



**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH, MUMBAI**

**BEFORE SHRI SAKTIJIT DEY, V.P.
AND
SMT RENU JAUHRI, A.M.**

ITA No.6078/Mum/2024 ITA No.6079/MUM/2024		A.Y.2022-23 A.Y.2021-22
ARI Healthcare Private Ltd. Office No. 107 Tower I, 1 st Floor, World Trade Centre, Oppeon SEZ, Kharadi.	Vs.	ACIT, CC2(2), Mumbai
(Appellant)		(Respondent)
PAN		AADCA 3120F
Assessee by		Shri Dharmesh Shah & Shri Mitali Parekh
Revenue by		Shri Ram Krishn Kedia (Sr.DR)
Date of hearing		02.01.2025
Date of pronouncement		09.01.2025

ORDER

PER SAKTIJIT DEY, V.P.:

The Captioned appeals by the assessee arise out of two separate orders of learned Commissioner of Income Tax (Appeals) [in short learned ‘CIT(A)’], Mumbai, pertaining to Assessment Years 2021-22 and 2022-23.



2. Since Common issues are involved in both the appeals, they have been clubbed together and disposed of by this consolidated order, for the sake of convenience.

3. The only common issue arising in the appeals relates to disallowance of marketing expenses by treating it as capital expenditure. Since, facts relating to issue in dispute are identical in both the years under consideration, for the sake of brevity, we propose to deal with the facts as involved in the lead appeal, being ITA No. 6079/Mum/2024 pertaining to Assessment Year 2021-22.

4. Briefly stated, the assessee is a resident in corporate entity. As stated by the Assessing Officer, the assessee is engaged in the business of manufacturer and sale of pharmaceuticals, medicinal chemicals and botanical products. In course of assessment proceedings, the Assessing Officer noticed that the assessee has debited an amount of Rs.2,16,04,410/- towards sales and marketing expenses. Whereas, the total sales reported by the assessee during the year was Rs.1,54,29,100/-. On further verification, he noticed that the sales and marketing expenses are on account of payment made to Nijji Healthcare Pvt. Ltd. ('NHPL'), Kolkata. He observed that the payments made by the assessee to NHPL have been claimed to be for sale/distribution of product through sales persons appointed by NHPL. The



assessee further explained that NHPL is involved in providing marketing related services and to demonstrate such fact, the assessee furnished the brochures of NHPL. Upon scanning through the profile of NHPL as provided in its website, the Assessing Officer observed that NHPL is not involved in sale of products but the contract sales task includes expansion and product launch. Referring to the work profile of NHPL as mentioned in the webpage, he observed that the services provided relate to launch of product, project planning and management of workforce, consultancy in branding and strategic solution etc. However, it does not include sale of product. Further, referring to the invoice issued by NHPL, he observed that expenses are for development of market and not for sale of product. Accordingly, he issued a show cause notice to the assessee proposing to disallow the expenses claimed, as according to the Assessing Officer they are of capital nature.

5. In response to the show cause notice, the assessee furnished a detailed reply justifying its claim and objecting to the proposed disallowance. However, rejecting the submissions of the assessee, the Assessing Officer went by the work profile of NHPL as mentioned in the web page and concluded that the market development expenses are not related to sale of product. Further, he observed that while considering allowability of identical



expenses in A.Ys 2017-18 and 2018-19, the First Appellate Authority has upheld the disallowance of such expenses as they are in the nature of capital expenses. Thus, observing that principle of consistency has to be maintained, the AO proceeded to disallow the market development expenses claimed by the assessee. Though, the assessee contested the aforesaid disallowance before learned First Appellate Authority, however, relying upon the decision taken by him on identical issue in assessee 's own case in A.Ys. 2017-18 and 2018-19, learned First Appellate Authority upheld the disallowance.

6. Before us, learned counsel appearing for the assessee reiterated the stand taken before the Departmental Authorities and submitted that the Departmental Authorities have completely misconceived the facts while treating the expenditure as capital in nature. He submitted, relevant and necessary evidences were furnished before the Departmental Authorities to demonstrate that the expenses are related to sale of products and expansion of market presence. He submitted, simply relying upon the profile of NHPL as mentioned in its Webpage and the decision taken in A.Ys 2017-18 and 2018-19 claim has been disallowed. He submitted, while upholding the disallowance learned First Appellate Authority has completely ignored assessee's contention that the decision taken by him in A.Ys 2017-18 and 2018-19 has been set aside by the Tribunal and issue is now pending in those



years before the Assessing Officer. Proceeding further, he submitted that based on the position taken by the Department qua the expenses in A.Ys 2021-22 and 2022-23, the Assessing Office reopened the assessments for A.Ys. 2019-20 and 2020-21. In this context, he drew our attention to the reasons recorded for reopening of assessments, placed in the paper book. He submitted, though, the assessments for those two years were reopened only for the purpose of disallowance of market development expenses paid to NHPL, however, ultimately the Assessing Officer completed the assessments u/s. 147 of the Act, allowing the expenses. In this context, he drew our attention to the assessment orders passed u/s.147 of the Act for the A.Ys 2019-20 and 2020-21 placed in Paper Book. Thus, he submitted, rather than maintaining principle of consistency, the action of the Assessing Officer is totally inconsistent. He submitted, in A.Ys 2017-18 and 2018-19 the Tribunal restored the issue to the Assessing Officer due to lack of evidence regarding the nature of expenses. However, he submitted, the factual position on the issue in the impugned assessment year is different as the assessee has furnished confirmation and other corroborative evidences before the Departmental Authorities to demonstrate that the expenses are for sale of product. Thus, he submitted, the disallowance made by the Assessing Officer should be deleted.



7. Learned Departmental Representative strongly relied upon the observations of learned First Appellate Authority.

8. We have considered rival submissions and perused materials on record. A reading of the impugned assessment order clearly reveals that the Assessing Officer has disallowed the market development expenses paid to NHPL, basically for two reasons. Firstly, as per the work profile of NHPL mentioned in the Webpage of the company, it is not involved in sale of product. Secondly, with regard to allowability of identical expenses in A.Ys 2017-18 and 2018-19, assessee's claim has been rejected both by the Assessing Officer and thereafter by the First Appellate Authority.

9. On appreciation of facts and material on record, we are of the view, both the aforesaid reasoning of the Assessing Officer are unsustainable. It is evident, in A.Ys 2017-18 and 2018-19, referring to the work profile of NHPL in its webpage, the Assessing Officer had made identical disallowances and learned First Appellate Authority had sustained them. However, while deciding assessee's appeals for A.Ys 2017-18 and 2018-19 the Tribunal vide order dated 20.06.2023 in ITA No. 382/Mum/2023 restored the issue to the Assessing Officer with a following observations:

“9. Heard the parties and perused the material available on record and given thoughtful consideration to the peculiar facts and circumstances

and the rival contentions of the parties. We observe that the AO disallowed the expenses claimed by the assessee as “revenue in nature” mainly on the reasons that profile of the Nijji do not depict as to whether the Nijji is involved in the sale of products. The work profile of Nijji includes all the service related to launch of products, product planning and management, the work force consultancy in branding and strategic solutions except sales of product as claimed by the assessee. In the bills issued by Nijji, it is clearly mentioned that expenses are towards development of market and not towards the sale of product. Further the Market Development Expenses are more than five times of the sales turnover of the assessee and the assessee though provided the list of employees, but not the appointment letters etc. in order to substantiate its claim. On going through the agreement, it is nowhere provided that Nijji will look after the sales of the products of the assessee.

9.1 The AO and the assessee infact from the website of the Nijji, captured the profile images. The AO held that Nijji is not involved in sales, whereas the assessee tried to establish that the Nijji is involved in geographical expansion, contract sales and marketing, contract sale solution etc. which includes complete accounting of achieving mutual agreed sales/KPI targets for the given range of products in the assigned territory. The AO also doubted the service agreement and also considered the fact that the assessee has failed to provide the details of work done by the employees as mentioned in employment list issued by Nijji.

9.2 In our considered view, on failure of assessee to provide the requisite details sought for, the same would have been asked by the AO, directly from the Nijji, for assessing the income correctly. Further, simply on the basis of images captured from the internet website, the decision about the profile of the company (Nijji) is neither logical not appreciable and

therefore, in order to enquire about the work/job profile of Nijji, the AO should have asked either the assessee to bring M/s Nijji to define its profile or should have asked Nijji directly to establish its profile. May be in the website, profile of Nijji company has not specified specifically and clearly that it also involves in selling of the products but still on the basis of profiles images captured from internet site, it cannot be construed, without any substantive material that the works carried out by the assessee by M/s Nijji were outside of its scope.

9.3 No doubt the onus is upon the assessee as per the Evidence Act, as observed by the Ld. Commissioner in the impugned order, to establish its case. However, as per Article-265 of the Constitution of India, it is the mandate of the law that no tax shall be levied or collected except by the authorities of law. The Hon'ble Allahabad High Court in the case of P.T. Sheonath Prasad Sharma Vs. CIT 66 ITR page 647 (Alld.) also reminded that Income Tax Officer is empowered to assess the income of the Assessee and determine the tax payable therein in accordance with law but not otherwise. Therefore in our considered view, the AO by exercising its powers under the Act, would have summoned M/s Nijji to ascertain the real picture and to determine real status of expenditures in particular facts and circumstances.

9.4 Hence, for the just decision of case and for the ends of justice, we deem it appropriate to remand the instant issue to the file of the AO to determine afresh the nature of expenditure incurred as claimed by the assessee, by considering the Objects/Memorandum of Association/ Profile of Nijji and nature of expenditure incurred/amount received respectively by the Assessee and Nijji and by giving an opportunity to the assessee to produce Nijji or by summoning Nijji directly for establishing its Objects /Memorandum of Association/Profile and the scope/nature of services provided and details of the employees

engaged/appointed by Nijji particularly for selling the products of the assessee. Further, also to establish the actual output made by M/s Nijji in the business of the assessee. We clarify that primary onus would be on the assessee. In the result, issue qua expenditure, accordingly remitted to the file of the AO for determination afresh, in view of observation made above.”

10. As could be seen from the aforesaid observations, the Coordinate Bench did not appreciate the action of the Assessing Officer in disallowing the expenses simply relying upon the work profile of NHPL taken from the website. However, since the relevant facts relating to the work profile of NHPL was not available on record, the Bench deemed it appropriate to restore the issue to the Assessing Officer to conduct necessary enquiry with regard to the profile of NHPL and nature of expenditure by calling for necessary information from the assessee and NHPL. Surprisingly, in spite of such clear directions of the Coordinate Bench, both the Assessing Officer and learned First Appellate Authority have deemed it appropriate to follow identical approach as was taken in A,Ys 2017-18 and 2018-19. More surprising is the action of learned First Appellate Authority while following non-existent orders of the learned First Appellate Authority for A. Ys 2017-18 and 2018-19. When the assessee had specifically brought to his notice



that the First Appellate orders for AYs 2017-18 and 2018-19 have been set aside by the Tribunal, we fail to understand, how he can ignore such fact.

11. Be that as it may, it is a fact on record that in the impugned assessment year, the assessee had furnished confirmation from NHPL and other corroborative evidences both before the Assessing Officer and learned First Appellate Authority to demonstrate that the market development expenses incurred by the assessee are not only for sale of products but also to expand its market presence. In fact, the Assessing Officer has acknowledged furnishing of confirmation of NHPL. Therefore, we find substantial merit in the submission of learned counsel for the assessee that the reason for which the issue was restored back to the Assessing Officer in AYs 2017-18 and 2018-19 does not exist in the impugned assessment years. Hence, the issue can be decided on merits.

12. On perusal of the confirmation of NHPL and other corroborative evidences, it is evident that the expenses incurred primarily involve expenditure related to sale of products, such as, staff recruitment charges, salary and expenses of territory sales executives, salary and expenses of sales personnel manager, salary and expenses of sales manager, salary of MIS executives, salary and expenses of project Director and fix management service payments. It is an undisputed fact on record that the personnel



engaged in sale of products of the assessee belong to NHPL. Therefore, it cannot be denied that market development expenses are towards sale of product, hence, are of revenue nature.

13. It would be relevant to observe, based on the reasoning, on which, market development expenses were disallowed in A.Ys 2021-22 and 2022-23, the Assessing Officer proposed to reopen the assessments for A.Ys 2019-20 and 2020-21 to disallow the market development expenses, being payment made to NHPL. This is evident from the orders passed u/s. 148A(d) of the Act on 28.03.2023. However, after considering the objections and submissions of the assessee, the Assessing Officer himself was convinced and passed assessment orders u/s. 147 of the Act on 26.03.2024 for A.Ys 2019-20 and 2020-21, accepting assessee's claim of market development expenses. Therefore, principle of consistency would have been maintained by following the position taken in the reassessment proceedings for A.Ys 2019-20 and 2020-21 rather than following the non-existent orders of the First Appellate Authority in A.Ys 2017-18 and 2018-19. Thus, upon consideration of overall facts and circumstances of the case, we are of the view that the market development expenses incurred by the assessee on account of payment made to NHPL, being in the nature of revenue expenses,



are allowable. Accordingly, we direct the Assessing Officer to delete the disallowances.

14 In the result, appeals are allowed as indicated above.

Order pronounced in the open court on 09/01/2025.

Sd/-

(RENU JAUHRI)
(ACCOUNTANT MEMBER)

Sd/-

(SAKTIJIT DEY)
(VICE PRESIDENT)

Mumbai, Dated: 09.01.2025

Aks/-

Copy of the Order forwarded to :

The Appellant, The Respondent, The CIT, The DR ITAT & Guard File

BY ORDER,

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