

IN THE INCOME TAX APPELLATE TRIBUNAL

"D" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER AND

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA no.3321/Mum./2023

(Assessment Year : 2013-14)

Med-Link Devices Pvt. Ltd.

Shop no.08, Shree Gokul Garden Building

G to N CHS Ltd., Thakur Complex

Kandivali (East), Mumbai 400 101

PAN – AARFM2929F

..... Appellant

v/s

Dy. Commissioner of Income Tax

Central Circle-3(2), Mumbai

..... Respondent

Assessee by : Shri Upender Kothiyal

Revenue by : Smt. Mahita Nair

Date of Hearing – 30/01/2024

Date of Order – 01/02/2024

ORDER

PER SANDEEP SINGH KARHAIL, J.M.

The present appeal has been filed by the assessee challenging the impugned order dated 17/07/2023, passed under section 250 of the Income Tax Act, 1961 (*"the Act"*) by the learned Commissioner of Income Tax (Appeals)-51, Mumbai, [*"learned CIT(A)"*], for the assessment year 2013-14.

2. In the larger interest of justice, the slight delay of 3 days in filing the appeal by the assessee is condoned.

3. In its appeal, the assessee has raised the following grounds:-

"1. BECAUSE Ld. CIT(A) erred in law in not considering that the Assessment order passed by the AO is barred by limitation and passed beyond the statutory mandate of Sec. 153 of the Act.

2. BECAUSE the Ld. Assessing Officer as well as the CIT(A) erred in law in disallowing expenses to the tune of Rs. 35,26,803 incurred as the business promotion expenses by the Assessee u/s 37(1) of the Income Tax Act, solely on the ground that the expenditure incurred in organizing connection to various camps/seminars/conferences, were in the nature of "Freebies" to the medical practitioners, which being prohibited by law in terms the CBDT circular No. 05 of 2012 dated 01.08.2012; It is submitted that such finding was not only erroneous but also without any basis or justification.

3. BECAUSE the Ld. CIT(A) has failed to appreciate that it is matter of common knowledge and understanding as well as established industry practice to organizing camps, conferences and seminars and therefore, business expenditure of such nature are quite common, essentials and integral part of the businesses for pharmaceutical/medical companies and certainly cannot be termed as the activities prohibited by law.

4. BECAUSE the Ld. CIT (A) failed to appreciate that there are enough instances as well as precedents, judgements and decisions of this Hon'ble Tribunal as well as other Courts/Tribunals, where the expenditure of such as nature has been held to be business expenditures and thus, allowed deduction u/s 37(1) of the Act. [ref. this Hon'ble Tribunal's decision dated 28.06.2019 in Aristo Pharmaceuticals (P) Limited vs ACIT ITAT No. 5807/MUMBAI/2017]. Therefore, AO as well as CIT(A) had no basis to hold that that expenditure incurred in organizing the camps & seminars were "Freebies" to the medical practitioner and therefore prohibited in law.

5. BECAUSE the orders passed by the Ld. Assessing Officer as well as CIT(A) are non-speaking orders inasmuch as they do-not assign any reason and are conspicuously silent as to what are the exact nature of expenditures, which rather than treating them as business expenditures, were being treated as Freebies by the department and thus prohibited by CBDT circular No. 05 of 2012 dated 01.08.2012. The order is conspicuously silent and there is no detail or basis given by either the AO or the CIT(A) in their decision to arrive at the finding as to how the entire amount of Rs. 35,26,803 is being blindly treated as Freebies notwithstanding the fact that the Assessee had given full details of expenses as well as the details of the reputed hospitals, where various camps were organized under the supervision of reputed doctors and experts and the expenditures were incurred.

6. BECAUSE the Ld. CIT(A) has failed to appreciate that the nature of business in which the Assessee/Appellant is engaged i.e. trading and distribution of cardiac stents, biomedical instruments, Medical Instruments, Equipment and machinery, owing highly technical in nature, necessarily requires expertise marketing skills of these products as well as through other various means including organizing camps/seminars/conferences at various hospitals where the attendance and participation of experts as well as renowned doctors in the field, are arranged to ensure use of such expertise and knowledge for creating awareness and dissemination of expert information amongst various other industry experts, doctors as well as general public; There is no other way to disseminate information and product knowledge to other experts, doctors as well as general public about the products of the Assessee except through these

legitimate and well accepted means and well established industry practices, which requires considerable amounts of resources and expenditures. These expenses being integral part of the sales and promotions activities of the Assessee to make the world at large aware and informed about its products and services, amounts to "sales and promotion expenses" and certainly fulfils all the ingredients of business expenditures as per the provisions of Sec. 37(1) of the Act and therefore could not have been disallowed.

7. BECAUSE the Ld. CIT (A) failed to appreciate that the expenditure incurred for organizing medical camps/conferences/seminars and inviting doctors, experts and others from the industry to ensure successful events and dissemination of information and awareness amongst other cannot be treated as "Freebies".

8. BECAUSE the Ld. CIT(A) has failed to appreciate that the Assessee had given full and complete details of several camps which had been organized during the Financial Year in question, however neither any independent enquiry was done, nor any attempt was made to verify these details either from the concerned hospitals, where these camps were organized or otherwise. The fact of these camps having been organized by the Assessee has also not been disputed or questioned either by the AO or CIT(A). Therefore, in view of the above, the Ld. CIT(A) could not have disallowed the entire expenditure of Rs. 35,26,809:

9. BECAUSE the CIT(A) has failed to appreciate that even assuming without conceding the said circular is applicable to expenses in question, the onus to prove that the expenditure were not the "business expenses" but alleged "Freebies" had shifted to the Respondent Department to show and establish through evidence. However said expenses mere allowed merely on the basis of assumptions and surmises. Reliance was placed on the decision of the Himachal Pradesh High Court in Confederation of Indian Pharmaceutical Industry v. CBDT, (2013) 258 CTR 332: (2013) 86 DTR (HP) 34: (2013) 353 ITR 388 (HP) and of the Gujarat High Court in CIT v. Ashok J. Patel, (2014) 43 taxmann.com 227 (Guj). It is submitted that the assessee had placed before the Assessing Officer, all the relevant details thereby discharging the initial onus. Thereafter, open to the Revenue to prove to the contrary. However, in the present case, it transpires that onus was shifted upon the Appellant herein to prove the negative. It is submitted that the Ld. Assessing Officer as well as CIT(A) have not considered the legal position as explained in CIT v. United Hotels Ltd., (2009) 177 Taxman 417 (Del) and CIT v. Ashok J. Patel, (supra) as regards burden of discharging the initial onus.

10. BECAUSE the CIT(A) failed to appreciate that assuming without conceding that the circular in question is to be applied in the present case, same was issued on 01.08.2012 i.e. almost in the mid of the Financial Year in question, therefore any expenditure or even for that matter "Freebies" incurred prior to issuance of such circular shall have to be exempted. However, no such enquiry to find out as to which were the expenses incurred prior to issuance of the circular and which were incurred after said circular, was conducted either by the Assessing Officer or CIT(A);

11. BECAUSE CIT(A) erred in law in upholding the Assessment Order and disallowance of Rs 2,99,500, which was admittedly towards the business expenditures in the nature of travelling expenses of the officials of the company; It is submitted that except assuming such, there was neither basis

nor justification to treat these expenses as persons in nature. Besides, there is no application of mind by Ld. CIT(A), since it failed to pass a speaking order and give any reason as to on what basis these expenses were held to be personal in nature and not business expenses as claimed by Assessee.

12. BECAUSE, without prejudice to above submissions, it is further submitted that the Ld. CIT(A) failed to appreciate that under the "Vivad to Viswas Scheme" also, the Assessee has already paid Rs. 13,34,061, however same was rejected on ground that no power is vested with the Department to condone the delay in making the payment and accordingly the request for "Vivad to Viswas scheme" was not considered.

4. The only dispute raised by the assessee, in the present appeal, is against the disallowance of business promotion expenditure of Rs. 35,26,803 and the disallowance of travelling expenditure of Rs. 2,99,000.

5. The brief facts of the case are that the assessee is a partnership firm and is engaged in trading and distribution of cardiac stents, biomedical instruments, medical instruments, equipment, and machinery. For the year under consideration, the assessee filed its return of income on 20/09/2013 declaring a loss of Rs. 15,618. A survey action under section 133A of the Act was conducted in the case of the assessee on 26/11/2015, wherein various discrepancies relating to the suppression of receipts, expenses disallowable under section 37 of the Act, and personal expenses disallowable were found. Accordingly, proceedings under section 147 of the Act were initiated and notice under section 148 of the Act was issued to the assessee. During the reassessment proceedings, the assessee was asked to furnish the details in respect of various expenses claimed by it in its return of income. In response thereto, the assessee, inter-alia, submitted that the expenditure of Rs. 35,26,803 is related to sales and promotion expenses incurred for distributing medicines, food, arranging medical camps, and ancillary activities. The assessee further submitted that these expenses were paid directly from the

bank as well as out of cash withdrawn. As regards the travelling expenses of Rs. 2,99,000, the assessee submitted that this expenditure was incurred towards business trips of the partner of the firm and his family. Accordingly, the assessee submitted that the aforesaid expenditures are allowable expenses under section 37 of the Act.

6. The Assessing Officer ("AO") vide order dated 27/12/2018 passed under section 143(3) read with section 147 of the Act did not agree with the submissions of the assessee and held that on perusal of the bills and accompanying documents, it is clear that the partner of the firm was not on a business tour. It was further held that the assessee has not put forth any evidence regarding the business visit. Accordingly, the AO disallowed the travelling expenses amounting to Rs. 2,99,000 and added the same to the total income of the assessee. As regards the business promotion expenditure of Rs. 35,26,803, the AO held that these expenditures are disallowable in view of the CBDT Circular No. 5 of 2012. Accordingly, the AO disallowed the business promotion expenditure of Rs. 35,26,803 claimed by the assessee.

7. The learned CIT(A), vide impugned order, dismissed the appeal filed by the assessee in the absence of supporting documentary evidence and upheld the disallowance of business promotion expenditure of Rs. 35,26,803 and travelling expenditure of Rs. 2,99,000. Being aggrieved, the assessee is in appeal before us.

8. We have considered the submissions of both sides and perused the material available on record. As per the assessee, its primary business is the trading and distribution of cardiac stents, biomedical instruments, medical

instruments, equipment, and machinery. It is further the submission of the assessee that it makes an endeavour by organising camps at various hospitals where the prospective buyer attendance is attracted to create awareness amongst a certain class of key doctors about the products of the assessee and the new developments taking place in the area of medicine and providing correct diagnosis and treatment of the patients. It is further the submission of the assessee that during the year under consideration, it organised a total of 12 medical camps in hospitals, such as Grant Medical College and Sir Jamshedjee Jeejeebhoy Group of Hospitals, Bombay Hospital and Medical Research Centre, Bhaktivedanta Hospital and Research Institute, Wockhardt Hospitals. As per the assessee, these medical camps are conducted by health professionals to provide limited health services amongst the underprivileged community. Further, these medical camps provide the poor population with overall physical examination which includes eyes and health checkups, and assessment of the functioning of vital organs like the heart, lungs, digestive system, liver, kidneys, and immune system. The assessee submitted that for organising these camps it provides various equipment, machinery, stationery items, educational material, as under:-

"Things such as Sphygmomanometers (BP apparatus), Torchlights, Stethoscopes, Thermometers, Mobile ECG machine, Mobile Echo, Glucometers, Knee hammers, Height scales, Surgical gloves, Xylocaine Jelly, Masks, Sterile pads, Spirit and tray of emergency drugs, Savlon, betadine, Soaps, Dressing sets, Gauze, Cotton, Bandages and hand towels were required in huge quantity duly packed.

Equipments were required to be packed in advance depending on the requirement and type of specialties likely to participate, for instance, the number of doctors or laboratory tests to be done in the camp.

For ECG: ECG machines papers, jelly, and cotton were carried. For Ultrasound: Jelly, cotton, stationery, was taken. Electrical boards with electrical points for ECG or Echo machines Extension boards were also arranged.

Stationary items were needed for outpatient cards, prescription pads, papers, and the outpatient card were designed in such a way that a patient coming to the hospital after the camp can be easily identified and shows the attended health camp stamp with date and time.

Staff members like doctors, nurses, technicians, lab assistants, physiotherapists, dieticians, office assistants, supportive staff like drivers and helpers were all required.

Educational material like posters informing about diseases like Cancer, HIV, Kidney problems, Stroke, Mother and Child health, Polio, Immunization, Rabies, Prophylaxis should be carried.”

9. As per the assessee, the expenditure of Rs. 35,26,803 claimed as business promotion expenditure was incurred for organising these medical camps and the same does not amount to the provision of any freebies to the medical professionals. It is further the submission of the assessee that these expenditures are incurred in the normal course of its business for the purpose of marketing its products and dissemination of knowledge and not with a view to give something free of charge to the doctors. Accordingly, it is the plea of the assessee that these expenditures are allowable under section 37 of the Act.

10. From the perusal of the record, we find that apart from making a general statement and explaining the mode of operation of these medical camps, the assessee has not furnished any item-wise detail of the total expenditure of Rs. 35,26,803 claimed as business promotion expenditure. From the perusal of the impugned order, we find that such details were also not furnished before the learned CIT(A). Therefore, the nature of the expenditure incurred by the assessee under the head “*business promotion expenditure*” is not clear.

11. We find that the learned CIT(A) has placed reliance upon the decision of the Hon'ble Supreme Court in Apex Laboratories Pvt. Ltd. v/s DCIT, [2022] 442 ITR 1 (SC), wherein it was held that since the acceptance of freebies by medical practitioners was punishable as per Circular issued by Medical Council of India under MCI regulations, 2002, gifting of such freebies by 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 a deduction in terms of Explanation 1 to section 37(1) of the Act. However, we are of the considered view that before applying the ratio of the aforesaid decision it is relevant to examine the true nature of the expenditure incurred by the assessee for arranging these medical camps. Therefore, in the interest of justice, we grant one more opportunity to the assessee to furnish the item-wise details of the total expenditure of Rs. 35,26,803 incurred by it for organising the medical camps before the AO. Accordingly, we restore this issue to the file of the jurisdictional AO for *de novo* adjudication after examination of aforesaid details as may be furnished by the assessee and in light of the law laid down by the Hon'ble Supreme Court in Apex Laboratories Pvt. Ltd. (supra).

12. We find that even as regards the claim of allowance of travel expenses of Rs. 2,99,000, apart from claiming that the expenditure was incurred for business trips of the partner of the assessee firm, no details were furnished by the assessee nor any document was furnished to prove the purpose of the visit. Accordingly, this issue is also restored to the file of the jurisdictional AO for *de novo* adjudication, and one more opportunity is granted to the assessee, in the interest of justice, to furnish the necessary documents in support of its

claim. Needless to mention no order shall be passed without affording reasonable opportunity of being heard to the assessee. Further, the assessee is directed to furnish any other information as may be required by the AO for complete adjudication of the aforesaid issues. Accordingly, with the above directions, the impugned order is set aside and the grounds raised by the assessee are allowed for statistical purposes.

13. In the result, the appeal by the assessee is allowed for statistical purposes.

Order pronounced in the open Court on 01/02/2024

Sd/-
PRASHANT MAHARISHI
ACCOUNTANT MEMBER

MUMBAI, DATED: 01/02/2024

Sd/-
SANDEEP SINGH KARHAIL
JUDICIAL MEMBER

Copy of the order forwarded to:

- (1) The Assessee;
- (2) The Revenue;
- (3) The PCIT / CIT (Judicial);
- (4) The DR, ITAT, Mumbai; and
- (5) Guard file.

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai