IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI
BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA No. 519/Mum/2021 (A.Y. 2017-18)

Ajanta Pharma Ltd.
98, Charkop, Kandivali (W)
Mumbai-400 067
PAN: AAACA5579P ..... Appellant

Vs.

DCIT, CC-7(2)
Aayakar Bhavan,
M. K. Road
Mumbai-400 020 ..... Respondent

Appellant by	:	Shri J. D. Mistri
Respondent by	:	Smt. Shailja Rai CIT-DR
Date of hearing	:	27/03/2023
Date of pronouncement	:	15/05/2023

ORDER

PER GAGAN GOYAL, A.M:

This appeal by assessee is directed against the order of Ld. Commissioner of Income Tax Appeals-49, Mumbai (for short 'Ld. CIT (A)) dated 17.02.2021 u/s. 143(3) of the Income Tax Act, 1961 (for short 'the Act') for A.Y. 2017-18. The assessee has raised the following grounds of appeal:

"I. Non-Adjudication of Grounds of Appeal on the merits of the matter on the ground that once claim is not made in the return, it cannot be made during the assessment proceedings:

1.1. On the facts and in the circumstances of the case and in law the learned CIT (A) has erred in not adjudicating upon grounds raised by the appellant on merits by simply holding that once appellant has not made a claim in its return of income, it is not open to the appellant to make a claim subsequently during the course of assessment proceedings, when the claim was adjudicated by the AO in the assessment order and rejected on the merits.

1.2. On the facts and in the circumstances of the case and in law the learned CIT (A) has travelled beyond the subject matter of the appeal and has erred in not adjudicating the grounds of appeal on the merits of the matter.

1.3. It is submitted and prayed that the learned CIT(A) ought to have adjudicated upon each of the grounds raised by the appellant and ought to have decided various issues considering submissions made by the appellant and the judicial pronouncements on the subject without simply rejecting all written submissions

II. Deduction for Sales Promotion Expenses of Rs 28, 75, 17,266/- incurred on doctors for prescribing Appellant Company's Products:

2.1. On the facts and in the circumstances of the case and in law the learned Commissioner of Income-tax (Appeals) [CIT(A)"] has erred in upholding the action of the Assessing Officer [AO] of not allowing deduction under section 37(1) of the Act of the sales promotion expenditure of Rs 28.75,17 266/- incurred by the Appellant.

2.2. On the facts and in the circumstances of the case and in law, the learned CIT (A) has erred in holding that once the appellant has disallowed expenses in its return of income, it is not open to the appellant to make a claim for deduction during the course of assessment proceedings or the appellate proceedings.

III. Taxability of difference between Deferral Sales Tax Liability and its prepayment at its Net Present Value (NPV) amounting to Rs 3.77.47.870/- u/s 28(iv) of the Income Tax Act:

3.1. On the facts and in the circumstances of the case and in law, the learned CIT (A) has erred in upholding the action of the AO in not accepting the contention of the appellant that the difference between Deferral Sales Tax Liability and its prepayment at its Net Present Value (NPV) amounting to Rs. 3, 77,47,870/- is a Capital Receipt not taxable u/s. 28(iv) of the Act.

3.2. On the facts and in the circumstances of the case and in law, the learned CIT (A) has erred in holding that once the appellant has offered the amount as taxable income by mistake, it is not open to the appellant to make a claim for its non-taxability during the course of assessment proceedings or the appellate proceedings.

IV. Disallowance of Education Cess Rs 3, 50, 04,768/- u/s. 40(a) (ii) of the Income Tax Act:

4.1. On the facts and in the circumstances of the case and in law, the learned CIT (A) has erred in upholding the action of the AO in not accepting the contention of the appellant that Cess of Rs 3, 50, 04,768/- paid by the Appellant during the relevant year is allowable as a deduction not being hit by the provisions of section 40(a)(ii) of the Act.

4.2. On the facts and in the circumstances of the case and in law, the learned CIT (A) has erred in holding that once the appellant has not made a claim in its return of income, it is not open to the appellant to make a claim subsequently during the course of assessment proceedings or the appellate proceedings.

V. Disallowance of Education Cess on Dividend Distribution Tax Rs. 42, 23,186/- u/s. 40(a)(ii) of the Income Tax Act:

5.1. On the facts and in the circumstances of the case and in law, the learned CIT (A) has erred in upholding the action of the AO in not accepting the contention of the appellant that Cess of Rs 42, 23,186/- paid by the Appellant on Dividend

Distribution Tax is allowable as a deduction not being hit by the provisions of section 40(a)(ii) of the Act.

5.2. On the facts and in the circumstances of the case and in law, the learned CIT (A) has erred in holding that once the appellant has not made a claim in its return of income, it is not open to the appellant to make a claim subsequently during the course of assessment proceedings or the appellate proceedings.

VI. The appellant craves leave, to add, to alter to amend, to modify, and /or to delete any of the above grounds of appeal as may be necessary."

Additional grounds of appeal:

1. Taxation of Export Incentives under the Merchandise Exports from India Scheme ("MEIS") Rs.48, 57, 84,707/-:

1.1 The Appellant submits that the Learned AO ought to have held that the amount of Rs.48, 57, 84,707/- received by the Appellant as Export Incentives under the Merchandise Exports from India Scheme ("MEIS") is a capital receipt not taxable under the provisions of the Act.

1.2 The Appellant submits that the amount of Rs 48, 57, 84,707/- received by the Appellant as Export Incentives under the Merchandise Exports from India Scheme ("MEIS") is a capital receipt and ought to have been reduced while computing the Book Profit u/s 115JB of the Act.

1.3 The Appellant prays for directing the A.O. to treat the amount of Rs. 48, 57, 84,707/- as a capital receipt not liable to tax under the normal provisions of the Act as well as while computing the Book Profit u/s. 115JB of the Act.

In this appeal assessee raised one general ground and five substantive grounds. Thereafter assessee raised one additional ground also vide letter dated 18-11-2021. Contentions of ground no.1 will be taken care in 5 substantive grounds whereas **ground nos. 4 & 5 along with additional ground raised was not pressed by the assessee during the course of hearing.**

1. Brief facts of the case are that assessee filed its return of income on 26-11-2017 declaring total income of Rs 407,06,93,390/-. The case of the assessee was selected for scrutiny under CASS. Assessee Company is engaged in the business of manufacturing, marketing and distribution of wide range of pharmaceutical products in India and abroad. During the assessment proceeding assessee filed a revise computation vide letter dated 20-02-2019 in which assessee withdrew the disallowance on account of sales promotion expenses amounting to Rs 28,75,17,266/-, deferred sales tax liability amounting to Rs 3,77,47,870/-, vide letter dated 18-03-2019, education cess u/s. 40a(ii) amounting to Rs 3,50,04,768/- vide letter dated 28-06-2019 and education cess on dividend distribution tax amounting to Rs 42,23,186/- u/s. 40(a)(ii). AO assessed the income on original return filed u/s. 139(1). Aggrieved with this order of AO (wherein AO has ignored the revised computation filed on various dates during the assessment proceedings) assessee preferred an appeal before the Ld.CIT (A).

2. Ld.CIT (A) without travelling in the merits of the grounds raised by the assessee dismissed the appeal of the assessee on technical ground that additional claims of the assessee which were fresh claims not in the form of revised claim could not be entertain as alternative mechanism as assessing authority is not empowered to entertain these claims in view of decision of honorable apex court in the case of **Goetze India Ltd 204 CTR 182 (2006).** Ld.CIT (A) dismissed the appeal of the assessee on this technical ground itself. Assessee being further aggrieved with this order of Ld.CIT (A) preferred this appeal before us. We have thoroughly gone through the order of AO, order of the Ld.CIT (A) and submissions of the assessee at various stages.

3. Ground no. 1 pertains to authority of Ld.CIT (A), by not entertaining the claims of the assessee raised first time before the AO and then before the Ld.CIT (A). For sake of clarity and better appreciation of the matter we are

reproducing herein below the relevant extracts of the decisions of honorable apex court in the case of Goetze India Ltd. (supra).

> *"The question raised in this appeal relates to whether the appellant-assessee could make a claim for deduction other than by filing a revised return. The assessment year in question was 1995-96. The return was filed on 30-11-1995 by the appellant for the assessment year in question. On 12-1-1998, the appellant sought to claim a deduction by way of a letter before the Assessing Officer. The deduction was disallowed by the Assessing Officer on the ground that there was no provision under the Income-tax Act to make amendment in the return of income by modifying an application at the assessment stage without revising the return.*
>
> *This appellant's appeal before the Commissioner of Income-tax (Appeals) was allowed. However, the order of the further appeal of the Department before the Income-tax Appellate Tribunal was allowed. The appellant has approached this Court and has submitted that the Tribunal was wrong in upholding the Assessing Officer's order. He has relied upon the decision of this Court in National Thermal Power Co. Ltd. v. CIT[1998] 229 ITR 383, to contend that it was open to the assessee to raise the points of law even before the Appellate Tribunal.*
>
> *The decision in question is that the power of the Tribunal under section 254 of the Income-tax Act, 1961, is to entertain for the first time a point of law provided the fact on the basis of which the issue of law can be raised before the Tribunal. The decision does not in any way relate to the power of the Assessing Officer to entertain a claim for deduction otherwise than by filing a revised return. In the circumstances of the case, we dismiss the civil appeal. However, we make it clear that the issue in this case is limited to the power of the assessing authority and does not impinge on the power of the Income-tax Appellate Tribunal under section 254 of the Income-tax Act, 1961. There shall be no order as to costs."*

4. We have respectfully considered the decision of honorable apex court as mentioned (supra). We found that assessee sought our indulgence in the

matter which is already on record and in ITR filed by the assessee for which no new facts are required to be looked into therefore in the light of the judgment of honorable apex court in the case of National Thermal Power Co Ltd Vs CIT (1998) 229 ITR 383 (S.C) and the decision of honorable jurisdictional high court in the case of CIT Vs Pruthvi Brokers and shareholders 349 ITR 336 (Bom.) wherein the honorable court held that assuming the assessing officer is not entitled to grant a deduction on the basis of letter filed during the course of assessment proceedings, the appellate authorities are entitle to consider the claim and adjudicate the same.

5. It is clear therefore that an assessee is entitled to raise not merely additional legal submissions before the appellate authorities but is also entitled to raise additional claims before them. To that extent the order of Ld.CIT (A) is perverse by not adjudicating the matter on merits and dismissed on technical grounds itself. **Therefore ground no. 1 raised by the assessee is allowed and stand of Ld.CIT (A) is set aside.** This ground of appeal is allowed for statistical purposes as the claim of the assessee is admitted by this bench to be adjudicated on merits.

6. Ground no. 2 pertains to allowability of sales promotion expenses incurred on doctors for prescribing appellant company's product. This issue has deliberated in detail by the honorable apex court in the case of Apex Laboratories Ltd Vs CIT 442 ITR 1(S.C). Although the similar issue has been decided in appellants own case by the co-ordinate bench of ITAT Mumbai for the AY 2015-16 and 2016-17 vides ITA NO. 4784 and 4785/Mum/2019 dated 25-05-2021 but in the light of decision of honorable apex court in the case of Apex Laboratories (supra) there is no rescue to the assessee and amount of sales promotion expenses is disallowable. **Hence, this ground of appeal raised by the assessee is dismissed.**

7. Ground no.3 pertains to taxability of difference between deferral sales tax liability and its prepayment at its NPV u/s. 28(iv) of the Act. On this matter we have gone through the 1993 package scheme of incentives vide resolution no. IDL-1093/(8889)/IND dated 07-03-1993, letter of Sicom Ltd about eligibility certificate under packaged scheme of incentives, 1993 dated 18-07-2000 vide page no. 20 to 26 of paper-book no.2, copy of certificate of entitlement no.431107-S/R-31B/1151 dated 09-10-2000 approved by deputy commissioner of sales tax Mum vide page no. 27 to 31 of paper book no. 2, trade circular no. 31T of 2005 dated 03-10-2005 issued by the commissioner of sales tax Mum vide page no. 32 to 37 and copy of approval from DC sales tax along with detailed working of benefits availed and its NPV dated 21-04-2016 vide page no. 38 to 40. Assessee entitled deferral of sales tax liability of Rs 1581.567 lakhs for the period 01-10-2000 to 31-07-2015. Based on the above entitlement DC of sales tax Mumbai issued certificate of entitlement with a monetary ceiling of benefit at Rs 11.86 cr. and the same was repayable in equal annual installment not exceeding 5 such installment on expiry of the 10th year.

8. Assessee availed the set scheme and shown the same as unsecured loan under note no. 21 of annual reports for FY 2016-17. The deferral sales tax liability outstanding in the books of the assessee as on 1st April 2016 was Rs 9.09 cr. Against this assessee made a request before DC of sales tax along with detailed working of benefits availed and its net present value (NPV) amounting to Rs 5,30,99,305/-. This application by the assessee was made in response to the trade circular no 31T issued by the commissioner of sales tax Maharashtra. The request of the assessee was approved vide letter dated 21-04-2016 and in response to that assessee made payment of Rs 5,10,61,131/- and Rs 20,38,174/- on 19-04-2016 and 31-03-2017 respectively. Out of this arrangement between assessee and state government, there is a surplus of Rs 3, 77, 47,870/- which assessee, credited under the head other income in its books of accounts.

9. Assessee offered the above said income of Rs 3, 77, 47,870/- to tax though it represents the capital receipt not liable to income tax. Thereafter assessee resubmitted the revised computation by claiming the deduction of Rs 3, 77, 47,870/- being a capital receipt. We have examined the claim of the assessee and we are of the view that this surplus of Rs 3,77,47,870/- relying on the decision of honorable apex court in the matter of **CIT Vs Balkrishna Industries Ltd. (2017) 88 Taxxmann.com 273 (S.C).** in view of the above decision this amount of Rs 3, 77, 47,870/- is neither chargeable to tax u/s. 41 nor u/s. 28(iv) as the same is not a remission or cessation of liability for the purposes of Sec. 41 nor covered by Sec. 28(iv) as the same is not a non-monetary benefit which can be covered in sec 28(iv). Sec 28(iv) comes into picture only when sum value of benefit or perquisite arising from business or profession. Here in this case there is no benefit of perquisite arising to assessee by virtue of this arrangement. It is further to be noted that sec 28(iv) of the act has been amended by the finance act 2023 w.e.f A.Y 2024-25 which covers cash or in kind or partly in cash or partly in kind. This amendment clearly strengthens the contention of the assessee that in the year under consideration the same was not covered by section 28(iv). It is further held that revenue is not supposed to take advantage of assessee ignorance about treatment of any particular receipt/expenditure. Entries in the books of accounts are not the decisive factor as has been held by honorable apex court in the case of **Kedarnath Jute Mfg Ltd Vs CIT 82 ITR 363, UP state industrial development corporation (1997) 225 ITR 703 and CIT Vs Woodward Governor India Pvt Ltd.(2009) 312 ITR 204.**

10. In view of the above discussion considering the facts and law of land we direct the AO to reduce the income of the assessee by Rs 3,77,47,870/- being a capital receipt. **Resultantly ground no. 3 raised by the assessee is allowed.**

11. As ground nos. 4 & 5 were not pressed by the assessee during the course of hearing, **same are dismissed.**

12. **In the result appeal of the assessee is partly allowed.**

Order pronounced in the open court on 15th day of May, 2023.

Sd/-	Sd/-
(KULDIP SINGH)	(GAGAN GOYAL)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, दिनांक/Dated: 15/05/2023

Mahesh R. Sonavane

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

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(Dy. / Asstt. Registrar)
ITAT, Mumbai