

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

BEFORE SHRI VIKAS AWASTHY (JUDICIAL MEMBER)
AND
BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)

I.T.A. No.2062/Mum/2020
(Assessment year 2003-04)

Procter and Gamble Health Limited (Formerly known as Merck Ltd) 8 th Floor, Godrej One, Pirojsha Nagar Eastern Express Highway, Vikhroli (East), Mumbai-400 079 PAN : AAACE2616F	vs	The Assistant Commissioner of Income-tax-7(2)(1), Mumbai
APPELLANT		RESPONDENT

Assessee represented by	Smt. Aarti Vissanji
Revenue represented by	Shri R.A. Dhyani, Sr.DR

Date of hearing	18-01-2022
Date of pronouncement	31 -01-2022

ORDER

Per O.P. Kant (AM) :

This appeal has been preferred by the assessee against the order dated 27/10/ 2020 passed by the learned Commissioner of Income-tax(Appeals)-57, Mumbai [in short the Ld. CIT(A)] for assessment year 2003-04 raising following grounds:

Distribution of free samples - Rs. 1.06.53.800/-;

On the facts and in the circumstances of the case, and in law the Learned AO / the CIT(A) erred in-

- (a) disallowing cost of samples distributed of Rs. 1,06,53,800/- being 20% of total Sample expenses of Rs 5,32,69,000/- and allowing 80% of total expenses on

an arbitrary basis without any justification or reasons for the said arbitrary disallowance

(b) not allowing the balance expenses in respect of physician's samples i.e. 20% of the total expenses without any reasons and/or justification for disallowing the same.

(c) disregarding the full-fledge records and details in respect of quantities of physician's sample distributed.

(d) disallowing 20% of the cost of physician sample without any basis, reasons, justification or any other allegation about the disposal of the physician sample in any manner other than the distribution thereof to the doctors, chemist etc.

(e) without prejudice to the above and in the alternate not allowing the said expenditure as "trading loss" since there was no doubt that the stocks were manufactured by the company on which excise duty was paid and the said items were not lying with the appellant in its closing stock as at the year end.

(f) not allowing the cost of samples produced in respect of those samples which would have expired had they been not distributed as alleged by the assessing officer.

2. On the facts and in the circumstances of the case, and in law, the Learned AO erred in initiating penalty proceedings U/s. 271(l)(c) of the Act

3. The above grounds of appeal are distinct and separate and without prejudice to each other."

2. Briefly stated facts of the case are that Tribunal in its order dated 19/07/2013 in ITA No. 925/Mum/2007 restored the issue of disallowance out of expenses on free samples to physician amounting to ₹ 5, 32, 69, 000/- to the file of the learned Assessing Officer. The Assessing Officer in his consequent order dated 27/03/2015, restricted the disallowance to 50% of the cost of the samples distributed, which was worked out to ₹ 2, 66, 34, 500/-. The finding of the Id. Assessing Officer is reproduced as under:

"7.1 The assessee has produced before me the details with regard to the names of the doctors and addresses which in some places are incomplete. The assessee has made submissions that since the Marketing Representatives (MR) of the assessee physically travelled to various doctors in order to distribute the samples, they did not require exact postal addresses of each and every doctor. Hence the details are maintained in the format which was required to be maintained by the MRs which in any case specified each and every doctors' names and details of the samples distributed to them.

7.2 Upon perusal of the various details and submissions of the assessee, I am of the view that the disallowance has to be restricted to 50 % of the total costs of

samples distributed. Therefore there will be relief to the extent of Rs. 2.86.34,500/- in respect of the physician samples."

3. The Ld. CIT(A) in the impugned order restricted the disallowance from 50% to 20% following the order of the learned Dispute Resolution Panel (DRP) for assessment year 2013-14. The relevant finding of the Ld. CIT(A) is reproduced as under:

"Similar issue has come up before DRP in assessment year 2013-14. The DRP reduced the disallowance from 50 per cent to 20 per cent of the cost of samples distributed observing as under.

"After considering the facts of the case and records as produced before the AO, we are of the view that the action of the AO is proposing to disallow 50% of the expenditure incurred by the assessee in distributing physician sample is not justified keeping in view the nature of business and the prevalent practice is pharmaceutical industry which is acknowledged by the Hon. Tribunal and also in the judgements quoted by the assessee as mentioned earlier. It has been explained that all the expenses have been incurred in the ordinary course of business and are therefore normal business expenditure incurred for maintaining relationship. It is also seen that the AO has himself stated that the CD has been given to him by the assessee and it has been examined. Nothing has been brought out on record by the AO to justify such disallowance. No adverse findings or otherwise has been recorded by the AO in the body of the assessment order. It is therefore held that in the absence of any adverse findings the AO cannot make disallowance on ad hoc basis without any justification.

It is seen that no specific finding have been given by the A.O in the assessment order. The A.O is categorically stating that the names and addresses of the doctors have been submitted during the course of hearing but he is not bringing out on record as to why he is making the disallowance of 50% of this expenditure.

Having regard to the totality of the facts and circumstances, we are of the view that the disallowance of Rs. 3,46,05,809/- in respect of 50% of the expenditure debited under the head of cost of samples distributed is not justified and so the disallowance is restricted to 20%. This ground of objection is partly allowed. "

As the facts of the case are similar to assessment year 2013-14. The AO is directed to restrict the disallowance to 20 per cent of the total cost of samples distributed.”

4. Before us, the parties appeared virtually through video conferencing facility. The learned counsel of the assessee filed a paper book containing pages 1 to 77. The learned counsel submitted that issue in dispute is covered by the order of the Tribunal in the assessee's own case for assessment years 2004-05, 2005-06 and 2006-07, wherein cost incurred by the assessee towards distribution of free samples was allowed in its entirety.

5. The learned departmental representative on the other hand relied on the order of the lower authorities.

6. We have heard rival submissions of the parties on the issue in dispute and perused the order of the lower authorities and order of the Tribunal relied upon by the assessee. The assessee before us was engaged in the business of the manufacturing and marketing of pharmaceutical products and in the course of business of marketing, assessee distributed free samples to doctors / medical practitioners . The Assessing Officer disallowed 50% of the expenses incurred on distribution of free samples , which has been further reduced to 20% by the Ld. CIT(A) .

7. Before us , the assessee is disputing the disallowance of 20% out of the total expenses sustained by the Ld. CIT(A). We find that identical issue of disallowance of distribution of free samples has been adjudicated by the Tribunal in ITA Nos. 1637 to 1639/Mum/2020 for assessment years 2004-05 to 2006-07 in the case of the assessee. The relevant finding of the Tribunal(supra) is reproduced as under:

8. We have considered rival submissions and perused materials on record. Undisputedly, the assessing officer had disallowed 50% of the total cost incurred by the assessee

towards free samples in the relevant assessment years. Whereas, simply relying upon the decision of the learned DRP in assessment year 2013-14, learned Commissioner (Appeals) has restricted the disallowance to 20% of the cost incurred. Admittedly, against the aforesaid decision of learned Commissioner (Appeals), the revenue has not preferred any appeal. Be that as it may, the respective orders of learned departmental authorities clearly indicate that the disallowance was made purely on estimate basis. The assessing officer has accepted the fact that the assessee had produced before him the details with regard to names of the doctors and their addresses. He has disallowed 50% out of the expenditure saying that in some instances names and address are incomplete. However, the assessing officer has not referred to any such specific instance. On the contrary, on perusal of documents furnished in the paper book, we have noticed that the assessee had furnished the details of free samples along with their quantity and cost. Further, the assessee has also furnished the details of chemists' shop to which samples have been given. Additionally, the assessee has furnished the list of doctors / medical practitioners with their qualification, the field of practice, detailed address with PIN code.

9. It is a fact that the assessee personally does not go and distribute free samples to doctors / medical practitioners. Rather, the assessee has appointed a number of marketing representatives to physically visit doctors / medical practitioners to distribute the samples. Therefore, even accepting that the complete address of medical practitioners are not available in few instances, that by itself cannot be a reason to make the disallowance when the departmental authorities have accepted that distribution of free samples is a regular business practice and in fact, have not raised any doubt regarding the genuineness of the expenditure. Thus, when the assessee has furnished the required details relating 5 Procter & Gamble Health Ltd to the expenditure claimed, there is no justifiable reason to disallow even a part of it.

10. Further, It is relevant to observe, the cost incurred by the assessee towards free samples distributed as a percentage of the total turnover in different assessment years under dispute are as under:- 2004-05 0.86% 2005-06 1.76% 2006-07 1.21%

11. On a perusal of material placed before us, it is noticed that the cost incurred by the assessee towards distribution of free samples in these assessment years is much lesser than similar expenditure incurred in the earlier and subsequent assessment years. Thus, keeping in view the peculiar circumstances of the case, we hold that no disallowance out of the cost incurred towards free physician's samples is called for in any of these assessment years. Accordingly, we delete the additions. Ground 1 in all the appeals is allowed."

8. We find that in the year under consideration also the assessee furnished details of doctors and their addresses before the Assessing Officer. The learned counsel also brought our attention to page 42 of the paper book , wherein the ratio of expenses on distribution of free samples (Rs. 5,32,69,000/-) to the sales

(Rs. 3,44,29,73,000/-) has been worked out to 1.55 %, which is well within the ratio of 1.76% for assessment year 2005-06 i.e. the year for which such expenses have been allowed by the Tribunal (supra).

9. In view of above, respectfully following the finding of the Tribunal (supra), we delete the addition on distribution of free samples, which was sustained by the Ld. CIT(A). Accordingly, ground 1 of the appeal is allowed.

10. Ground 2 being premature, we are not required to adjudicate upon. Also, grounds 3 to 5 being general in nature, we are not required to adjudicate upon.

11. In the result, the appeal of the assessee is allowed.

Order pronounced on 31/01/2022.

Sd/-

sd/-

(VIKAS AWASTHY)	(OM PRAKASH KANT)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 31/01/2022

Pavanan

Copy to :

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

/True copy/

By Order

Asstt. Registrar, ITAT, Mumbai