

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH: 'E', NEW DELHI**

**BEFORE SMT. DIVA SINGH, JUDICIAL MEMBER  
AND  
SHRI O.P. KANT, ACCOUNTANT MEMBER**

ITA No.2427/Del/2015  
Assessment Year: 2009-10

M/s. Biotronik Medical Devices India Pvt. Ltd., Unit No.805-807, 8 <sup>th</sup> Floor, Commercial Complex, DLF Tower-B, Jasola, New Delhi	<b>Vs.</b>	Income Tax Officer, Ward-3(1), New Delhi
<b>PAN :AADCB1386Q</b>		
<b>(Appellant)</b>		<b>(Respondent)</b>

Appellant by	Shri Sandeep Kumar, CA
Respondent by	Shri S.R. Senapati, Sr. DR

Date of hearing	21.08.2018
Date of pronouncement	12.10.2018

**ORDER**

**PER O.P. KANT, AM:**

This appeal by the assessee is directed against order dated 13/02/2015 passed by the Ld. Commissioner of Income Tax (Appeals) -2, New Delhi [in short 'the Ld. CIT(A)'] for assessment year, 2009-10, raising the following grounds:

- 1. Lower Authorities have erred in passing/ confirming orders which are based on hypothetical grounds, are bad*

*in law, are against provision of Income Tax Act and are against law of natural justice.*

- 2. The lower authorities have grossly erred in making/confirming additions of Rs. 54,36,024/-on account of excess of stock, without considering the factual situation and submissions made Appellate and passing order on hypothetical and arbitrary grounds, therefore orders are bad in law and against provision of Income Tax Act.*
- 3. The lower authorities have grossly erred in making/confirming addition of Rs. 1,87,788/- out of Foreign Travel expenses without understanding business exigency of the Appellant.*
- 4. The lower authorities were not justified in making/confirming additions of Rs. 72,99,303/-on account of disallowance of 4/5th of Advertisement expenses, considering same as deferred revenue expenditure which is based on hypothetical and arbitrary grounds, against the decided position of law, therefore is bad in law and against provisions of the Income Tax Act.*
- 5. The Appellant craves to amend, add or modify any Grounds of Appeal before its disposal.*

**2.** Briefly stated facts of the case are that the assessee company was engaged in importing medical equipments and materials from its associated company located at Berlin (Germany) and Bulach. In the period relevant to the year under consideration, a survey under section 133A of the Income-tax Act, 1961 (in short 'the Act') was conducted on 06/12/2008 and during which certain discrepancy of stock of "programmers" for pacemakers was noticed. For the year under consideration, the assessee filed return of income on 29/09/2009, declaring total income of Rs.4,85,45,268/-. The case was selected for scrutiny, and notice under section 143(2) of the Act was issued and

complied with. In the scrutiny assessment completed under section 143(3) of the Act on 18/03/2013, the Assessing Officer made certain additions/disallowances and assessed the total income at Rs.6,14,68,390/-. The assessee challenged the additions/disallowances before the Ld. CIT(A), however, could not succeed. Aggrieved, the assessee is in appeal before the Tribunal raising the grounds as reproduced above.

**3.** Both the parties were heard at length on 20.08.2018 but the matter was adjourned to 21.08.2018 and the learned counsel was asked by the bench to submit documentary evidences on the issues raised in ground No. 3, supporting the claim of foreign travelling expenses incurred for the purpose of businesses. The case was finally heard on 21.08.2018.

**4.** The ground No.1 of the appeal is general nature and covered by the rest of the grounds and, therefore, not adjudicated specifically.

**5.** The ground No. 2 of the appeal relates to addition of Rs.54,36,024/- on account of excess stock found during the course of survey action.

**5.1** The facts in brief qua the addition in dispute are that during the course of survey action by the Income-tax Department on 06/12/2008 i.e. during the period relevant to the assessment year under consideration, in respect of the 2 items of stock, variation in book inventory and physical stock was found. These 2 items were “programmers” used at the time of implant of “pacemakers”. These “programmers” are used for programming the ‘pacemakers’ after it is implanted in the body of the patient. In the records maintained by the assessee company, 40 numbers of “programmer” item No. 120459 PMS 1000C and 35 numbers of

item No. 128113 PMS 1000 plus were found. As against, the 75 items, quantity of 22 items was only found physically. It was explained by the assessee that the remaining items were issued/transferred on loan basis to hospitals or distributors of the item. During the course of assessment proceedings, the Assessing Officer noticed that against the value of 40 items of Rs.22,59,840/-, only value of 6 items was declared by the assessee at Rs.6,27,200/- in its books of account and the value of the balance items amounting to Rs.16,32,640/- was not declared in the books of accounts. Similarly, the Assessing Officer observed that value of the 35 items amounting to Rs.38,03,386/- was declared at Nil by the assessee. In the assessment order, the Assessing Officer has prepared two tables having complete details of these 2 items. The Assessing Officer asked the assessee to furnish documents in respect of these items like delivery challans/invoices, documents related to custom clearance and shipping bills, handling charges and detail of all expenses incurred in respect of the import of sale items to India. In response, the assessee filed only a letter dated 05/03/2013 from its Associated Enterprises confirming that said items of the stock were provided free of cost (FOC) basis to the assessee and therefore value of the said items was taken at nil. In view of the failure of the assessee in submitting the documentary evidence asked for, he treated the difference in value of the stock amounting to Rs.54,36,026/- as value short declared by the assessee. The detailed of working of Rs.54,36,026/- made by the Assessing Officer is reproduced as under:

<i>“Value of 40EA items as per Table-A</i>	<i>Rs.22,59,840/-</i>
<i>Less: Value declared by the assessee</i>	<i><u>Rs. 6,27,200/-</u></i>
<i>Value short declared</i>	<i>Rs.16,32,640/- (X)</i>

*The value of stock item 128113-PMS 1000 Plus INCL, ACC is short declared by Rs.38,03,386/-*

*The Value of 22EA available with distributor as per Table-B Rs.23,90,700/-*

*The value of remaining 13EA available with the assessee*

*But value taken at ‘Nil’ (Avg. value\*x13) Rs.14,12,686/-*

*\*Average value of IEA (23,90,700/22)= Rs.1,08,668*

*Total value of 35EA Rs.38,03,386/- (Y)*

*Total value of stock declared short by the assessee (X+Y=) Rs.54,36,026/-“*

**5.2** Aggrieved, the assessee submitted invoices and custom documents of the relevant items before the Ld. CIT(A) as additional evidences under Rule 46A of Income Tax Rules, 1962. The assessee contended that it was not required to make any payment towards the cost of those items and therefore no value was attached to those items at the year-end. According to the assessee, since no cost had been incurred, no closing stock value could be attached to those items.

**5.3** Simultaneously, the assessee submitted that those items were of consumable nature and their life was also very short in view of technological changes, and thus should be treated as revenue expenditure. The assessee submitted that all those “programmers” had been declared obsolete in financial year 2010-11.

**5.4** The Ld. CIT(A) forwarded the additional evidences submitted by the assessee for comment of the Assessing Officer. The Assessing Officer objected admission of the additional evidences.

The Ld. CIT(A) provided a copy of the objections raised by the Assessing Officer to the assessee and after taking into account rejoinder of the assessee, upheld the addition holding that the explanation of supplying the item free of cost to the assessee was only an afterthought on the part of the assessee to justify the excess unrecorded stock found with the assessee, part of which was stated to have been given on loan to hospitals. The confirmation and invoices etc from the parent company to this effect were found by the Ld. CIT(A) as self-serving document. The Ld. CIT(A) also rejected the contention of not providing ample opportunity by the Assessing Officer.

**5.5** Before us, the Ld. counsel of the assessee has filed a paperbook containing pages 1 to 63 and submitted that except 6 pcs. of programmers, balance items were received free of cost from the associated companies and thus no cost has been charged in the books of accounts of the assessee in respect of the balance items. The Ld. counsel referred to pages 5 onwards of the paper book and submitted that in the commercial invoice raised by the Associated Enterprises, it was clearly mentioned that no payment was required in respect of those items. The Ld. counsel also referred to pages 47 to 50 of the paperbook, which is a copy of the confirmation issued by the Associated Enterprises stating that those items were supplied free of cost to the assessee. Further, the Ld. counsel relied on the submissions made before the Ld. CIT(A). According to him, when no purchase cost was recorded in books of account in respect of those items, the assessee was not required to take value of those items in the closing stock.

**5.6** The Ld. DR, on the other hand, relied on the order of the lower authorities and submitted that values of the items are clearly recorded in the bills of entries issued by the Customs Department. In said bill of entry, invoice number, date and invoice values are clearly recorded. He also submitted that copy of the proforma invoice or the commercial invoice in respect of the items in dispute submitted before the Ld. CIT(A) are documents prepared separately and not submitted to the custom authorities. According to him, the Custom Authorities has duly valued those items and levied the custom duty, which has been paid by the assessee. According to the Ld. DR, the custom duty paid in respect of the items has not been disputed by the assessee, but, the said custom duty paid has not been shown in the books of accounts as closing value of those items. The Ld. counsel submitted that the assessee has duly imported those items at the value declared in the bill of entry for custom duty purposes, but failed to explain the source of purchase of the same, in its books of accounts and thus the expenditure falls in the nature of unexplained expenditure under section 69C of the Act. In view of the arguments, according to him, the Ld. Assessing Officer and the Ld. CIT(A) were justified in making addition for short valuation of the stock.

**5.7** We have heard the rival submissions and perused the relevant material on record. The undisputed facts in the case are that 75 programmers for pacemakers have been imported by the assessee and except 13 programmers, which were found in the premise of the assessee, balance were transferred on loan to different hospitals/ distributors. The fact that out of those 75 programmers, the assessee has shown cost of purchase of 6

programmers in its books of accounts is also undisputed. The dispute is in respect of the value of the remaining 69 “programmers”, which has not been shown in the valuation of closing stock. The Assessing Officer has valued those items at Rs.54,36,026/-. The claim of the assessee is that those items were received free of cost (FOC) and therefore no value was attached and same were valued at nil in the books of accounts. The alternative argument of the assessee is that in view of the technological changes, those items became obsolete in the year under consideration and thus their value became nil. The arguments of the Revenue are that in the bill of entry of those items, the value has been duly recorded and thus the claim of the assessee that same have been supplied free of cost, is false. In view of the Revenue, the proforma invoice or commercial invoice claiming free of cost supply of items have been prepared internally and were not submitted before the custom authorities. According to Revenue, those proforma invoice or commercial invoice are not custom approved invoices of the items.

**5.8** As far as contention of the Ld. counsel that in view of the free of cost supply of the items by the Associated Enterprises, purchase cost corresponding to those items was not charged to books of accounts, is concerned, we do not find anything wrong in principle. If no cost has been incurred in respect of the purchases, then, corresponding value of the closing stock has to be taken according to the method of accounting regularly followed by the assessee, which may be cost or market value, whichever is less. In those circumstances, in principle, the contention of the Ld. counsel is not incorrect.



**5.9** But, we find from the various pages of the paper book from page No. 2 to 26, that that custom duty has been paid in respect of all the “programmers” imported by the assessee and this custom duty paid has not been treated as value of the programmer for the purpose of valuation of closing stock. This practice of the assessee is against the principles of valuation of closing stock. Without prejudice to the authenticity of the claim of free of cost supply, the assessee was at least required to declare the custom duty paid in respect of those items as the value of the closing stock of those items, rather than showing the same at Nil.

**5.10** The contention of the Revenue, on the other hand, is that the assessee has purchased those items from its Associated Enterprises, at the values declared in the bill of entry of those items and the source of said expenditure, has not been explained satisfactorily by the assessee and, thus, the amount covered by such expenditure is deemed to be income of the assessee for such financial year in terms of section 69C of the Act.

**5.11** We agree with the above contention of the Revenue as the assessee has failed to explain as why certain value of the item has been recorded in the bill of entry of import of those items. In normal course, if the goods are sent as sample free of cost, then the fact is recorded in the bill of entry and in the invoice used for custom duty purposes. But in the case of the assessee, the facts are contrary and the value has been shown for the purpose of custom duty and the assessee has also paid the custom duty. The pro-forma invoice or commercial invoice showing free of cost supply of items are not stamped by the custom authorities and thus those were not produced before the custom authorities. In

the bill of entry, the values are recorded keeping in mind the sale invoices issued by the seller, accordingly, the custom authorities have valued the items and levied the custom duty. In the bill of entry, no where it is mentioned that those goods have been supplied free of cost to the assessee.

**5.12** The question is now as how, the cost of items which has been recorded in the bill of entry, has been paid by the assessee. In terms of section 69C of the Act, if the assessee offers no explanation about the source of the expenditure, or the explanation offered by him is not in the opinion of the Assessing Officer, satisfactory, the amount covered by such expenditure, may be deemed to be the income of the assessee for such financial year. In our opinion, the assessee has failed to discharge his onus to explain the source of expenditure or how the same has been paid. There might be number of ways through which such expenditure could be adjusted between two parties which remain in the knowledge of the those parties. This may be by way of passing certain benefit to the Associated Enterprises also. Since, in the instant case, the assessee has not explained as how the said cost/price has been paid to the Associated Enterprises, thus, the lower authorities are justified in treating the said expenditure as unexplained expenditure and deemed income of the assessee. The ground of the appeal of the assessee is accordingly dismissed.

**6.** The ground No. 3 of the appeal relates to addition of Rs.1,87,788/- out of foreign travel expenses. The facts qua the issue in dispute are that the Assessing Officer observed total expenses of Rs.75,18,814/- under the head 'travelling and conveyance expenses' and out of which expenses of Rs.94,149/-

was found to be sponsored by the assessee towards 'Hotel expenses of foreign tour' of Dr. Mohan Nair to Rome and Rs.93,639/- sponsored towards registration and hotel expenses of Dr. Ashwini Mehta for conference at Milan. The assessee was asked to explain whether the expenses incurred for the purpose of the business of the assessee and submit documentary evidence in support thereof. Before the Assessing Officer, the assessee submitted that expenses were not incurred in respect of the related persons. According to the assessee, company's products can be sold on the recommendation of the medical professional and the medical professional recommend when they are confident about the product. At the education programs, the medical professionals are made to understand the nature of product and utilities and thus sponsoring the expenses was for the purpose of business. It was also explained that in process of sponsoring the marketing staff get acquainted with the medical professional, which in turn helps for the promotion of the company's products at large. The submission was found to be lacking documentary evidence and, therefore, the Assessing Officer disallowed the expenses in question holding to be not related to the business of the assessee. Before the Ld. CIT(A), the assessee reiterated same arguments and further submitted that how business is to be run is to be decided by the management of the company and even if the expenditure has not resulted in the profit earning of the company directly or indirectly, under the business exigency the expenditure is allowable. The Ld. CIT(A) after taking into account, the comment of the Assessing Officer and rejoinder of the assessee, upheld the finding of the Assessing Officer in absence of

any documentary evidence to establish any nexus between the foreign visit of the 2 doctors for the business of the assessee.

**6.1** Before us, the Ld. counsel of the assessee relied on the submission made before the Ld. CIT(A) and submitted that expenses incurred were for the purpose of the business of the assessee. The Ld. counsel of the assessee was asked specifically to submit documentary evidence which could show a link of the foreign travels of the doctors with the business of the assessee. But, he only submitted copies of bill raised by the vendors in the name of the assessee company and copies of vouchers prepared by the assessee company along with proof of payment to those vendors.

**6.2** The Ld. DR, on the other hand, relied on the finding of the lower authorities.

**6.3** We have heard the rival submission and perused the material on record and the copies of the documents produced by the Ld. counsel before us. We find that except standard explanation that participation of doctors in the International conferences helped in understanding the products, no documentary evidence which could specifically establish that expenses on hotel and registration of doctors was related to the business of the assessee are filed. The counsel of the assessee was asked by the bench to submit the detail of the conference in which the doctors participated and asked to explain, whether the products sold by the assessee were subject matter of those conferences, but no such evidences have been produced before us by the counsel of the assessee. The filing of copy of bills of expenditure on hotel or registration in itself cannot establish whether the expenditure has been incurred wholly and

exclusively for the purpose of business. In view of the aforesaid discussion, we are of the opinion that action of the lower authorities in disallowing the expenses in dispute is justified in terms of section 37(1) of the Act. The ground No. 3 of the appeal is accordingly dismissed.

**7.** The ground No. 4 of the appeal relates to addition of Rs.72,99, 303/-on account of disallowance of 4/5<sup>th</sup> of advertising and expenses. The facts qua the issue in dispute are that the Assessing Officer observed advertisement and sales promotion expenses of Rs.91,24,129/- in the profit and loss account. According to the Assessing Officer, the year under consideration being initial year of the company's business, the large sum of expenses incurred on advertisement and sales promotion should be capitalized. The Assessing Officer relied on the decision of the Hon'ble Supreme Court in the case of Madras Industrial Investment Corporation Limited Vs. CIT (225 ITR 820), wherein at the instance of the assessee benefit of spread of expenses over a number of years was allowed. The Ld. CIT(A) also upheld the disallowance keeping in view the above decision of the Hon'ble Supreme Court.

**7.1** Before us, the Ld. counsel of the assessee submitted that in the said decision of the Hon'ble Supreme Court in the case of Madras Industrial Investment Corporation Limited (supra), the spread of the expenses over number of years was allowed at the instance of the assessee only. But in the instant case no such claim is made by the assessee and, therefore, ratio of the said decision cannot be applied over the facts of the instant case. He further submitted that the Tribunal in the preceding assessment year i.e. 2008-09 deleted the similar disallowance made.

Accordingly, submitted that issue in dispute might be decided in favour of the assessee.

**7.2** The Ld. DR, on the other hand, relied on the finding of the lower authorities.

**7.3** We have heard the rival submission and perused the relevant material on record. We find that identical question was before the Tribunal in the case of the assessee in ITA No. 1263/Del/2013 for assessment year 2008-09, wherein also the advertisement and sales promotion expenses were disallowed relying on the decision of the Hon'ble Supreme Court in the case of Madras Industrial Investment Corporation Limited (supra). The Tribunal after taking into consideration the decisions relied upon by the assessee and observing that there is no concept of deferred revenue expenditure deleted the addition. The relevant finding of the Tribunal is reproduced as under:

*“7. Brief facts apropos ground no. 2 are that in the course of assessment proceedings, the Assessing Officer noticed that assessee company had claimed an advertisement and sales promotion expenses ol Rs. 26,49,273/- in the P/L account during the year under consideration. The assessee's reply to the Assessing Officer's query was as under:-*

*“Advertisement and sales promotion of Rs. 26,49,273/- should not be considered heavy one having initial years of the company as the expenses are normal in nature in our type of industry. Secondly, there is no provision in Income Tax also that, any expenditure of revenue nature can be capitalized due to fact that the expenses is heavy one or light one. Where ever law wanted any expenditure to be considered as deferred, the same in provided in I.T. Act e.g 35-D for preliminary expenses. ”*

*8. The Assessing Officer, however, relying on the decision of Hon'ble Supreme Court in the case of Madras Industrial Investment Corporation Ltd. Vs CIT. 225 ITR 820, wherein Hon'hie Supreme Court has held that considering the facts of a particular case, the revenue expenditure also can be spread over the years, allowed only*

20% of the assessee's claim and disallowed the balance amount of Rs. 21,19,419/- treating the same being in capital field.

9. The Id. CIT(A) allowed the assessee's appeal, inter alia, observing that there is no concept of deferred revenue expenditure. He observed that the genuineness of the expenditure has no-where being disputed by A.O. He relied on following decisions:

- CIT Vs Citi Financial Consumer Fin. Ltd. (201 1) 335 ITR 29 (Del)
- Amar Raja Batteries Ltd. Vs ACIT (2004) 91 ITD 280 (Hyd.)
- JCIT Vs Modi Olivetti Ltd. (2005) 4 SOT 859 (Delhi)
- ACIT Vs Medicamen Biotech Ltd. (2005) 1 SOT 347 (Delhi)
- Hero Honda Motors Ltd. Vs JCIT (2005) 3 SOT 572 (Delhi)
- Charak Pharmaceuticals Vs JCIT (2005) 4 SOT 393 (Mumbai)
- CIT Vs Industrial Finance Corporation of India (2209) 185 Taxman 296 (Delhi)
- ACIT Vs Ashina Syntex Lid. (ITA Nos. 2001 & 2002, A HD (Spl. Bench)
- CIT Vs Pancea Biotech Ltd. (ITA No. 22/2012) (Del).

10 We have considered the submissions of Id. Senior DR. The assessee's claim was that heavy expenditure on sales promotion was incurred because of the initial years of the company. Therefore, the facts in the present case do not justify spreading over of the Revenue expenditure, which is not disputed, over the years. We find that the assessee's claim is squarely covered by the various decisions relied upon by Id. CIT(A) as noted above. We, therefore, confirm the order of CIT(A)."

**7.4** We find that in the instant assessment year also the Assessing Officer has disallowed the advertisement and sales promotion expenses in view of the decision of the Hon'ble Supreme Court in the case of Madras Industrial Investment Corporation Limited (supra). It is undisputed that assessee has not claimed for such a spreading over of the expenditure. The only ground of disallowance in the year under consideration is in view of the decision of the Hon'ble Supreme Court cited by the Assessing Officer. The Tribunal in the preceding year has already

deleted the disallowance made on similar ground, thus respectfully following the same, we set aside the finding of the Ld. CIT(A) on the issue in dispute and the disallowance made in the year under consideration is directed to be deleted. The ground No. 4 of the appeal is accordingly allowed.

**8.** The ground No. 5 of the appeal being general in nature, we are not required to adjudicate specifically.

**9.** In the result, the appeal of the assessee is allowed partly.

**Order is pronounced in the open court on 12<sup>th</sup> October, 2018.**

**Sd/-  
DIVA SINGH  
JUDICIAL MEMBER**

**Sd/-  
O.P. KANT  
ACCOUNTANT MEMBER**

Dated: 12<sup>th</sup> October, 2018.

RK/-(D.T.D.)

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi