

आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई
**IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, CHENNAI**

श्री महावीर सिंह, उपाध्यक्ष एवं डॉ. एम.एल मीना, लेखा सदस्य के समक्ष
**BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
DR. M.L. MEENA, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA No.:3396/CHNY/2019
निर्धारण वर्ष /Assessment Year: 2011 - 2012

M/s. Diabetes Supplies Centre,
No.6B, Conran Smith Road,
Gopalapuram,
Chennai – 600 086.
PAN : AADFD 7141 E

Vs. The Assistant Commissioner of
Income Tax,
Non-Corporate Circle – 16(1),
Nungambakkam,
Chennai – 600 034. T.N.

(अपीलार्थी/**Appellant**)

(प्रत्यर्थी/**Respondent**)

अपीलार्थी की ओर से/Appellant by
प्रत्यर्थी की ओर से/Respondent by

: Mr. K.R. Adivarahan, C.A.
: Mr. AR.V. Sreenivasan, Addl. CIT

सुनवाई की तारीख/Date of Hearing : 08.03.2022
घोषणा की तारीख/Date of Pronouncement : 10.03.2022

आदेश /O R D E R

PER BENCH:

The appeal by the Assessee, is arising out of the order dated 30.09.2019 of the Commissioner of Income Tax (Appeals)-4, Chennai (hereinafter referred as "CIT(A)"), in ITA No.88/18-19/CIT(A)-4/A.Y.2011-12 for the Assessment Year 2011 – 2012.

2. The two effective grounds raised by the Assessee are as under:

- a) The Assessing Officer failed to give a finding on the point raised by the Assessee regarding the jurisdiction of the Assessing Officer to reopen the case u/s.147 of the Income Tax Act, 1961.
- b) The Commissioner of Income Tax had erred in confirming the addition made by the Assessing Officer disallowing the commission paid to the Doctors amounting to Rs.27,63,120/- with reference to the Circular No.5/2012 (F.No.225/142/2012-ITA.II) dated 01.08.2012.

3. The brief facts of the case are that the Assessee filed its return of income for the Assessment Year 2011 - 2012 on 30.09.2011 admitting a total income of Rs.1,54,95,810/- and an order u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') was passed on 21.01.2014 accepting the returned income. However, the case was reopened u/s.147 of the Act vide notice dated 28.11.2017. In response to the notice u/s.148 of the Act, the Assessee filed his return of income on 04.12.2018 declaring the same total income as was declared in the original return of income. Subsequently, a notice u/s.143(2) of the Act was issued to the Assessee on 04.12.2018 posting the case for hearing. On verification of the return of income for the Assessment Year 2011 - 2012, it was observed that the Assessee is running a pharmacy. From the profit and loss account the Assessing Officer has noted that the Assessee has claimed a sum of Rs.27,63,120/- as commission

paid to the Doctors. The payment was made to the Doctors as incentives towards purchase of medicines made by the patients. However, the Assessing Officer pointed out that as per the CBDT Circular No.5/2012 dated 01.08.2012, distribution of any article as gift, travel facility, hospitality, cash or monetary grant from the pharmaceuticals and allied health sectors are to be treated as freebies and should not be allowed as deductible expenses in the case of the pharmaceutical entities. As the above expenditures of commission to Doctors are in violation of the regulations issued by the Medical Council of India, the Assessing Officer disallowed the claim of expenditure Rs.27,63,120/- and brought to tax.

4. The first issue raised by the Assessee is regarding jurisdiction of the Assessing Officer to reopen the case u/s.147 of the Act within four years. As per the record, the Assessee's case was reopened u/s.147 of the Act within four years by the Assessing Officer after obtaining prior approval of the Principal Commissioner of Income Tax-5, Chennai. The learned Counsel for the Assessee has not raised any objection to the notice issued u/s.148 of the Act before the Assessing Officer nor had raised the ground before the learned CIT(A) on this issue.

5. Even before us, the learned Counsel for the Assessee failed to furnish any documentary evidences in support of the same to challenge the jurisdiction of the Assessing Officer with regard to the reopening the case u/s.147 of the Act. Finding no merit in the submissions of the Assessee on this issue, the ground of the Assessee regarding the jurisdiction of the Assessing Officer to reopen the case u/s.147 of the Act is dismissed.

6. In the next issue, the Assessee has challenged the confirmation of the addition made by the Assessing Officer disallowing the commission paid to the Doctors amounting to Rs.27,63,120/- with reference to the Circular No. 5/2012 (F.No.225/142/2012-ITA.II) dated 01.08.2012.

7. During the course of the assessment proceedings, the Assessing Officer noticed that the Assessee has claimed a sum of Rs.27,63,120/- as commission paid to the Doctors as incentives for the purchase of medicines made by the patients. The Assessing Officer referred to the Central Board of Direct Taxes [CBDT] Circular No.5/2012, dated 01.08.2012 wherein it is held that distribution of any article as gift, travel facility,

hospitality, cash or monetary grant from the pharmaceuticals and allied health sectors are to be treated as freebies and should not be allowed as deductible expenses in the case of the pharmaceutical entities. He referred to Section 37(1) of the Act that provides for deduction of any revenue expenditure from the business income. He made a special mention regarding the explanation appended to this sub-section which denies claim of any such expenses, if the same has been incurred for a purpose which is either an offence or prohibited by law. In view of the CBDT circular and the rules laid down in 2002 by the Indian Medical Council, the Assessing Officer has made the disallowance of the disputed amount of Rs.27,63,120/- of the expenses claimed by the Assessee u/s.37(1) of the Act.

8. Aggrieved, the Assessee preferred an appeal before the learned CIT(A) wherein the learned CIT(A) had confirmed the action of the Assessing Officer by observing as under:

“Regarding the disallowance of commission paid to Doctors, the Appellant’s submission is that the Board’s Circular restricting the freebies to Doctors by Pharmaceutical companies and allied health sector companies. Without going into the applicability of the Board’s Circular, the issue can be decided. When an Assessee claims an expenditure while computing the

income, the onus is on him to prove that the expenditure was incurred wholly and exclusively for the purpose of the business. The Appellant is owning pharmacies in various locations and medicines are being supplied to the patients as prescribed by the Doctors. The patients are at liberty to purchase the medicines as per their wish and there is no compulsion that they should purchase the medicines only from the pharmacy of the Appellant. Thus, the Doctors who prescribe medicines to the patients are not sure that the patients would buy the medicines only from the pharmacy of the Appellant. No services are rendered by the Doctors to the Appellant to pay any commission to them by the Appellant. The sales in the pharmacy had no direct or indirect link with the Doctor who prescribes medicines to the patients. Since, no service was done by the Doctors to the Appellant, there is absolutely no need for the Appellant to pay any commission. Further, they are the employees of the Appellant company who were paid normal salary / remuneration. I therefore hold that the commission paid by the Appellant to the Doctors cannot be allowed as they have not rendered any services to the Appellant to merit any commission and the disallowance made is confirmed. "

9. The learned Counsel for the Assessee reiterated the submission made before the authorities below.

10. Per contra, the learned Departmental Representative stands by the impugned order.

11. Heard both the sides, perused the records, impugned order and case-law cited. Admittedly, the Assessee has paid an amount of Rs.27,63,120/- as commission to the Doctors on the purchase of medicines by the patients. The Assessing Officer has disallowed the Assessee's claim of the expenditure towards the payment of commission of Rs.27,63,120/- u/s.37(1) of the Act. The learned CIT(A) has confirmed the finding of the Assessing Officer by observing that the Doctor's have rendered no service to the Assessee and the payment made were in violation to CBDT Circular and Rules laid down in 2002 by the Indian Medical Council.

12. On identical facts, the Hon'ble Apex Court in its latest decision in the case of Apex Laboratories (P.) Limited Vs. Deputy Commissioner of Income Tax LTU reported in [2022] 135 taxmann.com 286 (SC), wherein the Apex Court has observed that since acceptance of freebies by medical practitioners was punishable as per Circular issued by the Medical Council of India under MCI Regulations, 2002, gifting of such freebies by assessee-pharmaceutical company to medical practitioners would also be prohibited by law and thus, expenditure incurred in distribution of such freebies would not

be allowed as deduction in terms of Explanation 1 to Section 37(1) of the Act vide relevant paragraphs nos.22, 24 and 36, as under:

“22. This Court is of the opinion that such a narrow interpretation of *Explanation 1* to section 37(1) defeats the purpose for which it was inserted, *i.e.*, to disallow an assessee from claiming a tax benefit for its participation in an illegal activity. Though the memorandum to the Finance Bill, 1998 elucidated the ambit of *Explanation 1* to include "protection money, extortion, hafta, bribes, etc.", yet, ipso facto, by no means is the embargo envisaged restricted to those examples. It is but logical that when acceptance of freebies is punishable by the MCI (the range of penalties and sanction extending to ban imposed on the medical practitioner), pharmaceutical companies cannot be granted the tax benefit for providing such freebies, and thereby (actively and with full knowledge) enabling the commission of the act which attracts such opprobrium.

24. Even if Apex's contention were to be accepted - that it did not indulge in any illegal activity by committing an offence, as there was no corresponding penal provision in the 2002 Regulations applicable to it - there is no doubt that its actions fell within the purview of "prohibited by law" in *Explanation 1* to Section 37(1).

36. In the present case too, the incentives (or "freebies") given by Apex, to the doctors, had a direct result of exposing the recipients to the odium of sanctions, leading to a ban on their practice of medicine. Those sanctions are mandated by law, as they are embodied in the code of conduct and ethics, which are normative, and have legally binding effect. The conceded participation of the assessee- *i.e.*, the provider or donor- was plainly prohibited, as far as their receipt by the medical practitioners was concerned. That medical practitioners were forbidden from accepting such gifts, or "freebies" was no less a prohibition on the part of their giver, or donor, *i.e.*, Apex.”

13. Respectfully following the verdict of Hon'ble Supreme Court in the case of Apex Laboratories (P.) Limited Vs. Deputy Commissioner of Income Tax LTU (supra), we hereby uphold the

order passed by the learned CIT(A) and thus, the addition of Rs,27,63,120/- is confirmed.

14. In the result, the appeal of the Assessee is dismissed.

Order pronounced in the court on 10th March, 2022 at Chennai.

Sd/-

(महावीर सिंह)

(MAHAVIR SINGH)

उपाध्यक्ष /VICE PRESIDENT

Sd/-

(डॉ. एम.एल मीना)

(Dr. M.L. MEENA)

लेखा सदस्य /ACCOUNTANT MEMBER

चेन्नई/Chennai,

दिनांक/Dated, the 10th March, 2022

IA, Sr. PS

आदेश की प्रतिलिपि ँ ग्रेषित/**Copy to:** 1. ँ पीलर्षी/Appellant
2. प्रत्यर्षी/Respondent
3. आयकर आयुक्त (ं पील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF