vs. ITO, Ward 2(1), New Delhi (2019); and ITAT, Mumbai "K" Bench in the case of India Medtronics Pvt. Ltd. Vs. Dy. CIT, ITA No. 7263/Mum/2018, dated 13.09.2019. Also, reliance was placed on the order of the Hon'ble High Court of Delhi in the case of Max Hospital Vs. Medical Council of India, W.P(C) 1334/2013; dated 10.01.2014. Qua the issue of allowability of "Education cess" and "Higher Education cess" as a deduction while computing the income of the assessee, it was submitted by the ld. A.R that the issue therein involved was squarely covered by the judgment of the Hon'ble High Court of Bombay in the case of Sesa Goa Ltd. vs. JCIT, Range 1, Panaji

Goa (2020) 423 ITR 426 (Bom) and that of the Hon'ble High Court of Rajasthan in the case of CIT, Range-2, Kota Vs. M/s Chambal Fertilizers and Chemicals Ltd., ITA No. 52/2018, dated 31.07.2018.

8. Per Contra, the ld. Departmental Representative (for short "D.R") relied on the orders of the lower authorities. In order to drive home his claim that expenses incurred by a pharmaceutical company in providing freebies to medical practitioners was in violation of the provisions of Indian Medical Council (Professional conduct, etiquette and ethics) regulations 2002, and the CBDT Circular No. 5/2012, dated 01.08.2012, the ld. D.R relied on four judicial pronouncements, viz. Confederation of Indian Pharmaceutical Industry (SSI) Vs. Central Board of Direct taxes (2013) 353 ITR 388 (Himachal Pradesh); ACIT, Circle 6(3), Mumbai Vs. Liva Healthcare Ltd. (2016) 161 ITD 63 (Mum); J.K Panthaki & Co. Vs. ITO (2012) 344 ITR 329 (Kar); and CIT Vs. Gill & Co. (P). Ltd. (2001) 248 ITR 362 (Bom). It was submitted by the ld. D.R that as the expenditure incurred by the assessee towards distributing freebies to the medical practitioners and the doctors was against the public policy, therefore, the same was not allowable as a deduction as per 'Explanation' to Sec. 37(1) of the Act. Rebutting the assessee's claim for allowability of "Education Cess" and "Higher Education cess" as a deduction while computing the income of the assessee, the ld. D.R relied on the judgment of the Hon'ble High Court of Calcutta in the case of Srei Infrastructure Finance Ltd. Vs. Dy. CIT, Circle 11(2), Kolkata (2016) 72 taxmann.com 239 (Cal). It was the contention of the ld. D.R that as observed by the Hon'ble High Court that the MAT credit under Sec. 115JAA brought forward from the earlier years was to be set-off against tax on total income including surcharge and education cess instead of adjusting same from tax on total income before charging such

surcharge and education cess, thus, proved that the “cess” formed part of the tax.

9. Rebutting the aforesaid judicial pronouncements, it was submitted by the ld. A.R that all the said cases relied upon by the revenue were distinguishable on facts. Referring to the judgment of the Hon’ble High Court of Karnataka in the case of J.K Panthaki & Co. Vs. ITO (2012) 344 ITR 329 (Kar), it was submitted by the ld. A.R that the issue therein involved was payment of illegal gratification i.e kick back or bribe by the assessee company in the garb of commission which was disallowed as per the ‘Explanation’ to Sec. 37 of the Act. It was submitted by the ld. A.R that the facts of the present case were totally distinguishable as against those involved in the aforementioned case. As regards the reliance that was placed by the ld. D.R on the judgment of the Hon’ble High Court of Bombay in the case of CIT Vs. Gill & Co. (P) Ltd. (2001) 248 ITR 362 (Bom), it was submitted by Shri. J.D Mistri, ld. Senior Advocate, that unlike the facts involved in the case of the present assessee the issue involved in the aforementioned case was qua the disallowance under ‘Explanation’ to Sec. 37(1) of the amount of secret commission that was paid by the assessee company and was claimed as deduction. It was submitted by the ld. A.R that the issue involved in the present appeal i.e allowability of the sales promotion expenses incurred by the assessee company i.e a pharmaceutical company was absolutely differently placed as in comparison to the facts involved in the aforesaid judgment that was relied upon by the revenue. As regards the support that was drawn by the ld. D.R from the judgment of the Hon’ble High Court of Himachal Pradesh in the case of Confederation of Indian Pharmaceutical Industry (SSI) Vs. CBDT and that of the ITAT, Mumbai in the case of ACIT, Circle 6(3), Mumbai Vs. Liva Healthcare Ltd. (2016)

161 ITD 63 (Mum), it was submitted by the ld. A.R that both the said judicial pronouncements had been deliberated upon by the Tribunal in its order passed in the case of Dy. CIT 8(2), Mumbai vs. PHL Pharma P. Ltd., ITA No. 4605/Mum/2014, dated 12.01.2017. As regards the reliance that was placed by the ld. D.R on the judgment of the Hon'ble High Court of Calcutta in the case of Srei Infrastructure Finance Ltd. (supra), it was submitted by the ld. A.R that the same was qua the issue pertaining to set-off of MAT credit under Sec. 115JAA b/forwad from earlier years against tax on total income including surcharge and education cess. It was submitted by the ld. A.R that the issue involved in the present appeal i.e as to whether "cess" was allowable as a deduction while computing the income of the assessee was totally distinguishable as against the issue that was involved in the aforesaid appeal that was relied upon by the ld. D.R. It was vehemently submitted by the ld. A.R that the allowability of "cess" as a deduction while computing the income of an assessee was squarely covered by the judgment of the Hon''ble High Court of Bombay in the case of Sesa Goa Limited. (supra).

10. Before adverting to the sustainability of the disallowance of sales promotion expenses by the lower authorities, we shall first address the observation of the CIT(A) that as the assessee had not raised the claim for deduction of the Sales promotion expenses in its return of income, but had raised the same only by way of a revised computation of income filed in the course of the assessment proceedings, therefore, the same was not maintainable and the A.O remained under no obligation to take cognizance of the same. Admittedly, the assessee in the course of the assessment proceedings by filing a revised computation of income had raised a 'fresh claim' of deduction by seeking to withdraw the disallowance of the sales promotion expenses that was earlier offered in

the return of income. Before proceeding any further, we shall first deal with the issue as to whether an assessee in the course of the assessment proceedings could be permitted to raise a claim which would lead to exclusion of an income offered by him in his return of income. In our considered view the CIT(A) is principally correct in observing that an A.O is divested of his jurisdiction to entertain a 'fresh claim' for deduction raised by an assessee in the course of the assessment proceedings except for where the same is raised by filing of a revised return of income. The aforesaid view of the CIT(A) is fortified by the judgment of the Hon'ble Supreme Court in the case of Goetze (India) Ltd. Vs. CIT (2006) 284 ITR 323 (SC). However, the Hon'ble Apex Court in its aforesaid judgment in the case of Goetze (India) Ltd.(supra) had specifically observed that its decision was qua the restriction on entertainment of a 'fresh claim' of deduction by the A.O in the course of the assessment proceedings and would in no way impinge on the powers of the Income-tax Appellate Tribunal which would remain vested with the jurisdiction to entertain for the first time a point of law provided the facts on the basis of which the said issue is raised are available on record. We find that the said issue had thereafter been deliberated upon at length by the Hon'ble High Court of Bombay in the case of CIT Vs. Pruthvi Brokers & Shareholders (P) Ltd. (2012) 349 ITR 336 (Bom), wherein after inter alia considering the judgment of the Hon'ble Apex Court in the case of Goetze (India) Ltd. (supra), it was observed by the Hon'ble High Court that an assessee is entitled to raise additional grounds not merely in terms of legal submissions but also additional claims to wit claims not made in the return filed by it. The Hon'ble High Court while concluding as hereinabove had observed as under:

"10. A long line of authorities establish clearly that an assessee is entitled to raise additional grounds not merely in terms of legal submissions, but also additional claims to wit claims not made in the return filed by it. It is necessary for us to refer to some of these decisions only to deal with two submissions on behalf of the department. The first is with respect to an observation of the Supreme Court in Jute Corporation of India Limited v. Commissioner of Income Tax, 1991 Supp (2) SCC 744 = (1991) 187 ITR 688. The second submission is based on a judgment of the Supreme Court in Goetze (India) Limited v. Commissioner of Income Tax.

11(A). In Jute Corporation of India Limited v. CIT, for the assessment year 1974-75 the appellant did not claim any deduction of its liability towards purchase tax under the provisions of the Bengal Raw Jute Taxation Act, 1941, as it entertained a belief that it was not liable to pay purchase tax under that Act. Subsequently, the appellant was assessed to purchase tax and the order of assessment was received by it on 23rd November, 1973. The appellant challenged the same and obtained a stay order. The appellant also filed an appeal from the assessment order under the Income Tax Act. It was only during the hearing of the appeal that the assessee claimed an additional deduction in respect of its liability to purchase tax. The Appellate Assistant Commissioner (AAC) permitted it to raise the claim and allowed the deduction. The Tribunal held that the AAC had no jurisdiction to entertain the additional ground or to grant relief on a ground which had not been raised before the Income Tax Officer. The Tribunal also refused the appellant's application for making a reference to the High Court. The High Court upheld the decision of the Tribunal and refused to call for a statement of case. It is in these circumstances that the appellant filed the appeal before the Supreme Court.

The Supreme Court held as under :-

> "5. In CIT v. Kanpur Coal Syndicate, a three Judge bench of this Court discussed the scope of Section 31(3)(a) of the Income Tax Act, 1922 which is almost identical to Section 251(1)(a). The court held as under: (ITR p. 229)
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> "If an appeal lies, Section 31 of the Act describes the powers of the Appellate Assistant Commissioner in such an appeal. Under Section 31(3)(a) in disposing of such an appeal the Appellate Assistant Commissioner may, in the case of an order of assessment, confirm, reduce, enhance or annul the assessment; under clause (b) thereof he may set aside the assessment and direct the Income Tax Officer to make a fresh assessment. The Appellate Assistant Commissioner has, therefore, plenary powers in disposing of an appeal. The scope of his power is co-terminus with that of the Income-tax Officer. He can do what the Income-tax Officer can do and also direct him to do what he has failed to do." (emphasis supplied)
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> 6. The above observations are squarely applicable to the interpretation of Section 251(1)(a) of the Act. The declaration of law is clear that the power of the Appellate Assistant Commissioner is co-terminus with that of the Income Tax Officer, if that be so, there appears to be no reason as to why the appellate authority cannot modify the assessment order on an additional ground even if not raised before the Income Tax Officer. No exception could be taken to this view as the Act does not place any restriction or limitation on the exercise of appellate power. Even otherwise an Appellate Authority while hearing appeal against the order of a subordinate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or

limitations if any prescribed by the statutory provisions. In the absence of any statutory provision the Appellate Authority is vested with all the plenary powers which the subordinate authority may have in the matter. There appears to be no good reason and none was placed before us to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income Tax Officer." [emphasis supplied]

(B) It is clear, therefore, that an assessee is entitled to raise not merely additional legal submissions before the appellate authorities, but is also entitled to raise additional claims before them. The appellate authorities have the discretion whether or not to permit such additional claims to be raised. It cannot, however, be said that they have no jurisdiction to consider the same. They have the jurisdiction to entertain the new claim. That they may choose not to exercise their jurisdiction in a given case is another matter. The exercise of discretion is entirely different from the existence of jurisdiction.

12. At page 694, after referring to certain observations of the Supreme Court in Additional Commissioner of Income-tax v. Gurjargravures P. Ltd., (1978) 111 ITR 1, the Supreme Court observed at Page 694 as under :-

"The above observations do not rule out a case for raising an additional ground before the Appellate Assistant Commissioner if the ground so raised could not have been raised at that particular stage when the return was filed or when the assessment order was made, or that the ground became available on account of change of circumstances or law. There may be several factors justifying raising of such new plea in appeal, and each case has to be considered on its own facts. If the Appellate Assistant Commissioner is satisfied he would be acting within his jurisdiction in considering the question so raised in all its aspects. Of course, while permitting the assessee to raise an additional ground, the Appellate Assistant Commissioner should exercise his discretion in accordance with law and reason. He must be satisfied that the ground raised was bona fide and that the same could not have been raised earlier for good reasons. The satisfaction of the Appellate Assistant Commissioner depends upon the facts and circumstances of each case and no rigid principles or any hard and fast rule can be laid down for this purpose." [emphasis supplied]

13. The underlined observations in the above passage do not curtail the ambit of the jurisdiction of the appellate authorities stipulated earlier. They do not restrict the new/additional grounds that may be taken by the assessee before the appellate authorities to those that were not available when the return was filed or even when the assessment order was made. The sentence read as a whole entitles an assessee to raise new grounds/make additional claims :-

"if the ground so raised could not have been raised at that particular stage when the return was filed or when the assessment order was made..."

"or"

if "the ground became available on account of change of circumstances or law"

The appellate authorities, therefore, have jurisdiction to deal not merely with additional grounds, which became available on account of change of

circumstances or law, but with additional grounds which were available when the return was filed. The first part viz. "if the ground so raised could not have been raised at that particular stage when the return was filed or when the assessment order was made... "clearly relate to cases where the ground was available when the return was filed and the assessment order was made but "could not have been raised" at that stage. The words are "could not have been raised" and not "were not in existence". Grounds which were not in existence when the return was filed or when the assessment order was made fall within the second category viz. where "the ground became available on account of change of circumstances or law."

14. The facts in Jute Corporation of India Ltd., various judgments referred to therein as well as in subsequent cases, which we will refer to, establishes this beyond doubt. In many of the cases, the grounds were, in fact, available when the return was filed and/or the assessment order was made. In Jute Corporation of India Ltd., the ground was available when the return was filed. The assessee did not claim any deduction of its liability to pay purchase tax as "it entertained a belief that it was not liable to pay purchase tax under the Bengal Raw Jute Taxation Act, 1941". Thus, the ground existed when the return was filed. The assessment order was even made and received by the assessee. It is only after the appeal was filed that the assessee claimed a deduction in respect of the amount paid towards the purchase tax under the said Act. It is also significant to note that the assessee's entitlement to claim deduction had been held to be valid in view of an earlier judgment of the Supreme Court in Kedarnath Jute Manufacturing Company Limited v. Commissioner of Income-tax, (1971) 82 ITR 363. This was, therefore, a case of error in perception/judgment. Despite the same, the Supreme Court upheld the decision of the Appellate Assistant Commissioner in allowing the deduction. The words "could not have been raised" must, therefore, be construed liberally and not strictly.

15. It is indeed a question of exercise of discretion whether or not to allow an assessee to raise a claim which was not raised when the return was filed or the assessment order was made. As held by the Supreme Court there may be several factors justifying the raising of a new plea in appeal and each case must be considered on its own facts.

However, such cases include those, where the ground though available when the return was filed or the assessment order was made, was not taken or raised for reasons which the appellate authorities may consider valid. In other words, the jurisdiction of the appellate authorities to consider a fresh or new ground or claim is not restricted to cases where such a ground did not exist when the return was filed and the assessment order was made.

16(A). A Full Bench of this Court in Ahmedabad Electricity Limited v. Commissioner of Income-tax, (1993) 199 ITR 351 considered a similar situation. In that case, the appellant/assessee did not claim a deduction in respect of the amounts it was required to transfer to contingencies reserve and dividend and tariff reserve either before the Income Tax Officer or before the Appellate Assistant Commissioner in appeal. Subsequently, this Court had, in Amalgamated Electricity Company Limited v. Commissioner of Income-tax, (1974) 97 ITR 334, held that such amounts represented allowable deductions on revenue account. The appellant, therefore, raised a new claim and additional grounds before the Tribunal in that connection. The Tribunal rejected the same. The second question which was raised in the reference before the Division Bench was as under :-

> "(2) Whether, on the facts and in the circumstances of the case, the Tribunal erred in not allowing the assessee leave to raise in its own appeals additional grounds and in the departmental appeals cross objections regarding the deductibility of the sums transferred to contingency reserve and tariff and dividend control reserve?"

(B) The Division Bench which heard the reference, finding that there was a conflict of decisions, placed the papers before the Hon'ble Chief Justice for constituting a larger bench to resolve the controversy.

The Full Bench answered the reference in the affirmative and in favour of the assessee. The Full Bench held :-

> "Thus, the Appellate Assistant Commissioner has very wide powers while considering an appeal which may be filed by the assessee. He may confirm, reduce, enhance or annul the assessment or remand the case to the Assessing Officer. This is because, unlike an ordinary appeal, the basic purpose of a tax appeal is to ascertain the correct tax liability of an assessee in accordance with law. Hence an Appellate Assistant Commissioner also has the power to enhance the tax liability of the assessee although the Department does not have a right of appeal before the Appellate Assistant Commissioner. The Explanation to subsection (2), however, makes it clear that for the purpose of enhancement, the Appellate Assistant Commissioner cannot travel beyond the proceedings which were originally before the Income-tax Officer or refer to new sources of income which were not before the Income-tax Officer at all. For this purpose, there are other separate remedies provided under the Income-tax Act."

(C) It is unnecessary to refer to all the judgments that the Full Bench referred to while answering the reference. The Full Bench referred to the observations of the Supreme Court in Jute Corporation of India Limited v. Commissioner of Income-tax (supra) set out above. It is important to note that even in this case, therefore, the ground existed when the return was filed. The mere fact that a decision of a court is rendered subsequently does not indicate that the ground did not exist when the law was enacted. Judgments are only a declaration of the law. The assessee could have raised the ground in its return itself. It did not have to await a decision of a court in that regard. Indeed, even if a judgment is against an assessee, it is always open to the assessee to claim the deduction and carry the matter higher. The words "could not have been raised", therefore, cannot be read strictly. Neither the Supreme Court nor the Full Bench of this Court meant them to be read strictly. They include cases where the assessee did not raise the claim for a reason found to be reasonable or valid by the appellate authorities in the facts and circumstances of a case.

17. The next judgment to which our attention was invited by Mr. Mistri is the judgment of a Bench of three learned Judges of the Supreme Court in National Thermal Power Company Limited v. Commissioner of Income-tax, (1997) 7 SCC 489 = (1998) 229 ITR 383. In that case, the assessee had deposited its funds not immediately required by it on short term deposits with banks. The interest received on such deposits was offered by the assessee itself for tax and the assessment was completed on that basis. Even before the Commissioner of Income-tax (Appeals), the inclusion of this amount was neither challenged by the assessee nor considered by the Commissioner of Income-tax (Appeals). The assessee filed an appeal before the Tribunal. The inclusion of the amount was not objected to even in the grounds of appeal as originally filed before the Tribunal.

Subsequently, the assessee by a letter, raised additional grounds to the effect that the said sum could not be included in the total income. The assessee contended that on a erroneous admission, no income can be included in the total income. It was further contended that the ITO and the Commissioner of Income-tax (Appeals) had erred and failed in their duty in adjudicating the matter correctly and by mechanically including the amount in the total income. It is pertinent to note that the assessee contended that it was entitled to the deduction in view of two orders of the Special Benches of the Tribunal and the assessee further stated that it had raised these additional grounds on learning about the legal position subsequently.

The Tribunal declined to entertain these additional grounds.

The Supreme Court did not answer the question on merits, but framed the following question and held as under :-

> "4. The Tribunal has framed as many as five questions while making a reference to us. Since the Tribunal has not examined the additional grounds raised by the assessee on merit, we do not propose to answer the questions relating to the merit of those contentions. We reframe the question which arises for our consideration in order to bring out the point which requires determination more clearly. It is as follows:
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> "Where on the facts found by the authorities below a question of law arises (though not raised before the authorities) which bears on the tax liability of the assessee, whether the Tribunal has jurisdiction to examine the same."

Under Section 254 of the Income Tax Act the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with the appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under Section 254 only to decide the grounds which arise from the order of the Commissioner of Income Tax (Appeals). Both the assessee as well as the Department have a right to file an appea1/cross- objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier."

18. In the case before us, the CIT(A) and the Tribunal have held the omission to claim the deduction of Rs.40,00,000/- to be inadvertent. Both the appellate authorities held, after considering all the facts, that the assessee had inadvertently claimed a deduction of Rs.20,00,000/- paid after the end of the year in question. We see no reason to interfere with this finding. We see less reason to interfere with the exercise of discretion by the appellate authorities in permitting the respondent to raise this claim. That the respondent is entitled to the deduction in law is admitted and, in any event, clearly established. In the circumstances, the respondent ought not be prejudiced.

19. The orders of the CIT(A) and the Tribunal clearly indicate that both the appellate authorities had exercised their jurisdiction to consider the additional claim as they were entitled to in view of the various judgments on the issue, including the judgment of the Supreme Court in National Thermal Power Corporation Limited. This is clear from the fact that these judgments have been expressly referred to in detail by the CIT(A) and by the Tribunal.

20. We wish to clarify that both the appellate authorities have themselves considered the additional claim and allowed it. They have not remanded the matter to the Assessing Officer to consider the same. Both the orders expressly direct the Assessing Officer to allow the deduction of Rs.40,00,000/- under section 43B of the Act. The Assessing Officer is, therefore, now only to compute the respondent's tax liability which he must do in accordance with the orders allowing the respondent a deduction of Rs.40,00,000/- under section 43B of the Act.

21. The conclusion that the error in not claiming the deduction in the return of income was inadvertent cannot be faulted for more than one reason. It is a finding of fact which cannot be termed perverse. There is nothing on record that militates against the finding. The appellant has not suggested, much less established that the omission was deliberate, mala-fide or even otherwise. The inference that the omission was inadvertent is, therefore, irresistible.

22. It was then submitted by Mr. Gupta that the Supreme Court had taken a different view in Goetze (India) Limited v. Commissioner of Income-tax. We are unable to agree. The decision was rendered by a Bench of two learned Judges and expressly refers to the judgment of the Bench of three learned Judges in National Thermal Power Company Limited vs. Commissioner of Income-tax (supra). The question before the Court was whether the appellant-assessee could make a claim for deduction, other than by filing a revised return. After the return was filed, the appellant sought to claim a deduction by way of a letter before the Assessing Officer.

The claim, therefore, was not before the appellate authorities. The deduction was disallowed by the Assessing Officer on the ground that there was no provision under the Act to make an amendment in the return of income by modifying an application at the assessment stage without revising the return. The Commissioner of Income-tax (Appeals) allowed the assessee's appeal. The Tribunal, however, allowed the department's appeal. In the Supreme Court, the assessee relied upon the judgment in National Thermal Power Company Limited contending that it was open to the assessee to raise the points of law even before the Tribunal. The Supreme Court held :-

> "4. The decision in question is that the power of the Tribunal under section 254 of the Income-tax Act, 1961, is to entertain for the first time a point of law provided the fact on the basis of which the issue of law can be raised before the Tribunal. The decision does not in any way relate to the power of the Assessing Officer to entertain a claim for deduction otherwise than by filing a revised return. In the circumstances of the case, we dismiss the civil appeal. However, we make it clear that the issue in this case is limited to the power of the assessing authority and does not impinge on the power of the Income-tax Appellate Tribunal under section 254 of the Income- tax Act, 1961. There shall be no order as to costs." [emphasis supplied]"

> 23. It is clear to us that the Supreme Court did not hold anything contrary to what was held in the previous judgments to the effect that even if a claim is not made before the assessing officer, it can be made before the appellate authorities. The jurisdiction of the appellate authorities to entertain such a claim has not been negated by the Supreme Court in this judgment. In fact, the Supreme Court made it clear that the issue in the case was limited to the power of the assessing authority and that the judgment does not impinge on the power of the Tribunal under section 254.
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> 24. A Division Bench of the Delhi High Court dealt with a similar submission in Commissioner of Income-tax v. Jai Parabolic Springs Limited, (2008) 306 ITR 42. The Division Bench, in paragraph 17 of the judgment held that the Supreme Court dismissed the appeal making it clear that the decision was limited to the power of the assessing authority to entertain a claim for deduction otherwise than by a revised return and did not impinge on the powers of the Tribunal. In paragraph 19, the Division Bench held that there was no prohibition on the powers of the Tribunal to entertain an additional ground which, according to the Tribunal, arises in the matter and for the just decision of the case."

Further, the Hon'ble High Court of Madras in the case of CIT, Chennai vs. Abhinitha Foundations (Pvt.) Ltd. (2017) 396 ITR 251 (Mad), had observed, that even if a claim made by an assessee does not form part of its original return or even the revised return, it can still be considered by the A.O as well as the appellate authorities in case the relevant material is available on record. In both the aforesaid judgments the Hon'ble High Courts had referred to the judgment of the Hon'ble Apex Court in the case of Goetze (India) Ltd. (supra). Accordingly, in the backdrop of the aforesaid judgment of the Hon'ble High Court of Bombay in the case of Pruthvi Brokers & Shareholders (Pvt). Ltd. (supra) and that of the Hon'ble High Court of Madras in the case of Abhinitha Foundations (Pvt.) Ltd. (supra), we are of the considered view that the assessee's claim for deduction of freebies distributed to doctors, though raised for the first time by way of a revised computation of income in the course of the assessment proceedings and declined to be taken cognizance of by the A.O, however, without any hesitation could have been considered in the course of the proceedings before the appellate authorities, as the same was borne out from the facts available

on record and no new facts were required to be looked into for adjudicating the same.

11. We shall now advert to the sustainability of the view taken by the lower authorities, i.e as to whether or not the assessee company was entitled to raise a claim for deduction of the sales promotion expenses that were incurred towards providing of freebies to doctors. We have given a thoughtful consideration to the contentions advanced by the ld. authorised representatives for both the parties in context of the merits of the disallowance made by the A.O, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by them to drive home their respective contentions. Before us, the ld. A.R has assailed the adverse inferences drawn by the lower authorities as regards the allowability of the aforesaid expenses as a deduction primarily on two grounds, viz. (i) that though the Medical Council Regulations, 2002 would apply to medical practitioners but the same were not applicable to the pharmaceutical companies; AND (ii) that the circular issued by CBDT cannot impose an obligation adverse to an assessee.

12. After deliberating at length, we find, that the issue that the expenses wholly and exclusively incurred by a pharmaceutical company in the normal course of its business towards, viz. gifts, travel facility, conference expenses or similar freebies to medical practitioners or their professional associations would not be hit by the 'Explanation 1' to Sec. 37 of the Act is covered by the orders of the coordinate benches of the Tribunal, viz. (i). ITAT "C" Bench, Mumbai in the case of Dy. CIT 8(2), Mumbai Vs. PHL Pharma P. Ltd, ITA No. 4605/Mum/2014, dated 12.01.2017; (ii). ITAT, "D" Bench, Mumbai in the case of M/s Medley

Pharmaceuticals Ltd. Vs. Dy. CIT, ITA No. 2344/Mum/2018; (iii). ITAT, "A" Bench in the case of M/s Aristo Pharmaceuticals Pvt. Ltd. Vs. DCIT-2(1)(1), Mumbai; (iv). ITA No. 1104/Mum/2018; ITAT, Delhi Bench "A" in the case of Aishika Pharma (P) Ltd. Vs. ITO, Ward 2(1), New Delhi (2019); AND (v). ITAT, Mumbai "K"Bench in the case of India Medtronics Pvt. Ltd. Vs. Dy. CIT, ITA No. 7263/Mum/2018, dated 13.09.2019. In the order passed by the ITAT "A" Bench, Mumbai in the case of Aristo Pharmaceuticals Pvt. ltd. Vs. ACIT (ITA No. 6680/Mum/2012, dated 26.07.2018), the Tribunal after exhaustive deliberations had observed, that a perusal of the provisions of the Indian Medical Council Act, 1956, revealed that the scope and ambit of the statutory provisions relating to professional misconduct of registered medical practitioners under the Indian Medical Council Act, 1956 was restricted only to the persons registered as medical practitioners with the State Medical Council and whose names were entered in the Indian Medical Register maintained under Sec. 21 of the said Act. Further, it was observed that the scheme of the Indian Medical Council Act, 1956 neither deals with nor provides for any conduct of any association/society and regulates the conduct of only the registered medical practitioners and not that of the pharmaceutical companies or allied health sector industries. Apart from that, the Tribunal in its order had also drawn support from the order of the Hon'ble High Court of Delhi in the case of MAX Hospital., Pitampura Vs. Medical Council of India [CWP No. 1334/2013, dated 10.01.2014]. In the aforesaid case, the Medical Council of India (MCI) had filed an 'Affidavit' before the High Court, wherein it was deposed by the council that its jurisdiction was limited only to take action against the registered medical professionals under the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, and it had no jurisdiction to pass an order affecting the rights/interest of the petitioner

hospital. In the backdrop of its exhaustive deliberations the Tribunal had concluded that even if the assessee had incurred expenditure on distribution of 'freebies' to doctors and medical practitioners, the same, may though not be in conformity with the Indian Medical Council (Professional Conduct, Etiquette and Ethics) regulations, 2002, 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 on incurring of such sale promotion expenses, it cannot be held to have incurred an expenditure for a purpose which is an offence or is prohibited by law. The Tribunal while concluding as herein above had observed as under:

> "20. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record. We find that our indulgence in the cross appeals filed by the assessee and the revenue has been sought for adjudicating the allowability of the sales promotion expenses incurred by the assessee on the distribution of articles to the stockists, distributors, dealers, customers and doctors, in the backdrop of the CBDT Circular No. 5/2012, dated 01.08.2012 and the MCI regulations. We find that it is the case of the revenue that as per the CBDT Circular No. 5/2012, dated 01.08.2012 any expense incurred by a pharmaceutical or allied health sector industry in providing any "freebies" to medical practitioners or their professional associations in violation of the regulation issued by Medical Council of India which is a regulatory body constituted under the Medical Council Act, 1956, would be liable to be disallowed in the hands of such pharmaceutical or allied health sector industry or any other assessee which had provided such "freebies" and claimed the same as a deductible expense against its income in the accounts.
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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 Vs. 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 "*ExpressioUnius Est ExclusioAlterius*", 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 freebies (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 Vs. 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 health care 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."

13. We are further of the view, that even otherwise, the enlargement of the scope of MCI regulation to the pharmaceutical companies by the CBDT is *de hors* any enabling provision either under the Income Tax Act or under the Indian Medical Council Regulations. Although 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 powers to create a new impairment adverse

to an assessee, or to a class of assessee's, without any sanction or authority of law. We find that the aspect that the CBDT is divested of its powers to enlarge the scope of MCI regulations by extending the same to pharmaceutical companies without any enabling provision either under the Income tax Act or the Indian Medical Regulations had also been deliberated upon by the Tribunal in the case of Aristo Pharmaceuticals Pvt. ltd. Vs. ACIT (ITA No. 6680/Mum/2012, dated 26.07.2018), wherein it was observed as under :

> "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."

As regards the reliance placed by the revenue on the judgment of the Hon'ble High Court of Himachal Pradesh in the case of Confederation of Indian Pharmaceutical Industry (SS) Vs. CBDT (2013) 353 ITR 388 (Himachal Pradesh), the same we find had been considered by the Tribunal in the case of The Dy. CIT 8(2), Mumbai Vs. PHL Pharma P. Ltd, ITA No. 4605/Mum/2014, dated 12.01.2017. It was therein observed by the Tribunal that the Hon'ble High Court had though upheld the validity of the CBDT Circular No. 5/2012, dated 01.08.2012, but with a rider that if the assessee satisfied the assessing authority that the expenditure was not in violation of the regulation framed by the medical council, then, it may legitimately claim the deduction. It was observed by the Tribunal that if the assessee brings out that the MCI regulation was not applicable to the assessee before the A.O, then, the same cannot be applied blindly. As in the present case, the A.O despite the claim of the assessee that the Sales promotion expenses incurred by it were not liable to be disallowed, had however, summarily rejected the same by referring to the CBDT Circular No. 5/2012 (supra), therefore, the reliance placed by the revenue on the aforesaid judgment would not assist its case. As regards the reliance placed by the ld. D.R on the order of the ITAT, Mumbai in the case of CIT, Circle 6(3), Mumbai Vs. Liva Healthcare Ltd. (2016) 161 ITD 63 (Mum), the same had been considered and distinguished on facts by the Tribunal in the case of PHL Pharma Ltd. (supra). It was observed by the Tribunal that in the case of

Liva Healtcare Ltd. (supra) the expenses were disallowed under Sec. 37(1), for the reason, that they were not incurred wholly and exclusively for the purpose of business and were infact incurred to create good relations with the doctors in lieu of expected favours from them for recommending to the patients the pharmaceutical products dealt with by the assessee company with a purpose to facilitate generation of more business and profits. It was further observed by the Tribunal that in the case of Liva Healtcare Limited (supra) the spouse of the doctors also accompanied the doctors for overseas trips to Istanbul and expenses were incurred for cruise travels to islands, gala dinners, cocktails, gala entertainment etc. of such doctors. It was therein observed by the Tribunal that as in the case of the assessee before them, viz. PHL Pharma P. Ltd. (supra) it was an admitted fact that the expenses had not been incurred for the purpose of personal benefit/enjoyment of the doctors or their spouses, thus, the facts therein involved were distinguishable as against those as were there before the Tribunal in the case of Liva Healthcare Limited (supra). In the case of the present assessee before us, as it is neither a fact nor the case of the revenue that the assessee had incurred expenses for the purpose of personal benefit/enjoyment of the doctors or their spouses, therefore, on a similar footing as in the case of PHL Pharma P. Ltd. (supra), the order passed by the Tribunal in the case of Liva Healthcare Limited (supra) being distinguishable on facts would not assist the case of the revenue. As regards the judgment of the Hon'ble High Court of Karnataka in the case of J.K Panthaki & Co. Vs. ITO (2012) 344 ITR 329 (Kar) relied upon by the revenue, we find, that as stated by the ld. A.R, and rightly so, the issue therein involved was the allowability of the assessee's claim for deduction of illegal gratification i.e kick back or bribe in the garb of commission, which was disallowed as per the 'Explanation' to Sec. 37 of

the Act. As the facts involved in the said case are glaringly distinguishable as against the facts involved in the case of the assessee before us, therefore, the same would not in any way come to the rescue of the department. As regards the reliance that was placed by the ld. D.R on the judgment of the Hon'ble High Court of Bombay in the case of CIT Vs. Gill & Co. (P) Ltd. (2001) 248 ITR 362 (Bom), we find that the facts therein involved were clearly distinguishable as against the facts involved in the case of the assessee before us. In the said case, the issue therein involved was qua the disallowance under 'Explanation' to Sec. 37(1) of the amount of secret commission that was paid by the assessee company and was claimed as deduction. As the issue involved in the appeal of the present assessee before us i.e allowability of the sales promotion expenses incurred by the assessee company, a pharmaceutical company, is differently placed as in comparison to the facts involved in the aforesaid judgment relied upon by the revenue, therefore, the same too would not assist its case.

14. We, thus, in terms of our aforesaid observations and respectfully following the view taken by the co-ordinate bench of the Tribunal i.e ITAT "A" Bench, Mumbai, in the case of Aristo Pharmaceuticals Pvt. ltd. Vs. ACIT (ITA No. 6680/Mum/2012, dated 26.07.2018), are of a strong conviction that the expenditure of Rs. 36,92,20,070/- incurred by the assessee towards sales promotion expenses would not be hit by the 'Explanation' to Sec. 37 of the Act. Accordingly, on the basis of our aforesaid observations, we are of the considered view that the CIT(A) had erred in upholding the disallowance of the assessee's claim for deduction of sale promotion expenses of Rs.36,92,20,070/- made by the A.O. We, thus, set-aside the order of the CIT(A) to the extent she had sustained the disallowance of the sale promotion expenses and

accordingly vacate the disallowance of Rs.36,92,20,070/-made by the A.O. The **Grounds of appeal Nos. 1 and 2** are allowed in terms of our aforesaid observations.

15. We shall now deal with the assessee's claim that in the circumstances of the case and in law it is entitled for deduction of "cess" of Rs.3,55,17,709 /-. Before us, the ld. A.R in order to drive home his aforesaid contention had relied on a recent judgment of the Hon'ble High Court of Bombay in the case of Sesa Goa Limited vs. Joint Commissioner of Income-tax (2020) 107 CCH 375 (Bom). On being confronted with the fact that the said claim of the assessee was not raised before the lower authorities, it was submitted by the ld. A.R that the aforesaid ground of appeal was being raised on the basis of the aforesaid recent judgment of the Hon'ble High Court of Bombay in the case of Sesa Goa Limited (supra). The ld. A.R submitted that the Hon'ble High Court in its aforesaid judgment, had observed, that if the legislature intended to prohibit the deduction of amounts paid by an assessee towards "Education Cess" or any other "Cess" and "Higher and Secondary Education Cess", then, it could have easily included reference to "cess" in clause (ii) of Sec. 40(a). It was further submitted by the ld. A.R that the Hon'ble High Court had observed that as the legislature had not included "education cess" or any other "cess" in clause (ii) of Sec. 40(a), therefore, it would mean that there was no prohibition in claiming deduction of the said amounts while computing the income of the assessee under the head "Profits and gains of business or profession". It was submitted by the ld. A.R that the Hon'ble High Court in its aforesaid order had observed that where the assessee has raised a claim for deduction of the amount paid towards "cess", then, said claim for deduction was bound to be considered by the

CIT(Appeals) or the ITAT before whom it was specifically raised. It was, thus, submitted by the ld. A.R that the aforesaid claim for deduction though raised by the assessee for the very first time before the Tribunal did merit to be adjudicated upon and consequntially allowed.

16. We have heard the ld. authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, and have also considered the judicial pronouncements that have been relied upon by them in context of the issue in hand. In so far the claim of the Ld. A.R that unlike “rates” and “taxes” the amount paid by an assessee towards “Education Cess” or any other “cess” viz. the Secondary and Higher Education Cess is not a disallowable expenditure u/s 40(a)(ii) of the Income-tax Act, 1961, we find, that the said issue is squarely covered by the recent order of the Hon’ble High Court of Bombay in the case of Sesa Goa Limited vs. Joint Commissioner of Income-tax (2020) 107 CCH 375 (Bom). In the case before the Hon’ble High Court the following substantial question of law was inter alia raised:

> “iii. Whether on the facts and in the circumstances of the case and in law, the Education Cessand Higher and Secondary Education Cess is allowable as a deduction in the year of payment.”

After exhaustive deliberations the Hon’ble High Court had observed that the legislature in Sec. 40(a)(ii) had though provided that “any rate or tax levied” on “profits and gains of business or profession” shall not be deducted in computing the income chargeable under the head “Profits and gains of business or profession”, but then, there was no reference to any “cess”. Also, the High Court observed that there was no scope to accept that “cess” being in the nature of a “tax” was equally not deductible in computing the income chargeable under the head “Profits and gains of business or profession”. It was further observed that if the

legislature would had intended to prohibit the deduction of amounts paid by an assessee towards say, “education cess” or any other “cess”, then, it could have easily included a reference to “cess” in clause (ii) of Section 40(a). On the basis of its aforesaid observations the Hon’ble High Court had concluded that now when the legislature had not provided for any prohibition on the deduction of any amount paid towards “cess” in clause (ii) of Sec. 40(a), therefore, holding to the contrary would amount to reading something which is not to be found in the text of the provision of Sec. 40(a)(ii). Accordingly, the Hon’ble High Court had concluded that there was no prohibition on the deduction of any amount paid towards “cess” in Sec. 40(a)(ii) while computing the income chargeable under the head “Profits and gains of business or profession”, observing as under :

> “16. The aforesaid question arises in the context of provisions of Section 40(a)(ii) which inter alia provides that notwithstanding anything to the contrary in sections 30 to 38 of the IT Act, the following amounts shall not be deducted in computing the income chargeable under the head “Profits and gains of business or profession”, -
>
> (a) in the case of any assessee –
> (ia).....
> (ib).....
> (ic) .....
> **(ii) any sum paid on account of any rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains.**
>
> [Explanation 1.—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any sum paid on account of any rate or tax levied includes and shall be deemed always to have included any sum eligible for relief of tax under section 90 or, as the case may be, deduction from the Indian income-tax payable under section 91.]
>
> [Explanation 2.—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, any 9 TXA17&18-13 dt.28.02.2020 sum paid on account of any rate or tax levied includes any sum eligible for relief of tax under section 90A;]
>
> 17. Therefore, the question which arises for determination is whether the expression “any rate or tax levied” as it appears in Section 40(a)(ii) of the IT Act includes “cess”. The Appellant – Assessee contends that the expression does not include “cess” and therefore,

the amounts paid towards "cess" are liable to be deducted in computing the income chargeable under the head "profits and gains of business or profession".

However, the Respondent – Revenue contends that "cess" is also included in the scope and import of the expression "any rate or tax levied" and consequently, the amounts paid towards the "cess" are not liable for deduction in computing the income chargeable under the head "profits and gains of business or profession".

18. In relation to taxing statute, certain principles of interpretation are quite well settled. In New Shorrock Spinning and Manufacturing Co. Ltd. Vs Raval, 37 ITR 41 (Bom.), it is held that one safe and infallible principle, which is of guidance in these matters, is to read the words through and see if the rule is clearly stated. If the language employed gives the rule in words of sufficient clarity and precision, nothing more requires to be done. Indeed, in such a case the task of interpretation can hardly be said to arise :Absoluta sententia expositore non indiget. The language used by the Legislature best declares its intention and must be accepted as decisive of it.

19. Besides, when it comes to interpretation of the IT Act, it is well established that no tax can be imposed on the subject without words in the Act clearly showing an intention to lay a burden on him. The subject cannot be taxed unless he comes within the letter of the law and the argument that he falls within the spirit of the law cannot be availed of by the department. [See CIT vs Motors & General Stores 66 ITR 692 (SC)].

20. In a taxing Act one has to look merely at what is clearly said.

There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied, into the provisions which has not been provided by the legislature [See CIT Vs Radhe Developers 341 ITR 403]. One can only look fairly at the language used. No tax can be imposed by inference or analogy. It is also not permissible to construe a taxing statute by making assumptions and presumptions [See Goodyear Vs State of Haryana 188 ITR 402(SC)].

21. There are several decisions which lay down rule that the provision for deduction, exemption or relief should be interpreted liberally, reasonably and in favour of the assessee and it should be so construed as to effectuate the object of the legislature and not to defeat it. Further, the interpretation cannot go to the extent of reading something that is not stated in the provision [See AGS Tiber Vs CIT 233 ITR 207].

22. Applying the aforesaid principles, we find that the legislature, in Section 40(a)(ii) has provided that "any rate or tax levied" on "profits and gains of business or profession" shall not be deducted in computing the income chargeable under the head "profits and gains of business or profession". There is no reference to any "cess". Obviously therefore, there is no scope to accept Ms. Linhares's contention that "cess" being in the nature of a "Tax" is equally not deductable in computing the income chargeable under the head "profits and gains of business or profession". Acceptance of such a contention will amount to reading something in the text of the provision which is not to be found in the text of the provision in Section 40(a)(ii) of the IT Act.

23. If the legislature intended to prohibit the deduction of amounts paid by a Assessee towards say, "education cess" or any other "cess", then, the legislature could have easily included reference to "cess" in clause (ii) of Section 40(a) of the IT Act. The fact that the

legislature has not done so means that the legislature did not intend to prevent the deduction of amounts paid by a Assessee towards the "cess", when it comes to computing income chargeable under the head "profits and gains of business or profession".

24. The legislative history bears out that the Income Tax Bill, 1961, as introduced in the Parliament, had Section 40(a)(ii) which read as follows :

> "(ii) any sum paid on account of any cess, rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains"

25. However, when the matter came up before the Select Committee of the Parliament, it was decided to omit the word "cess" from the aforesaid clause from the Income Tax Bill, 1961. The effect of the omission of the word "cess" is that only any rate or tax levied on the profits or gains of any business or profession are to be deducted in computing the income chargeable under the head " profits and gains of business or profession". Since the deletion of expression "cess" from the Income Tax Bill, 1961, was deliberate, there is no question of reintroducing this expression in Section 40(a)(ii) of IT Act and that too, under the guise of interpretation of taxing statute.

26. In fact, in the aforesaid precise regard, reference can usefully be made to the Circular No. F. No.91/58/66-ITJ(19), dated 18th May, 1967 issued by the CBDT which reads as follows :-

> "Interpretation of provision of Section 40(a)(ii) of IT Act, 1961–Clarification regarding. "Recently a case has come to the notice of the Board where the Income Tax Officer has disallowed the 'cess' paid by the assessee on the ground that there has been no material change in the provisions of section 10(4) of the Old Act and Section 40(a)(ii) of the new Act.
>
> 2. The view of the Income Tax Officer is not correct. Clause 40(a)(ii) of the Income Tax Bill, 1961 as introduced in the Parliament stood as under:-
>
> > "(ii) any sum paid on account of any cess, rate or tax levied on the profits or gains of any business or profession or assessed at a proportion of, or otherwise on the basis of, any such profits or gains".
>
> When the matter came up before the Select Committee, it was decided to omit the word 'cess' from the clause. The effect of the omission of the word 'cess' is that only taxes paid are to be disallowed in the assessments for the years 1962-63 and onwards.
>
> 3. The Board desire that the changed position may please be brought to the notice of all the Income Tax Officers so that further litigation on this account may be avoided.[Board's F. No.91/58/66-ITJ(19), dated 18-5-1967.]"

27. The CBDT Circular, is binding upon the authorities under the IT Act like Assessing Officer and the Appellate Authority. The CBDT Circular is quite consistent with the principles of interpretation of taxing statute. This, according to us, is an additional reason as to why the expression "cess" ought not to be read or included in the expression "any rate or tax levied" as appearing in Section 40(a)(ii) of the IT Act.

28. In the Income Tax Act, 1922, Section 10(4) had banned allowance of any sum paid on account of 'any cess, rate or tax levied on the profits or gains of any business or profession'. In the corresponding Section 40(a)(ii) of the IT Act, 1961 the expression “cess” is quite conspicuous by its absence. In fact, legislative history bears out that this expression was in fact to be found in the Income Tax Bill, 1961 which was introduced in the Parliament. However, the Select Committee recommended the omission of expression “cess” and consequently, this expression finds no place in the final text of the provision in Section 40(a)(ii) of the IT Act, 1961. The effect of such omission is that the provision in Section 40(a)(ii) does not include, “cess” and consequently, “cess” whenever paid in relation to business, is allowable as deductable expenditure.

29. In Kanga and Palkhivala's “The Law and Practice of Income Tax” (Tenth Edition), several decisions have been analyzed in the context of provisions of Section 40(a)(ii) of the IT Act, 1961. There is reference to the decision of Privy Council in CIT Vs Gurupada Dutta 14 ITR 100, where a union rate was imposed under a Village Self Government 15 TXA17&18-13 dt.28.02.2020 Act upon the assessee as the owner or occupier of business premises, and the quantum of the rate was fixed after consideration of the 'circumstances' of the assessee, including his business income. The Privy Council held that the rate was not 'assessed on the basis of profits' and was allowable as a business expense. Following this decision, the Supreme Court held in JaipuriaSamla Amalgamated Collieries Ltd Vs CIT [82 ITR 580] that the expression 'profits or gains of any business or profession' has reference only to profits and gains as determined in accordance with Section 29 of this Act and that any rate or tax levied upon profits calculated in a manner other than that provided by that section could not be disallowed under this sub-clause. Similarly, this sub-clause is inapplicable, and a deduction should be allowed, where a tax is imposed by a district board on business with reference to 'estimated income' or by a municipality with reference to 'gross income'. Besides, unlike Section 10(4) of the 1922 Act, this sub-clause does not refer to 'cess' and therefore, a 'cess' even if levied upon or calculated on the basis of business profits may be allowed in computing such profits under this Act.

30. The Division Bench of the Rajasthan High Court (Jaipur Bench) in Income Tax Appeal No.52/2018 decided on 31st July, 2018 (Chambal Fertilisers and Chemicals Ltd. Vs CIT Range-2, Kota), by reference to the aforesaid CBDT Circular dated 18th May, 1967 has held 16 TXA17&18-13 dt. 28.02.2020 that the ITAT erred in holding that the “education cess” is a disallowable expenditure under Section 40(a)(ii) of the IT Act. Ms. Linhares was unable to state whether the Revenue has appealed this decision. Mr. Ramani, learned Senior Advocate submitted that his research did not suggest that any appeal was instituted by the Revenue against this decision, which is directly on the point and favours the Assessee.

31. Mr. Ramani, in fact pointed out three decisions of ITAT, in which, the decision of the Rajasthan High Court in Chambal Fertilisers and Chemicals Ltd.(supra) was followed and it was held that the amounts paid by the Assessee towards the 'education cess' were liable for deduction in computing the income chargeable under the head of “profits and gains of business or profession”. They are as follows :- (i) DCIT Vs Peerless General Finance and Investment and Co. Ltd. (ITA No.1469 and 1470/Kol/2019 decided on 5th December, 2019 by the ITAT, Calcutta; (ii) DCIT Vs Graphite India Ltd. (ITA No.472 and 474 Co. No.64 and 66/Kol/2018 decided on 22nd November, 2019)by the ITAT, Calcutta; (iii) DCIT Vs Bajaj Allianz General Insurance (ITA No.1111 and 1112/PUN/2017 decided on 25th July, 2019) by the ITAT, Pune.

32. Again, Ms. Linhares, learned Standing Counsel for the Revenue was unable to say whether the Revenue had instituted the appeals in the aforesaid matters. Mr. Ramani, learned Senior Advocate for the Appellant submitted that to the best of his research, no appeals were instituted by the Revenue against the aforesaid decisions of the ITAT.

33. The ITAT, in the impugned judgment and order, has reasoned that since "cess" is collected as a part of the income tax and fringe benefit tax, therefore, such "cess" is to be construed as "tax". According to us, there is no scope for such implications, when construing a taxing statute. Even, though, "cess" may be collected as a part of income tax, that does not render such "cess", either rate or tax, which cannot be deducted in terms of the provisions in Section 40(a)(ii) of the IT Act. The mode of collection, is really not determinative in such matters.

34. Ms. Linhares, has relied upon M/s Unicorn Industries Vs Union of India and others, 2019 SCC Online SC 1567 in support of her contention that "cess" is nothing but "tax" and therefore, there is no question of deduction of amounts paid towards "cess" when it comes to computation of income chargeable under the head profits or gains of any business or profession.

35. The issue involved in Unicorn Industries (supra) was not in the context of provisions in Section 40(a)(ii) of the IT Act. Rather, the issue involved was whether the 'education cess, higher education cess and National Calamity Contingent Duty (NCCD)' on it could be construed as "duty of excise" which was exempted in terms of Notification dated 9th September, 2003 in respect of goods specified in the Notification and cleared from a unit located in the Industrial Growth Centre or other specified areas with the State of Sikkim. The High Court had held that the levy of education cess, higher education cess and NCCD could not be included in the expression "duty of excise" and consequently, the amounts paid towards such cess or NCCD did not qualify for exemption under the exemption Notification. This view of the High Court was upheld by the Apex Court in Unicorn Industries (supra).

36. The aforesaid means that the Supreme Court refused to regard the levy of education cess, higher education cess and NCCD as "duty of excise" when it came to construing exemption Notification. Based upon this, Mr. Ramani contends that similarly amounts paid by the Appellant – Assessee towards the "cess" can never be regarded as the amounts paid towards the "tax" so as to attract provisions of Section 40(a)(ii) of the IT Act. All that we may observe is that the issue involved in Unicorn Industries (supra) was not at all the issue involved in the present matters and therefore, the decision in Unicorn Industries (supra) can be of no assistance to the Respondent – Revenue in the present matters.

37. Ms. Linhares, learned Standing Counsel for the Revenue however submitted that the Appellant – Assessee, in its original return, had never claimed deduction towards the amounts paid by it as "cess". She submits that neither was any such claim made by filing any revised return before the Assessing Officer. She therefore relied upon the decision of the Supreme Court in Goetze (India) Ltd. Vs Commissioner of Income Tax (2006) 284 ITR 323 (SC) to submit that the Assessing Officer, was not only quite right in denying such a deduction, but further the Assessing Officer had no power or jurisdiction to grant such a deduction to the Appellant – Assessee. She submits that this is what precisely held by the ITAT in its impugned judgments and orders and therefore, the same, warrants no interference.

38. Although, it is true that the Appellant – Assessee did not claim any deduction in respect of amounts paid by it towards "cess" in their original return of income nor did the

Appellant – Assessee file any revised return of income, according to us, this was no bar to the Commissioner (Appeals) or the ITAT to consider and allow such deductions to the Appellant – Assessee in the facts and circumstances of the present case. The record bears out that such deduction was clearly claimed by the Appellant – Assessee, both before the Commissioner (Appeals) as well as the ITAT.

39. In CIT Vs Pruthvi Brokers & Shareholders Pvt. Ltd. 349 ITR 336, one of the questions of law which came to be framed was whether on the facts and circumstances of the case, the ITAT, in law, was right in holding that the claim of deduction not made in the original returns and not supported by revised return, was admissible. The Revenue had relied upon Goetze (supra) and urged that the ITAT had no power to allow the claim for deduction. However, the Division Bench, whilst proceeding on the assumption that the Assessing Officer in terms of law laid down in Goetze (supra) had no power, proceeded to hold that the Appellate Authority under the IT Act had sufficient powers to permit such a deduction. In taking this view, the Division Bench relied upon the Full Bench decision of this Court in Ahmedabad Electricity Co. Ltd Vs CIT (199 ITR 351) to hold that the Appellate Authorities under the IT Act have very wide powers while considering an appeal which may be filed by the Assessee. The Appellate Authorities may confirm, reduce, enhance or annul the assessment or remand the case to the Assessing Officer. This is because, unlike an ordinary appeal, the basic purpose of a tax appeal is to ascertain the correct tax liability of the Assessee in accordance with law.

40. The decision in Goetze (supra) upon which reliance is placed by the ITAT also makes it clear that the issue involved in the said case was limited to the power of the assessing authority and does not impinge on the powers of the ITAT under section 254 of the said Act. This means that in Goetze (supra), the Hon'ble Apex Court was not dealing with the extent of the powers of the appellate authorities but the observations were in relation to the powers of the assessing authority. This is the distinction drawn by the division Bench in Pruthvi Brokers (supra) as well and this is the distinction which the ITAT failed to note in the impugned order.

41. Besides, we note that in the present case, though the claim for deduction was not raised in the original return or by filing revised return, the Appellant – Assessee had indeed addressed a letter claiming such deduction before the assessment could be completed. However, even if we proceed on the basis that there was no obligation on the Assessing Officer to consider the claim for deduction in such letter, the Commissioner (Appeals) or the ITAT, before whom such deduction was specifically claimed was duty bound to consider such claim. Accordingly, we are unable to agree with Ms. Linhare's contention based upon the decision in Goetze (supra).

42. For all the aforesaid reasons, we hold that the substantial question of law No.(iii) in Tax Appeal No.17 of 2013 and the sole substantial question of law in Tax Appeal No.18 of 2013 is also required to be answered in favour of the Appellant – Assessee and against the Respondent-Revenue. To that extent therefore, the impugned judgments and orders made by the ITAT warrant interference and modification.

43. Thus, we answer all the three substantial questions of law framed in Tax Appeal No.17 of 2013 in favour of the Appellant – Assessee and against the Respondent -Revenue. Similarly, we answer the sole substantial question of law framed in Tax Appeal No.18 of 2013, in favour of the Appellant – Assessee and against the Respondent – Revenue."

As regards the support drawn by the ld. D.R from the judgment of the Hon'ble High Court of Calcutta in the case of Srei Infrastructure Finance Ltd. Vs. Dy. CIT, Circle 11(2), Kolkata (2016) 72 taxmann.com 239 (Cal), we are of the considered view, that as stated by the ld. A.R, and rightly so, the same being distinguishable on facts would by no means assist the case of the revenue before us. Accordingly, respectfully following the aforesaid judgment of the Hon'ble High Court of Bombay in the case of Sesa Gold Limited (supra), we are principally in agreement with the assessee's claim that "Education Cess" and the "Secondary and Higher Education Cess" are not disallowable as a deduction u/s 40(a)(ii) of the Act. However, as the aforementioned claim had been raised by the assessee for the very first time before us, we, therefore, in all fairness restore the matter to the file of the A.O for considering the said claim of the assessee in the backdrop of our observations recorded hereinabove, though, subject to verification of the factual position as had been claimed by the assessee before us. The **Ground of appeal No. 4** is allowed for statistical purposes in terms of our observations recorded hereinabove.

17. Resultantly, the appeal of the assessee is allowed in terms of our aforesaid observations.

ITA No.4785/MUM/2019
(Assessment Years: 2015-16)

18. We shall now take up the appeal of the assessee for A.Y 2015-16. The assessee has assailed the impugned order of the CIT(A) on the following grounds before us :

"Deduction for Sales Promotion Expenses of R.34,08,98,501/- incurred on doctors prescribing Appellant company's Products:

1. On the facts and in the circumstances of the case and in law the learned Commissioner of Income-tax (Appeals) ["CIT(A)"] has erred in upholding the action of the Asssessing Officer ["A.O"] in not allowing deduction of Rs.34,08,98,501/- incurred by the appellant on sales promotin expenses under section 37(1) of the Act.

2. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in applying Explanation-1 to Section 37(1) to disallow the sales promotion expenses of Rs.34,08,98,501/-.

3. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in holding that once the appellant disallowed similar expenses in earlier years, it is not open to the appellant to make a claim for deduction in the relevant year.

4. On the facts and in the circumstances of the case and in law, the Appellant is entitled to deduction of Rs. 4,01,43,083/-, being of cess paid by the Appellant under the Act. The Appellant submits that the Assssing Officer be directed to allow the deduction of Rs.4,01,43,083/-, in computing the income of the Appellant

The appellant craves leave, to add, to alter, to emend, to modify, and/or to deleted any above grounds of appeal as may be necessary."

19. Briefly stated, the assessee company had e-filed its return of income for A.Y 2015-16 on 02.11.2015, declaring its total income at Rs. 428,63,07,770/- and 'book profit' under Sec. 115JB at Rs.451,75,08,196/-. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act. During the course of the assessment proceedings, it was observed by the A.O that the assessee in view of the CBDT Circular No. 5/2012 r.w. Medical Council of India (MCI) Regulations, 2002 had in its return of income offered a disallowance of sales promotion expenses of Rs.34.09 crore in respect of the freebies that were given to doctors during the year in question. However, in the course of the assessment proceedings the assessee vide a revised computation of income withdrew the suo motto disallowance of sales promotion expenses of Rs.34.09 crore that was earlier offered in the original return of income. Elaborating on the withdrawal of the aforesaid disallowance of sales promotion expenses the assessee had drawn support from the order of the ITAT, Mumbai in the case of Dy. CIT-8(2), Mumbai Vs. PHL Pharma Pvt. Ltd., ITA No. 4605/Mum/2014, dated 12.01.2017. In its aforesaid order the Tribunal had observed that the MCI guidelines were not applicable to pharamaceutical companies and there was no violation on the part of

pharmaceuticals companies in giving any kind of freebies to the medical practitioners which being an expenditure incurred purely for business purposes was to be allowed as a business expenditure. However, the aforesaid claim of the assessee did not find favour with the A.O. Observing, that as per the CBDT Circular No. 5/2012, dated 09.08.2012 the expenses incurred by the pharmaceutical companies on distribution of freebies being in violation of the provisions of the Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulations, 2002 was inadmissible as an expenditure, the A.O disallowed the assessee's claim for deduction of the sales promotion expenses of Rs.34.09 crore. As regards the support drawn by the assessee on the order of the ITAT, Mumbai in the case of PHL Pharmaceuticals Pvt. Ltd. (supra), it was observed by the A.O that the department had not accepted the aforesaid order of the Tribunal and had assailed the same before the Hon'ble High Court of Bombay. Accordingly, the A.O observed that to keep the issue alive the aforesaid claim raised by the assessee seeking deduction of the sales promotion expenses amounting to Rs.34.09 crore could not be accepted. Backed by his aforesaid deliberations the A.O assessed the income of the assessee company at Rs.428,63,07,770/- i.e as originally returned.

20. Aggrieved, the assessee carried the matter in appeal before the CIT(A). However, the CIT(A) not finding favour with the contentions advanced by the assessee upheld the view taken by the A.O and sustained the disallowance of the sales promotion expenses of Rs.34.09 crore.

21. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. As the facts and the issue in question i.e allowability of the freebies given to doctors as a deduction

under Sec. 37(1) of the Act remains the same as were there before us in the aforementioned appeal of the assessee for A.Y. 2016-17 in ITA No. 4784/M/2019, therefore, our order and the reasoning therein adopted shall apply mutatis mutandis for the purpose of disposal of the said issue. Accordingly, in terms of our observations recorded hereinabove the assessee's claim for deduction of sales promotion expenses of Rs.34,08,98,501/- is allowed. The **Grounds of appeal No(s).1 to 3** are allowed in terms of our aforesaid observations.

22. We further find that the assessee has by way of an "additional ground of appeal" raised for the first time before us a claim for deduction of "cess" of Rs. 4,01,43,083/-. As the facts and the issue in context of the aforesaid claim of the assessee remains the same as were there before us in its case for the immediately succeeding year i.e A.Y. 2016-17 in ITA No. 4784/Mum/2019, therefore, our order therein passed while disposing off the appeal for A.Y. 2016-17 shall apply mutatis mutandis for the purpose of disposing off the issue in hand for the year under consideration i.e A.Y. 2015-16 in ITA No. 4785/Mum/2019. Accordingly, on the same terms, we therein restore the matter to the file of A.O for considering the aforesaid claim of the assessee in the backdrop of our observations therein recorded. The **Ground of appeal No. 4** is allowed for statistical purposes in terms of our aforesaid observations recorded hereinabove.

23. The appeal of the assessee is allowed in terms of our aforesaid observations.

24. Resultantly, the appeals filed by the assessee i.e ITA No. 4784/Mum /2019 for A.Y 2016-17 and ITA No. 4785/Mum/2019 for A.Y 2015-16 are both allowed in terms of our aforesaid observations.

Order pronounced in the open court on 25/05/2021.

Sd/-	Sd/-
Ravish Sood	Rajesh Kumar
(JUDICIAL MEMBER)	(ACCOUNTANT MEMBER)

Mumbai, Date: 25.05.2021

Copy of the Order forwarded to :
1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "A" Bench, ITAT, Mumbai
6. Guard File

Dy./Asst.Registrar
ITAT, Mumbai.