



IN THE INCOME TAX APPELLATE TRIBUNAL "G", BENCH MUMBAI

BEFORE SHRI R.C.SHARMA, AM

&

SHRI RAM LAL NEGI, JM

ITA No.1553/Mum/2016

(Assessment Year :2010-11)

M/s. Edwards Life Science (India) Pvt. Ltd., Techniplex II, 7 th Floor Unit No.1 & 2, Off. S.V. Road Goregaon (W), Mumbai – 400 002	Vs.	DCIT – Range 8(1) Mumbai
PAN/GIR No.AAACB4203F		
(Appellant)	..	(Respondent)

Assessee by	Shri Madhur Agarwal
Revenue by	Shri Rajore Satish Chandra Ramsevak
Date of Hearing	23/10/2018
Date of Pronouncement	20/11/2018

आदेश / O R D E R

PER R.C.SHARMA (A.M):

This is an appeal filed by the assessee against the order of CIT(A)-16, Mumbai dated 28/12/2015 for A.Y.2010-11 in the matter of order passed u/s.143(3) of the IT Act.

2. Following grounds have been taken by the assessee:-

i. On the facts and in the circumstances of the case and in law, the Hon'ble Commissioner of Income-tax (Appeals)-16 ['the CIT(A)'] erred in upholding the action of the Deputy, Commissioner of Income tax - 8(1) (Assessing Officer) in disallowing the following expenditure aggregating to Rs.1,20,66,377 on the ground that the expenditure was in violation of clause 6.8 of the Indian Medical Council (Professional

Conduct, Etiquette and Ethics) (Amendment Regulations) of India (MCI regulations):

- *the expenditure incurred on doctors attending the medical conferences as faculties -Rs. 33,30,321*
- *the expenditure incurred towards sponsorship of scientific and technical sessions -Rs. 78,76,556*
- *the expenditure incurred for sponsoring conferences at various medical colleges - Rs. 175,000*
- *the expenditure incurred towards sponsorship of registration fees of faculties at various conferences - Rs, 75,000*
- *the expenditure incurred for conducting clinical research - Rs. 379,500*
- *the expenditure incurred on setting up of stalls at conferences - Rs. 230,000*

The Appellant prays that the Assessing Officer be directed to delete the aforesaid disallowance.

1.2 On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in holding that expenditure amounting to Rs. 33,30,321 incurred on doctors attending the medical conferences as faculties, did not result in any benefit to the Appellant.

The Appellant prays that the Assessing Officer be directed to delete the aforesaid disallowance.

2. On the facts and in the circumstances of the case and in law, the Assessing Officer erred in holding that Circular No 5 of the Central Board of Direct Taxes dated 1st August 2012 was applicable to the year under consideration i.e AY 2010-11 even though the said circular was issued in Assessment Year 2013-14.

The Appellant prays that the Assessing Officer be directed to delete the disallowance of aforementioned expenditure aggregating to Rs. 1,20,66,377 made on the basis of the aforesaid Circular during the year under consideration.

3. The Hon'ble CIT(A) erred in upholding the pro-rata disallowance made by the Assessing Officer in respect of conference expenses amounting to Rs.4,79,990 incurred from December 10, 2009 to December 13, 2009 without appreciating the fact that the MCI regulations were published in the Official Gazette on December 14, 2009.

The Appellant prays that the Assessing Officer be directed to delete the aforesaid disallowance.

4. *On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in upholding the disallowance of expenditure amounting to Rs,47,643 incurred for providing lunch and snacks to doctors at various conferences.*

The Appellant prays that the Assessing Officer be directed to delete the aforesaid disallowance.

5. *On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A) erred in confirming the action of the Assessing Officer in levying interest under section 2346 of the Income Tax Act, 1961 ('Act').*

The Appellant prays that the Assessing Officer be directed to delete the interest levied under section 2346 of the Act.

6. *The Appellant craves leave to add, alter, amend, delete, modify or withdraw all or any of the Grounds of Appeal herein and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing as they may be advised to do so.*

3. Rival contentions have been heard and record perused. Facts in brief are that the assessee is engaged in the business of distributing the heart therapy products and related medical equipments manufactured by its group companies. The assessee mainly sells products falling within the cardiac care which consist of heart valve therapy products, cardiac pulmonary products & RMI products, critical care and vascular product lines. The assessee sells the products mainly to hospitals and other medical institutions. During the year under consideration, the assessee filed its return of income ('ROI') on 4 October 2010, declaring a total income of Rs. 4,10,27,764. The case of the assessee was selected for scrutiny assessment vide notice dated 20/09/2011 issued u/s.143(2) of the IT Act.

4. During the course of assessment proceedings, the Assessing Officer ('AO') called various information/ documents, including information & submission in connection with allowability of advertising and sales promotion expenditure of Rs. 5,10,93,756. After considering the factual and legal submission made by the assessee, the AO completed the assessment proceedings and passed the assessment order dated 13 March 2014 under section 143(3) of the IT Act. In the said order, the AO without accepting assessee's contention made the following disallowances:

(a) Conference expenses of Rs. 1,65,51,331

- Rs. 1,60,71,341 incurred from 14 December 2009 to 31 March 2010

- Rs 4,79,990 disallowed on pro rata basis for the period 10 December 2010 to 13

(b) Entertainment expenses of Rs, 1,08,885 incurred from 14 December 2009 to 31 March 2010.

5. Against the above order of AO, assessee approached to CIT(A).

6. By the impugned order CIT(A) partly confirmed the addition on account of disallowance of expenditure of Rs.33,30,321/- incurred towards appointment of faculty doctor or assessee's consultant doctor in a medical conference out of conference expenses of Rs.1,65,51,331/-. CIT(A) given relief of Rs.31,98,259/- and Rs.8,06,705/-. The CIT(A) has also allowed to relief in respect of expenditure incurred on lunch and snacks of own staff amounting to Rs.61,242/-. Finally CIT(A) confirmed the disallowance of Rs.1,21,14,020/- incurred on doctors or their

professional association by observing that same was prohibited by MCI regulations.

7. Assessee is in further appeal before us. It was argued by learned AR Mr. Madhur Agarwal that assessee had filed a breakup of the advertising and sales promotion expenditure and also filed detailed submission on allowability of advertisement and sales promotion expenditure vide letter dated 20 February 2014. Pursuant to this, the assessee also submitted sample supporting documents in respect of the conference expenditure vide its submission dated 28 February 2014.

8. Our attention was also invited by Mr. Madhur Agarwal to the information called by the AO for details regarding expenditure incurred post the notification of the guidelines issued by Medical Council of India ('MCI') and asked the assessee to submit why the conference expense of Rs. 3,91,10,683 (forming part of the advertisement and sales promotion expenditure) should not be disallowed in terms of the Circular no. 5 ('Circular') dated 1st August 2012 issued by the Central Board of Direct Taxes CCBDT). The assessee vide letter dated 11 March 2014 filed a detailed submission claiming that the conference expenses incurred by the assessee are not hit by the said Circular and accordingly, should not be disallowed.

9. As per learned AR, the expenditure so incurred is not as per the CBDT Circular in so far as the same is applicable only to the expenditure incurred post 14/12/2009 i.e., when the notification relating to MCI guidelines was published in official gazette of India and also provided the

break up of the expenses prior to publication of MCI notification and post publication.

10. Learned AR also placed on record the order of the Co-ordinate Bench in case of Syncom Formulations (I) Ltd., in ITA No.6429 & 6428/Mum/2012 dated 23/12/2015 wherein the Tribunal have observed as under:-

“5. 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.”

11. Reliance was also placed by learned AR on the order passed by the Co-ordinate Bench on similar facts in the case of Solvay Pharma India Ltd., 169 ITD 13. As per learned AR, MCI guidelines cannot be applied to the pharma company and it is only applicable to the practicing doctors.

12. Learned AR also invited our attention to the expenditure so incurred so as to bring to our notice that new expenditure is incurred on freebies to the doctors. Learned AR also invited our attention to the detailed documentary proof with regard to the nature of expenditure incurred

which was filed before the lower authorities to substantiate the claim of expenditure so incurred was fully and exclusively for the purpose of business to promote its product.

13. On the other hand, learned DR invited our attention to the findings recorded by lower authorities to the fact that expenditure were incurred in contravention of guidelines laid down by MCI and the judicial pronouncements relied on by the lower authorities in their respective orders.

14. We have considered rival contentions and carefully gone through the orders of the authorities below. We had also deliberated on the judicial pronouncements referred by lower authorities in their respective orders as well as cited by learned AR during the course of hearing before us in the context of factual matrix of the case.

15. From the record we found that assessee is engaged in the business of distributing the heart therapy products and related medical equipments manufactured by its group companies. The AO called for details of expenditure incurred on advertisement and sales promotion. The assessee had filed a breakup of the advertising and sales promotion expenditure and also filed detailed submission on allowability of advertisement and sales promotion expenditure vide letter dated 20 February 2014. Pursuant to this, the assessee also submitted sample supporting documents in respect of the conference expenditure vide its submission dated 28 February 2014. During the assessment proceedings,

the AO sought the breakup of the advertisement and sales promotion expenditure incurred during the year. In response to this, the assessee vide submission dated 20 February 2014, submitted a detailed breakup of the advertisement and sales promotion expenditure and also made its submission on the allowabiity of the conference expenditure (forming part of the advertisement and sales promotion expenditure) in light of the Circular stating that the said Circular is not applicable to the assessee.

16. From the record we also found that during the course of assessment proceedings, the assessee vide letter dated 11 March 2014 submitted the details of conference expenditure and entertainment expenditure incurred post 14 December 2009 (i.e. from the date when the notification was published in the Official Gazette of India). Also, the assessee contended that the expenses incurred by the assessee were not hit by the Circular and accordingly, the alleged expenditure ought not to be disallowed in terms of the said Circular.

17. We found that the conference expenses of Rs. 1,65,51,331 represent the following:

- (i) Expenses incurred in connection with attendance of faculty doctor or appellant's consultant doctor in a medical conferences - Rs. 33,30,321*
- (ii) Expenses incurred by sales staff during conferences - Rs. 31,98,259*
- (iii) Expenses incurred for purchase/hiring of materials during conferences - Rs.8,06,705*
- (iv) Expenses incurred for participation/sponsorship of conferences - Rs. 87,36,056*
- (v) Pro rata disallowance of conference incurred from 10 December 2009 to 13 December 2009- Rs. 4,79,990/-*

18. We observe that the nature of the expenses itself demonstrates that the expenses incurred are outside the purview of the MCI guidelines. In respect of expenditure incurred on the sales staff during conference amounting to Rs.31,98,259/-, we found that these expenses represent travel expenses, visa charges etc of the employees of the assessee incurred for attending various conferences, group meetings etc. These expenses are not incurred on the doctors/medical practitioners but are incurred wholly and exclusively for the purpose of business.

19. With regard to the expenditure alleged to be incurred on purchase / hiring materials during conference amounting to Rs.8,06,705/- we found that these expenses represent printing, stationery, Xerox charges, and stall designing charges incurred by the assessee in relation to the sponsoring of conferences like Atlas, CTCOMCON, IACTA etc. These expenses are also not incurred on the doctors/medical practitioners and are incurred wholly and exclusively for the purpose of business.

20. With regard to the expenditure incurred for participation / sponsorship of conference amounting to Rs.87,36,056/- we found that these expenses represent the sponsorship charges of the conferences, seminars like CTCON, IACTA, CME's etc paid by the assessee. This expenditure is incurred by the assessee to promote and create awareness about its product. These expenses are also not incurred on the doctors/medical practitioners and are incurred wholly and exclusively for the purpose of business.

21. From the record we found that AO has disallowed these expenditure by observing that these expenses are incurred by the staff on behalf of doctors and accordingly is a freebie which is not allowable in the light of circular. As per our considered view these expenses are not in the nature of gifts, travel facilities, hospitality, cash or monetary grants to doctors. The MCI guidelines prohibits accepting gifts, travel facilities, hospitality, cash or monetary grants etc by doctors from pharmaceutical and allied health sector companies. These expenses have been incurred by the staff of the assessee or the assessee during the conferences and in relation to sponsorship of conferences. It is abundantly clear that they are not incurred for the doctors neither do they provide any benefit to doctors. Further, these expenses are incurred by the assessee in day to day course of its business and are not prohibited by the MCI guidelines.

22. In respect of expenditure incurred in connection with medical conference attendance of faculty doctors or doctors who are consultant of assessee we found that the business exigencies demand updating of knowledge of the doctors/surgeons to implant/use assessee's products. To achieve this objective, the assessee has to incur expenses in connection with facilitation of doctors / surgeons to attend medical conferences organised by well known medical organizations like Indian Association of Cardio Vascular Thoracic Anesthesiologist, Indian Society of Critical Care Medicine, etc. In this regard, Clause 6.8.1.(b) of MCI guidelines which prohibit doctors from accepting travel facilities for

conference where they are 'delegates'. The MCI guidelines do not prohibit the doctors from accepting the travel facility for conference where they are faculty. Also, clause 6.8.i(g) of the MCI Guidelines allows a doctor to work for a pharmaceutical and allied health sector companies in advisory capacity, as consultant, as researcher, as treating doctors or in any other professional capacity. Accordingly, the assessee has appointed certain doctors as consultant to the company.

23. From the record we also found that the assessee does not provide any personal gifts or free holiday packages to doctors and hence no expense is incurred for such unethical practice. Furthermore, the products dealt in by the assessee are very different than those dealt in by pharmaceutical companies. The assessee deals in cardiovascular products. While the products manufactured by pharmaceutical companies are low priced products with a longer life cycle, the products of assessee are high end technology products either implanted inside human body or used for monitoring patients which have short life cycle due to quick technologically upgradation.

24. From the record we also observe that while the products of pharmaceutical companies are sold at the counter through prescription, assessee's products are not sold at counter through prescriptions. Also, the patient is not the buyer of the assessee's products rather it is the medical institutions, hospitals to whom the assessee sells its products.

25. We also observe that assessee's high end technological products and to carry out heart valve surgeries, which are very complex in nature, the doctors/surgeons also need training. In the medical conferences, the doctors are also provided skill set training wherein live surgeries are performed so as to educate the doctors about the use of the new technologically advanced products. Considering the need, the assessee nominates few selected doctors/surgeons to attend the training. These doctors/surgeons further provide training to other doctors so as to also make them also aware about the use of Assessee's product. It was also brought to our notice that these life saving devices necessary for the well-being of the society as a whole and it is in the interest of the patients that the doctors are trained.

26. After going through the details of expenditure so incurred, we found that the expenditure incurred by the assessee is not in violation of the provisions of any statute so as to render it excessive and inadmissible. The expenditure incurred by the assessee is on account of business exigencies and not in violation of any statute.

27. With regard to the disallowance of similar expenditure the Co-ordinate Bench has dealt with threadbare in the case of Solvy Pharma India Ltd., 169 ITD 13 and observed as under:-

“17. We have considered rival contentions and carefully gone through the orders of the authorities below. We had also deliberated on the judicial pronouncements cited by learned AR and DR during the course of hearing before us as well as referred by CIT in his order passed u/s.263 of the IT Act, in the context of factual matrix of the case. In this

case, we found from record that the assessee is engaged in the manufacturing of pharmaceutical products. In the course of its business it has incurred expenditure on advertisement and publicity. While framing the assessment, AO has called for the detail of expenditure so incurred and examined the nature of expenditure and thereafter only AO has allowed the expenditure as having been incurred for the purpose of business. We had also carefully gone through the notification dated 11/03/2002 notifying the regulations issued by the Medical Council of India (MCI). The code of conduct laid down in the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 ('MCI Regulations') issued with effect from 10th December 2009 applies only to doctors and not to Pharmaceutical and Medical device companies. Accordingly, MCI Regulations are not applicable to assessee, the question of assessee incurring expenditure in alleged violation of the regulations does not arise.

18. On the plain and simple reading of the provision of the Indian Medical Council Act, 1956, it is apparent that the ambit of statutory provisions relating to professional conduct of registered medical practitioners under the Indian Medical Council Act, 1956 is restricted only to persons registered as medical practitioners with the State Medical Council and whose names are entered into the Indian Medical Register maintained u/s 21 of the Act. 'Under the scheme of the Act.

19. Furthermore, there is no ambiguity of any kind in the scheme of the Indian Medical Council Act, 1956 that it neither deals with nor provides for any conduct of any association / society and deals only with the conduct of individual registered medical practitioners. There is no other interpretation, which is possible under the Act.

20. The intent of the applicability of the MCI Regulations was always to cover only individual medical practitioners, and not the pharmaceutical and medical device companies. Whether there is any contravention of the MCI Regulations or not is a matter which can be decided by the MCI itself and not by the Income-tax Department. Furthermore, the MCI has itself admitted that it has no jurisdiction whatsoever over any association/ society etc and its jurisdiction is confined only to the conduct of the registered medical practitioners. Furthermore, since the said MCI Regulations 2002 contains punitive "provisions, it has to be read strictly and consequently it can apply only to Medical Practitioners and Physicians and not to the pharmaceutical companies. Further, MCI Act, 1956 does not apply pharmaceutical companies and consequently MCI Regulations 2002 cannot apply to such companies.

21. CBDT Circular no. 5 of 2012 seeks to disallow expenditure incurred by pharmaceutical companies inter-alia in providing 'freebies'

to doctors in violation of the MCI Regulations. The term "freebies" has neither been defined in the Income-tax Act nor in the MCI Regulations'. However, the expenditure so incurred by assessee does not amount to provision of 'freebies' to medical practitioners. The expenditure incurred by it is in the normal course of its business for the purpose of marketing of its products and dissemination of knowledge etc and not with a view to giving something free of charge to the doctors. The act of giving something free of charge is incidental to the main objective of product awareness. Accordingly, it does not amount to provision of freebies. Consequently, there is no question of contravention of the MCI Regulations and applicability of Circular no. 5 of 2012 for disallowance of the expenditure.

22. 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, the assessee has brought to the notice of the bench the judgment of the Delhi High Court in the case of Max Hospital v. MCI in [WPC 1334 of 2013, dated 10-1-2014], 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. 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.

23. Now coming to the Explanation to Section 37(1) invoked by the CIT, 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 Explanation 1 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.

24. We observe that the CBDT Circular dated 1-8-2012 (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 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.

28. Considering the nature of expenditure so incurred with reference to the judicial pronouncements referred above, we do not find any merit in the action of CIT(A) for upholding the expenditure incurred by assessee fully and exclusively for the purpose of business.

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

Order pronounced in the open court on this 20/11/2018

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

Sd/-
(R.C.SHARMA)
ACCOUNTANT MEMBER

Mumbai; Dated 20/11/2018

Karuna Sr.PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

सत्यापित प्रति //True Copy//

(Asstt. Registrar)
ITAT, Mumbai