आयकर अपीलीय अधिकरण, मुंबई " के" खंडपीठ

Income-tax Appellate Tribunal -"**K**"Bench Mumbai

सर्वश्री राजेन्द्रलेखा सदस्य एवं, संदीप गोसांई, न्यायिक सदस्य

Before S/Shri Rajendra,Accountant Member and Sandeep Gosain,Judicial Member

आयकर अपील सं./I.T.A./1246/Mum/2016,निर्धारण वर्ष /Assessment Year: 2011-12

India Medtronic Private Limited 1241, Solitaire Corporate Park Building No.12, 4th Floor Andheri Ghatkopar Link Road Andheri (E), Mumbai-400 093. **PAN:AAACI 4227 Q**	Vs.	DCIT-10(1)(1) Mumbai.

आयकर अपील सं./I.T.A./1800/Mum/2016,निर्धारण वर्ष /Assessment Year:2011-12

DCIT-10(1)(1) Mumbai.	Vs.	India Medtronic Private Limited Andheri (E), Mumbai-400 093

CO/प्रत्याक्षेप/157/Mum/2016

India Medtronic Private Limited Andheri (E), Mumbai-400 093.	Vs.	DCIT-10(1)(1) Mumbai.

(अपीलार्थी **/Appellant**) (प्रत्यर्थी **/ Respondent**)

Revenue by: Shri Jayant Kumar- DR

Assessee by: S/Shri Rajan Vora and Nikhil Tiwari

सुनवाई की तारीख **/ Date of Hearing: 21.03.2018**

घोषणा की तारीख **/ Date of Pronouncement: 02.05.2018**

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य, राजेन्द्र के अनुसार- PER RAJENDRA, AM-

Challenging the order of the Assessing Officer (AO),dated 09/02/2016, passed u/s. 143(3) r.w.s. 144C(13)of the Act,the assessee had filed the present appeal.Assessee -company,engaged in the business of trading in life saving devices,filed its return of income on 22/11/2011,declaring total income of Rs.40.90 crores under normal provisions and of Rs.38.73 crores u/s.115JB of the Act.

2.Vide its application dated 24/4/2017 the assessee has raised additional Ground of appeal It was mentioned that the additional ground did not require verification of facts and were legal in nature,that in the earlier year the Tribunal had allowed depreciation on non compete fees. We find that the additional ground is purely legal in nature,hence,we admit the same.

3. First effective ground of appeal (Gs.A O-2to9) is about AMP expenditure.It was brought to our notice that identical issue was adjudicated by the Tribunal, while deciding the appeal for the

AY. 2010-11 (I.T.A./1600/Mu/2015,dtd.17.01.2018). we are reproducing the relevant portion of the order and it reads as under :

3.First effective Ground of appeal (GOA 2-9) is about Transfer Pricing (TP) adjustment made on account of advertisement,marketing,promotion(AMP)expenses amounting to Rs.18.36 crores. It was brought to our notice that identical issue was decided by the Tribunal while adjudicating the appeal for the AY.2010-11 (ITA/1600/Mum/2015, Dtd.17.01/2018.)We are reproducing the relevant portion of the said order and it reads as under:

3.1.*During the TP proceedings,the TPO observed that the assessee was a part of Medtronic's Inc.,a USA based global leader in medical technology,that the parent company was engaged in developing a wide range of products and therapies mostly patented or IP protected items, that the assessee was a subsidiary of Medtronic's International Hong Kong, that in the tax audit report it had mentioned the nature of business as 'trading of life saving devices',that the assertion made by it was not correct,that the items dealt with by the assessee were specialised products and technologies which required specialised workforce,infrastructure and system for marketing and distribution.He further observed that the assessee had used TNMM to determine the ALP of the IT.s,that it used operating margin as PLI ,that purchase shown from AE.s were valued at Rs. 296.88 crores,that it had purchased finished goods from Medtronic's Intl Trading (SARL) MITS, Medtronic's Sofamardamic,USA Inc.,that purchases from these two constituted for more than 90% of purchases,that it had not submitted separate FAR analysis for each of the transactions, that as per the Global TP report of the Group prices were fixed for each year for each product on the basis of average selling price for last year less a resale discount percentage, that the resale discount percentage was based on comparable resellers,that it had conducted TP study in respect of transactions of purchase of products, purchase of capital asset and receipt of management fee by clubbing them together as part of distribution work, that as per the TP study the assessee had earned an OPM of 5.39%,as against 4.22% earned by the comparable companies,that it had considered itself a distribution company,that it was carrying out marketing and distribution activities in India,that sales commission,selling and distribution expenses,product give-away and samples and convention expenses were part of sales promotion expenses,that the TP study by the assessee was incorrect and insufficient.Though he did not reject the TNMM study with reference to distribution function.But,he held that AMP expenditure incurred by the assessee were the IT.s, that it had created brand awareness in itsterritorial domain,that the ultimate benefit of the activity did not remain with the assessee only,that it passed it on to the parent company in the form of better brand value for its products.Finally,he determined the ALP of reimbursement for brand promotion and marketing intangibles at Rs.38.72 crores.The AO in his draft order proposed for said addition.*

3.2.*Aggrieved by order of the TPO/AO,the assessee filed objections before the DRP.Vide its directions,dated 16/12/2014,the DRP confirmed the order of the TPO/AO relying upon the Special Bench decision delivered in the case of LG Electronics .*

3.3.*During the course of hearing before us,the Authorised Representative(AR)stated that AMP expenditure was not an IT.,that there was no understanding or agreement between the assessee and the AE in that regard,that even if there was any arrangement with the AE for incurring expenses there must be an understanding/agreement with AE for spending 'excessively' towards marketing expenses for promoting the brand in India, that the TPO had applied the brightline method to compute adjustment on account of AMP expenses,that no such method was prescribed under the Act and the Rules,that in absence of a machinery provision to benchmark the AMP expenses no adjustment could be made,that based on the principles of 'bundled approach',as emanated by the Delhi High Court in case of Sony India Limited (374 ITR 118)no addition should have been made.He further argued that the assessee had earned an operating margin of 5.39% which was higher than the margins earned by comparables,that it was only carrying out its own business and any benefits derived by the AEs were purely incidental in nature,the DRP had passed a non speaking order,that the TPO had not rejected*

the method applied by the assessee, that it was not incurring AMP expenditure on behalf of the AE,that the selling and distribution expenses were not even 1% of the total expenses,that the DRP had followed order of the then DRP for 2009-10 and had adopted Brightline Method.He also referred to cases of Li and Fung (361 ITR 85 of Hon'ble Delhi High Court),Thomas Cook India Ltd. (ITA.s/1261& 1238/ Mum/ 2015,dtd 31/5/16),L'Oreal India Pvt.Ltd.(ITA/7714/& Ors./Mum/12, dtd.4/5/16).

The Departmental Representative (DR)that there was obligation on part of the AE to compensate the assessee,that it was an IT.,that the AE had entered in to three agreements with the assessee, that the assessee was also carrying out marketing and distribution activities,that sales commission could be categorised as AMP expense,that part of travelling expenses and man -power expenses should go to marketing,that the Tribunal in the earlier AY.s had sent back the issue to the file of the AO/TPO(ITA/No.2168/ Mum/14,dtd. 31/12/2015.AY-2009-10 and ITA 811/Ahd/2008,AY.2002-03,dtd.25/10/2016),that matter should be restored back to the file of the TPO.He referred to the case of Luxottica India Eyeware Pvt.Ltd.((ITA/1492/Del/2015 dtd. 26. 05.2017

In his rejoinder,the AR stated that after a series of order/judgments of the Tribunal and the Hon'ble Courts with regard to AMP expenses there was no need to follow the orders of the earlier years as at that time there was not much clarity on the subject.

3.4.*We have heard the rival submissions.We find that the TPO had held that assessee should have been compensated by its AE for the AMP expenditure incurred by it.We have gone through the agreements entered in to by the AE.s with the assessee,that in the agreements there is no condition about sharing of AMP,that the agreements talks of using best efforts to market and distribute the product or promote the products in a commercially reasonable manner.In our opinion,these terms do not give any indication that the AE and the assessee had to share AMP expenses.Secondly,if the AE was benefitted indirectly by the AMP expenditure incurred by the assessee,it cannot be held that it had entered into agreement for sharing AMP expenses.We are also of the opinion that Bright Line Method should not have been applied by the TPO.We would like to reproduce the relevant portion of the order of the Thomas Cook(supra),wherein the identical issue has been dealt in length,and it reads as under:*

> "8.3.We have heard the rival submissions and perused the material before us.In the earlier part of our order,we have mentioned that we would like to deal with the issue of AMP expenses for both the years at one place,as there is no change in the facts except for the amounts involved and the non adjudication of the issue in the earlier year.The arguments of the assessee for both the years are identical. We find that assessee had incurred an expenditure of Rs.12,25,71,652/-and Rs.10,01,37,032/-respectively for the earlier and current AY.under the head AMP,that it was paying name and licence fee to TCUK, that the TPO held that the assessee was spending much more than Industry average in promoting and building brand of TCUK,that he made an adjustment of Rs.8.09 crores and Rs.8.31 crores for the AY.s.2009-10 and AY.2010-11 towards AMP expenditure,that the assessee had filed additional evidences before the FAA,that the FAA did not admit the evidences referring to the provisions of Rule 46A of the Rules, that he upheld the order of the TPO,that for the AY.2010-11 the assessee had filed objections before the DRP,that the adjustment made by the TPO were confirmed the DRP,that the adjustment was made/confirmed by the TPO/DRP because both of them were of the opinion that by incurring expenditure in India the assessee was benefitting a brand name of TCUK.
>
> 8.3.1.First of all,we would like to mention that as on today the legal position is as clear as crystal with regard to AMP expenses.The Hon'ble Delhi High Court has dealt the issue in depth and has arrived at the conclusion that in absence of any agreement for sharing AMP expenses it cannot be held that AMP expenditure was an IT.Probable incidental benefit to the AE would not make such a transaction an IT.The factors like payment under the head AMP expenditure to the third independent parties, promoting own business interest by way of AMP expenses take away the alleged 'internationality' of the transacttion.In absence of any direct or direct evidence of incurring of AMP expenses by the assessee for the benefit of the AE or on behalf of the AE,it is

has to be held that the transaction in dispute is not covered by the provisions of section 92B or 92B(1)of the Act and hence is not an IT.Once it goes out of the ambit of being an IT,FAR analysis of comparables or any other adjustment will and cannot come in picture.Folk wisdom of rural India the says that mother(Maa)is must for existence of her sister(Mausi).Similarly the existence of an IT is the pre-requisite of applying the provisions of chapter X of the Act. The assessee from the very beginning was arguing that it is not an IT,but,the TPO and the DRP did not deal with the core issue.In these circumstances,we are of the opinion that the matter should not be remitted back to the file of the TPO/ AO. Litigation has to be put to an end at some stage.Judicial time of every authority, including the TPO/DRP,is very precious and it should not be wasted for dealing with mere academic arguments.The recourse of remanding of matters/issue to the AO.s has to resorted rarely and selectively.In the case before us,no reasonable cause has been shown to justify the setting aside the issue. Here,we would also like to refer to the case of Bosch and Lomb (supra) wherein all the arguments raised by the TPO & FAA/DRP have been deliberated upon in length and the relevant portion of the order reads as under:

> *"53.A reading of the heading of Chapter X['Computation of income from international transactions having regard to arm's length price"]and Section 92 (1) which states that any income arising from an international transaction shall be computed having regard to the ALP and Section 92C (1) which sets out the different methods of determining the ALP, makes it clear that the transfer pricing adjustment is made by substituting the ALP for the price of the transaction. To begin with there has to be an international transaction with a certain disclosed price.The transfer pricing adjustment envisages the substitution of the price of such international transaction with the ALP.*
>
> *54. Under Sections 92B to 92F, the pre-requisite for commencing the TP exercise is to show the existence of an international transaction. The next step is to determine the price of such transaction. The third step would be to determine the ALP by applying one of the five price discovery methods specified in Section 92C. The fourth step would be to compare the price of the transaction that is shown to exist with that of the ALP and make the TP adjustment by substituting the ALP for the contract price.*
>
> *55. Section 928 defines 'international transaction' as under: "Meaning of international transaction. 928.(1) For the purposes of this section and sections 92,92C,92D and 92E ,"international transaction" means a transaction between two or more associated enterprises, either or both of whom are non-residents; in the nature of purchase, sale or lease of tangible or intangible property, or provision of services, or lending or borrowing money, or any other transaction having a bearing on the profits, income, losses or assets of such enterprises, and shall include a mutual agreement or arrangement between two or more associated enterprises for the allocation or apportionment of, or any contribution to, any cost. or expense incurred or to be incurred in connection with a benefit, service or facility provided or to be provided to anyone or more of such enterprises. (2) A transaction entered into by an enterprise with a person other than an associated enterprise shall, for the purposes 'of sub-section (1), be deemed to be a transaction entered into between two associated enterprises, if there exists a prior agreement in relation to' the relevant transaction between such other person and the associated enterprise, or the terms of the relevant transaction are determined in substance between such other person and the associated enterprise." 56.Thus, under Section 92B(1) an 'international transaction' means- (a) a transaction between two or more AEs, either or both of whom are non-resident (b) the transaction is in the nature of purchase, sale or lease of tangible or intangible property or provision of service or lending or borrowing money or any other transaction having a bearing on the profits, incomes or losses of such enterprises, and (c) shall include a mutual agreement or arrangement between two or more AEs for allocation or apportionment or contribution*

to the any cost or expenses incurred or to be incurred in connection- with the - benefit, service or facility provided or to be provided to one or more of such enterprises.

57. Clauses (b) and (c) above cannot be read disjunctively. Even if resort is had to the residuary part of clause (b) to contend that the AMP spend of BLI is "any other transaction having a bearing" on its "profits, incomes or losses", for a 'transaction' there has to be two parties. Therefore for the purposes of the 'means' part of clause (b) and the 'includes' part. of clause (c), the Revenue has to show that there exists an 'agreement' or 'arrangement' or' 'understanding' between BLI -and B&L, USA whereby BLI is obliged to spend excessively on AMP in order to promote the brand of B&L, USA. As far as the legislative intent is concerned, it is seen that certain transactions listed in the Explanation under clauses (i) (a) to (e) to Section 92B are described as an 'International transaction'. This might be only an illustrative list, but significantly' it does not list AMP spending as one such transaction.

58. In Maruti Suzuki India Ltd. (supra), one of the submissions of the Revenue was: "The mere fact that the service or benefit has been provided by one party to the other would by itself constitute a transaction irrespective of whether the consideration for the same has been paid or remains payable or there is a mutual agreement to not charge any compensation for the service or benefit. "This was negatived by the Court by pointing out; "Even if the word 'transaction' is given its widest connotation, and need not involve any transfer of money or a written agreement as suggested by the Revenue, and even if resort is had to Section 92F (v), which defines 'transaction' to include 'arrangement', 'understanding' or 'action in concert', 'whether formal or in writing', it is still incumbent on the Revenue to show the existence of an 'understanding' or an 'arrangement' or 'action in concert' between MSIL and SMC as regards AMP spend for brand promotion. In other words, for both the 'means', part and the 'includes' part of Section 928 (1) what has to be definitely shown is the existence of transaction whereby MSIL has been obliged to incur AMP of a certain level for SMC for the purposes of promoting the brand of SMC."

59. In Whirlpool of India Ltd. (supra), the Court interpreted the expression "acted in concert" and in that context referred to the decision of the Supreme Court in Daiichi Sankyo Company Ltd. v.. Jayaram Chigurupati 2010(6)MANU/SC/0454/2010, which arose in the context of acquisition of shares of Zenotech Laboratory Ltd. by the Ranbaxy Group. The question that was examined was whether at the relevant time the Appellant, i.e., 'Daiichi Sankyo Company and Ranbaxy were "acting in concert" within the meaning of Regulation 20(4) (b) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997. In. para 44, it was observed as under:

"The other limb of the concept requires two or more persons joining together with the shared common objective and purpose of substantial acquisition of shares etc. of a-certain target company, There can be no "persons acting in concert" unless there is a shared common objective or purpose between two or more persons of substantial acquisition of shares etc. of the target company, For, de hors the element of the shared common Objective' or purpose the idea of "person acting in concert" is as meaningless as criminal conspiracy without any agreement to commit a criminal offence. The idea of "persons acting in concert" is not about a fortuitous relationship coming into existence by accident or chance. The relationship' can come into being only by design, by meeting of minds between two or more persons leading to the shared common objective or purpose of acquisition of substantial acquisition of shares etc. of the target company. It is another matter that the common objective or purpose may be in pursuance of an agreement' or an understanding, formal or informal; 'the acquisition of shares etc. may be direct or indirect or the persons acting in concert may cooperate in actual

acquisition of shares etc. or they may agree to, cooperate in such acquisition. Nonetheless, the element of the shared common objective or purpose is the sine qua non for the relationship of "persons acting in concert"to come into being. "

60. The transfer pricing adjustment is not expected to be made by deducing from the difference between the 'excessive' AMP expenditure incurred by the Assessee and the AMP expenditure of a comparable entity that an international transaction exists and then proceeding to make the adjustment of the difference in order to determine the value of such AMP expenditure incurred , for the AE. In any event, after the decision in Sony Ericsson (supre), -- the question of applying the BLT to determine the existence-of an-international transaction involving AMP expenditure does not arise.

61. There is merit in the contention of the Assessee that a distinction is required to be drawn between a 'function' and a 'transaction' and that every expenditure forming part of the function, cannot be construed as a 'transaction'. Further, the- Revenue's attempt at re-characterising the AMP expenditure incurred as a transaction by itself when it has neither been identified as such by the Assessee or legislatively recognised in the Explanation to Section 92 B runs counter to legal position explained in CIT vs. EKL Appliances Ltd. (supra) which required a TPO "to examine the 'international transaction' as he actually finds the same."

62. In the present case, the mere fact that B&L, USA through B&L, South Asia, Inc holds 99.9% of the share of the Assessee will not ipso facto lead to the conclusion that the mere increasing of AMP expenditure by the Assessee involves an international transaction in that regard with B&L, USA. A similar contention by the Revenue, namely the fact that even if there is no explicit arrangement, the fact that the benefit of such AMP expenses would also encure to the AE is itself self sufficient to infer the existence of an international transaction has been negatived by the Court in Maruti Suzuki India Ltd. (supra) as under:

xxxxxx

68. The above submissions proceed purely on surmises and conjectures and if accepted as such will lead to sending the tax authorities themselves on a wild-goose chase of what can at best be described as a 'mirage'. First of all, there has to be a clear statutory mandate for such an· exercise. The Court is unable to find one. To the question whether there is any 'machinery' provision for determining the existence of an international transaction involving AMP expenses, Mr. Srivastava only referred to Section 92F (ii) which defines ALP to mean a price "which is applied or proposed to be applied in a transaction between persons other than AEs in uncontrolled conditions",Since the reference is to 'price' and to 'uncontrolled conditions' it implicitly brings into play the BLT. In other words, it emphasises that where the price is something other than what would be paid or charged by one entity from another in uncontrolled situations then that would be the ALP. The Court does not see this as a machinery provision particularly -in-light of the fact that -the-BLT has been expressly negatived by the Court in Sony Ericsson. Therefore, the existence of an international transaction will have to be established de hors the BLT,

70. What is clear is that it. is the 'price' of an international transaction which is required to be adjusted: The very existence of an international transaction cannot be presumed by assigning some price to it and then deducing that since it is not an ALP, an adjustment had to be made. The -burden is on the Revenue to first show the existence of an international transaction. Next, to ascertain the disclosed 'price' of such transaction and thereafter ask whether it is an ALP. If the answer to that is in the negative the TP adjustment should follow.The objective of Chapter X is to make adjustments to the price of an international transaction which the AEs involved may seek to shift from one

jurisdiction to another.An 'assumed' price cannot form the reason for making an ALP adjustment. "

71- Since a quantitative adjustment is not permissible for the purposes of a TP adjust - ment under Chapter X,equally it cannot be permitted in respect of AMP expenses either. As already noticed hereinbetore,what the Revenue has sought to do in the present. case is to resort to a quantitative adjustment by first determining whether the AMP spend of the Assessee on- application of the BLT,is excessive,thereby evidenc - ing the existence of an international transaction involving the AE. The quantitative determination forms the very basis for the entire TP exercise in the present case. 74.The problem with the Revenue's approach is that it wants every instance of an AMP spend by an Indian entity which happens to use the brand of a foreign AE to be presumed to involve an international transaction. And this, notwithstanding that this is not one of the deemed international transactions listed under the Explanation to Section 928 of the Act.The problem does not stop here.Even if a transaction involving an AMP spend for a foreign AE is able to be located in some agreement, written (for e.g., the sample agreements produced before the Court by the Revenue) or otherwise, how should a TPO proceed to benchmark the portion of such AMP spend that the Indian entity should be compensated for? 63. Further, in Maruti Suzuki India Ltd. '(supra) the Court further explained the absence of a 'machinery provision qua AMP expenses by the following analogy: "75. As an analogy; and for-no other purpose; in the- context of a domestic transaction involving two or more related parties, reference may' be made to Section 40 A (2) (a) under which certain types of expenditure incurred by way of payment to related parties is not deductible where the AO is of the opinion that such expenditure is excessive or unreasonable having regard to the fair market value of the goods." In such event, so much of the expenditure as is so considered by him to be excessive or unreasonable shall not be allowed as a deduction." The AO in such an instance deploys the 'best judgment' assessment as a device to disallow what he considers to be an excessive expenditure. There is no corresponding 'machinery' provision in Chapter X which enables' an AO to determine what should be the fair 'compensation' an Indian entity would be entitled to if it is found' that there is an International transaction in that regard. In practical terms, absent a clear statutory guidance, this may encounter further difficulties. The strength of a brand,which could be product specific, may be "impacted by numerous other imponderables not limited to the nature of the industry, the geographical peculiarities, economic trends both international and domestic, the consumption patterns, market behaviour and so on.A simplistic approach using one of the modes similar to the ones contemplated by Section 92C may not only be legally impermissible but will lend itself to arbitrariness. What is then needed is a clear statutory scheme encapsulating the legislative policy and mandate which provides the necessary checks against arbitrariness while at the same time addressing the apprehension of tax avoidance."

64. In the absence of any machinery provision, bringing an imagined transaction to tax is not possible. The decisions in CIT v. B.C. Srinivasa Setty (1981) 128 ITR 294 (SC) and PNB Finance Ltd. v, CIT (2008) 307 ITR 75 (SC) make this position explicit. Therefore,where the existence of an international transaction involving AMP expense with an ascertainable price is- unable to be shown to exist, even if such price is nil,Chapter X provisions cannot be invoked to undertake a TP adjustment exercise.As already mentioned, merely because there is an incidental benefit to the foreign AE, it cannot be said that the AMP expenses incurred by the Indian entity was for promoting the brand of the foreign AE. As mentioned-in- Sassoon -J David-(supra)- "the--fact that-somebody other than the Assessee is also benefitted by the expenditure should not come in the way of an expenditure being 'allowed by way of a deduction under Section 10 (2)

(xv) of the Act (Indian Income Tax Act, 1922) if it satisfies otherwise the tests laid down by the law".

With reference to the submissions of the DR,we would like mention that first of all the issue before us is not an assessee that is engaged in distribution and manufacturing of certain goods,so the question of slicing of expense in two portions would not arise.

However,the other part of the argument that matter should be restored back to the file of the AO/TPO as they were following the order of LG and did not have benefit of later judgments of the Hon'ble High Court,we would like to mention that matter can be restored back in certain conditions only.Restoration of matters to the AO.s is not a tool to give one more opportunity of hearing to the litigants.It is not advisable to prolong the judicial proceedings in the name of fair play.It is not a case where new evidences have been placed on record by the assessee, that were not made available to the AO at the time of original assessment.It is not also a matter wherein some ground of appeal has remained un-adjudicated.There is violation of principles of natural justice.So,we hold that it is not a fit case to be sent back to the TPO **for** fresh adjudication."

Considering the above,we decide the first effective ground of appeal(GOA-1-16)in favour the assessee.

Respectfully,following the above,we allow grounds no.2-9,raised by the assessee.

4.GOA-10 is about disallowance of depreciation on plant and machinery and building amounting to Rs.2.96 lakhs.It was brought to our notice,by the representatives of both the sides,that the issue stands covered by the earlier orders of the Tribunal(ITA/812/Ahd./2008(04-05)& 1245/ Ahd./2008(03-04);ITA/836/Ahd/2008(04-05)& 1181/Ahd/2008(03-04),dated-25/5/2017).We are reproducing the relevant portion of the order and it reads as follow:

11. We have gone through the order of the Tribunal in assessee's own case as well as the order of the lower authorities for the year under consideration. In the A.Y. 2003-04, the CIT(A) has confirmed the addition on account of depreciation on plant and machinery, building, furniture and fixtures by holding the same to be related to the discontinuity of manufacturing operation of the assessee and also holding that the same have not been used during the year. We found that exactly the similar issue was considered by the Tribunal in assessee's own case for the A.Y.2002-03 vide order dated 23/11/2007 also in the A.Y.2007-08 vide order dated 30/03/2012 and for A.Y.2009-10 vide order dated 31/12/2015.

12. Learned DR fairly conceded that issue is covered in favour of the assessee by the order of the Tribunal in assessee's own case. We also found that assessee was engaged in the business of manufacturing and trading. However, the manufacturing processes were discontinued with effect from 25 January 2002. During the year under consideration, the assessee had claimed depreciation on plant and machinery, building, furniture and fixtures and office equipment. Once the concept of block of assets was brought into effect from AY 1989-90 onwards, then depreciation is allowable on the aggregate of WDV of all the assets in the block at beginning of the Financial year alongwith the additions made to the assets in the subject AY. The individual asset losses its identity for depreciation. From the record, we also found that in AY 2007-08, the Hon'ble CIT(A) has allowed the assessee's ground by placing reliance on the decisions in case of CIT v Oswal Agro Mills (197 Taxman 25) (HC), Swati Synthetics Ltd v ITA (38 SOT 208) (Mumbai ITAT) and Allied Photographics (8 SOT 318) (Mumbai ITAT). The Department has filed an appeal before the Hon'ble ITAT for AY 2007-08. However, the aforementioned issue was not taken in appeal by the Department before ITAT. We also found that Department accepted

CIT(A) order for AY 2002-03. The CIT(A) has accepted the principle that with the introduction of concept of WDV of block of assets, the depreciation is allowable not on individual items but depending upon date of acquisition and put to use of the asset. Further, CIT(A) was in agreement with Assessee's view that section 38(2) deals with usage of assets for non-business purposes and does not refer to assets partly used during the year for business purposes. Accordingly, CIT(A) has allowed the depreciation claimed on plant and machinery during AY 2002-03. The Department has filed an appeal before the Hon'ble ITAT for AY 2007-08. However, the aforementioned issue was not taken in appeal by the Department before ITAT. In view of the above, based on a combined reading of all of the above, it is abundantly clear that depreciation is allowable on the plant and machinery, building, furniture and fixture and office equipment of INR 1,22,84,477 and the disallowance made by the AO was not justified. Thus, there is no merit for the disallowance so made. Respectfully, following the order of the Tribunal in assessee's own case, we delete the disallowance of depreciation so made by the AO.

Respectfully,following the above order,ground no.10 is decided in favour of the assessee.

5.Next effective Ground of appeal(Gs.OA 11 to 29) pertains to disallowance of payment made to doctors(Convention Expenses)amounting to Rs.17.23 crores.We find that identical issue was deliberated upon and decided by the Tribunal in ITA/1600/Mum/2015(supra).Relevant portion is reproduced here:

"During the assessment proceedings,the AO found that the assessee had debited Rs.13.26 crores,in its books of accounts,under the head invention expenses.He called for detail in that regard.After considering the same,he referred to and relied on the amendments to MCI Act. He held that amendment was effective from 10/12/2009,that same was applicable to expenses incurred by the assessee,that expenses incurred on or after 10/12/09 were in violation of MCI guidelines,that same were not allowable.Finally, he made disallowance of Rs.6.02 crores.

5.1. The assessee filed objections before the DRP and referred to Circular No.05 of 2012 and case of KAP Scan and Diagnostic Centre(344 ITR 476).After considering the available material,it held that expenditure of Rs.5.93 crores was related to education grants to medical association for organising conference and seminars(Rs.2.69 crores),printing and equipment hire charges (Rs. 16. 59lakhs)accomodation expenses(Rs.1crores),expenses incurred for organizing medical-education meeting(Rs.1.75 crores)and distribution of free product samples(9.03 lakhs).The DRP further held that a regulatory body like MCA would regulate only the conduct of individuals or organisa -tions only,that the payment made by the assessee were prohibited by MCI regulation,that the expenses were incurred by benefit of doctors and not associations, that the associations were not at liberty to spend money received by assessee,that association had to spend as per the desire and guidance of the assessee company,that the expenditure was incurred against public policy,that expenditure incurred on hospitality,travel facilities provided to medical practitioners for participa -tion in workshop were not allowable,that MCI guidelines had prohibited giving free samples. Finally,it upheld the order of the TPO/AO.

5.2. Before us,the AR argued that the convention expenses and expenditure incurred on distribution of free product samples did not violate any of the provisions of MCI regulation, that same were not prohibited by any law to attract provisions of section 37(1) of the Act, that the code of conduct for doctors/professional association,laid down by MCA regulation,would apply to doctors and not to the assessee who was a medical device company,that the Circular of the CBDT was operative from 1/08/2012,that same was not applicable for the expenditure incurred during the year under consideration,that MCI guidelines were effective from 10/12/2009, that any disallowance incurred prior to the issue of guidelines could not be made applying the guide -lines,that AO had no disputed

the genuineness of expenses.He relied upon the cases of . The DR contended that expenditure incurred by the assessee was not allowable as per the provisions of section 37(1)Expl.1 of the Act,that there was clear cut violation of the guidelines issued by the MCI.He relied upon the cases of Ochoa Lab(85 taxmann.com.168).

5.3. We have heard the rival submissions and perused the material before us.We find that the TPO and the DRP were of the opinion that expenditure incurred by the assessee in violation of the MCI guidelines was not allowable under the Act,that incurring of expenditure for education grants or travelling was against the public policy,that the assessee had incurred the similar expenses in the earlier years also.

5.3.1.Before proceeding further,we would like to refer to certain matters that deal with the issue under consideration.First among them is the judgment of the Hon'ble Delhi High Court in the case of MAX Hospital,Pitampura v/s.Medical Council of India[W.P.(C) 1334/2013,dtd. 10/01/ 2014].Relevant portion of the judgment reads as follow:

"6.The Petitioner's grievance is twofold. Firstly, that since the Medical Council of India (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (the Regulations) have been framed in exercise of the power conferred under Section 20-A read with Section 33 (m) of the Indian Medical Council Act, 1956, these regulations do not govern or have any concern with the facilities, infrastructure or running of the Hospitals and secondly, that the Ethics Committee of the MCI acting under the Regulations had no jurisdiction to pass any direction or judgment on the infrastructure of any hospital which power rests solely with the concerned State Govt. The case of the Petitioner is that the Petitioner hospital is governed by the Delhi Nursing Homes Registration Act, 1953. It is urged that in fact, an inspection was also carried out on 22.07.2011 by Dr. R.N. Dass, Medical Superintendent (Nursing Home) under the Directorate of Health Services, Govt. of NCT of Delhi and the necessary equipments and facilities were found to be in order which negates the observations dated 27.10.2012 of the Ethics Committee of the MCI. It is also the plea of the Petitioner hospital that the Petitioner was not provided an opportunity of being heard and thus the principles of natural justice were violated.

7. In the counter affidavit filed by the Respondents, it is not disputed that the MCI under the 2002 Regulations has jurisdiction limited to taking action only against the registered medical practitioners. It's plea however, is that it has not passed any order against the Petitioner hospital therefore; the Petitioner cannot have any grievance against the impugned order. At the same time, it is stated that only simple observations were made by the Ethics Committee of the MCI about the state of affairs in the Petitioner hospital and the same did not harm any legal right or interest of the Petitioner. It will be apposite to extract the relevant paragraphs of the counter affidavit filed by the MCI as under:

xxxxx

8. It is clearly admitted by the Respondent that it has no jurisdiction to pass any order against the Petitioner hospital under the 2002 Regulations. In fact, it is stated that it has not passed any order against the Petitioner hospital. Thus, I need not go into the question whether the adequate infrastructure facilities for appropriate post-operative care were infact in existence or not in the Petitioner hospital and whether the principles of natural justice had been followed or not while passing the impugned order. Suffice it to say that the observations dated 27.10.2012 made by the Ethics Committee do reflect upon the infrastructure facilities available in the Petitioner hospital and since it had no jurisdiction to go into the same, the observations were uncalled for and cannot be sustained.

5.3.2.*In the case of PHL Pharma P Ltd.(ITA/4605/Mum/2014-AY.2010-11,dtd.18/5/2016) following grounds of appeal were raised by the AO:*

"1.Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of Rs.22,99,72,607/- being freebies given by the assessee to doctors, ignoring the fact that such payments are specifically prohibited w.e.f. 10.12.2009 by the Medical Council of India (MCI), which is the competent authority, and therefore, the said expenses are illegal and consequently not allowable as per the Explanation to Section 37(1) of the Income-tax Act, 1961?
2.Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in deleting the disallowance of Rs.22,99,72,607/- being freebies given by the assessee to doctors observing that the prohibition by IMA is on medical practitioners and not applicable to Pharma companies without appreciating that the Prohibition of IMA is to curb the malpractices in the medical profession and equally binding on both medical practitioners and Pharma companies?
3.The appellant prays that the order of the CIT (A) on the above ground be set aside and that of the A.O. be restored."
We are reproducing the relevant portion of the order which reads as under:
2.The brief facts of the case qua the issue raised in the grounds of appeal are that, the assessee is a pharmaceutical company engaged in the business of providing Pharma marketing consultancy and detailing services to develop mass market for Pharma products. …….On further perusal of the details appearing in the ledger account furnished by the assessee, he further noted that there are certain expenses which has been debited by the assessee like, 'Customer Relationship & Management expenses' (CRM) of Rs.7,61,96,260/-; 'Key Account Management expenses' (KAM)of Rs.2,56,68,509/-; gift articles of Rs.9,20,22,518/-; and cost of samples of Rs.3,60,85,320/-, which according to him are in the nature of freebies given to medical practitioners/doctors which are disallowable in terms of Explanation to section 37(1) as clarified by CBDT vide its Circular No.5/2012 dated 1.8.2012. In response to the show cause notice by the AO, firstly, as regard CRM expenses, assessee submitted that expenditure under this category includes activities like holding national level seminars on new medical researches and drugs for discussion panels of eminent doctors and inviting other doctors to participate in it; arranging lectures or sponsoring knowledge upgrade course, wherein eminent doctors are invited to speak on the selected topic related to the therapeutic area and also share their research and other latest knowledge updates; subscription of costly journals, information books etc.; and sponsoring travel and accommodation expenses of doctors for such important conferences. Under the KAM services, the assessee promotes ICCU range of products, which normally focuses on either single brand or a group of brands in one particular therapy area. This is done for certain key doctors, who are opinion leaders and has larger potential for sale of brands. Regarding gift articles, it was stated that this includes expenses for small value items given across the entire pool of doctors in India so as to maintain brand memory on a continuous basis. These small items include diaries, pen sets, injection boxes, calendars, table weights, postcard holders, stationery items, etc., wherein logo of the assessee company and the name of the medicine is advertised. This is important because in the same generic drug there are more than 40 to 60 brands, therefore, brand promotion is done through small value items. Lastly, for cost of samples, it was stated that these samples are distributed through various agents to doctors to prove the efficacy of the drug and to establish the trust of the doctors on quality of drugs. Free samples are given of smaller size, wherein it is marked as "physician sample not for sale". Various other expenditure under the aforesaid head, have been elaborately explained and illustrated by the assessee in its reply dated, 27.12.2012 before AO. The relevant portion of the reply has been incorporated by the AO from pages 3 to 6 of the assessment order. Regarding the applicability of CBDT Circular No.5 of 2012 (supra), wherein the CBDT has referred to amendment to the "Indian Medical Council Regulations, 2002", brought from 10.12.2009, imposing prohibition of 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, the assessee submitted that

firstly, cost of free samples, KAM expenses, CRM expenses are not prohibited under any law and, secondly, the CBDT Circular cannot have retrospective effect so as to be made applicable in the assessment year 2010-11 as the Circular is dated 01.08.2012. As required by the AO, the assessee also segregated expenses incurred after 10.12.2009, i.e., the date of amendment brought in the Indian Medical Council Guidelines. After segregating the expenses, AO disallowed the expenditure aggregating to Rs.22,99,72,607/- (post 10.12.2009) on the ground that, firstly, the guidelines issued by the Medical Council of India is binding because it is a statutory body having been set up under the Act of the Parliament; secondly, the amended notification dated 10.12.2009, which has been reproduced by him in the order, clearly forbids medical practitioners to receive any kind of gift, travel facilities, hospitality and any kind of cash or monetary grants from any pharmaceutical or health care industries. Thus, such an expenses, he held that, is disallowable in terms of Explanation to section 37(1).

5.We have considered the rival contentions made by ld. CIT DR as well as ld. Sr. Counsel, Mr J.D. Mistry, perused the relevant finding given in the impugned orders and material referred to before us. The entire controversy revolves around, whether the expenditures in question incurred by the assessee (a pharmaceutical company) is hit by Explanation 1 below section 37(1) in view of CBDT Circular dated 01.08.2012, interpreting the amendment dated 10.12.2009 brought in Indian Medical Council Regulation 2002 or not. The break-up of sales promotion expenses, which has been disallowed by the AO, are as under:

	Particulars of expenses	Amount (in Rs.)
	Customer Relationship Management expenses (CRM)	7,61,96,260
	Key Account Management expenses(KAM)	2,56,68,509
	Gift Articles	9,20,22,518
	Cost of samples	3,60,85,320
	Total	22,99,72,607

The nature of aforesaid expenses has already been explained above. Now whether the nature of such expenditure incurred by the assessee is to be disallowed in view of the CBDT Circular dated 01.08.2012.For the sake of ready reference, the said CBDT Circular No.5/2012 is reproduced hereunder:

xxxx

From the perusal of the aforesaid Board Circular, it can be seen that heavy reliance has been placed by the CBDT on the Circulars issued by the Medical Council of India, which is the regulatory body constituted under the 'Medical Council Act, 1956'. One such regulation has been issued is "Indian Medical Council Professional Conduct, Etiquette and Ethics) Regulations, 2002". The said regulation deals with the professional conduct, etiquette and ethics for registered medical practitioners only. Chapter 6 of the said regulation/notification deals with unethical acts, whereby a physician or medical practitioners shall not aid or abet or commit any of the acts illustrated in clause 6.1 to 6.7 of the said regulation which shall be construed as unethical. Clause 6.8 has been added (by way of amendment dated 10.12.2009) in terms of notification published on 14.12.2009 in Gazette of India. The said clause reads as under:-

xxxxx

6. On a plain reading of the aforesaid notification, which has been heavily relied upon by the department, it is quite apparent that the code of conduct enshrined therein is meant to be followed and adhered by medical practitioners/doctors alone. It illustrates the various kinds of conduct or activities which a medical practitioner should avoid while dealing with pharmaceutical companies

and allied health sector industry. It provides guidelines to the medical practitioners of their ethical codes and moral conduct. Nowhere the regulation or the notification mentions that such a regulation or code of conduct will cover pharmaceutical companies or health care sector in any manner. The department has not brought anything on record to show that the aforesaid regulation issued by Medical Council of India is meant for pharmaceutical companies in any manner. On the contrary, before us the learned senior counsel, Shri Mistry brought to our notice the judgment of Hon'ble Delhi High Court in the case of Max Hospital vs. MCI in WPC 1334/2013 judgment dated 10.01.2014, wherein the Medical Council of India admitted that the Indian Medical Council Regulation of 2002 has jurisdiction to take action only against the medical practitioners and not to health sector industry. Relevant portion of the said judgment reads as under:

xxxxx

From the aforesaid decision, it is ostensibly clear that the Medical Council of India has no jurisdiction to pass any order or regulation against any hospital or any health care sector under its 2002 regulation. So once the Indian Medical Council Regulation does not have any jurisdiction nor has any authority under law upon the pharmaceutical company or any allied health sector industry, then such a regulation cannot have any prohibitory effect on the pharmaceutical company like the assessee. If Medical Council regulation does not have any jurisdiction upon pharmaceutical companies and it is inapplicable upon Pharma companies like assessee then, where is the violation of any of law/regulation? Under which provision there is any offence or violation in incurring of such kind of expenditure. The relevant provision of section 37(1)reads as under:

xxxxx

The aforesaid provision applies to an assessee who is claiming deduction of expenditure while computing his business income.The Explanation provides an embargo upon allowing any expenditure incurred by the assessee for any purpose which is an offence or which is prohibited by law. This means that there should be an offence by an assessee who is claiming the expenditure or there is any kind of prohibition by law which is applicable to the assessee. Here in this case, no such offence of law has been brought on record, which prohibits the pharmaceutical company not to incur any development or sales promotion expenses. A law which is applicable to different class of persons or particular category of assessee, same cannot be made applicable to all. The regulation of 2002 issued by the Medical Council of India (supra), provides limitation/curb/prohibition for medical practitioners only and not for pharmaceutical companies. Here the maxim of "Expressio Unius Est Exclusio Alterius" is clearly applicable, that is, if a particular expression in the statute is expressly stated for particular class of assessee then by implication what has not been stated or expressed in the statute has to be excluded for other class of assessee. If the Medical Council regulation is applicable to medical practitioners then it cannot be made applicable to Pharma or allied health care companies. If section 37(1) is applicable to an assessee claiming the expense then by implication, any impairment caused by Explanation1 will apply to that assessee only. Any impairment or prohibition by any law/regulation on a different class of person/assessee will not impinge upon the assessee claiming the expenditure under this section.

7.Before us the learned CIT DR strongly relied upon the fact that CBDT Circular, while clarifying the applicability of Explanation 1 to section 37(1) on medical practitioners and pharmaceutical companies have interpreted that Indian Medical Council Regulation is applicable for pharmaceutical companies also. He also brought to our notice that another notification was issued by Indian Medical Council which was published on 01.12.2016 which further prohibits such kind of embargo on medical practitioners and have added para 6.8.1 and also given instances of action which shall be taken upon medical practitioners. The relevant clause of the said notification as relied upon by him is reproduced hereunder:

xxxxx

From the aforesaid notification, ld. CIT DR submitted that so many violations and censures have been prescribed for any expenditures/ or benefit given to doctors, thus, violation of such guidelines for incurring such kind of expenditures cannot be held to be allowable expenditure. CBDT is well within its power to clarify and interpret the law and prohibit allowance of any expenditure which violates any statute or is in nature of offence.

8.From a perusal of above amendment/notification in the MCI regulation, it is quite clear again that same is applicable for medical practitioners only and the censure/action which has been suggested by it is only on medical practitioners and not for pharmaceutical companies or allied health sector industries. The violation of the aforesaid regulation would not only ensure a removal of a doctor from the Indian Medical Register or State Medical Register for a certain period of time and it does not impinge upon the conduct of pharmaceutical companies. This important distinction has to be kept in mind that regulation issued by Medical Council of India is qua the doctors/medical practitioners and not for the pharmaceutical companies. As a logical corollary to it, if there is any violation or prohibition as per MCI regulation in terms of section 37(1) r.w.Explanation1, then it is only meant for medical practitioners and not for pharmaceutical company (Assessee Company) for claiming the expenditure.

9.Adverting to the contention of the Ld. CIT DR that CBDT is well empowered to issue such clarification, it is seen that the CBDT Circular dated 01.08.2012 (supra) in its clarification has enlarged the scope and applicability of 'Indian Medical Council Regulation 2002' by making it applicable to the pharmaceutical companies or allied health care sector industries. Such an enlargement of scope of MCI regulation to the pharmaceutical companies by the CBDT is without any enabling provisions either under the provisions of Income Tax Law or by any provisions under the Indian Medical Council Regulations. The CBDT cannot provide casus omissus to a statute or notification or any regulation which has not been expressly provided therein. The CBDT can tone down the rigours of law and ensure a fair enforcement of the provisions by issuing circulars and by clarifying the statutory provisions. CBDT circulars act like 'contemporanea expositio' in interpreting the statutory provisions and to ascertain the true meaning enunciated at the time when statute was enacted. However the CBDT in its power cannot create a new impairment adverse to an assessee or to a class of assessee without any sanction of law. The circular issued by the CBDT must confirm to tax laws and for purpose of giving administrative relief or for clarifying the provisions of law and cannot impose a burden on the assessee, leave alone creating a new burden by enlarging the scope of a different regulation issued under a different act so as to impose any kind of hardship or liability to the assessee. In any case, it is trite law that the CBDT circular which creates a burden or liability or imposes a new kind of imparity, same cannot be reckoned retrospectively. The beneficial circular may apply retrospectively but a circular imposing a burden has to be applied prospectively only. Here in this case the CBDT has enlarged the scope of 'Indian Medical Council Regulation, 2002' and made it applicable for the pharmaceutical companies. Therefore, such a CBDT circular cannot be reckoned to have retrospective effect. The same CBDT circular had come up for consideration before the co-ordinate Bench of the ITAT, Mumbai Bench in the case of Syncom Formulations (I) Ltd. (in ITA Nos. 6429 & 6428/Mum/2012 for A.Ys. 2010-11 and 2011-12, vide order dated 23.12.2015), wherein Tribunal held that CBDT circular would not be not be applicable in the A.Ys. 2010-11 and 2011-12 as it was introduced w.e.f. 1.8.2012.

10.From the perusal of the nature of expenditure incurred by the assessee, it is seen that under the head "Customer Relationship Management", the assessee arranges national level seminar and discussion panels of eminent doctors and inviting of other doctors to participate in the seminars on a topic related to therapeutic area. It arranges lectures and sponsors knowledge upgrade course which helps pharmaceutical companies to make aware of the products and medicines manufactured and launched by it. Under Key Account Management, the assessee makes endeavour to create awareness amongst 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. The said activities by the assessee are to make the doctors aware of its products and research work carried out by it for bringing the medicine in the market and its results are based on several levels of tests and approvals. Unless the pharmaceutical companies make aware of such kind of products to key doctors or medical practitioners, then only it can successfully launch its products/medicines. This kind of expenditure is definitely in the nature of sales and business promotion, which has to be allowed. Coming to the gift articles and free samples of medicines, it is seen that the assessee gives various kind of articles like, diaries, pen sets, calendars, paper weights, injection boxes etc. embossed with bold logo of its brand name and the product name so that the doctors remembers the brand of the assessee and also the name of the medicine. All the gift articles, as pointed out by the assessee before the authorities below and also before us are very cheap and low cast articles which bears the name of assessee and it is purely for the promotion of its product, brand reminder, etc. These articles cannot be reckoned as freebies given to the doctors. Even the free sample of medicine is only to prove the efficacy and to establish the trust of the doctors on the quality of the drugs. This again cannot be reckoned as freebies given to the doctors but for promotion of its products. The pharmaceutical company, which is engaged in manufacturing and marketing of pharmaceutical products, can promote its sale and brand only by arranging seminars, conferences and thereby creating awareness amongst doctors about the new research in the medical field and therapeutic areas, etc. Every day there are new developments taking place around the world in the area of medicine and therapeutic, hence in order to provide correct diagnosis and treatment of the patients, it is imperative that the doctors should keep themselves updated with the latest developments in the medicine and the main object of such conferences and seminars is to update the doctors of the latest developments, which is beneficial to the doctors in treating the patients as well as the pharmaceutical companies. Further as pointed out and concluded by the learned CIT(A) there is no violation by the assessee in so far as giving any kind of freebies to the medical practitioners. Thus, such kind of expenditures by a pharmaceutical companies are purely for business purpose which has to be allowed as business expenditure and is not impaired by EXPLANATION 1 to section 37(1).

11.Before us, the Ld. CIT DR has also much harped upon the decision of the Hon'ble Himachal Pradesh High Court in the case of Confederation of Indian Pharmaceutical Industry (SS) vs. CBDT (supra), in support of the argument that CBDT Circular has been approved and confirmed by the High Court and therefore, it has a huge binding precedence. From the perusal of the said judgment of the Hon'ble High Court, it is seen that in that case the validity of Circular No.5/12 dated 1.8.2012 was challenged. The Hon'ble High Court though upheld the validity of the said circular but with a rider that if the assessee satisfies the assessing authority that the expenditure is not in violation of the regulation framed by the medical council, then it may legitimately claim the deduction. The assessee has to satisfy the AO that the expenditure is not in violation of the Medical Council regulation. Thus, if the assessee brings out that the MCI regulation is not applicable to the assessee before the AO, the same cannot be applied blindly.

12. At the time of hearing, our attention was also drawn to the decision of Tribunal of our Co-ordinate Bench in the case of 'Liva Healthcare Limited ITA Nos. 904 & 945/Mum/2013', decided vide order dated 12.09.2016. In counter, to this decision the learned counsel, Shri JD Mistry distinguished the said judgment and submitted that the facts of the case in the Liva Healthcare (supra) were substantially different from the facts of the present case. In the case of Liva Healthcare, the Hon'ble Tribunal disallowed such expenses u/s. 37(1) of the Act on the ground that they were not incurred wholly and exclusively for the purpose of business as the same were incurred to create good relations with the doctors in lieu of expected favours from doctors for recommending to the patients the pharmaceutical products dealt with by the company to generate more and more business and profits for the assessee company. The Tribunal also recorded the fact that the spouse of the doctors also accompanied the doctors for overseas trips to Istanbul and expenses were incurred for cruise travels to island, gala dinner, cocktails, gala

entertainment etc. of such doctors. In assessee's case it is an admitted fact that expenses have not been incurred for the purpose personal benefit/enjoyment of the doctors or their spouses. In the case of Liva, the question as to whether such IMC Regulations can be applicable to Pharma Companies was not argued before the Hon'ble Bench. He reiterated that the Hon'ble Delhi High Court in the case of Max Hospital (supra) and the Jurisdictional Tribunal in the case of Syncom (supra) have held that such IMC Regulations apply only to medical practitioners. He further submitted that the Tribunal in the case of ACIT vs. Liva Healthcare Ltd. (ITA 847/Mum/2012) for A.Y. 2008-09, has decided similar issue in favour of the assessee. However, in A.Y. 2009-10, Hon'ble Tribunal while noting the fact that consistency has to be adopted, distinguished the order of A.Y. 2008-09 as under:

"The assessee has contended that in the immediately preceding assessment year the Tribunal has decided the issue in favour of the assessee in ITA NO. 388/Mum/2012 for assessment year 2008-09. In our considered view, principles of Res judicata is not applicable to income tax proceedings although we are fully agreeable that principles of consistency is to be maintained (Hon'ble Supreme Court decision in Radha Soami Satsang v. CIT (1992) 193 ITR 321 (SC) but in the instant assessment year, we have observed that these overseas trips for Doctors and their spouses were organized by the assessee whereby no details of the contents of seminar, if any conducted by the assessee overseas has been brought on record and also even the spouses accompanied the Doctors to the overseas trip which included cruise visit to island, gala dinners, cocktail, gala entertainment etc. rather than being directed towards seminar for product information dissemination or directed towards knowledge enhancement or knowledge sharing oriented as no details of seminar and its course content is brought on record rather the trip is directed towards leisure and entertainment of Doctors and their spouses which in our view appears to be clearly a distinguishable feature in this year enabling us to take a divergent view and the expenses incurred by the assessee cannot be allowed as business expenditure u/s. 37 of the Act as it is clearly hit by explanation to Section 37 of the Act being against public policy as unethical prohibited by law.

In view of the above, he pointed out that in the above decision for A.Y. 2009-10 in the case of Liva Healthcare, there was a specific finding of a fact that no details have been filed with respect to any seminar has been conducted for doctors and that the trips were directed towards leisure and entertainment of doctors and their spouses. This was a distinguishable feature for the Hon'ble Tribunal to take a contrary view from A.Y. 2008-09. He further submitted that the Hon'ble Tribunal in the case of Liva Healthcare Ltd. vs. ACIT (ITA No. 4791/Mum/2014) for A.Y. 2010-11 has followed the decision of Liva Healthcare (supra) for A.Y. 2008-09 and has decided this issue in favour of the assessee. This, further brings out the fact that the Hon'ble Tribunal disallowed the expenses u/s. 37(1) of the Act in the case of Liva Healthcare for A.Y. 2009-10 only on the ground that the same were not incurred wholly and exclusively for the purpose of business.

13.Apart from the aforesaid distinguishing features as highlighted by the learned senior counsel, we find that on the facts itself in the case of Liva Healthcare (2009-2010) (supra), there was a clear cut material on record that the Doctors along with their spouses were taken to foreign tours and cruise travel etc., in lieu of expected favours from doctors. In the light of these facts and material the Tribunal has decided the issue against the assessee by not following the earlier year precedence and subsequent year orders of the same assessee. As brought on record before us, we find that similar issue of allowance of such expenditure in the case of pharmaceutical companies has been decided in favour of the assessee, in the case of UCB India Pvt. Ltd. v. ITO (ITA No. 6681/Mum/2013 order dated 13.05.2016, wherein it was held that CBDT circular cannot have a retrospective effect. This judgment was lost sight of by the bench. In any case on careful perusal of the Tribunal order in the case of Liva Healthcare (supra) we find that the Tribunal though has incorporated the relevant provisions and clauses of the 'Indian Medical Council Regulation

2002', however, has not elaborated or dwell upon as to how this MCI regulation which is strictly meant for medical practitioners and doctors can be made applicable to pharmaceutical companies. There has to be some enabling provision or specific clause in the said regulation whereby the pharmaceutical companies are barred from conducting seminars or conferences by sponsoring the doctors. The entire conduct relates to doctors and medical practitioners and lists out the censures and fines imposed upon them. What has not been provided in the MCI regulation cannot be supplied either by the court or by the CBDT. There has to be express provision under the law whereby pharmaceutical companies are prohibited to conduct conferences or seminar or give free samples. In the Tribunal decision of Liva Healthcare, strong reference has been made to Hon'ble Himachal Pradesh High Court (supra), that the said CBDT circular has been upheld. On this aspect we have already discussed in detail herein above that, firstly, High Court itself carves out a rider that assessee is free to demonstrate before the AO that this circular is not applicable on facts of the case; and secondly, CBDT circular which creates new impairment and imposes disallowbi - lity not envisaged in any of the Act or regulation cannot be reckoned to be retrospective.Another strong reference has been made to the decision of Hon'ble Punjab & Haryana High Court in the case of CIT vs. *Kap Scan* and *Diagnostic Centre* (P.) Ltd. [2012] *25* taxmann.com 92, wherein commission was paid to the private doctors for referring the patients for diagnosis to the assessee company. In background of these facts and issues involved, the Hon'ble High Court held that said payment of commission is wrong and is opposed to be a public policy. It should be discouraged as it is not a fair practice. The ratio of said decision cannot be applied on the facts of the present case because there is no violation of any law or anything which is opposed to public policy. Similarly, there is reference to the decision of Hon'ble Supreme Court in the case of Eskayef (Now Known as Smithkline Beecham) Pharmaceuticals (India) Limited v. CIT (2000) 111 Taxman 561(SC), which was given in context of Section 37(3A) of the Act. In the said case the assessee had claimed expenditure on distribution of physician's samples u/s. 37. In the background of such claim the Hon'ble Apex court held that, if the expenditure falls within the bare minimum it will not be caught by subsection (3A) of section 37. On the contrary, the Hon'ble Apex Court observed that physicians samples are necessary to ascertain the efficacy of medicine and introduce it in the market for circulation and it is only by this method the purpose is achieved. In such cases giving a physician samples for reasonable period is essential to the business of manufacture and sale of medicine. It is only if a particular medicine has been introduced by the market and its uses are established then giving of free samples could only be the measure of sale/ promotion and development would thus be hit by subsection (3A). Said decision no way prohibits the nature of expenditure which has been incurred in the case of the assessee. Therefore, such a reference to a Hon'ble Apex Court decision is not germane to the issue involved. Thus, in our opinion, the aforesaid decision of this Tribunal is clearly distinguishable and cannot be held to be applicable and also we have already given our independent finding as to allowability of expenses in the hands of the assessee as business expenditure.

14.Accordingly, we uphold the order of the ld. CIT(A) deleting the disallowance aggregating to Rs.22,99,72,607/-."

5.3.3..*Lastly,we want to refer to the case of Syncom Formulations in ITA No. 6429 & 6428/ Mum/2012,dated 23.12.2015, the Tribunal has held that the CBDT Circular,dated 1.8.2012 is applicable w.e.f.1.8. 2012 relevant to AY.2013-14.While holding so,it was observed as under:*

"We have considered rival contentions and found that receiving of gifts by doctors was prohibited by MCI guidelines, giving of the same by manufacturer is not prohibited under any law for the time being in force. Giving small gifts bearing company logo to doctors does not tantamount to giving gifts to doctors but it is regarded as advertising expenses. As regards sponsoring doctors for conferences and extending hospitality, pharmaceuticals companies have been sponsoring practicing doctors to attend prestigious conferences so that they gather

contemporary knowledge about management of certain illness/disease and learn about newer therapies. We found that the disallowance was made by the AO by relying on the CBDT Circular dated 01.08.2012 onwards. However, the Circular was not applicable because it was introduced w.e.f.01.08.2012 i.e. assessment year 2013-2014, whereas the relevant assessment year under consideration is 2010-2011 and 2011-2012. Accordingly, we do not find any merit in the disallowance so made by the AO in both the assessment years under consideration".

5.4.*Considering the above,we are of the opinion that the MCI guidelines are applicable to the professionals i.e. Doctors only.They do not and cannot govern the other tax entities like Drug manufacturing or drug distributing Companies or individuals other than the doctors, or HUF,s., or Firms etc.MCI,as a body can formulate policy for the Doctors.The assessee is not a practicing professional.So,any guidelines issued by it cannot decide the allowability or otherwise of an expenditure under the Act.Income tax Act is a code in itself and business income an assessee has to be assessed and taxed as envisaged by the provisions of the Act.The AO/DRP had not doubted incurring of expenditure.They have heavily relied upon the guidelines issued by the MCI for the doctors.The Hon'ble Delhi High Court in the case of MAX Hospital,Pitampura (supra)has clearly held that MCI could issue guide lines for the Doctors only and that the MCI in its affidavit admitted that it has 'no jurisdiction' to pass any order against the 'Petitioner hospital'.Ethics Committee of MCI is authorised to pass some order about the infrastructure of any hospital.But,as far as corporate entities are concerned MCI cannot issue any guide lines. Therefore,we are not dealing with the issue as to from which AY.the guide lines would be applicable.We would also like to hold that distribution of free samples cannot be treated as violation of Expl.1 to section 37(1).*

5.5.*We would also like to prefer to follow the judgment of the Hon'ble Delhi High Court delivered in the case of MAX Hospital,Pitampura and the above referred two orders of the Tribunal i.e. PHL Pharma P Ltd.(supra)and Syncom Formulations(supra)over the order of Ochoa Lab. (supra). Accordingly,third effective ground of appeal(Gs.OA 20-32)is decided in favour of the assessee."*

In view of above discussion,we decide Grounds no.11-29 in favour of the assessee.

6.In the additional ground of appeal,the assessee has raised the issue of allowing consequential depreciation on non compete fee.It was argued that while deciding the appeal for the AY.2002-03,the Tribunal(order dtd.25.10.2016) had directed the AO to allow depreciation on payment made for non compete fee treating the same as capital expenditure.

Following the above order of the Tribunal,we allow the additional ground raised by the assessee.

ITA/1800/Mum/2016:

7.Solitary ground of appeal,raised by the AO is about not upholding the adjustment based on BLT on the premises that it was not the most appropriate method.While deciding the appeal filed by the assessee,we have held that AMP expenses was not an International transaction. Therefore,the issue of applying BLT as the MAM would not arise.Tribunal had taken the same view while deciding the appeal for the AY.2010-11(supra).Accordingly,we decide the effective ground of appeal,raised by the AO, against him.

CO/157/Mum/2016:

8.In its CO,the Assessee has supported the directions of the DRP about not applying bright line method .In our opinion,in light of our discussion in earlier paragraph,the CO should be treated as infructuous.

As a result,the appeal filed by the assessee stands allowed and the appeal of the AO is dismissed. CO of the assessee is treated infructuous.

फलतः निर्धारिती द्वारा दाखिल की गई अपील मंजूर की जाती है. निर्धारिती अधिकारी की गई अपील नामंजूर की जाती है.निर्धारिती का प्रत्याक्षेप निष्प्रभावी माना जा रहा है.

Order pronounced in the open court on 2nd May, 2018.
आदेश की घोषणा खुले न्यायालय में दिनांक 2 मई , 2018 को की गई.

Sd/-	**Sd/-**
(**संदीप गोसांई /** Sandeep Gosain**)**	(राजेन्द्र **/ Rajendra**)
न्यायिक सदस्य **/ JUDICIAL MEMBER**	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक/Dated : 02.05.2018.
Jv.Sr.PS.

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

1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी
3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त
5.DR "K " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अ.न्याया.मुंबई
6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**
उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण, मुंबई **/ITAT, Mumbai.**