

IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

ITA No.4/Bang/2017
Assessment year : 2012-13

G7 Healthcare (India) Pvt. Ltd., C/o. K. Janardhanan & Co., No.451, 64 th Cross, 5 th Block, Rajajinagar, Bangalore – 560 010. PAN: AAECG 3312N	Vs.	The Income Tax Officer, Ward 3(1)(2), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Arvind V. Chavan, Advocate
Respondent by	:	Shri Kannan Narayanan, Jt.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	09.08.2021
Date of Pronouncement	:	12.08.2021

ORDER

Per Chandra Poojari, Accountant Member

This appeal by the assessee is directed against the order of CIT(Appeals)-3, Bengaluru dated 31.10.2016 for the assessment year 2012-13 on the following grounds:-

“1) The order of the Learned Commissioner of Income Tax (Appeals)-3 in the case of the Appellant for the Assessment Year 2012-13 is opposed to law in so far as it is prejudicial to the interest of the Appellant.

2) The Learned Commissioner of Income Tax (Appeals) erred both in law as well as in fact, in not giving relief to the extent of Rs.1,03,37,972/- claimed by the Appellant as expenses

in the nature of 'Tour and program' reimbursed to the holding Company M/s. Team Life Care Company (India) Private Limited under an agreement for arranging a sales promotion meeting at Srilanka.

3) The Learned Commissioner of Income Tax (Appeals) erred both in facts as well as in law, in observing that the function at Srilanka had no nexus with the purpose of the business carried on by the Appellant Company.

4) The Learned Commissioner of Income Tax (Appeals) erred both in facts as well as in law, in ignoring the facts that the video coverage, was all about the food supplement products dealt in by the Appellant Company. The entire exercise was meant for apprising the sales representatives with the details of food value of various ingredients of the products they were going to sell in the market.

5) The Learned Commissioner of Income Tax (Appeals) erred both in facts as well as in law, in ignoring the contents of the video coverage and concluded based mainly on the finding of the Assessing Officer.

6) The Learned Commissioner of Income Tax (Appeals) erred both in facts as well as in law, in ignoring the bills presented by the event manager/ travel agent in arranging the video coverage at Srilanka without recording any valid reason. Though the bill was drawn up in the name of M/s. Team Life Care Company (India) Private Limited, the Holding Company, the Appellant Company had an agreement with the holding company to pay for such bill.

7) The Learned Commissioner of Income Tax (Appeals) erred both in facts as well as in law, in not adjudicating on the veracity of the reasoning put forward by the Learned Assessing Officer in the Assessment Order in disallowing the part of expenses of Rs.1,04,23,246/- under the head 'sales promotion' and substituting the reasoning of the Learned Assessing Officer by his own estimate based on surmise and conjecture.

8) The Learned Commissioner of Income Tax (Appeals) erred both in facts as well as in law, in determining the allowance

of sales promotion expenditure based on his own estimate without bringing in any evidence on record and rejecting the bills and vouchers produced by the Appellant. In fact, as a result of the Learned Commissioner of Income Tax's observation, the amount of disallowance got enhanced by a sum of Rs.22,40,828/-, though no notice of enhancement was served.

9) The Learned Commissioner of Income Tax (Appeals) erred both in facts as well as in law, in determining the disallowance of sales promotion expenses on the basis of his own estimate and in deviation to the reasoning put forward by the Learned Assessing Officer in the Assessment Order.

10) The Learned Commissioner of Income Tax (Appeals) erred both in facts as well as in law, in rejecting the bill for payment towards sales promotion.

11) The Appellant craves leave to add and alter grounds of appeal during the course of hearing. ”

2. With regard to the disallowance of sales promotion expenditure amounting to Rs.62,53,938/-, the appellant has claimed to have incurred an expenditure of Rs.1,04,23,246/- towards 'sales promotion which was debited to the P&L account. The AO has taken into consideration the fact that the business activities of the appellant had commenced only on 21.12.2011 whereas the appellant has claimed to have spent a sum of Rs.87,88,429/- towards sales promotion by 29.12.2012. Accordingly, the AO was of the view that the amount of Rs.87,88,429/- could not have been spent towards sales promotion during the short time after commencement of the business of the company. Therefore, the AO held that 75% of the expenditure was incurred prior to the commencement of the business. Accordingly, 25% of the expenditure was allowed as deduction and 75% of the expenditure (Rs.78.17 lakhs) was treated as preoperative expenses. The AO has also allowed deduction of 1/5th of pre-operative expenses amounting to Rs.15,36,487/-, thereby resulting in net disallowance of Rs.62,53,938/-.

3. Before the CIT(Appeals), the appellant has claimed that it had entered into an agreement with the holding company for carrying out the marketing of the products traded by the appellant company including the sales and distribution of the products through its agents. It is claimed that for these activities, for every sale of Rs.2,000/- one point was allotted to the holding company for marketing the products, which was reimbursed at the rate of Rs.350/- per point. As per the details furnished, the appellant had claimed that during the year, the holding company has earned 23280 points. Accordingly, at the rate of Rs.350/-per point, the appellant has stated that the holding company had raised a bill of Rs.87,88,429/- for sales made up to February 2012 and a bill for Rs.1,98,952/- for March 2012. The appellant has also claimed that apart from this, various other sundry expenditures were incurred in connection with the sales promotion.

4. The CIT(Appeals) observed that the amount of Rs.1,04,23,246/- debited to the P&L account includes the bills for Rs.87.88 lakhs and Rs.1.98 lakhs, which were paid to the holding company. The balance amount includes various expenditures for amounts below Rs.20,000/-, which were incurred in cash. No evidence has been furnished to substantiate such cash expenditure. The expenditure debited also includes Rs.13.10 lakhs for which entries were passed by way of a journal entries and no evidence has been furnished to substantiate these expenditures. In this regard, he noted that the total sales of the company as reported in the financial statements for the year ending 31.03.2012 is found to be Rs.3.85 crores. The appellant claims to have incurred expenditure of Rs.104,23,246/- towards sales promotion, which accounts for approximately 26.70% of the total sales turnover. In the subsequent year i.e. 31.03.2013, the appellant has claimed to have incurred sales promotion expenses of Rs.2.58 crores against which the total sales was reported as Rs.3.53 crores. Thus, the amount of sales promotion expenditure incurred

is found to be approximately 67.30% of the total sales turnover. Thus the quantum of sales promotion expenditure incurred by appellant is found to be disproportionately high as compared to the total sales made during the year, for which the appellant has not furnished any justification.

5. The CIT(Appeals) further noted that payments for such expenditures have been made to the holding company and the specific services rendered by the holding company have not been clearly established. In fact the basis of allotting points in respect of the sales made and the basis for reimbursing the expenditure at the rate of Rs.350/- per point has not been substantiated by the appellant. Therefore, under the circumstances, the adequacy for making the payments to the holding company has not been established by the appellant company.

6. Considering these facts, according to the CIT(Appeals), the entire amount of Rs.1,04,23,246/- claimed as sales promotion expenditure, which is approximately 26.70% of the total sales turnover, cannot be allowed as deduction,. The appellant has not furnished any details with regard to the specific activities undertaken by the holding company for marketing the product of the appellant. Hence payment of sales promotion expenses at the rate of 5% of the sales turnover was found to be reasonable and adequate. For the year under consideration the total sales turnover has been reported at Rs.385,69,609/- and therefore, the allowable sales promotion expenditure at the rate of 5% is computed at Rs.19,28,480/-. Accordingly, the AO was directed to allow the same and add back the excess amount of Rs.84,94,766/-, in place of Rs.62,53,9381- disallowed in the assessment order.

7. We have heard both the parties on this issue and perused the material on record. In this case, the assessee claimed an amount of Rs.104,23,246 as expenditure incurred towards sales promotion. It is the

contention of assessee that it was incurred on launch of its products in Sri Lanka and it has to be allowed u/s. 37 of the Act. However, the AO observed that the assessee commenced business on 21.12.2011 and as on 29.12.2012 the assessee has claimed it has spent Rs.87,88,429 and for the next month i.e., March, 2012, it has expended Rs.1,98,952. The balance amount was spent in cash and the AO doubted the genuineness of the balance payment. However, he considered 75% of expenditure i.e., Rs.104,23,246 at Rs.78,17,245 as pre-operative expenses and out of this, he allowed 1/5th as revenue expenditure worked at Rs.15,36,4878. He disallowed the balance amount of Rs.62,53,938.

8. The CIT(Appeals) has observed that the total sales of assessee during the year was Rs.3.53 crores. Total expenditure under the head sales promotion expenses worked out at Rs.2.58 crores which worked out at 67.30% of total sales turnover. According to the CIT(A), it was very disproportionate as compared to the total sales of assessee in the assessment year under consideration. Even otherwise, an amount of Rs.104,23,246 which was claimed as sales promotion works out at 26.70% of total sales which is very unreasonable. He held maximum allowable expenditure under this head could be 5% of total sales of Rs.385,69,609 worked out at Rs.19,28,480. Accordingly he directed the AO to disallow Rs.84,94,766 instead of Rs.62,53,938 allowed by the AO and finally allowed Rs.19,28,480 out of Rs.104,23,246.

9. The first contention of the Id. AR is that this act of CIT(Appeals) amounts to enhancement of assessment which cannot be allowed. In our opinion, the implication of proposed action of CIT(Appeals) was brought to the notice of assessee at the time of proceedings before the CIT(A). Therefore, it is not correct to say that the CIT(Appeals) has not issued any show cause notice before making enhancement of disallowance. Since there is no statutory notice prescribed under the Act and the assessee has

been allowed full opportunity of hearing before enhancing the addition, there is no illegality in the action of the CIT(Appeals). Law only requires the assessee must be made aware of the proposed action of the CIT(Appeals) in enhancing the addition and explanation to be obtained and considered. In our opinion, the assessee has not brought anything to show that the enhancement of addition as made unilaterally by the CIT(Appeals). Thus, it has to be inferred that the assessee was duly put to notice before making the enhancement of income. Accordingly, this plea of the assessee is rejected.

10. Coming to the merits of the addition made by the CIT(Appeals), the assessee has failed to establish that such sales promotion expenditure was incurred wholly and exclusively for the purpose of business. There is no dispute about the fact that the assessee has not produced any written agreement between the assessee and beneficiary to incur this expenditure, though it was not mandatory, to claim this expenditure for the purpose of business. However, the assessee has to establish with documentary and cogent evidence that such expenditure was indeed incurred for the purpose of assessee's business. Before us the Id. AR for the assessee has not been able to lead any cogent evidence about the nature of services rendered by the beneficiary on this count. We have gone through the various expenditure details submitted by the assessee. Most of the details include hotel (lodging) and food bills and also car hiring charges. It was explained by the Id. AR that 320 employees of assessee went to Sri Lanka to launch its products and it is reflected in the video recorded by the assessee. The assessee submitted list of 320 persons stating that they are employees of the assessee company and went to Sri Lanka to launch the product of the company. However, there is no documentary evidence to show that 320 persons are employed by the assessee as the assessee has not filed any appointment orders or any correspondence of these persons

stated to be employees of assessee company. We have carefully gone through a Bill issued by Global Travels appearing in page 53 of PB. We failed to find out names of persons in this bill in the list of 320 persons submitted by the assessee. At page 47 of PB, the assessee has produced a Bill which says it is relating to expenses of Late Mr. Ramaswamy. It is not explained how this late Mr. Ramaswamy is connected to assessee company and what services were rendered during the period 11th to 13th October, 2011. The assessee has produced bill copy of car hiring charges of Rs.1,55,300 for pick-up and drop for 35 cars without mentioning names of persons travelled in the car and car numbers.

11. Further it is to be noted that the assessee has not been able to lead any evidence and explain what is the product launched by the assessee with reference to sales bill raised by the assessee in subsequent sales. There is no evidence about the enquiries received for the product during the course of launch or any product sold in that region subsequent to this launch. In such circumstances, it could not be presumed that the assessee has sold any product in this region where the alleged product launch took place. There is nothing on record to show that any sales increased during this alleged launch of product in Sri Lanka. In other words, there is no evidence whatsoever to support the claim of assessee that they have launched any product during this period so as to claim this expenditure as product launch expenses. Therefore, it cannot be said that the assessee has discharged its onus to prove that the expenditure was incurred wholly and exclusively for the purpose of business. There does not appear to be any trade practice undertaken by the assessee to launch the assessee's product in Sri Lanka. Since the assessee failed to establish that expenditure was incurred wholly and exclusively for the purpose of business, the same could not be allowed as business expenditure. In the absence of any evidence and material on record, we are of the view that

the assessee made attempts to claim some expenditure in Sri Lanka for some obvious purpose as sales promotion expenditure which cannot be allowed. The grounds of appeal by the assessee on this count are rejected.

12. In the result, the appeal of the assessee is dismissed.

Pronounced in the open court on this 12th day of August, 2021.

Sd/-
(N V VASUDEVAN)
VICE PRESIDENT

Sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Bangalore,
Dated, the 12th August, 2021.

/Desai S Murthy /

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.