

IN THE INCOME TAX APPELLATE TRIBUNAL
JAIPUR BENCH "A", JAIPUR
BEFORE Dr. S. SEETHALAKSHMI, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER
ITA Nos. 789 & 790/JPR/2024

Ramdulari Bansal Welfare Society,

C/o. M/s. Kalani & Co., 5th Floor,
Milestone Building, Gandhi Nagar Turn,
Tonk Road, Jaipur – 302 015.

PAN No.: AAIAR 5828A

..... Appellant

Vs.

CIT (E), Jaipur,

Jaipur – 302 015.

..... Respondent

Appellant by	:	Mr. P. C. Parwal, CA, Ld. AR
Respondent by	:	Mr. Arvind Kumar, Ld. CIT-DR
Date of hearing	:	26/11/2024
Date of pronouncement	:	28/11/2024

ORDER

PER GAGAN GOYAL, A.M:

These two appeals by assessee are directed against the order of Ld. CIT (E), Jaipur dated 31.03.2024 passed u/s. 12AB (1) (b) (ii) of the Income Tax Act, 1961 (in short 'the Act'). The assessee has raised the following grounds of appeal:

- The Ld. CIT(E) has erred on facts and in law in rejecting the application filed by the assessee u/s 12A(1)(ac)(iii) in Form No.10AB seeking registration u/s 12AB of IT Act, 1961 by making various incorrect & irrelevant observations without appreciating the explanation of assessee in correct perspective and by holding that (i) assessee is doing business in garb of charity & doing activity beyond the objects of the trust (ii) it has made payment to persons*

specified u/s 13(3) & thus siphoned the funds of trust by claiming non-genuine expenses and (iii) it is not genuinely carrying out charitable activities.

2. *The Ld. CIT (E) has further erred on facts and in law in cancelling the provisional registration dt. 15.12.2022 granted by CIT u/s. 12A (1) (ac) (vi) of IT Act, 1961.*
3. *The appellant craves to alter, amend and modify any ground of appeal.*
- 4.
5. *Necessary cost to be awarded to the assessee.*

In ITA No. 790/JPR/2024, the assessee has raised the following grounds of appeal:-

1 The Ld. CIT (E) has erred on facts and in law in rejecting the application filed by the assessee in Form No. 10AB seeking approval under clause (iii) of first proviso to section 80G (5) of IT Act, 1961 on the ground that (i) approval u/s. 80G cannot be granted without registration u/s. 12AB and (ii) application filed in Form No. 10AB is not within the time limit.

2 The Ld. CIT (E) has further erred on facts and in law in cancelling the provisional approval dt. 03.02.2023 granted by the CIT under clause (iv) of first proviso to section 80G (5) of IT Act, 1961.

- 3 *The appellant craves to alter, amend and modify any ground of appeal.*
4. *Necessary cost to be awarded to the assessee.*

2. The brief facts of the case are that the applicant filed an online application in Form No. 10AB dated: 27.09.2023 seeking registration u/s. 12AB of the Act in continuation to the provisional registration granted earlier vide dated: 15.12.2022 for the A.Y.'s 2023-24 to 2025-26. During the course of proceedings it was observed by the Ld. CIT (E), Jaipur that the assessee society was constituted with the main object of imparting training to doctors, organizing conferences and

seminars to educate professionals. The assessee is duly registered under the Rajasthan Society Registration Act, 1958 and the Rajasthan Public Trust Act, 1959.

3. **It is also observed by the Ld. CIT (E), Jaipur that the assessee has shown sponsorship and other receipts for F.Y.'s 2022-23 and 2023-24 on which T.D.S. has been deducted by the contributors, i.e. Pharma companies.** The Ld. CIT (E), Jaipur relied upon the decision of Hon'ble Apex Court in the case of Ahmedabad Urban Development Authority [2022] 143 taxmann.com 278 (SC), New Noble Education Society [2022] 143 taxmann.com 276 (SC), decision of Hon'ble Kerala High Court in the case of Annadan Trust [2018] 96 taxmann.com 207 (Kerala) and also the decision of coordinate bench in the case of Eternal Foundation in ITA No. 1504 & 1505/ JP/ 2018. Ultimately, the application of the assessee in Form No. 10AB is rejected and consequential rejection is there of application filed in Form No. 10AC also.

4. The assessee society being aggrieved with this order of the Ld. CIT (E), Jaipur preferred the present appeal before us. We have gone through the order of the Ld. CIT (E), Jaipur, submissions of the assessee filed through paper book alongwith grounds taken before us. The Memorandum of Association alongwith the Rules and Regulations were also referred by us while deciding the present issue under consideration. It may be noted that the main object of the society is to impart training to doctors, organizing conferences and seminars. It is observed through the financials of the assessee society that the assessee has managed its affairs in a way that after paying exorbitant amount for medical conferences collected the same with a huge gap from Pharma companies. No hard and fast rule to distinguish between the societies/trusts rendering real service of

charitable nature and the institutions being run on commercial lines could be laid down. The facts and circumstances of each case have to be evaluated in a judicial manner and in its entirety to come to a right conclusion that whether the assessee-society/trust is carrying on its activities for charitable purposes in accordance with the objects of the society.

5. Here we need to understand the background and substance of the matter. The Hon'ble Apex Court in the case of **[2022] 135 taxmann.com 286 (SC) Apex Laboratories (P.) Ltd. v. DCIT (LTU)** held as under:

"Section 37 is a residuary provision. Any business or professional expenditure which does not ordinarily fall under sections 30-36, and which is not in the nature of capital expenditure or personal expenses, can claim the benefit of this exemption. But the same is not absolute. Explanation 1, which was inserted in 1998 with retrospective effect from 1-4-1962, restricts the application of such exemption for "any purpose which is an offence or which is prohibited by law". The Income-tax Act does not provide a definition for these terms. Section 2(38) of the General Clauses Act, 1897 defines 'offence' as "any act or omission made punishable by any law for the time being in force". Under the IPC, section 40 defines it as "a thing punishable by this Code", read with section 43 which defines 'illegal' as being applicable to "everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action". It is therefore clear that Explanation 1 contains within its ambit all such activities which are illegal/prohibited by law and/or punishable. [Para 17]

Though the memorandum to the Finance Bill, 1998 elucidated the ambit of Explanation 1 to section 37(1) to include 'protection money, extortion, hafta, bribes, etc.', yet, ipso facto, by no means is the embargo envisaged restricted to those examples. It is but logical that when acceptance of freebies is punishable by the MCI (the range of penalties and sanction extending to ban imposed on the medical practitioner), pharmaceutical companies cannot be granted the tax benefit for providing such freebies, and thereby (actively and with full knowledge) enabling the commission of the act which attracts such opprobrium. [Para 22]

Even if assessee's contention were to be accepted - that it did not indulge in any illegal activity by committing an offence, as there was no corresponding penal provision in the 2002 Regulations applicable to it - there is no doubt that its actions fell within the purview of "prohibited by law" in Explanation 1 to section 37(1). [Para 25]

Furthermore, if the statutory limitations imposed by the 2002 Regulations are kept in mind, Explanation (1) to section 37(1) of the Act and the insertion of section 20A of the Medical

Council Act, 1956 (which serves as parent provision for the regulations), what is discernible is that the statutory regime requiring that a thing be done in a certain manner, also implies (even in the absence of any express terms), that the other forms of doing it are impermissible. [Para 25]

Furthermore, medical practitioners have a quasi-fiduciary relationship with their patients. A doctor's prescription is considered the final word on the medication to be availed by the patient, even if the cost of such medication is unaffordable or barely within the economic reach of the patient - is such the level of trust reposed in doctors. Therefore, it is a matter of great public importance and concern, 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. 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. [Para 28]

Thus, pharmaceutical companies gifting freebies to doctors, etc. is clearly "prohibited by law", and not allowed to be claimed as a deduction under section 37(1). Doing so would wholly undermine public policy. The well-established principle of interpretation of taxing statutes - that they need to be interpreted strictly - cannot sustain when it results in an absurdity contrary to the intentions of the Parliament. [Para 33]

In the instant case, the incentives (or "freebies") given by assessee, to the doctors, had a direct result of exposing the recipients to the odium of sanctions, leading to a ban on their practice of medicine. Those sanctions are mandated by law, as they are embodied in the code of conduct and ethics, which are normative, and have legally binding effect. The conceded participation of the assessee- i.e., the provider or donor- was plainly prohibited, as far as their receipt by the medical practitioners was concerned. That medical practitioners, were forbidden from accepting such gifts, or "freebies" was no less a prohibition on the part of their giver, or donor, i.e., assessee. [Para 36]

6 Regulation 6.8. of the 2002 Regulations states as follows:

"6.8. Code of conduct for doctors in their relationship with pharmaceutical and allied health sector industry.

6.8.1 In dealing with Pharmaceutical and allied health sector industry, a medical practitioner shall follow and adhere to the stipulations given below —

(a) Gifts: A medical practitioner shall not receive any gift from any pharmaceutical or allied health care industry and their sales people or representatives.

(b) Travel facilities: A medical practitioner shall not accept any travel Facility inside the country or outside, including rail, road, air, ship, cruise tickets, paid vacation, etc. from any pharmaceutical or allied healthcare industry or their representatives for self and family members for vacation or for attending conferences, seminars, workshops, CME Programme, etc. as a delegate.

(c) Hospitality: A medical practitioner shall not accept individually any hospitality like hotel accommodation for self and family members under any pretext.

(d) Cash or monetary grants: A medical practitioner shall not receive any cash or monetary grants from any pharmaceutical and allied healthcare industry for individual purpose in individual capacity under any pretext. Funding for medical research, study etc. can only be received through approved institutions by modalities laid down by law/rules/guidelines adopted by such approved institutions, in a transparent manner. It shall always be fully disclosed. "

The regulation further lays down corresponding action or sanction which can be taken against, or imposed upon, the medical practitioner for violation of each stipulation, based on the monetary value of the same. Thus, acceptance of freebies given by pharmaceutical companies is clearly an offence on part of the medical practitioner, punishable with varying consequences.

7. The CBDT circular dated 1-8-2012 is set out below:

1. It has been brought to the notice of the Board that some pharmaceutical and allied health sector Industries are providing freebies (freebies) to medical

practitioners and their professional associations in violation of the regulations issued by Medical Council of India (the 'Council') which is a regulatory body constituted under the Medical Council Act, 1956.

2. The council in exercise of its statutory powers amended the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (the regulations) on 10-12-2009 imposing a prohibition on the medical practitioner and their professional associations from taking any Gift, Travel facility, Hospitality, Cash or monetary grant from the pharmaceutical and allied health sector Industries.

3. Section 37(1) of Income-tax Act provides for deduction of any revenue expenditure (other than those failing under sections 30 to 36) from the business Income if such expense is laid out/expended wholly or exclusively for the purpose of business or profession. However, the explanation appended to this sub-section denies claim of any such expense, if the same has been incurred for a purpose which is either an offence or prohibited by law.

Thus, the claim of any expense 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 health sector Industries or other assessee which has provided aforesaid freebies and claimed it as a deductible expense in its accounts against income.

4. It is also clarified that the sum equivalent to value of freebies enjoyed by the aforesaid medical practitioner or professional associations is also taxable as

business income or income from other sources as the case may be depending on the facts of each case. The Assessing Officers of such medical practitioner or professional associations should examine the same and take an appropriate action.

This may be brought to the notice of all the officers of the charge for necessary action. *(Emphasis supplied)*

8. The 2002 Regulations, applicable to all medical practitioners (including doctors in private practice), was introduced w.e.f. 14-12-2009. Thus, pharmaceutical companies' gifting freebies to doctors, etc. is clearly "prohibited by law", and not allowed to be claimed as a deduction under section 37(1) of the Act. Doing so would wholly undermine public policy. The well-established principle of interpretation of taxing statutes - that they need to be interpreted strictly - cannot sustain when it results in an absurdity contrary to the intentions of the Parliament. **It is also a known principle that what cannot be done directly, cannot be achieved indirectly also.**

9. The above back ground discussed (supra) is required in the present matter to understand the real substance of the case. As the Pharma companies can't indulge into the practices mentioned (supra), they chose the entities like the assessee society for promoting their restricted activities. Here it is again to be reiterated that **“what cannot be done directly, cannot be achieved indirectly also.” what cannot be done directly, cannot be achieved indirectly.** If one compares the list of restricted activities for doctors and Pharma companies vis-à-vis the activities being undertaken by the assessee society, they are similar in nature and in the garb of contributing to a so called charitable institution, the

Pharma companies are claiming the expenses on the other hand the assessee society is also claiming benefit u/s. 12A of the Act. Allowing benefit of section 12A of the Act to the assessee society will defeat the whole purpose of the Regulation 6.8. of the 2002 Regulations of the Medical Council Act read with the law declared by the Hon'ble Apex Court in the case of **[2022] 135 taxmann.com 286 (SC) Apex Laboratories (P.) Ltd. v. DCIT (LTU) (supra)**.

10. The coordinate benches have already started following the decision of the Hon'ble Apex Court in the case **Apex Laboratories (P.) Ltd. (supra)** and coordinate bench, Mumbai in the case of **[2024] 161 taxmann.com 511 (Mum. - Trib.) IPCA Laboratories Ltd. v. DCIT** held as under:

"It is noted that the Supreme Court in the case of Apex Laboratories (P.) Ltd. v. Dy. CIT [2022] 135 taxmann.com 286/286 Taxman 200/442 ITR 1 has held that incentives or freebies given to doctors was punishable as per the Circular issued by the Medical Council of India on 14-12-2019 under the MCI Regulations 2002. The Apex Court held that such freebies given by pharmaceutical companies to medical practitioners was held to be prohibited by law and therefore the expenditure incurred on distribution of such freebies was not allowable as deduction in terms of Explanation (1) to section 37(1). While holding so, the Apex Court held that the CBDT Circular No. 5/2012 dated 1-8-2012 clarifying that the freebies given by pharmaceutical companies to medical practitioners was inadmissible as deduction under section 37(1) was clarificatory in nature. The said Circular was thus held to be effective from the date of implementation of Regulation 6.8 of the 2002 MCI Regulations i.e. from 14-12-2009. [Para 11.10]

- *It is also noted that the Bombay High Court in the case of Abbott India Ltd. v. Asstt. CIT [2023] 157 taxmann.com 423/458 ITR 529, after considering the decision of Supreme Court in the case of Apex Laboratories explained that the ruling of the High Court laying down that the CBDT Circular No. 5/2012 is indeed clarificatory in nature, but the same is only effective retrospectively from the date of implementation of Regulation 6.8 of 2002 Regulations, i.e. 14-12-2009. The High Court is noted to have thus held that, the expenditure incurred on freebies given to doctors, prior to 14-12-2009, was not hit by the rigors of CBDT Circular No.5/2012 read with MCI regulations dated 14-12-2009, and was thus allowable business expenditure. [Para 11.11]*
- *Having regard to the above position of law, it is to be held that the CBDT Circular No. 5/2012 read with MCI Regulations, 2009 did not apply to the sales promotion*

expenses incurred by the assessee in financial year 2008-09 relevant to assessment year 2009-10. It is accordingly held that the sales promotion expenses disallowed by the Assessing Officer in this assessment year 2009-10 by invoking explanation (1) to section 37(1) was unjustified. Thus, the entire disallowance is held to be unsustainable and is directed to be deleted. [Para 11.12]

- *Now coming to assessment year 2010-11, as noted above, the CBDT Circular No. 5/2012 read with MCI Regulations, 2009 is effective only from 14-12-2009. Accordingly, any sales promotion expenses incurred prior to the said date, irrespective whether it included any freebies given to doctors or not, cannot be said to be prohibited by law and hence cannot be disallowed under section 37(1). The assessee has provided the break-up of the sales promotion expenses incurred from 1-4-2009 to 13-12-2009 and 14-12-2009 to 31-3-2010. For the aforesaid reasons, the Assessing Officer is accordingly directed to delete the disallowance of sales promotion expenses to the extent pertaining to the period 1-4-2009 to 13-12-2009. [Para 11.13]*
- *In view of the above, it is required to adjudicate the merits of the disallowance made by the Assessing Officer out of sales promotions expenses in assessment years 2010-11 (14-12-2009 to 31-3-2010), 2011-12, 2012-13 and 2014-15. As noted earlier, the Apex Court has held that any expenditure incurred by pharmaceutical companies for the benefit of doctors, which fall within the mischief of MCI Regulations, 2009, shall not be allowable as deduction under section 37(1). [Para 11.14]*
- *Having perused the Regulation 6.8.1, it is noted that a medical practitioner is refrained from availing, (a) gifts, (b) travel facilities, (c) hospitality and (d) cash or monetary grants from pharmaceutical companies. The assessee further brought to notice that, the MCI vide Notification dated 1-2-2016 has clarified that, where any gift items or courtesies having value of less than Rs.1000 is provided, then such would not fall within the mischief of MCI Regulations, 2009. [Para 11.15]*
- *Being a pharmaceutical company, the assessee cannot advertise its products. However, the assessee is entitled to create awareness of its products by participating in exhibitions and organizing conferences and therefore the expenditure incurred for organizing the same would not fall within the ambit of CBDT Circular No.5/2012 read with MCI Regulations 2009. Likewise, any journals or periodicals printed and shared with customers, distributors or medical practitioners to make them aware about the research behind manufacture of any new medication or its uses or effects in any particular disease also cannot be termed as 'gifts' given to doctors. However, the expenses, if any, incurred on travel and hotel accommodation of the doctors to attend these exhibitions or conferences would however be hit by the rigours of MCI Regulations, 2009. [Para 11.17]*

- *In light of the above understanding of the position of law and MCI Regulations, 2009, the head-wise nature of sales promotion expenses claimed by the assessee is to be examined and ascertain as to the quantum of expenses, if any, which qualifies as 'freebies' given to doctors and thus disallowable under section 37(1). [Para 11.18]"*

11. In view of the above, we are following the principle of Substance over Form and it is found that, the expenditure, which the Pharma companies are prohibited to do, are being expanded through entities like the assessee society. **With this back ground and observation the substantive ground nos. 1 and 2 raised by the assessee society are rejected and the order of the Ld. CIT (Exem.) is sustained.**

12. **In the result, appeal of the assessee society is dismissed.**

ITA No. 790/JPR/2024

13. This appeal of the assessee solely dependent on the outcome of the ITA No. 789/JP/2024, decided (supra), as the same is decided against the assessee, findings will apply *Mutatis Mutandis* in this appeal also. Hence the same is also rejected.

14. **In the result, appeal of the assessee society is dismissed. Resultantly, both the appeals of the assessee society are dismissed.**

Order pronounced in the open court on 28th day of November 2024.

Sd/-

Sd/-

(Dr. S. SEETHALAKSHMI)
JUDICIAL MEMBER

(GAGAN GOYAL)
ACCOUNTANT MEMBER

Jaipur, दिनांक/Dated: 28/11/2024

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त CIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., Sr.DR., ITAT,
5. गार्ड फाइल/Guard file.

BY ORDER,

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(Asstt. Registrar)
ITAT, Jaipur

	Details	Date	Initials	Designation
1	Draft dictated on PC on	28.11.2024		Sr.PS/PS
2	Draft Placed before author	28.11.2024		Sr.PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			JM/AM
5.	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
6.	Kept for pronouncement on			Sr.PS/PS
7.	File sent to the Bench Clerk			Sr.PS/PS
8	Date on which the file goes to the Head clerk			
9	Date of Dispatch of order			