

**IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH : BANGALORE**

**BEFORE SHRI. CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

IT(TP)A No. 84/Bang/2020
Assessment Year : 2009-10

M/. Johnson & Johnson Surgical Vision India Pvt. Ltd. (earlier known as Abbott Medical Optics Pvt. Ltd.), The Masterpiece, Level 5, Golf Course Road, Sector – 54, Gurgaon – 122 002. Haryana. PAN: AAECA8659C	Vs.	The Income-tax Officer, Ward – 11(1), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri Ajit Tolani, CA
Revenue by	:	Shri Pradeep Kumar, CIT DR

Date of Hearing	:	18-04-2022
Date of Pronouncement	:	10-06-2022

ORDER

PER BEENA PILLAI, JUDICIAL MEMBER

Present appeal arises out of order dated 05.11.2011 passed by Ld.CIT(A)-4, Bangalore for A.Y. 2009-10 on following grounds of appeal:

“The grounds mentioned herein by the Appellant are without prejudice to one another.

1. That the order of the Learned Commissioner of Income-tax (Appeals)-4, Bangalore [‘Ld. CIT(A)'] and the Learned Income-tax Officer, Ward 11(1), Bangalore (‘Ld. AO’) to the extent prejudicial to the Appellant, are bad in law, contrary to facts and circumstances of the case and liable to be quashed.

Grounds relating to Corporate Tax matters

2.1. That on the facts and the circumstances of the case, Ld. CIT(A) and the Ld. AO has erred in making an addition of INR 1,310,156 towards 'Sponsorship expenses' stating that the said expenditure represented freebees in violation of the provisions of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002.

2.2. Without prejudice to the above, the Ld. CIT(A) and the Ld. AO failed to appreciate that the expenses amounting to INR 1,310,156 incurred by the Company towards 'Sponsorship expenses' pertains to the period April 1, 2008 to March 31, 2009, and hence, placing reliance on the provisions of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 which was subsequently amended on December 10, 2009 and the CBDT Circular No. 5/2012 issued on August 1, 2012 is incorrect and bad in law.

2.3. That on the facts and the circumstances of the case, the Ld. CIT(A) failed to appreciate the decision of Hon'ble Mumbai Bench of Income-tax Appellate Tribunal in the case of Johnson & Johnson Private Limited (successor-in-interest of Synthes Medical Private Limited) relied by the Appellant, wherein it was held that Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulations, 2002 are applicable to doctors / medical practitioners only and the same is not applicable to pharmaceutical companies/drug manufacturing/distribution companies.

3.1. That on the facts and the circumstances of the case, Ld. CIT(A) and the Ld. AO has erred in making an addition of INR 1,157,973 towards 'Other promotion expenses' stating that the said expenditure represented freebees in violation of the provisions of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002.

3.2. Without prejudice to the above, the Ld. CIT(A) and the Ld. AO failed to appreciate that the expenses amounting to INR 1,157,973 incurred by the Company towards 'Other promotion expenses' pertains to the period April 1, 2008 to March 31, 2009, and hence, placing reliance on the provisions of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 which was subsequently amended on December 10, 2009 and the CBDT Circular No. 5/2012 issued on August 1, 2012 is incorrect and bad in law.

3.3. That on the facts and the circumstances of the case, the Ld. CIT(A) failed to appreciate the decision of Hon'ble Mumbai Bench of Income-tax Appellate Tribunal in the case of Johnson & Johnson Private Limited (successor-in-

interest of Synthes Medical Private Limited) relied by the Appellant, wherein it was held that Indian Medical Council (Professional conduct, Etiquette and Ethics) Regulations, 2002 are applicable to doctors / medical practitioners only and the same is not applicable to pharmaceutical companies/drug manufacturing/distribution companies.

Grounds relating to transfer pricing matters

4. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in:

4.1. Upholding the action of the Ld. AO / Learned Transfer Pricing Officer ('Ld. TPO') in rejecting the Transfer Pricing documentation maintained by the Appellant by invoking provisions of subsection 3 of section 92C of the Act contending that the information or data used in the computation of the arm's length price is not reliable or correct;

4.2. Upholding the Ld. AO / Ld. TPO's approach of computing the operating margin of the Appellant by treating 'provision written back' and 'receipt of insurance claim' as non-operating in nature;

4.3. Upholding the Ld. AO / Ld. TPO's approach of rejecting the comparability analysis undertaken in the Transfer Pricing documentation by the Appellant in accordance with the provisions of the Act read with the Income Tax Rules, 1962, ('the Rules').

4.4. Upholding the Ld. AO/ Ld. TPO approach of rejecting companies functionally similar to the Appellant while performing the comparability analysis;

4.5. Upholding the Ld. AO/ Ld. TPO's approach of conducting a fresh comparability analysis and application of certain arbitrary filters in determining the arm's length in connection with the international transactions and holding that the Appellant's international transactions are not at arm's length;

4.6. Upholding the Ld. TPO's approach of issuing the final Transfer Pricing order arbitrarily by excluding the companies which were earlier considered as functionally comparable to the Appellant by the Ld. TPO in the show cause notice.

4.7. Upholding the Ld. TPO's approach of rejecting the supplementary analysis submitted by the Appellant demonstrating Resale Price Method as the most appropriate method.

4.8. Upholding the Ld. TPO's approach of not applying multiple year/ prior year data for comparable companies while determining arm's length price.

4.9. Upholding the Ld. TPO's approach of using data at the time of assessment proceedings, instead of that available

as on the date of preparing the Transfer Pricing documentation for comparable companies while determining the arm's length price, ignoring the fact that the data was not available to the Appellant at the time of complying with the TP documentation requirements.

General Grounds

5. The consequential relief is to be granted in computation of interest under section 234B and 234C of the Act.

6. The interest under section 244A of the Act is consequential in nature and therefore if subsequently the disallowance stands deleted, the interest under section 244A of the Act should be granted.

7. That on the facts and circumstances of the case, Ld. CIT(A) has failed to appreciate that the Ld.AO has erred in initiating penalty proceedings under section 271(1)(c) of the Act despite the fact that the Appellant has acted in a bona fide manner and provided all necessary details called for by the Ld.AO.

That the Appellant craves leave to add to and/or to alter, amend, rescind, modify the grounds herein below or produce further documents before or at the time of hearing of this Appeal.”

2. Brief facts of the case are as under:

2.1 The assessee is a company dealing with the business of Ophthalmic products. It filed its return of income for year under consideration on 29.09.2009 declaring total income of Rs.24,91,070/-. The case was selected for scrutiny, and notice was issued u/s. 142(1), calling for various details. In response to statutory notices, representative of assessee appeared before the Ld.AO and filed the submissions as called for.

2.2 The Ld.AO noted that, in the profit & loss account, assessee debited sum of Rs. 4,74,60,301/- under head “Advertisement & Sales Promotion”. It also noted that the assessee had international transaction with its associated enterprises in respect of purchase of capital goods, purchase of traded goods. A reference was accordingly made to the transfer pricing officer. The Ld.TPO upon receipt of reference, called for the economic details of

the international transaction by the assessee with its AE. The Ld.TPO noted that, following were the international transactions.

(in Rs)		
a.	Purchase of traded goods	524698546
b.	Purchase of capital goods	15095869
c.	Claims received	13074326
d.	Excess recovery paid	2427220
e.	Recovery of expenses	2122324

2.3 The Ld.TPO noted that, the assessee applied RPM as the most appropriate method and computed its margin by using OP/OC at (-)0.95%. Assessee used 5 comparables with an average margin of 3%, thereby considering the transaction to be at arms length. The assessee used RPM to the distribution segment, as there was no value addition to the products sold. The Ld.TPO rejected the method of assessee and applied TNMM as the most appropriate method. In reply to a show cause notice by Ld.TPO, the assessee agreed for TNMM to be a supplementary method regarding the transaction relating to purchases of traded goods.

2.4 The Ld.TPO however applied TNMM as the most appropriate method and by applying one comparable with an average margin of 4.54% computed the adjustment, in the hands of the assessee at Rs. 4,19,98,575/-.

On receipt of the transfer pricing order, the Ld.AO passed the draft order by disallowing the advertisement expenses incurred by the assessee to be not eligible for deduction u/s. 37(1), relying on the Circular No.5/2012 dt. 01.08.2012.

The assessee filed appeal before the Ld.CIT(A) against the additions made.

It is submitted that in respect of the most appropriate method to be applied to the international transaction no view was expressed by the Ld.CIT(A). However, the Ld.CIT(A) upheld the disallowance of “Advertisement & Sales Promotion” expenses u/s. 37(1).

2.5 Aggrieved by the order of Ld.CIT(A), the assessee filed the present appeal before this *Tribunal*.

2.6 The Ld.AR submitted that, Ground no.1 is general in nature and therefore do not require any adjudication.

2.7 **Ground nos. 2.1 to 3.3** is raised by assessee against the disallowance made in respect of expenditure that represented freebees.

2.8 **Ground Nos. 4 – 4.9** is in respect of the addition made under transfer pricing provisions.

3. Ground nos. 4-4.9:

3.1 The Ld.AR submitted that, in the traded segment undertaken by assessee, RPM is the most appropriate method, as there is no value addition undertaken by the assessee before the sale of products. The Ld.AR submitted that, the Ld.AO has wrongly used TNMM, and that the comparables considered has not been forwarded to the assessee.

We note that, the revenue has not considered the activity undertaken by the assessee under trading segment. The assessee in the present facts, is trading in ophthalmic goods, without any value addition. In our opinion, in case of a merely sale of traded goods, RPM is the most appropriate method, as it does not involve any manufacturing activity. The Ld.DR though opposed the submissions of the assessee could not controvert the various arguments in respect of the most appropriate method to be applied in the present facts of the case.

Accordingly, we remit this issue to the file of assessing officer with a direction to the assessee to furnish segmental details of the sale of traded goods.

3.2 The comparables sought to be considered should be based on the most appropriate method to be applied. In the event, exact comparable is sought having identical functions of assessee, RPM may be considered. On the contrary, if sufficient comparables are not available, that is functionally identical and similar in with that of the assessee, TNMM is to be applied. Under both the circumstances, due opportunity of being heard is to be granted to assessee in accordance with law.

Accordingly, grounds 4 – 4.9 stands allowed for statistical purposes.

4. Ground nos. 2.1 to 3.3

4.1 This ground is raised by the assessee against the disallowance of Rs.13,10,156/- incurred by the assessee towards sponsorship expense and sum of Rs.11,57,973/- incurred by assessee towards other promotion expenses.

4.2 The Ld.AO disallowed these expenses by holding that, they represent freebees, in violation of the provisions of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002. The Ld.AO also referred to Circular No.5/2012 dated 01.08.2012, wherein, such expenditure incurred are in the nature of freebees, has been held to be in violation of the provisions of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002. The Ld.AO thus held that, as the expenditure incurred is in violation, and is prohibited under law, cannot be allowed as deduction u/s. 37 of the Act.

This view has been upheld by the Ld.CIT(A).

The Ld.AR submitted that, amount incurred towards sponsorship expenses, pertains to period prior to the Regulations and Circular No. 5/2012 (supra) and hence the provisions of Indian Medical Council, issued on 10.12.2009 is prospective and cannot be applied to the year under consideration.

4.3 The Ld.AR further submitted that, expenses are incurred for the purposes of business of the assessee and therefore is otherwise an allowable expenditure u/s. 37. He placed reliance on the decision of *Hon'ble Mumbai Tribunal* in case of *Synthes Medical Pvt. Ltd. vs. JCIT* in *ITA No. 1784/Mum/2016* by order dated 13.04.2018.

4.4 On the contrary, the Ld.CIT.DR relied on the recent decision of *Hon'ble Supreme Court* in case of *M/s. Apex Laboratories Ltd. vs. DCIT* reported in (2022) 135 taxmann.com 286.

4.5 We have perused the submissions advanced by both sides in the light of records placed before us.

4.6 *Hon'ble Supreme Court* in case of *Apex Laboratories Ltd. vs. DCIT (supra)*, was considering the issue of applicability of circular on adoption of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (the Regulations) which was published in the official gazette on 14.12.2009 to be prospective in nature. Before *Hon'ble Supreme Court*, the assessment year under consideration was Assessment Year 2010-11 and the primary argument of the Ld. Counsel therein for assessee was that, the regulations would not be applicable, as they have come into force vide CBDT Circular dated 01.08.2012 and therefore prospective in nature. The Ld.Counsel therein, relied on plethora of decisions in support of this contention.

Hon'ble Supreme Court after considering the broad principle of the interpretation of statute opined that,

“It is also a settled principle of law that no court will lend its aid to a party that roots its cause of action in immoral or illegal act. (EX-DOLO-MALO-non-Oritur action) amending that none should be allowed to profit from any wrong doing coupled with the fact that the statutory regimes should be coherent and not self-defeating.”

4.7 The Hon’ble Supreme Court, after analysing the various decisions cited by both sides held as under:

“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.”

4.8 Respectfully following the above view, we cannot agree with the arguments advanced by the Ld.AR and the decisions relied by him cannot be of assistance to the assessee.

Accordingly, this ground raised by assessee stands dismissed. In the result, the appeal filed by assessee stands partly allowed.

Order pronounced in open court on 10th June, 2022.

Sd/-
(CHANDRA POOJARI)
Accountant Member

Sd/-
(BEENA PILLAI)
Judicial Member

Bangalore,
Dated, the 10th June, 2022.
/MS /

Copy to:

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

By order

Assistant Registrar,
ITAT, Bangalore