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

BEFORE SHRI PRAMOD KUMAR, VP AND SHRI ABY T. VARKEY, JM

आयकर अपील सं/ I.T.A. No. 453/Mum/2022
(**निर्धारण वर्ष** / Assessment Year: 2016-17)

DCIT, Circle-7(1)(1) Room No. 126, 1st Floor, Aayakar Bhavan, M. K. Road, Mumbai-400020.	**बनाम**/ Vs.	M/s. Novartis Healthcare Pvt. Ltd. 6th & 7th Floor Inspire BKC, G Block BKC Main Road Bandra Kurla Complex, Mumbai-400051.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACN5094N		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Revenue by:	Dr. Mahesh Akhade (DR)
Assessee by:	Shri Brijesh Parmar

सुनवाई की तारीख / Date of Hearing: 27/06/2022
घोषणा की तारीख /Date of Pronouncement: 22/07/2022

आदेश / O R D E R

PER ABY T. VARKEY, JM:

This is an appeal preferred by revenue against the order of the Ld. Commissioner of Income Tax (Appeals) (NFAC), Delhi dated 13.12.2021 for AY. 2016-17.

2. The first ground of appeal of the revenue is against the action of the Ld. CIT(A) in allowing the expenditure on license fees for use of computer software packages as Revenue expenditure, whereas, according to the revenue, the purchase of computer software and software development was Capital Expenditure since it provided enduring benefit to the assessee.

3. Brief facts of the case the assessee had incurred expenses in respect of software licenses amounting to Rs.5.35 crores. The AO asked the assessee as to why the expenses should not be treated as

capital expenditure and the assessee replied that the assessee company has incurred expenses on license fees for use of software. According to the assessee, software license fees was to the tune of Rs.5.35 crores out of which 5.25 crores was on account of license fees for "computer software packages" or user license expenses and the balance is towards maintenance expenses. It was pointed out by the assessee that these software packages get frequently outdated and have to be replaced. And the assessee company pointed out that it has a policy of capitalizing operating software systems related to hardware of a computer. However, since application software unlike operating software gets outdated and have to be replaced by latest versions hence, it was claimed as revenue expenditure. And also brought to the notice of AO that this Tribunal and CIT(A) in assessee's own case for AY. 1995-96 (ITA. No.1749/Mum/2003 dated 29.09.2013) and for AY. 2008-09 (ITA. No.7643/Mum/2012 dated 30.04.2015 for AY. 2010-11) has allowed the claim of software license as deductible revenue expenditure. And that the Ld. CIT(A) relying on the co-ordinate benches decision of Tribunal in assessee's own case for AY. 2008-09 has deleted the entire addition made by AO on account of capitalizing the software expenses and allowed the same as revenue expenditure. Even though, the aforesaid facts were brought to the notice of the AO, he did not accept the same and according to him the purchase of software provides enduring benefits and so is capital expenses; and resultantly is an intangible assets and allowed depreciation @ 25% of the expenses claimed. And thus the AO did

not accept the assessee claim of software expenses as revenue expenditure and allowed 25% depreciation on it. Aggrieved the assessee preferred an appeal before the Ld. CIT(A) after who appreciating the aforesaid contention of the assessee and taking note of the Tribunals decisions for earlier years, directed the deletion of the disallowance and allowed the expenditure claimed by the assessee in respect of license fees incurred for use of software packages. Aggrieved by the aforesaid action of the Ld. CIT(A), the revenue is before us.

4. We have heard both the parties and perused the records. We note that the assessee had incurred expenses on license fees for use of software to the tune of Rs.5.35 crores. Further, we note that out of this expenditure claimed of Rs.5.35 crores, Rs. 5.25 crores was on account of license fees for "computer software packages" or user license expenses and the balance was towards maintenance expenses. We note that the assessee company has a policy of capitalizing the expenses incurred in respect of operating software systems related to hardware of a computer whereas license fees incurred for application software gets soon outdated and have to be upgraded/replaced by latest versions and so it was claimed as revenue expenditure. Hence, according to Ld. AR of assessee, the contention of the AO that the fees/expenditure incurred for procuring the license for use of software would provide benefit of enduring nature to the assessee is an erroneous assumption of fact. Further it was clarified by Ld. AR that

since the assessee only got the license for use of software and does not get the ownership of the software, and so the enduring benefits test fails. Appreciating the aforesaid facts therefore, the Ld. CIT(A) has rightly held that the expenses incurred for licence of software to be of revenue nature and took note of Tribunals decision in assessee's own case for earlier years AY 2008-09 (supra) And has followed the same. Before us, the Ld. DR could not point out any change in facts or law which would warrant any interference from our part. And therefore, we are inclined to uphold the action of the Ld. CIT(A) and dismiss the ground of appeal of the revenue.

5. Ground no. 2 of the revenue appeal reads as under: -

> "2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not appreciating the fact that promotional expenses amounting to Rs.35,29,00,598/- were paid to doctors in violation of notification of Medical Counsel of India dated 10.12.2009 and CBDT Circular No. 5/0212 dated 01.08.2012 and the same were not allowable u/s 37(1) of the Income Tax Act, 1961, as subsequently held by Hon'ble Supreme Court in the case of Apex Laboratories Pvt. Ltd. In SLP No.23207 (Civil) of 2019 dated 22.02.2022.

6. Brief facts regarding the issue is that the AO noted from the details furnished by the assessee that the assessee has claimed promotional expenses to the tune of Rs.89,57,57,438/-. So the AO asked the assessee to give the nature of expenses incurred in respect of the said claim. The AO noted that for previous year additions were

made by his predecessor on account of freebies given to the doctors. Pursuant to the show cause of the AO, the assessee explained that these expenses are incurred to promote the business of the assessee company which includes expenses incurred on advertisement and payments made to the Doctors. So the AO asked the assessee to provide the details of expenses incurred in respect of payments to Doctors. And as per the details given by assessee, the AO noted the total expenses incurred/payments made to the Doctors was to the tune of Rs.35,29,00,598/- and then the AO reproduced the details of such expenditure at page no. 5 & 6 of his assessment order. Thereafter, the AO noted the notification made by "*Medical Council "Professional Conduct, Etiquette and ethics), Regulations 2002"* and noted that as per this notification issued by MCI, it prohibits the medical practitioners and their professional associations from making any gift, travel facility, hospitality, cash or monetary grant from pharmaceutical and allied health sector industries. And the AO notes that this notification of the MCI was followed by the CBDT's Circular No. 5/2012 dated 01.08.2012 which is reproduced as under: -

> "Thus, the claim of any expenses incurred in providing above mentioned or Similar freebies 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 healthcare sector industries or other assesse which has provided

> aforesaid freebees and claimed its as a deductible expenses in its accounts against income."

7. According to the AO, the MCI has issued the said notification with a sole purpose and intention of maintaining sanctity of medical profession and thereby to avoid the exploitation of patients in particular and public at large. And the AO as per the MCI notification & the Board Circular (supra) added the entire expense claimed to have been incurred by assessee in this regard to the tune of Rs.35,29,00,598/-. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who has decided the issue as under: -

> "7. Sales promotion expenses:
>
> 7.1 Assessing Officer disallowed Rs 35,29,00,598/- u/s 37(1) relying on the CBDT Circular No.5/2012 dt 1/8/2012
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> 7.2 In the grounds of appeal, the appellant contested that the AO erred in disallowing payments aggregating Rs.35,29,00,5981made to Healthcare Professionals (Doctors) by invoking an Explanation to section 37(1) and relying on CBDT circular No. 5/2012 dated 01.08.2012 without appreciating the fact that clause 6.8 introduced by the Medical Council of India in the Code of Medical Ethics is applicable to doctors, to be followed by them.
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> 7.3 In the written submission the appellant stated that — (i) MC! Guidelines are not applicable to Pharmaceutical Companies but it is applicable to Doctors as held in the case decision of Delhi High Court of Max Hospital, Pitampura vs Medical Council of India in W.P.(C). 1334/2013, dated 10-01-2014. (ii) The Appellant wishes to place

> reliance on order its own case Novartis Healthcare Pvt Ltd (ITA no 2590/Mum/2016) for the AY 2010-11, wherein the Hon'ble Mumbai ITAT has placed reliance on the decision of Max Hospital (Delhi High Court) and PHL Pharma Pvt Limited (Jurisdictional Mumbai ITAT) in order to conclude that the MCI guidelines are applicable to doctors and not Pharma companies. In view of the said decisions, the ITAT in Appellant's own case for AY 2010-11 held — "In view of series of decisions relied upon hereinabove on the impugned issue, we hold that the sales promotion expenses incurred by the assessee in the total sum of Rs 3,43,44,982/- deserves to be allowed. Accordingly, grounds raised by the assessee are allowed and the grounds raised by the Revenue is dismissed."
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> 7.4 Respectfully following the above stated decision of the Hon'ble ITAT in appellant's own case for AY. 2010-11 (ITA. No. 2590/Mum/2016) the AO is directed to delete the disallowance of sales promotion expenses."

8. Aggrieved by the aforesaid action of the Ld. CIT(A), the revenue is before us.

9. We have heard both the parties and perused the records. We note from a perusal of the impugned order that the Ld. CIT(A) has not looked into the nature of expenses claimed by the assessee and has not looked into the AO's actions of disallowing the expenditure on account of prohibition of doctors taking any favour in kind/cash from pharmaceutical or allied healthcare sector industries as stated in the CBDT notification (supra) and MCI notification pursuant to the Regulation 2002 (supra). We note that the Ld. CIT(A) has merely

followed certain case laws without discussing the nature of expenses claimed by the assessee which impugned action of Ld. CIT(A) cannot be accepted for the simple reason that the Ld. CIT(A) while examining an action of AO ought to have discussed the relevant facts pertaining to the issue and examined the same in the light of the applicable law. Here in this case the Ld CIT(A) have not bothered to discuss the claim of expenditure purported to have been incurred by the assessee and examined the same in the light of the MCI Regulation and the CBDT notification as well as the applicable law as per the Act; and thereafter ought to have passed a speaking order regarding the legality of the action of AO. Moreover on this issue the Ld. DR brought to our notice the decision of the Hon'ble Supreme Court in the case of Apex Laboratories Pvt. Ltd, in SLP No.23207 (Civil) of 2019 dated 22.02.2022 which needs to be considered and is relevant on this issue. Therefore, in the light of the aforesaid discussion, we set aside the impugned action of the Ld. CIT(A) on this issue and remand the matter back to the file of the Ld. CIT(A) and direct him to adjudicate the issue de-novo in accordance with the relevant judicial precedents and in the light of the Hon'ble Supreme Court decision in Apex Laboratories Pvt. Ltd (supra). So this ground of appeal of revenue is allowed for statistical purposes.

10. Next ground of appeal of the revenue is against the action of the Ld. CIT(A) in holding the Education Cess amounting to Rs.2,32,01,397/- was an admissible expenditure. At the outset, the Ld.

AR of the assessee brought to our notice that the assessee has already filed an application before the AO withdrawing this claim. In the light of the aforesaid submission made by the Ld. AR, we allow this ground of appeal of the revenue, and the uphold disallowance made by AO in respect of Secondary and Higher Education Cess.

9. In the result, the appeal filed by the revenue is partly allowed for statistical purposes.

Order pronounced in the open court on 22/07/2022.

Sd/-	Sd/-
(PRAMOD KUMAR)	**(ABY T. VARKEY)**
VICE PRESIDENT	**JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated : 22/07/2022.
Vijay Pal Singh, (Sr. PS)

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

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

आदेशानुसार/ BY ORDER,

<u>सत्यापित प्रति //True Copy//</u>

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**