

IN THE INCOME TAX APPELLATE TRIBUNAL “D” BENCH, MUMBAI

**BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI SANDEEP SINGH KARHAIL, JM**

ITA No. 3262/Mum/2022
(Assessment Year: 2017-18)

Merck Specialities Private
Limited
8th Floor, Godrej One,
vikhroli S.O.
Mumbai-400 079
(Appellant)

Vs.

The Dy. CIT
Circle 7(1)(1)
Room No. 126, 1st Floor,
Aaykar Bhavan, M.K. road,
Mumbai-400 020
(Respondent)

PAN No. AAECM2634N

Assessee by : Smt. Arati Vissanji,
Ms. Astha Dhowan,
Ms Hetal Sangani, ARs
Revenue by : Smt. Sanyogita Nagpal, CIT DR

Date of hearing: 07.02.2024
Date of pronouncement : 22.04.2024

ORDER

PER PRASHANT MAHARISHI, AM:

01. ITA number 3262/Mum/2022 is filed by Merck Specialities Private Limited (the assessee/ appellant) for A.Y. 2017-18 against the appellate order passed by the National faceless appeal Centre (NFAC), Delhi (the learned CIT – A) dated 9th November, 2022 wherein the appeal filed by the assessee against the assessment order



dated 25th December 2019 passed under section 143 (3) of the Income-tax Act, 1961 (the Act) by the Assistant Commissioner of Income Tax, Circle 7 (2) (2), Mumbai (the learned AO) was dismissed for statistical purposes.

02. Assessee is aggrieved with the same and is in appeal before us raising following grounds

“In the facts and circumstances of the case and in law the Ld. CIT (Appeal) erred in:

(1) Upholding the disallowance in respect of sales promotion expenses aggregating to Rs. 14,35,79,172/- on the basis of surmises, conjectures, presumption and assumptions and without considering the submissions made and the information and details provided to him during the appellate proceedings as also to the Ld. Assessing Officer during assessment proceedings.

(11) Disallowing the following expenses under the head "Sales Promotion Expenses" which had no relevance to the doctors and medical professionals nor were they incurred for providing gifts, travel facilities and hospitalities Le. "Freebies" to them which were prohibited by "Regulations" of the Indian Medical Council:

S.No	Code	Account Name	Disallowance (In %)	Amount of disallowance in Rs.
1	591000	Sales Promotion Advertisements	75	6,23,007

(III) Without prejudice to the above in any event erred in confirming the disallowance of the above expenses on a "percentage basis" in an adhoc and arbitrary manner:

(a) Confirming the disallowance of Rs. 12,45,52,664/- at 100% of the amount Incurred under Sales Promotion Conference Expenses (excluding amounts incurred for honorarium to doctors amounting to Rs. 50,03,131/-) in respect of advertisement, conference and registration to certain parties and thereafter Rs. 1,84,03,501/- at 100% under the head "Other Sales Promotion Expenses" without any reasons and justification in an adhoc manner.

(b) Confirming disallowance of Conference Expenses amounting to Rs. 12,45,52,664/- and "Other Sales Promotion Expenses" amounting to Rs. 1,84,03,501/- on the ground that the same were incurred for medical practitioners in providing them with hospitalities in Five Star Hotels and freebles, the sponsorship charges to medical practitioners and as payments to their professional associations to induce favouritism and for payments to hospitals and institutions which amounted to compromising their professional autonomy and freedom, though however the payments and expenses incurred in relation to doctors were segregated and provided to the Ld. Assessing Officer during the assessment proceedings.

(iv) Disregarding the submissions made to the Ld. AO during the assessment proceedings as also to the Ld. CIT (A) in the appellate proceedings that the appellant is governed by the "Merck Code of Conduct" and hence it

was not permitted to incur expenditure in relation to doctors and medical professionals which could be considered as "Freebies".

2. It is humbly prayed that the reliefs as prayed for hereinabove and/or such other reliefs as may be justified by the facts and circumstances of the case and as may meet the ends of justice should be granted.

3. The appellant craves leave to amend or alter any ground, or add a new ground which may be necessary.”

03. Brief facts of the case shows that assessee is a company engaged in pharmaceutical business. It filed its return of income on 29/3/2019 declaring a total income of ₹ 507,173,541/-. The return of income was picked up for scrutiny by issue of notice under section 143 (2) of the Act. During the course of assessment proceedings it was found that

i. Assessee has incurred the sales promotion expenditure of ₹ 179,303,207/- against which the assessee has claimed deduction under section 37 of the Act. The learned assessing officer was of the view that the sales promotion expenditure of the assessee are hit by the circular number 5/2012 of 1st August, 2012 as well as the notification by the Medical Council of India dated 10th December 2009.

ii. Assessee has incurred advertisement expenditure of ₹ 3,830,774/- out of which the advertisement expenditure of ₹ 3,000,098/- are expenses incurred in connection with services including event management, Facebook management, page management, which help the assessee company and selling its

marketing products to its customers and others. The assessee has submitted the copy of the agreement with the third-party. With respect to the balance advertisement expenditure of ₹ 830,676/- same are not substantiated before the learned assessing officer by submitting any evidence and therefore he held that these expenses remains uncorroborated. Accordingly, he disallowed 75% of such expenditure amounting to ₹ 623,007/-.

iii. Assessee has incurred expenditure on conference expenditure of ₹ 129,555,795/- , comprising of expenditure of ₹ 3,191,869 incurred for employees and ₹ 123,060,795/- incurred for third parties, and ₹ 5,003,131/- is incurred for honorarium to doctors. with respect to the other expenditure of ₹ 124,552,664/-. The learned AO noted that the payments were made to 5 star hotels which are in the nature of providing freebies to medical practitioners in the form of lavish dinners etc. On perusal of submission relating to conference expenses for participating in 12th International conference of Asian clinical oncology Society conference held at New Delhi from 8th to 10th April 2016, it was noted that cost of a banquet dinner costs ₹ 25 lakhs. Therefore he held that these expenses are nothing but hospitality and travel facilities as highlighted in the medical Council notification. Accordingly, he disallowed these expenditure.

iv. With respect to other sales promotion expenditure of ₹ 38,585,595/- it was noted that sum of ₹ 45,879/- is incurred for employees, ₹ 38,464,112/- is incurred for third parties and ₹ 75,604/- is incurred as honorary to doctors. As the assessee could not submit any evidence in support of the expenditure

pertaining to ₹ 18,403,501/–, the learned assessing officer disallowed the same.

04. Accordingly, the assessment order was passed under section 143 (3) of the act on 25/12/2019 determining the total income of the assessee at ₹ 650,752,713 against the total income as per return of income of ₹ 507,173,541/–.
05. The assessee being aggrieved with the assessment order preferred an appeal before the learned CIT – A. The learned CIT – A as per appellate order dated 9th November, 2022 has confirmed the addition of ₹ 143,579,179/–. The learned CIT – A noted that the learned assessing officer has analyzed that the payments made under different sub heads in details and found in nutshell all the expenses were incurred for providing gifts, travel facilities and hospitalities like freebies to medical practitioners which compromise the professional autonomy of their and which is prohibited by regulation of Indian medical Council, therefore and more so for the reason of the same that the assessee could not furnish any evidence and/or the details of the end-users as were asked by the learned assessing officer.
06. Aggrieved by the above appellate order assessee is in appeal. The learned authorized representative submitted that all these expenses are held by the learned CIT – A as falling within the definition of the freebies prohibited by Indian medical Council without verifying any information. Assessee submitted that they had submitted all the details before the learned AO. The learned assessing officer has not disallowed the expenditure on the ground that these are the freebies but has disallowed proportion of that expenditure. The learned authorized representative further referred to the paragraph number

6.4 of the assessment order stating that only the expenditure of ₹ 124,552,664/- made by the learned assessing officer was on account of MCI notifications. With respect to the other disallowance of ₹ 18,403,501/- was with respect to non-submission of the details.

07. The learned authorized representative also placed before us an application dated 5th February 2024 for admission of additional evidence under rule 29 of The Income Tax (Appellate Tribunal) Rules, 1963 along with the affidavit of the director.
08. In the affidavit and application it was submitted that the substantial amounts were disallowed by the learned assessing officer on the ground that the said expenditure was incurred for doctors and medical professionals, which are covered as prohibited by the Medical Council of India's guidelines as well as circular of the CBDT. The disallowance was also confirmed by the learned CIT – A. Subsequently, the honourable Supreme Court of India in case of Apex laboratories (2022) 442 ITR 1 have held that certain expenses incurred by the doctors as mentioned therein are held as not allowable under section 37 (1) read with explanation 1. Assessee has prepared the details and information along with the supporting evidences explaining the nature and purpose of the expenditure and expenditure incurred for in connection with the doctors. The said details and information as also the supporting documents are submitted now as an additional evidence to substantiate and support the contention of the appellant about the allowability or otherwise of the sales promotion expenditure. Therefore it was submitted that these additional evidences may be admitted and matter may be restored to the file of the learned assessing officer to examine the



details and then make such disallowance, if any, if covered by the decision of the honourable Supreme Court.

09. The learned departmental representative vehemently submitted that assessee is trying to wriggle out the case as issue is squarely covered against the assessee by the decision of the honourable Supreme Court. The additional evidences furnished by the assessee for admission does not support the case of the assessee.
010. We have carefully considered the rival contention and perused the orders of the lower authorities. We have also considered the application dated 5th February 2024 furnished by the assessee for admission of the additional evidences along with the affidavit of the director of the company. On careful consideration of the additional evidences we found that assessee has prepared a chart wherein it was submitted that there are certain expenditure incurred by the assessee, which are not hit by the provisions of guidelines of MCI and these payments are not prohibited and therefore those cannot be disallowed. It was also found that some of the expenditure which is incurred by the assessee on the employees of the company is also not covered by those guidelines. The chart also shows that certain advertisement expenses incurred by the assessee are printing and stationary charges as well as consultancy fees. The note on sales promotion is also submitted by the assessee showing the details of the total expenditure of ₹ 124,552,665 showing the end-user and the beneficiary of such expenditure. We find that because of the decision of the honourable Supreme Court in case of Apex laboratories Ltd, now the expenses which are incurred by the assessee in violation of the guidelines of the medical Council of India are not allowable at all. However, as that decision was not available at the time of



assessment proceedings or appellate proceedings. Now, the assessee has submitted such details. Therefore, the assessee was prevented by sufficient cause earlier in not submitting those details. In view of this, we admit the additional evidence furnished by the assessee.

011. In view of the admission of the additional evidences furnished by the assessee admitted, we restore ground number 1 along with sub-grounds to the file of the learned Assessing Officer with a direction to the assessee to substantiate before the assessing officer that the amount of expenditure incurred by the assessee whether hit by the guidelines of MCI. On verification of the details, the learned assessing officer, may decide the issue afresh and disallow the expenditure which is covered by the decision of the honourable Supreme Court in case of Apex laboratories. We make it clear that it would be the sole responsibility and onus of the assessee to show before the Assessing Officer that particular amount of expenditure is not prohibited. Accordingly, ground number 1 of the appeal is allowed with above directions.

012. In the result appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in the open court on 22.04.2024.

Sd/-
(SANDEEP SINGH KARHAIL)
(JUDICIAL MEMBER)

Sd/-
(PRASHANT MAHARISHI)
(ACCOUNTANT MEMBER)

Mumbai, Dated: 22.04. 2024

Sudip Sarkar, Sr.PS



Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai