

IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH, MUMBAI
BEFORE SHRI S RIFAUR RAHMAN, ACCOUNTANT MEMBER &
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 1219/Mum/2018
(A.Y: 2010-11)

Cipla Ltd., Cipla House, Peninsula Business Park, GK Mark, Lower Parel, Mumbai – 400 013	Vs.	DCIT CC-1(12) 9 th Floor, Old CGO Bldg, MK Road, Mumbai – 400020.
PAN/GIR No. : AAACC1450B		
Appellant	..	Respondent

Appellant by :	Shri. J.D. Mistry. AR
Respondent by :	Shri. V. Sreekar. DR Shri. Sanjay Sethi. DR

Date of Hearing	25.06.2021
Date of Pronouncement	20.09.2021

आदेश / O R D E R

PER PAVAN KUMAR GADALE, JM:

The assessee has filed the appeal against the order of the Commissioner of Income Tax (Appeals) -47, Mumbai, order passed u/s 148 r.w.s 147 and 250 of the Act. The assessee has raised the following grounds of appeal.

- 1. Merger of Order u/s 143(3) into order u/s 147 for issues which were already a part of order u/s 143(3) of the Act where there is a fresh material on same issue.*

The CIT(A) erred in holding that the AO has power to

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assess or reassess income that has escaped assessment involving matters which are the subject matters of proceedings referred to in the third proviso to Sec. 147 if any fresh materials have emerged in the course of the proceedings initiated u/s 147.

2. *Without prejudice, individual issues on material which were already a subject matter of order u/s 143(3) of the Act and again added back in the order u/s 147 of the Act, were not required to be dismissed.*

The Ld. CIT(A) erred in dismissing the individual issues on merits which were subject matter of proceedings referred to in the third proviso to Sec. 147.

3. *Claim in respect of profits derived from the business of part of the manufacturing activity carried out by outside parties on job work basis.*

Without prejudice, the Ld. CIT(A) has erred in dismissing the ground of appeal despite concluding that the Ld. AO has not brought any fresh material in relation to LLM issue and hence the AO is legally barred from making addition in the reassessment proceedings initiated u/s 147 of the Act.

4. *Disallowance of Rs. 8,68,24,374/- by relying on CBDT Circular No. 5/2012 r.w. Explanation 1 to Sec. 37(1)*

(a) The CIT(A) has erred in upholding disallowance of Rs. 8,68,24,374/- by relying on circular No. 5/2012 r.w. Explanation 1 to Sec. 37(1) of the Act towards amounts incurred by company for business expenditure on Marketing & Promotional Activity.

(b) The CIT(A) has erred in upholding that the regulations issued by Medical Council of India are also applicable to Pharmaceutical Companies apart from Doctors / Medical Practitioners. The CIT(A) ought to have appreciated that MCI regulation does not have any jurisdiction upon pharmaceutical companies and hence there cannot be any question of any violation of law / regulation for the same.

(c) Without prejudice to above, the CIT(A) has erred in

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upholding the disallowance without appreciating that the CBDT circular No. 5 of 2012 dated 01.08.2012 cannot be applied in a retrospective manner for the year under consideration.

(d) Without prejudice to above, the CIT(A) has erred in stating that the appellant has not been able to produce relevant documentary evidence to substantiate that the expenditure has been incurred wholly and exclusively for the purpose of business without allowing an opportunity to the appellant to produce the related evidence.

5. *Short Credit of taxes paid*

The CIT(A) has erred in law and on facts in concluding on the Ground as dismissed even though he has given direction to AO to allow appropriate credit for taxes paid after verification.

At the time of hearing, the Ld.AR of the assessee, submitted that the grounds of appeal no 1,2 & 3 are not pressed. Accordingly, these grounds of appeal are treated as withdrawn and are dismissed.

2. The Brief facts of the case are that the assessee company is engaged in manufacturing and sale of bulk drugs and pharmaceutical products namely formulations, tablets & Capsules, aerosols, injections / sterile solutions etc. The assessee company has filed the return of income electronically on 15.10.2010 for the A.Y 2009-10 declaring a total income of Rs. 611,84,99,609/-. Further, the assessee has filed the revised return of

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income on 09.12.2011 and the assessing officer has completed Assessement u/sec143(3) of the Act assessing the total income of Rs 1027,15,13,280/- and passed order dated 27/02/2012. Subsequently, there was survey u/s 133A of the Act was conducted on the assessee company on 06.03.2014. The A.O found that the assessee company has claimed expenses incurred by way of gifts, freebies, travel allowance, monetary grants or advantage in kind from pharmaceutical companies in contravention of MCI guidelines in 2009 amounting to Rs.8,68,24,374/-. Hence the A.O. has issued notice u/s 148 of the Act. In compliance the assessee has filed a letter dated 15.04.2015, to treat the return of income filed on 09.12.2011 as due compliance. The assessee has further requested for copy of the reasons recorded for the reopening of assessment u/s 147 of the Act and was provided to the assessee. The A.O. has issued notice u/sec143(2) and 142(1) of the Act along with the questionnaire. The Ld.AR of the assessee appeared from time to time and submitted the details and the case was discussed. The A.O. on perusal of profit & Loss account found that the assessee has claimed in selling and marketing expenses towards gifts/presentation articles and sponsored foreign trips /hotel stay. The A.O. relied on the circular issued by CBDT in August 2012 and

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guidelines issued by the Medical Council of India (MCI) in December 2009. The A.O. dealt on facts of selling & Distribution Expenses for 5 financial years. In the course of survey proceedings, the statement of Finance director was recorded referred at Para 12.1 of the order. The A.O. required the details of gifts/ presentation articles, sponsored foreign trips/hotel stay for various medical practitioners/doctors under freebees as per Para 6.8.1 of Medical Council of India (MCI) notification on "professional Conduct, Etiquette and Ethics Regulation 2002. The A.O. has referred to CBDT Circular No. 5/2012 dated 1.08.2012 at page 53 Para 12.2 of the order. The A.O. at Para 12.3 of the order dealt on provisions of sec37(1) of the Act and Explanations. Further the A.O. dealt on Question No. Q.53 recorded in statement u/sec131 of the Act in respect of expenses. Subsequently the assessee with the legal opinion, has filed a letter dated 21-4-2014 mentioning that the CBDT circular is effective from the date on which the circular was issued and not by the date on which MCI guidelines were amended. The assessee also filed letter dated 27-03-2015 with the juristic opinion on the claims. The A.O. dealt on the retraction statement of the assessee on allowability of claim of expenses and the applicability of CBDT Circular dated 1.08.2012 and Amendment in MCI

guidelines in the year 2009 and judicial decisions and the A.O. has not accepted the submissions of the assessee and finally observed at page 70 Para 14.9 of the order as under;-

'The submissions of the assessee is considered but cannot be accepted, as the expenses on doctors by way of freebees and gifts were allowed expenses u/s 37(1) being a business expenses till the Circular was issued. However, CBDT issued a circular No. 5/2012 in Aug 2012 clarifying that the said expenses will not be allowed u/s 37(1). The CBDT has issued the circular in the background of amendment in MCI guidelines. The MCI guidelines which was there since 2002 was amended in 2009. The medical professionals and their professional associations were barred from taking any gifts, freebees, travel allowance, money grants or any advantage in kind from pharmaceutical companies by the fresh amendment issued in Dec. 2009. So, any expenses incurred by the way of gifts, freebees, travel allowance, monetary grants or any advantage in kind from pharmaceutical companies are in contravention to be MCI guidelines in 2009 and so these expenses are hit by explanation of Sec 37 and became non allowable expenses. To further clarify the same Hon'ble CBDT issued a circular. So, the circular issued by the Hon'ble CBDT is clarificatory in

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nature and which clarified that the expenses incurred on doctors will not be allowed in the hands of pharmaceutical companies. As the MCI guidelines are amended from Dec. 2009, so the circular is effective from Dec. 2009. Accordingly the expenses claimed by the assessee company in different years at Rs. 269,57,57,193/- in respect of freebies given to the doctors is not allowable as deduction in the respective years. The said expenses in relation to current year amounts to Rs. 86,824,374/- and the same is disallowed and added back to the total income of the assessee.”

3. Finally the assessing officer made disallowances (i) weighted deduction U/sec 35(2AB) Rs.69,49,01,450/- (ii)Reduction in claim U/sec 10B Rs.31,20,36,983/- (iii) reduction in claim U/sec 80IB/80IC/80IE of Rs 2,85,06,07,040/- (iv) Foreign Travel Expenses of Rs 88,54,314/- (v) Balance in duty draw back pass book of Rs.28,44,74,457/- (vi) Bogus purchases of Rs.21,39,414/- and (vii) deduction u/sec37(1) r.w. circular 5/2012 and assessed the total income of Rs. 1035,83,37,650/- and passed u/s 143(3) and 147 of the Act on 22.06.2015.

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4. Aggrieved by the order of the A.O, the assessee has filed an appeal before the CIT(A). The CIT(A) considered the grounds of appeal, findings of the A.O and submissions of the assessee. The CIT(A) on the disputed issue of claim of marketing & promotional activity under the selling and distribution expenses u/sec. 37(1) has confirmed the addition by the assessing officer and granted relief in other grounds of appeal and partly allowed the assessee appeal. Aggrieved by the order the CIT(A), the assessee has filed an appeal with the Honble Tribunal..

5. At the time of hearing, the Ld. Counsel of the assessee submitted that the CIT(A) has erred in confirmation of disallowance of marketing & promotional expenses involved in the present appeal. Further, the Ld.AR substantiated the submissions with voluminous paper book and the judicial decisions as under :

1. *Max Hospital Pitampura Vs. MCI (Delhi HC).*
2. *Synocom Formulations ltd Vs. DCIT in ITA No. 6429 & 6428/Mum/2012.*
3. *UCB Ind Pvt ltd. Vs. ITO (ITA No. 6681/M/2013).*
4. *DCIT Vs. PHL Pharma Ltd. in ITA No. 4605/Mum/2014.*

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5. *Dr. Reddy's Laboratories Vs. ACIT (ITA No. 294/Hyd/2014 & 458/Hyd/2015)*
6. *Solvay Pharma India Ltd., Vs. PCIT in ITA No. 3585/M/2016.*
7. *India Medtronics Pvt Ltd., DCIT (ITA No. 1600/M/16).*
8. *Aristo Pharmaceuticals Pvt Ltd., ACIT (ITA No. 5553 & 6129/M/2014)*
9. *ACIT Vs Novartis Healthcare Pvt Ltd., (ITA No. 2590/M/2016 & Co. 2786/M/16).*
10. *Liva healthcare Ltd. Vs. ACIT in ITA No. 4791/M/14.*
11. *Aristo Pharmaceuticals Pvt Ltd. Vs. ACIT in ITA No. 1104/M/2018 & others.*
12. *DCIT Vs. Bayer Pharmaceuticals Pvt Ltd, ITA No. 6222/M/2018.*

6. Contra, the Ld. DR, on the other hand, relied on the order of the CIT(A).

7. We have heard the submissions of both the parties and perused the material on record. At the time of hearing the Ld. AR of the assessee has not pressed the ground of appeal Nos. 1 to 3, therefore the said grounds of appeal are dismissed as not pressed. The sole crux of the disputed issue is with regard to disallowance of Rs.

8,68,24,374/- by relying on CBDT Circular No. 5/2012 r.w explanation 1 to Sec. 37(1) of the Act. We observed that identical issue has been decided by the Coordinate Bench of the Hon'ble Tribunal in favour of the assessee in the case of M/s. Aristo Pharmaceuticals Pvt Ltd Vs. ACIT in ITA No.5807/Mum/2017, dated 28.06.2019 has observed at para 8 of the Hon'ble Tribunal order which is read as under:

“8. We have heard both the parties, perused the material available on record and gone through the orders of authorities below. The issue involved in the present appeal, i.e. whether freebies distributed to medical professionals by a pharmaceutical company is allowable u/s 37(1) of the Act or not in light of circular issued by MCI was subject matter of deliberations by the co-ordinate bench of ITAT, Mumbai Bench “A” in assessee’s own case for AY 2011-12. The co-ordinate bench, after considering various aspects including the circular issued by MCI and also circular of CBDT vide circular No.5 of 2012 held that the assessee was entitled for claim of sales promotion expenses incurred on distribution of articles to the stockists, distributors, dealers and doctors. The relevant findings of the Tribunal are as under:-

“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 9 Aristo Pharmaceuticals P Ltd 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 “Expressio Unius Est Exclusio Alterius”, 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 freebies 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 freebess (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 12 Aristo Pharmaceuticals P Ltd 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.

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 13 Aristo Pharmaceuticals P Ltd 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.

24. Alternatively, we are of the considered view that it is a trite law that a CBDT Circular which creates a burden or liability or imposes a new kind of imparity, cannot be reckoned retrospectively. We are of the considered view that though a benevolent circular may apply retrospectively, but a circular imposing a burden has to be apply prospectively only. Our aforesaid view is fortified by the judgment of the Hon'ble Supreme Court in the case of Director of Income-tax Vs. S.R.M.B Dairy Farming Pvt. Ltd. (2018) 400 ITR 9 (SC). The Hon'ble Apex Court in its aforesaid judgment has held that beneficial circulars had to be applied retrospectively, while oppressive circulars had to be applied prospectively, observing as under:

“25. It is in this context, the question arises, when the instruction expressly states that the benefit of the said policy is prospective, still can the courts place a construction on such instruction so as to make it retrospective. In this context, the apex court in the case of CCE v. Mysore Electricals Industries Ltd. reported in [2006] 204 ELT 517 (SC) : [2007] 8 RC 1, dealing with the question how a beneficial circular is to be construed, has approached this question in the following manner. At paragraph 13 of the judgment, it is stated that the learned counsel further submitted that the circular being oppressive and against the respondent, has to apply only prospectively and cannot be applied retrospectively. In other words, a beneficial circular has to be applied prospectively. Thus, when the circular is against the assessee they have a right to claim the enforcement of the same prospectively. It is further submitted that for the period in question, trade notices had been issued classifying the circuit breakers under heading No. 85.35 or 85.36. When the approved classification was proposed to be revised to reclassify the single panel circuit breakers under heading No.85.37 of the tariff, such reclassification can take effect only prospectively from the date of communication of the show-cause notice proposing reclassification.”

We find that the aforesaid CBDT Circular No. 5/2012, dated 01.08.2012 had come up for consideration before a coordinate bench of the Tribunal in the case of DCIT Vs. PHL Pharma (P) Ltd. (2017) 49 CCH 124 (Mum), wherein the Tribunal after deliberating at length on two aspects viz. (i) validity of the circular in the backdrop of enlargement of scope of MCI regulation to the pharmaceutical companies by the CBDT, without any enabling 15 Aristo Pharmaceuticals P Ltd provisions either under the Income Tax Law or under the Indian Medical Council Regulations; and (ii). the prospective applicability of the circular, had observed as under:

“5. We have considered the rival contentions made by ld. CIT DR as well as ld. Sr. Counsel, Mr J.D. Mistry, perused the relevant finding given in the impugned orders and material referred to before us. The entire controversy revolves around, whether the expenditures in question incurred by the assessee (a pharmaceutical company) is hit by Explanation 1 below section 37(1) in view of CBDT Circular dated 01.08.2012, interpreting the amendment dated 10.12.2009 brought in Indian Medical Council Regulation 2002 or not. The break-up of sales promotion expenses, which has been disallowed by the AO, are as under: Sr.No Particulars of expenses Amount (in Rs.) 1 Customer Relationship Management expenses (CRM) 7,61,96,260 2 Key Account Management expenses(KAM) 2,56,68,509 3 Gift Articles 9,20,22,518 4 Cost of samples 3,60,85,320 Total 22,99,72,60 7/-

The nature of aforesaid expenses has already been explained above. Now whether the nature of such expenditure incurred by the assessee is to be disallowed in view of the CBDT Circular dated 01.08.2012. For the sake of ready reference, the said CBDT Circular No.5/2012 is reproduced hereunder:

“INADMISSIBILITY OF EXPENSES INCURRED IN PROVIDING FREEBEEES 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 freebees (freebies) to medical practitioners 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, 16 Aristo Pharmaceuticals P Ltd 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 expense, 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.”

From the perusal of the aforesaid Board Circular, it can be seen that heavy reliance has been placed by the CBDT on the Circulars issued by the Medical Council of India, which is the regulatory body constituted under the ‘Medical Council Act, 1956’. One such regulation has been issued is “Indian Medical Council Professional Conduct, Etiquette and Ethics) Regulations, 2002”. The said regulation deals with the professional conduct, etiquette and ethics for registered medical practitioners only. Chapter 6 of the said regulation/notification deals with unethical acts, whereby a physician or medical practitioners shall not aid or abet or commit any of the acts illustrated in clause 6.1 to 6.7 of the said regulation which shall be construed as unethical. Clause 6.8 has been added (by way of amendment dated 10.12.2009) in terms of notification published on 14.12.2009 in Gazette of India. The said clause reads as under:-

“6.8 Code of conduct for doctors and professional association of doctors in their relationship with pharmaceutical and allied health sector industry.

6.8.1 In dealing with Pharmaceutical and allied health sector industry, a medical practitioner shall follow and adhere to the stipulations given below:

a) Gifts: A medical practitioner shall not receive any gift from any pharmaceutical or allied health care industry and their sales people or representatives.

b) Travel facilities: A medical practitioner shall not accept a any travel facility inside the country or outside, including rail,

air, ship, cruise tickets, paid vacations etc. from any pharmaceutical or allied healthcare industry or their 17 Aristo Pharmaceuticals P Ltd representatives for self and family members for vacation or for attending conferences, seminars, workshops, CME programme etc as a delegate.

c) *Hospitality*: A medical practitioner shall not accept individually any hospitality like hotel accommodation for self and family members under any pretext.

d) *Cash or monetary grants*: A medical practitioner shall not receive any cash or monetary grants from any pharmaceutical and allied healthcare industry for individual purpose in individual capacity under any pretext. Funding for medical research, study etc. can only be received through approved institutions by modalities laid down by law / rules / guidelines adopted by such approved institutions, in a transparent manner. It shall always be fully disclosed.

e) *Medical Research*: A medical practitioner may carry out, participate in work, in research projects funded by pharmaceutical and allied healthcare industries. A medical practitioner is obliged to know that the fulfilment of the following items:

(i) to (vii) will be an imperative for undertaking any research assignment / project funded by industry for being proper and ethical. Thus, in accepting such a position a medical practitioner shall:-

(i) Ensure that the particular research proposal(s) has the due permission from the competent concerned authorities.

(ii) Ensure that such a research project(s) has the clearance of national/ state / institutional ethics committees / bodies.

(iii) Ensure that it fulfils all the legal requirements prescribed for medical research.

(iv) Ensure that the source and amount of funding is publicly disclosed at the beginning itself.

(v) Ensure that proper care and facilities are provided to human volunteers, if they are necessary for the research project(s).

(vi) Ensure that undue animal experimentations are not done and when these are necessary they are done in a scientific and a humane way.

(vii) Ensure that while accepting such an assignment a medical practitioner shall have the freedom to publish the results of the research in the greater interest of the society by inserting such a clause in the MoU or any other document / agreement for any such assignment.

f) *Maintaining Professional Autonomy:* In dealing with pharmaceutical and allied healthcare industry a medical practitioner shall always ensure that there shall never be any compromise either with his / her own professional autonomy and / or with the autonomy and freedom of the medical institution.

g) *Affiliation:* A medical practitioner may work for pharmaceutical and allied healthcare industries in advisory capacities, as consultants, as researchers, as treating doctors or in any other professional capacity. In doing so, a medical practitioner shall always: (i) Ensure that his professional integrity and freedom are maintained. (ii) Ensure that patients' interests are not compromised in any way. (iii) Ensure that such affiliations are within the law. (iv) Ensure that such affiliations / employments are fully transparent and disclosed. 18 Aristo Pharmaceuticals P Ltd h) *Endorsement:* A medical practitioner shall not endorse any drug or product of the industry publically. Any study conducted on the efficacy or otherwise of such products shall be presented to and / or through appropriate scientific bodies or published in appropriate scientific journals in a proper way”.

6. On a plain reading of the aforesaid notification, which has been heavily relied upon by the department, it is quite apparent that the code of conduct enshrined therein is meant to be followed and adhered by medical practitioners/doctors alone. It illustrates the various kinds of conduct or activities which a medical practitioner should avoid while dealing with pharmaceutical companies and allied health sector industry. It

provides guidelines to the medical practitioners of their ethical codes and moral conduct. Nowhere the regulation or the notification mentions that such a regulation or code of conduct will cover pharmaceutical companies or health care sector in any manner. The department has not brought anything on record to show that the aforesaid regulation issued by Medical Council of India is meant for pharmaceutical companies in any manner. On the contrary, before us the learned senior counsel, Shri Mistry brought to our notice the judgment of Hon'ble Delhi High Court in the case of Max Hospital vs. MCI in WPC 1334/2013 judgment dated 10.01.2014, wherein the Medical Council of India admitted that the Indian Medical Council Regulation of 2002 has jurisdiction to take action only against the medical practitioners and not to health sector industry. Relevant portion of the said judgment reads as under:

"6. The Petitioner's grievance is twofold. Firstly, that since the Medical Council of India (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (the Regulations) have been framed in exercise of the power conferred under Section 20-A read with Section 33 (m) of the Indian Medical Council Act, 1956, these regulations do not govern or have any concern with the facilities, infrastructure or running of the Hospitals and secondly, that the Ethics Committee of the MCI acting under the Regulations had no jurisdiction to pass any direction or judgment on the infrastructure of any hospital which power rests solely with the concerned State Govt. The case of the Petitioner is that the Petitioner hospital is governed by the Delhi Nursing Homes Registration Act, 1953. It is urged that in fact, an inspection was also carried out on 22.07.2011 by Dr. R.N. Dass, Medical Superintendent (Nursing Home) under the Directorate of Health Services, Govt. of NCT of Delhi and the necessary equipments and facilities were found to be in order which negates the observations dated 27.10.2012 of the Ethics Committee of the MCI. It is also the plea of the Petitioner hospital that the Petitioner was not provided an opportunity of being heard and thus the principles of natural justice were violated.

7. In the counter affidavit filed by the Respondents, it is not disputed that the MCI under the 2002 Regulations has jurisdiction limited to taking action only against the registered medical practitioners. Its plea however, is that it has not passed any order against the Petitioner hospital therefore; the Petitioner cannot have any grievance against the impugned order.

8. It is clearly admitted by the Respondent that it has no jurisdiction to pass any order against the Petitioner hospital under the 2002 Regulations. In fact, it is stated that it has not passed any order against the Petitioner hospital.

Thus, I need not go into the question whether the adequate infrastructure facilities for appropriate post-operative care were in fact in existence or not in the Petitioner hospital and whether the principles of natural justice had been followed or not while passing the impugned order. Suffice it to say that the observations dated 27.10.2012 made by the Ethics Committee do reflect upon the infrastructure facilities available in the Petitioner hospital and since it had no jurisdiction to go into the same, the observations were uncalled for and cannot be sustained. " [Emphasis added is ours] From the aforesaid decision, it is ostensibly clear that the Medical Council of India has no jurisdiction to pass any order or regulation against any hospital or any health care sector under its 2002 regulation. So once the Indian Medical Council Regulation does not have any jurisdiction nor has any authority under law upon the pharmaceutical company or any allied health sector industry, then such a regulation cannot have any prohibitory effect on the pharmaceutical company like the assessee. If Medical Council regulation does not have any jurisdiction upon pharmaceutical companies and it is inapplicable upon Pharma companies like assessee then, where is the violation of any of law/regulation? Under which provision there is any offence or violation in incurring of such kind of expenditure. The relevant provision of section 37(1) reads as under: "(1) Any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the

nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the heads "profits and gains of business or profession" Explanation 1 – For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure." The aforesaid provision applies to an assessee who is claiming deduction of expenditure while computing his business income. The Explanation provides an embargo upon allowing any expenditure incurred by the assessee for any purpose which is an offence or which is prohibited by law. This means that there should be an offence by an assessee who is claiming the expenditure or there is any kind of prohibition by law which is applicable to the assessee. Here in this case, no such offence of law has been brought on record, which prohibits the pharmaceutical company not to incur any development or sales promotion expenses. A law which is applicable to different class of persons or particular category of assessee, same cannot be made applicable to all. The regulation of 2002 issued by the Medical Council of India (supra), provides limitation/curb/prohibition for medical practitioners only and not for pharmaceutical companies. Here the maxim of "Expressio Unius Est Exclusio Alterius" is clearly applicable, that is, if a particular expression in the statute is expressly stated for 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 assessee. If the Medical Council regulation is applicable to medical practitioners then it cannot be made applicable to Pharma or allied health care companies. If section 37(1) is applicable to an assessee claiming the expense then by implication, any impairment caused by Explanation1 will apply to that assessee only. Any impairment or prohibition by any law/regulation on a 7. Before us the learned CIT DR strongly

relied upon the fact that CBDT Circular, while clarifying the applicability of Explanation 1 to section 37(1) on medical practitioners and pharmaceutical companies have interpreted that Indian Medical Council Regulation is applicable for pharmaceutical companies also. He also brought to our notice that another notification was issued by Indian Medical Council which was published on 01.12.2016 which further prohibits such kind of embargo on medical practitioners and have added para 6.8.1 and also given instances of action which shall be taken upon medical practitioners. The relevant clause of the said notification as relied upon by him is reproduced hereunder:

*6.8. Code of conduct for doctors in their relationship with pharmaceutical and allied health sector industry
The Section 68.1(b) shall be substituted in terms of Notification published on 01.02.2016 in Gazette of India, as under:*

(b) Travel facilities: A medical practitioner shall not accept any travel facility inside the country or outside, including rail, road, air, ship, cruise tickets, paid vacation, etc., from any pharmaceutical or allied healthcare industry or their representatives for self and family members for vacation or for attending conferences, seminars, workshops, CME Programme etc. as a delegate (iii) Action to be taken by the Council for violation of section 6.8 as amended vide notification dated 10/12/2009, shall be prescribed by further amending the Section 6.8.1 as under:-

SECTION ACTI ON 6.8.1 In dealing with pharmaceutical and allied health sector industry, a medical practitioner shall follow and adhere to the stipulations given below: - a) Gifts: A medical practitioner shall not receive any gift from any pharmaceutical or allied health care industry and their sales people or representatives; Gifts more than Rs. 1,000/ - upto Rs. 5,000/- : Censure Gifts more than Rs. 5,000/- upto Rs. 10,000/- : Removal from Indian Medical Register or State

Medical Register for 3 (three) months Gifts more than Rs. 10,000/ - to Rs. 50,000/- : Removal from Indian Medical Register or State Medical Register for 6(six) months. 21 Aristo Pharmaceuticals P Ltd Gifts more than Rs. 50,000/- to Rs. 1,00,000/ - : Removal from Indian Medical Register or State Medical Register for 1 (one) year. Gifts more than Rs. 1,00,000/ - : Removal for a period of more than 1 (one) year from Indian Medical Register or State Medical Register b) Travel facilities: A medical practitioner shall not accept any travel facility inside the country or outside, including rail, road, air, ship, cruise tickets, paid vacations etc. from any pharmaceutical or allied healthcare industry or their representatives for self and family members for vacation or for attending conferences, seminars, workshops, CME programme etc. as a delegate. Expenses for travel facilities more than Rs. 1,000/ - upto Rs. 5,000/ -: Censure Expenses for travel facilities more than Rs. 5,000/-upto Rs. 10,000/-: Removal from Indian Medical Register or State Medical Register for 3 (three) months. Expenses for travel facilities more than Rs.10,000/-to Rs. 50,000/-: Removal from Indian Medical Register or State medical Register for 6 (six) months. Expenses for travel facilities more than more than Rs. 50,000/- to Rs. 1,00,000/-: Removal from Indian Medical Register or State Medical Register for 1 (one) year. Expenses for travel facilities more than Rs. 1,00,000/-: Removal for a period of more than 1 (one) year from Indian Medical Register or State Medical Register 22 Aristo Pharmaceuticals P Ltd c) Hospitality: A medical practitioner shall not accept individually any hospitality like hotel accommodation for self and family members under any pretext. Expenses for Hospitality more than Rs. 1,000/-upto Rs. 5,000/-: Censure Expenses for Hospitality more than Rs. 5,000/-upto Rs. 10,000/-: Removal from Indian Medical Register or State Medical Register for 3 (three) months. Expenses for Hospitality more than Rs. 10,000/-to Rs. 50,000/-: Removal from Indian Medical Register or State medical Register for 6 (six) months. Expenses for Hospitality more than more than Rs. 50,000/-to Rs. 1,00,000/: Removal from Indian Medical Register or State

Medical Register for 1 (one) year. Expenses for Hospitality more than Rs. 1,00,000/-: Removal for a period of more than 1 (one) year from Indian Medical Register or State Medical Register. d) Cash or monetary grants:- A medical practitioner shall not receive any cash or monetary grants from any pharmaceutical and allied healthcare industry for individual purpose in individual capacity under any pretext. Funding for medical research, study etc. can only be received through approved institutions by modalities laid down by law / rules / guidelines adopted by such approved institutions, in a transparent manner. It shall always be fully disclosed Cash or monetary grants more than Rs. 1,000/-upto Rs. 5,000/-: Censure. Cash or monetary grants more than Rs. 5,000/-upto Rs.10,000/-: Removal from Indian Medical Register or State Medical Register for 3 (three) months. Cash or monetary grants more than Rs.10,000/-to Rs. 50,000/-: Removal from Indian Medical Register or State Medical Register for 6 (six) months. 23 Aristo Pharmaceuticals P Ltd Cash or monetary grants more than more than Rs. 50,000/-to Rs. 1,00,000/-: Removal from Indian Medical Register or State Medical Register for 1 (one) year. Cash or monetary grants more than Rs. 1,00,000/-: Removal for a period of more than 1 (one) year from Indian Medical Register or State Medical Register.

From the aforesaid notification, ld. CIT DR submitted that so many violations and censures have been prescribed for any expenditures/ or benefit given to doctors, thus, violation of such guidelines for incurring such kind of expenditures cannot be held to be allowable expenditure. CBDT is well within its power to clarify and interpret the law and prohibit allowance of any expenditure which violates any statute or is in nature of offence.

8. From a perusal of above amendment/notification in the MCI regulation, it is quite clear again that same is applicable for medical practitioners only and the censure/action which has been suggested by it is only on medical practitioners and not for pharmaceutical companies or allied health sector industries. The violation of the aforesaid regulation would not

only ensure a removal of a doctor from the Indian Medical Register or State Medical Register for a certain period of time and it does not impinge upon the conduct of pharmaceutical companies. This important distinction has to be kept in mind that regulation issued by Medical Council of India is qua the doctors/medical practitioners and not for the pharmaceutical companies. As a logical corollary to it, if there is any violation or prohibition as per MCI regulation in terms of section 37(1) r.w.Explanation1, then it is only meant for medical practitioners and not for pharmaceutical company (Assessee Company) for claiming the expenditure.

9. Adverting to the contention of the Ld. CIT DR that CBDT is well empowered to issue such clarification, it is seen that the CBDT Circular dated 01.08.2012 (supra) in its clarification has enlarged the scope and applicability of 'Indian Medical Council Regulation 2002' by making it applicable to the pharmaceutical companies or allied health care sector industries. Such an enlargement of scope of MCI regulation to the pharmaceutical companies by the CBDT is without any enabling provisions either under the provisions of Income Tax Law or by any provisions under the Indian Medical Council Regulations. The CBDT cannot provide casus omissus to a statute or notification or any regulation which has not been expressly provided therein. The CBDT can tone down the rigours of law and ensure a fair enforcement of the provisions by issuing circulars and by clarifying the statutory provisions. CBDT circulars act like 'contemporanea expositio' in interpreting the statutory provisions and to ascertain the true meaning enunciated at the time when statute was enacted. However the CBDT in its power cannot create a new impairment adverse to an assessee or to a class of assessee without any sanction of law. The circular issued by the CBDT must confirm to tax laws and 24 Aristo Pharmaceuticals P Ltd for purpose of giving administrative relief or for clarifying the provisions of law and cannot impose a burden on the assessee, leave alone creating a new burden by enlarging the scope of a different regulation issued under a different act so as to impose any kind of hardship or liability to the assessee.

In any case, it is trite law that the CBDT circular which creates a burden or liability or imposes a new kind of imparity, same cannot be reckoned retrospectively. The beneficial circular may apply retrospectively but a circular imposing a burden has to be applied prospectively only. Here in this case the CBDT has enlarged the scope of 'Indian Medical Council Regulation, 2002' and made it applicable for the pharmaceutical companies. Therefore, such a CBDT circular cannot be reckoned to have retrospective effect. The same CBDT circular had come up for consideration before the co-ordinate Bench of the ITAT, Mumbai Bench in the case of Syncom Formulations (I) Ltd. (in ITA Nos. 6429 & 6428/Mum/2012 for A.Ys. 2010-11 and 2011-12, vide order dated 23.12.2015), wherein Tribunal held that CBDT circular would not be not be applicable in the A.Ys. 2010-11 and 2011-12 as it was introduced w.e.f. 1.8.2012.

10. From the perusal of the nature of expenditure incurred by the assessee, it is seen that under the head "Customer Relationship Management", the assessee arranges national level seminar and discussion panels of eminent doctors and inviting of other doctors to participate in the seminars on a topic related to therapeutic area. It arranges lectures and sponsors knowledge upgrade course which helps pharmaceutical companies to make aware of the products and medicines manufactured and launched by it. Under Key Account Management, the assessee makes endeavour to create awareness amongst certain class of key doctors about the products of the assessee and the new developments taking place in the area of medicine and providing correct diagnosis and treatment of the patients. The said activities by the assessee are to make the doctors aware of its products and research work carried out by it for bringing the medicine in the market and its results are based on several levels of tests and approvals. Unless the pharmaceutical companies make aware of such kind of products to key doctors or medical practitioners, then only it can successfully launch its products/medicines. This kind of expenditure is definitely in

the nature of sales and business promotion, which has to be allowed.

Coming to the gift articles and free samples of medicines, it is seen that the assessee gives various kind of articles like, diaries, pen sets, calendars, paper weights, injection boxes etc. embossed with bold logo of its brand name and the product name so that the doctors remembers the brand of the assessee and also the name of the medicine. All the gift articles, as pointed out by the assessee before the authorities below and also before us are very cheap and low cast articles which bears the name of assessee and it is purely for the promotion of its product, brand reminder, etc. These articles cannot be reckoned as freebies given to the doctors. Even the free sample of medicine is only to prove the efficacy and to establish the trust of the doctors on the quality of the drugs. This again cannot be reckoned as freebies given to the doctors but for promotion of its products. The pharmaceutical company, which is engaged in manufacturing and marketing of pharmaceutical products, can promote its sale and brand only by arranging seminars, conferences and thereby creating awareness amongst doctors about the new research in the medical field and therapeutic areas, etc. Every day there are new developments taking place around the world in the area of medicine and therapeutic, hence in order to provide correct diagnosis and treatment of the 25 Aristo Pharmaceuticals P Ltd patients, it is imperative that the doctors should keep themselves updated with the latest developments in the medicine and the main object of such conferences and seminars is to update the doctors of the latest developments, which is beneficial to the doctors in treating the patients as well as the pharmaceutical companies. Further as pointed out and concluded by the learned CIT(A) there is no violation by the assessee in so far as giving any kind of freebies to the medical practitioners. Thus, such kind of expenditures by a pharmaceutical companies are purely for business purpose which has to be allowed as business expenditure and is not impaired by EXPLANATION 1 to section 37(1).

11. Before us, the Ld. CIT DR has also much harped upon the decision of the Hon'ble Himachal Pradesh High Court in the case of Confederation of Indian Pharmaceutical Industry (SS) vs. CBDT (supra), in support of the argument that CBDT Circular has been approved and confirmed by the High Court and therefore, it has a huge binding precedence. From the perusal of the said judgment of the Hon'ble High Court, it is seen that in that case the validity of Circular No.5/12 dated 1.8.2012 was challenged. The Hon'ble High Court though upheld the validity of the said circular but with a rider that if the assessee satisfies the assessing authority that the expenditure is not in violation of the regulation framed by the medical council, then it may legitimately claim the deduction. The assessee has to satisfy the AO that the expenditure is not in violation of the Medical Council regulation. Thus, if the assessee brings out that the MCI regulation is not applicable to the assessee before the AO, the same cannot be applied blindly.

12. At the time of hearing, our attention was also drawn to the decision of Tribunal of our Co-ordinate Bench in the case of 'Liva Healthcare Limited ITA Nos. 904 & 945/Mum/2013', decided vide order dated 12.09.2016. In counter, to this decision the learned counsel, Shri JD Mistry distinguished the said judgment and submitted that the facts of the case in the Liva Healthcare (supra) were substantially different from the facts of the present case. In the case of Liva Healthcare, the Hon'ble Tribunal disallowed such expenses u/s. 37(1) of the Act on the ground that they were not incurred wholly and exclusively for the purpose of business as the same were incurred to create good relations with the doctors in lieu of expected favours from doctors for recommending to the patients the pharmaceutical products dealt with by the company to generate more and more business and profits for the assessee company. The Tribunal also recorded the fact that the spouse of the doctors also accompanied the doctors for overseas trips to Istanbul and expenses were incurred for

cruise travels to island, gala dinner, cocktails, gala entertainment etc. of such doctors. In assessee's case it is an admitted fact that expenses have not been incurred for the purpose personal benefit/enjoyment of the doctors or their spouses. In the case of Liva, the question as to whether such IMC Regulations can be applicable to Pharma Companies was not argued before the Hon'ble Bench. He reiterated that the Hon'ble Delhi High Court in the case of Max Hospital (supra) and the Jurisdictional Tribunal in the case of Syncom (supra) have held that such IMC Regulations apply only to medical practitioners. He further submitted that the Tribunal in the case of ACIT vs. Liva Healthcare Ltd. (ITA 847/Mum/2012) for A.Y. 2008-09, has decided similar issue in favour of the assessee. However, in A.Y. 2009-10, Hon'ble Tribunal while noting the fact that consistency has to be adopted, distinguished the order of A.Y. 2008-09 as under:

The assessee has contended that in the immediately preceding assessment year the Tribunal has decided the issue in favour of the assessee in ITA NO. 388/Mum/2012 for assessment year 2008-09. In our considered view, principles of Res judicata is not applicable to income tax proceedings although we are fully agreeable that principles of consistency is to be maintained (Hon'ble Supreme Court decision in Radha Soami Satsang v. CIT (1992) 193 ITR 321 (SC) but in the instant assessment year, we have observed that these overseas trips for Doctors and their spouses were organized by the assessee whereby no details of the contents of seminar, if any conducted by the assessee overseas has been brought on record and also even the spouses accompanied the Doctors to the overseas trip which included cruise visit to island, gala dinners, cocktail, gala entertainment etc. rather than being directed towards seminar for product information dissemination or directed towards knowledge enhancement or knowledge sharing oriented as no details of seminar and its course content is brought on record rather the trip is directed towards leisure and entertainment of Doctors and their spouses which in our view appears to be clearly a

distinguishable feature in this year enabling us to take a divergent view and the expenses incurred by the assessee cannot be allowed as business expenditure u/s. 37 of the Act as it is clearly hit by explanation to Section 37 of the Act being against public policy as unethical prohibited by law. In view of the above, he pointed out that in the above decision for A.Y. 2009- 10 in the case of Liva Healthcare, there was a specific finding of a fact that no details have been filed with respect to any seminar has been conducted for doctors and that the trips were directed towards leisure and entertainment of doctors and their spouses. This was a distinguishable feature for the Hon'ble Tribunal to take a contrary view from A.Y. 2008-09. He further submitted that the Hon'ble Tribunal in the case of Liva Healthcare Ltd. vs. ACIT (ITA No. 4791/Mum/2014) for A.Y. 2010-11 has followed the decision of Liva Healthcare (supra) for A.Y. 2008-09 and has decided this issue in favour of the assessee. This, further brings out the fact that the Hon'ble Tribunal disallowed the expenses u/s. 37(1) of the Act in the case of Liva Healthcare for A.Y. 2009-10 only on the ground that the same were not incurred wholly and exclusively for the purpose of business.

13. Apart from the aforesaid distinguishing features as highlighted by the learned senior counsel, we find that on the facts itself in the case of Liva Healthcare (2009-2010) (supra), there was a clear cut material on record that the Doctors along with their spouses were taken to foreign tours and cruise travel etc., in lieu of expected favours from doctors. In the light of these facts and material the Tribunal has decided the issue against the assessee by not following the earlier year precedence and subsequent year orders of the same assessee. As brought on record before us, we find that similar issue of allowance of such expenditure in the case of pharmaceutical companies has been decided in favour of the assessee, in the case of UCB India Pvt. Ltd. v. ITO (ITA No. 6681/Mum/2013 order dated 13.05.2016, wherein it was held that CBDT circular cannot have a retrospective effect. This judgment was lost sight of by the bench. In any case on careful perusal of

the Tribunal order in the case of Liva Healthcare (supra) we find that the Tribunal though has incorporated the relevant provisions and clauses of the 'Indian Medical Council Regulation 2002', however, has not elaborated or dwell upon as to how this MCI regulation which is strictly meant for medical practitioners and doctors can be made applicable to pharmaceutical companies. There has to be some enabling provision or specific clause in the said regulation whereby the pharmaceutical companies are barred from conducting seminars or conferences by sponsoring the doctors. The entire conduct relates to doctors and medical practitioners and lists out the censures and fines imposed upon them. What has not been provided in the MCI regulation cannot be supplied either by the court or by the CBDT. There has to be express provision under the law whereby pharmaceutical companies are prohibited to conduct conferences or seminar or give free samples. In the Tribunal decision of Liva Healthcare, strong reference has been made to Hon'ble Himachal Pradesh High Court (supra), that the said CBDT circular has been upheld. On this aspect we have already discussed in detail herein above that, firstly, High Court itself carves out a rider that assessee is free to demonstrate before the AO that this circular is not applicable on facts of the case; and secondly, CBDT circular which creates new impairment and imposes disallowability not envisaged in any of the Act or regulation cannot be reckoned to be retrospective. Another strong reference has been made to the decision of Hon'ble Punjab & Haryana High Court in the case of CIT vs. Kap Scan and Diagnostic Centre (P.) Ltd. [2012] 25 taxmann.com 92, wherein commission was paid to the private doctors for referring the patients for diagnosis to the assessee company. In background of these facts and issues involved, the Hon'ble High Court held that said payment of commission is wrong and is opposed to be a public policy. It should be discouraged as it is not a fair practice. The ratio of said decision cannot be applied on the facts of the present case because there is no violation of any law or anything which is opposed to public policy. Similarly, there is reference to the decision of Hon'ble

Supreme Court in the case of Eskayef (Now Known as Smithkline Beecham) Pharmaceuticals (India) Limited v. CIT (2000) 111 Taxman 561(SC), which was given in context of Section 37(3A) of the Act. In the said case the assessee had claimed expenditure on distribution of physician's samples u/s. 37. In the background of such claim the Hon'ble Apex court held that, if the expenditure falls within the bare minimum it will not be caught by subsection (3A) of section 37. On the contrary, the Hon'ble Apex Court observed that physicians samples are necessary to ascertain the efficacy of medicine and introduce it in the market for circulation and it is only by this method the purpose is achieved. In such cases giving a physician samples for reasonable period is essential to the business of manufacture and sale of medicine. It is only if a particular medicine has been introduced by the market and its uses are established then giving of free samples could only be the measure of sale/ promotion and development would thus be hit by subsection (3A). Said decision no way prohibits the nature of expenditure which has been incurred in the case of the assessee. Therefore, such a reference to a Hon'ble Apex Court decision is not germane to the issue involved. Thus, in our opinion, the aforesaid decision of this Tribunal is clearly distinguishable and cannot be held to be applicable and also we have already given our independent finding as to allowability of expenses in the hands of the assessee as business expenditure."

Still further, the coordinate bench of the Tribunal in the case of India Medtronic Pvt. Ltd. Vs. DCIT (2018) 52 CCH 43 (Mum), following the view taken by the Tribunal in the case of PHL Pharma Pvt. Ltd. (supra), had concluded that the MCI guidelines are only applicable to the doctors and the medical professionals registered with the council, and cannot govern the other tax entities like drug 28 Aristo Pharmaceuticals P Ltd manufacturing companies or individuals other than the doctors. In the backdrop of the aforesaid observations, the Tribunal had observed that the MCI guidelines cannot decide the allowability or otherwise of an expenditure in the hands of

such other entities under the Income-tax Act, 1961. It was further observed by the Tribunal that the Income tax Act is an independent code in itself and the business income of an assessee has to be assessed and taxed as envisaged under the provisions of the Act. On the basis of the limited scope of applicability of the MCI guidelines to a particular class of the society viz. doctors or medical practitioners registered with the council, the Tribunal had concluded that the guidelines issued by MCI would only regulate the code of conduct of the doctors and the medical practitioners registered with it and would not be applicable to other entities.

25. We thus, in the backdrop of the aforesaid settled position of law as regards the prospective applicability of an oppressive circular, are of the considered view that as the CBDT as per its Circular No. 5/2012, dated 01.08.2012 had enlarged the scope of Indian Medical Council Regulation, 2002, and had made the same applicable to the pharmaceutical companies, thus the same cannot be reckoned to have a retrospective effect. We find that a coordinate bench of the Tribunal viz. ITAT, Mumbai in the case of Syncom Formulations (I) Ltd. Vs. DCIT-8(3), Mumbai (ITA No. 6428 & 6429/Mum/2012, dated 23.12.2015) for A.Ys 2010-11 and 2011-12 had concluded that the aforesaid CBDT Circular No. 5/2012, dated 01.08.2012 would not be applicable to the A.Ys 2010-11 and 2011-12, as the same was introduced w.e.f. 01.08.2012. We thus, in terms of our aforesaid observations are of the considered view that the aforementioned CBDT Circular No. 5/2012, dated 01.08.2012 would not be applicable to the case of the assessee before us for A.Y. 2011-12.

26. We shall now advert to the judicial pronouncements which had been relied upon by the ld. D.R before us :

(i) DCIT, Circle-13(1), New Delhi Vs. Ochoa Laboratories Ltd., Noida (ITA No. 4114/Del/2009, dated 25.08.2017)

That the aforesaid order passed by the ITAT, Delhi pertained to the allowability of expenses incurred by the assessee in respect of hotel bookings at New Delhi, Cochin or Kochi against "Dermacon Conference" at Hyderabad, providing free air travel, stay and food in hotels, local car conveyance etc., which were held by the Tribunal as being akin to giving commissions to the doctors for prescribing medicines manufactured by the assessee company. The facts involved in the said case being distinguishable as against that of the present assessee before us, thus would not assist the case of the revenue.

(ii) ACIT, Circle-6(3), Mumbai Vs. Liva Healthcare Ltd., Mumbai (ITA No. 904/Mum/2013, dated 12.09.2016) In the aforesaid order passed by the coordinate bench of the Tribunal, expenses were incurred by the assessee for creating good relations with the doctors in lieu of expected favours from them for recommending to the patients the pharmaceuticals products of the company. We find that the Tribunal while adjudicating the case of DCIT-8(2), Mumbai Vs. PHL Pharma (P.) Ltd. had considered the aforesaid order of the Tribunal.

(iii) Confederation of Indian Pharmaceutical Industry (SSI) Vs. The Central Board of Direct Taxes (CWP No. 10793 of 2012, dated 26.12.2012)(HP):

*We find that the aforesaid judgment of the Hon'ble High Court of Himachal Pradesh was considered by the ITAT, Mumbai Bench "C", Mumbai in the case of DCIT-8(2), Mumbai Vs. PHL Pharma (P.) Ltd. 30 Aristo Pharmaceuticals P Ltd
The Tribunal after considering the aforesaid judgment had observed that as held by the High Court, if the assessee was able to establish that the MCI regulation was not applicable to the assessee, then the same could not be blindly applied in its case.*

(iv) CIT Vs. Kap Scan and Diagnostic Centre (P.) Ltd. (2012) 344 ITR 476 (P&H):

We find that the judgment in the aforesaid case was rendered in context of the commission paid by the assessee company which was running a scanning and a diagnostic centre to the private doctors for referring patients for diagnosis/scanning. Thus, the facts involved in the case before the High Court are distinguishable as against those in the case of the assessee before us. Still further, the said judgment was also considered by the Tribunal while passing the order in the case of DCIT-8(2), Mumbai Vs. PHL Pharma (P.) Ltd.

27. We thus, in terms of our aforesaid observations conclude that the assessee was duly entitled for claim of sales promotion expenses of Rs. 9,70,82,317/- incurred on the distribution of articles to the stockists, distributors, dealers, customers and doctors. Thus, the order of the CIT(A) sustaining the disallowance of the sales promotion expenses to the extent of Rs. 66,49,685/- is set aside. In terms of our aforesaid observations the entire disallowance of the sales promotion expenses of Rs. 9,70,82,317/- made by the A.O is deleted.

28. The appeal of the assessee viz. ITA No. 5553/Mum/2014 is allowed and the appeal of the revenue viz. ITA No. 6129/Mum/2014 is dismissed.

8. We find that the facts of the present case are similar and identical to the above decision in respect of sales promotional expenses claimed in the profit and loss account. The Hon'ble Tribunal in the above decision has considered the provisions of law, facts and circumstances, CBDT circular, MCI guidelines and granted the relief to the assessee. Accordingly, we follow the judicial precedence and set aside the order of the

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CIT(A) to the extent of disallowance of sale promotion expenses incurred by way of gifts, freebies, travel allowance and monetary grants and direct the Assessing Officer to delete the addition and allow the ground of the appeal No. 4 of the assessee.

9. In respect of ground of appeal No.5 in respect of short credit of taxes paid, we direct the Assessing Officer to examine and verify the authenticity of the taxes paid and allow the credit.

10. In the result the appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 20.09.2021

Sd/-

(S RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Sd/-

(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 20.09.2021

KRK, PS

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

1.

(Asst. Registrar)
ITAT, Mumbai

		Date	<u>Initial</u>	
1.	Draft dictated on	19.07.21		PS
2.	Draft placed before author	11.08.21		PS
3.	Draft proposed & placed before the second member			PS
4.	Draft discussed/approved by Second Member.			PS
5.	Approved Draft comes to the Sr.PS/PS			PS
6.	Kept for pronouncement on			
7.	File sent to the Bench Clerk			
8.	Date on which file goes to the AR			
9.	Date on which file goes to the Head Clerk.			
10.	Date of dispatch of Order.			
11.	Dictation Pad is enclosed			