

**IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, AHMEDABAD**

**BEFORE MS. SUCHITRA R. KAMBLE, JUDICIAL MEMBER AND
SHRI NARENDRA PRASAD SINHA, ACCOUNTANT MEMBER**

**ITA No. 565/Ahd/2024
Assessment Year : 2018-19**

Kepler Healthcare Private Limited, C/o. M S Chhajer & Co., CA, "Kamal Shanti, Nr. Sardar Patel Statute, Ahmedabad-380014 PAN : AAFCK 1130 R	Vs	The Pr. Commissioner of Income Tax-1, Ahmedabad
अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
Assessee by :		Shri M.S. Chhajer, AR
Revenue by :		Shri Kamlesh Makwana, CIT-DR

सुनवाई की तारीख/Date of Hearing : 30/05/2024
घोषणा की तारीख /Date of Pronouncement : 12/06/2024

आदेश/O R D E R

PER NARENDRA PRASAD SINHA, ACCOUNTANT MEMBER:

This appeal is filed by the assessee against the order passed by the learned Principal Commissioner of Income Tax, Ahmedabad-1 [hereinafter referred to as "PCIT" in short] dated 29.02.2024, in exercise of his revisionary powers under Section 263 of the Income-tax Act, 1961 [hereinafter referred to as "the Act" in short], for the Assessment Year 2018-19.

2. The brief facts of the case are that the return of income for AY 2018-19 was filed by the assessee on 09.10.2018 declaring loss of (-) Rs.7,29,10,574/-. The assessment was completed u/s 143(3) of the Act on 05.04.2021 at a total income of Rs.76,71,681/-. In the course of assessment, the Assessing Officer had made addition of Rs. 34,01,467/- being 10% of marketing expenses. The assessment records were subsequently called for by the Id. PCIT, wherein he noticed that the Assessing Officer had disallowed only 10% of the

expenditure incurred for distribution of gifts, bags and other articles. According to ld. PCIT, the expenditure in the nature of gifts was required to be disallowed at 100% of such expenses. He, therefore, found that the order of the Assessing Officer was erroneous and prejudicial to the interest of the Revenue and, accordingly, he passed order u/s 263 of the Act on 29.02.2024, setting aside the order of the Assessing Officer for passing a fresh order after examining the facts and the issues as discussed in the order u/s 263 of the Act.

3. Aggrieved with the order of the ld. PCIT, the assessee is in appeal before us.

4. The assessee has taken following grounds in its appeal:-

"1. The order passed by the Ld. Pr. CIT is against law, equity & justice.

2. The Order passed by the by the Ld. Pr. CIT is bad and illegal, as no proceedings u/s 263 of the Act shall be initiated for which the case is pending before CIT(A).

3. The Ld. Pr. CIT has erred in law and on facts in considering that order passed by Ld. A.O. as erroneous and prejudicial to the interest of revenue.

4. The Ld. Pr. CIT has erred in law and on facts in initiating and passing the order u/s 263 of the Act is bad and illegal, as conclusion drawn by the Income Tax Officer cannot be termed as erroneous.

5. The Ld. Pr. CIT has erred in law and on facts in setting aside the assessment order passed by the Ld. A.O. u/s 143(3) by directing AO to disallowing various expense claimed in business of Rs 76,71,681/-."

5. Shri M.S. Chhajed, learned Counsel for the assessee, submitted that the issue of marketing expenses was examined in details by the Assessing Officer in the course of assessment. He explained that the assessee was engaged in the business of trading of its own branded pharmaceutical products on PAN

India basis. In order to promote and market its products, certain items such as working bags, hand sanitizer, shirt tie, ball pen, wallet, LED torch etc. were distributed as gifts to distributors, stockists, chemists, including doctors etc. The Assessing Officer, after examining the matter, had disallowed 10% of the expenditure in the course of assessment. Since the matter was already examined by the Assessing Officer during the course of assessment, the finding of the Id. PCIT that the order was erroneous and prejudicial to the interest of the Revenue was not correct. The Id. AR further submitted that when the Assessing Officer has taken one view, it was not open for the Id. PCIT to substitute his view on the stand already taken by the Assessing Officer in the course of assessment proceedings. He further submitted that the revision order u/s 263 of the Act was passed by the Id. PCIT on the basis of an audit objection and there was no independent application of mind by the Id. PCIT. He also submitted that the entire marketing expenditure was not incurred on distribution of gifts to the doctors alone and, therefore, the contention of the Id. PCIT that the entire expenses should have been disallowed was not correct.

6. The Id. CIT-DR, on the other hand, submitted that the Assessing Officer had not correctly examined the nature of expenditure and not applied his mind to the issue. He has made only ad-hoc disallowance of 10% without examining as to whether the entire expenditure was incurred towards distribution of gifts to the doctors or not. Therefore, the order of the Assessing Officer was certainly erroneous and prejudicial to the interest of the Revenue. The Id. CIT-DR has also relied upon the decision of this Tribunal dated 27.05.2024 in the case of *Mafatbhai Bhikhabhai Parmar Vs. PCIT and others*, in ITA Nos. 463-471/Ahd/2023.

7. We have carefully considered the facts of the case and the rival submissions. At the outset the objection of the assessee that the revision order u/s 263 of the Act was passed by the Id. PCIT on the basis of an audit objection is not found relevant. The mistaken in the assessment order can be brought to the notice of the PCIT by the Assessing Officer which can be on the basis of audit objection as well. What is relevant to consider is whether the order of the order was erroneous or not. There is no dispute to the fact that the Id. PCIT has inherent power to review the order of the Assessing Officer if the order of the Assessing Officer is found to be erroneous and prejudicial to the interest of the Revenue. We have to, therefore, examine whether the basic condition that the order of the Assessing Officer was erroneous and prejudicial to the interest of the Revenue was satisfied in the order u/s 263 of the Act.

8. The Id. PCIT has observed that the distribution of gifts, bags and other articles were in the nature of gifts and were required to be disallowed at 100% of such expenses; whereas the Assessing Officer had disallowed only 10% of the expense. No cogent reason has been given by the Id. PCIT as to why the entire marketing expenses were required to be disallowed. The Id. PCIT has formed his opinion and given the direction to the Assessing Officer to disallow the entire expenses on the presumption that the entire marketing expenses was in the nature of gifts distributed to doctors. However, no material has been brought on record to establish that the entire gifts were given to the doctors. The reason for revising the order and giving direction to disallow 100% of the expenditure, as appearing in paragraph No. 7.1 of the order of Id. PCIT, is found to be as under:-

"7.1 In this regard, Hon'ble Supreme Court bench of justices Uday U Lalit and S Ravindra Bhat underlined that it is not just an issue of taxation but "a

matter of great public importance" when it is demonstrated that a doctor's prescription can be manipulated and driven by the motive to avail the freebies offered to them by pharmaceutical companies, ranging from gifts such as gold coins, fridges and LCD TVs to international trips. The Bench further held as "These freebies are technically not 'free' - the cost of supplying such freebies is usually factored into the drug, driving prices up, thus creating a perpetual publicly injurious cycle," said the court, emphasising that medical practitioners have a quasi-fiduciary relationship with their patients, who take doctor's prescriptions as final words even if the cost of medication is unaffordable or barely within their economic reach. When doctors are prohibited under the law from accepting gifts, the court said, pharma companies cannot defeat the objective behind the legal provision by arguing that donors have not been forbidden under the law from giving gifts. Under the 2002 Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, receiving emoluments in the form of gifts, travel facilities, hospitality, cash, etc., can lead to suspension of a medical practitioner's right to practice for up to one year. "The 2002 Regulations, applicable to all medical practitioners (including doctors in private practice), was introduced from December 14, 2009. Thus, pharmaceutical companies' gifting freebies to doctors is clearly 'prohibited by law', and not allowed to be claimed as a deduction under Section 37(1) of the Income Tax Act (as business expenditure). Doing so would wholly undermine public policy," - said the bench."

There is no dispute in the fact that gifts to the doctors are now prohibited and liable to be disallowed u/s 37(1) of the Act. However, before giving the direction to disallow the entire marketing expenses, no material has been brought on record to establish that the entire marketing expenses of Rs.3,40,14,669/- in respect of distribution of gifts, bags, other articles etc. was given to doctors only.

9. The Assessing Officer had examined this issue and a finding was given in the assessment order that the distribution of gifts, bags and other articles was made to distributors, stockists and chemists including the doctors. Considering the fact that some component of marketing expenses was utilized towards giving gifts to doctors, the Assessing Officer had taken a

reasoned decision to disallow only 10% of the expenditure following the identical disallowance made in the earlier years. The Assessing Officer had reproduced the findings given in the assessment order for AY 2016-17 to make the disallowance in the current year and the said reason is found to be as under:-

“First of all, the above circular nowhere defines any monetary limit upto freebies, gifts etc. given expenditure. Therefore, assessee's contention that the gifts and freebies are low in cost is not satisfactory justification. Most of the items are directly related to freebies and gifts given to stockiest, distributors medical staff and doctors etc. but the assessee failed to furnish details of items given to doctors. Further, in the guise of camp and survey charges, assessee is providing undue benefits to doctors. Though assessee has contended that the above expenditure is incurred for sales promotion having logo and name of its brands but at the same time assessee failed to produce concrete proof which shows that the above items were only distributed to stockiest and distributors. Accordingly, it is assumed that some of the above items were also given to doctors and their staff members. Even otherwise also, the gift items/freebies which are given to distributors/stockiest also reach to the hands of doctors and their staff members.

As per circular No. 5 of 2012 CBDT and MCI guidelines and judgment of Himachal Pradesh High Court freebies and gifts to the doctors is not allowable u/s 37(1) of the Income Tax Act, 1961. Further the assessee has also not submitted the details of the schemes introduced by the assessee company under which gifts items were distributed.

It is also pertinent to mention here that similar additions were i.e 23,28,458/- is made u/s 37(1) as per the circular No. 5 of 2012 CBDT treated as gifts to the doctors. Penalty proceedings Act u/s 271(1)(c) of the are initiated separately for filing inaccurate particulars of income.”

10. It is, thus, evident from the above facts that there was no material before the Assessing Officer to treat the entire expenditure of Rs.3,40,14,669/- as gifts to doctors. The Assessing Officer had made the disallowance on the presumption that some of the items were also utilized towards giving gifts to the doctors and his staff members, and also for the reason that the gifts given

to distributors/stockists also ultimately reach to the hands of the doctors. In view of these facts, there was no material to conclude that the entire marketing expenses was in the nature of gifts to doctors. In the course of the proceedings u/s 263 of the Act also, no such material has been brought on record. As per provisions of Section 263 of the Act, the PCIT is empowered to cause such inquiry as he deems necessary. However, no such inquiry was caused by the ld. PCIT to establish that the entire marketing expenses was in the nature of gifts to doctors. In the absence of any such evidence on record, there was no basis for the ld. PCIT to conclude that the entire marketing expenses was in the nature of gifts to doctors and was liable for 100% disallowance. The Assessing Officer had taken a reasoned view to disallow 10% of marketing expenses being in the nature of gifts to doctors, following the treatment as given in the earlier years. It was also not the case that the entire marketing expense was disallowed in the earlier years. Considering the consistent view taken by the AO on this issue, it can't be held that the order of the AO was erroneous and prejudicial to interest of revenue. Further, in the absence of any additional material being brought on record, the direction of the ld. PCIT to disallow the entire marketing expenditure as being in the nature of gifts to doctors was not correct.

11. With regard to the decision in the case of *Mafatbhai Bhikhabhai Parmar Vs. PCIT and others (supra)* relied upon by the ld. CIT-DR, it is found that the facts of that case are totally different from the facts of the present case. In those cases, the ld. PCIT had made inquiries in the course of proceedings u/s 263 of the Act in order to establish that the order of the Assessing Officer was erroneous and prejudicial to the interest of the Revenue. In the present case, no such inquiry was made by the ld. PCIT and nothing adverse has been brought on record. The ld. PCIT was not correct in substituting his own view

on the stand already taken by the Assessing Officer without bringing anything adverse on record.

12. In view of the above facts and discussions, we are of the opinion that the order of the Assessing Officer was neither erroneous nor prejudicial to the interest of the Revenue. Therefore, the Id. PCIT was not correct in assuming jurisdiction u/s 263 of the Act and in directing to make a fresh assessment by disallowing 100% of the marketing expense, without bringing anything adverse on record. The order u/s 263 of the Act passed by the Id. PCIT is, therefore, cancelled and the grounds taken by the assessee is accordingly allowed.

13. In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on 12th June, 2024 at Ahmedabad.

Sd/-

Sd/-

(SUCHITRA R. KAMBLE)
JUDICIAL MEMBER

(NARENDRA PRASAD SINHA)
ACCOUNTNAT MEMBER

Ahmedabad, Dated 12/06/2024

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आदेश की प्रतिलिपि ँ ग्रेषित/Copy of the Order forwarded to :

1. ँ पीलर्णी / The Appellant
2. प्रत्यर्णी / The Respondent.
3. संबधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त (ं पील) / The CIT(A)-
5. विभर्णीय प्रतिनिधिं धिकरण ँ पीलीय आयकर , /DR,ITAT, Ahmedabad,
6. गार्ड फर्ईल /Guard file.

आदेशनुसर / BY ORDER,

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सहस्रक पंजीकर (Asstt. Registrar)
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