

**IN THE INCOME TAX APPELLATE TRIBUNAL
“D” BENCH, AHMEDABAD**

**BEFORE Ms. SUCHITRA RAGHUNATH KAMBLE, JUDICAL MEMBER
&
SHRI NARENDRA PRASAD SINHA, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 328/Ahd/2023
(निर्धारण वर्ष / Assessment Year : 2018-19)

HBC Lifesciences Private Limited B-218, Mayur House, G.I.D.C., Electronic Estate Sector-25, Gandhinagar, Gujarat, 382016	बनाम/ Vs.	Principal Commissioner of Income Tax-3 Ahmedabad
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCH1407M		
(Appellant)	..	(Respondent)

अपीलार्थी ओर से /Appellant by :	Shri S. N. Soparkar, Sr. Advocate & Shri Parin Shah, A.R.
प्रत्यर्थी की ओर से/Respondent by :	Dr. Darsi Suman Ratnam, CIT. DR

Date of Hearing	20/06/2024
Date of Pronouncement	05/07/2024

ORDER

PER SHRI NARENDRA PRASAD SINHA, AM:

This appeal is filed by the assessee against the order of the Principal Commissioner of Income Tax-3, Ahmedabad, (in short the ‘PCIT’) dated 25.03.2023 in exercise of the revisionary powers under Section 263 of the Income-tax Act, 1961 [hereinafter referred to as “the Act” in short], for the Assessment Year 2018-19.

2. The brief facts of the case are that the return of income for A.Y. 2018-19 was filed by the assessee on 30.10.2018 declaring

income of Rs.44,02,420/-. The case was selected for limited scrutiny on the issue of 'business expenses'. The assessment was completed under Section 143(3) of the Act on 03.02.2021 and the returned income of the assessee was accepted. The assessment record was subsequently called for by the PCIT wherein it was noticed that the assessee had claimed business promotion expense of Rs.5,12,01,872/- which was in the nature of freebies/monetary grant for promoting its products. According to the Ld. PCIT, this business promotion expense was required to be disallowed which was not done by the AO and, therefore, the order of the AO was erroneous and prejudicial to the interest of the revenue. Accordingly, a notice under Section 263 of the Act was issued by the PCIT on 17.02.2023 and after considering the reply of the assessee, the Ld. PCIT passed order under Section 263 of the Act dated 25.03.2023 setting aside the order of the AO for passing fresh order after making necessary enquiries relating to business promotion expenses. According to the Ld. PCIT the explanation of the assessee was not satisfactory and contrary to the provision of Section 37 of the Act, which required disallowance of the claim.

3. Aggrieved with the order of the PCIT, the assessee is in appeal before us.

4. The assessee has taken the following grounds in this appeal:

"1. The order passed by the PCIT is bad in law and needs to be quashed. It is submitted it be so held now.

1.1 The order has been passed without complying with the requirements of the CBDT circular no.19/2019 dated 14th August 2019. It is submitted it be so held now

2. *The PCIT erred on facts and in law in holding that the order passed by the Assessing officer (AO) under section 143(3) of the Income Tax Act (Act) was erroneous and prejudicial to the interest of the revenue and thereby setting aside the order with direction for fresh assessment order. It is submitted it be so held now.*
- 2.1 *The PCIT erred in facts and in law in invoking Explanation 2 to sub section (1) of section 263 of the Act while holding that the assessment order was passed without proper enquiry and verification of facts when in fact inquiry had been made and details were submitted in the course of regular proceedings. It is submitted it be so held now.*
- 2.2 *The PCIT erred in facts and in law in holding that the contention raised by the appellant necessitates re-verification of the matter in its entirety without appreciating that section 263 does not confer the power to re-review the same set of records. It is submitted it be so held now.*
- 2.3 *The learned PCIT erred on facts in considering that the assessee has failed to submit the relevant necessary documents during the course of assessment proceedings. It is submitted that it be so held now.*
3. *The learned PCIT has erred in law and in facts in not appreciating that the expenses are incurred purely for the purpose of business and are allowable as business expenditure and it is not impaired by explanation 1 to section 37(1) of the Act. It is submitted that it be so held now.*
- 3.1. *The learned PCIT has erred in not appreciating that the expenditure incurred are not in violation of MCA guidelines and incurred wholly and exclusive for the business purpose and no disallowance is called for in respect of business promotion expenditure. It is submitted that it be so held now.”*

5. Shri S. N. Soparkar, Sr. Advocate appearing for the assessee submitted that the issue of business promotion expense was examined by the AO in detail in the course of assessment proceedings. The assessee has a filed a paper book containing 109 pages and the Ld. Counsel has meticulously taken us through the said paper book. He has drawn are attention to various notices issued by the AO in the course of assessment and the reply filed by the assessee. The Ld. AR explained that the details of business promotion expense was called for and examined by the AO in great detail and after examining the nature of expenditure and the explanation of the assessee, the AO had taken a conscious

decision that no disallowance was called for in respect of these expenses. The Ld. Counsel contended that when the matter was examined in-depth by the AO, the Ld. PCIT was not correct in initiating proceedings under Section 263 of the Act on the ground that the matter was not examined by the AO. He also pointed out that the Ld. PCIT had not invoked the provision of Explanation-2 to Section 263 of the Act in the notice under Section 263 of the Act. He has placed reliance on the following decisions in support of his contention that the order of the AO was not erroneous and prejudicial to the interest of the Revenue and, therefore, the order under Section 263 of the Act passed by the Ld. PCIT should be quashed.

- i. *CIT vs. Kamal Galani*, [2018] 95 taxmann.com 261 (Gujarat)
- ii. *CIT vs. Kamal Galani*, [2019] 110 taxmann.com 213 (SC)
- iii. *PCIT vs. Shree Gayatri Associates*, [2019] 106 taxmann.com 31 9SC)
- iv. *Diamines & chemicals Ltd. vs. PCIT in ITA No. 1472/Ahd/2015 & ITA No. 219/Ahd/2017*, order dated 14.12.2022
- v. *National Dairy Development Board vs. PCIT in ITA No.215/Ahd/2022*, order dated 12.07.2023
- vi. *Leeford Healthcare Limited vs. PCIT in ITA Nos. 343 to 353/Chd/2022*, order dated 29.07.2022
- vii. *M/s. Aristo Pharmaceuticals Pvt. Ltd. vs. PCIT in ITA Nos. 2982/Mum/2017 &554/Mum/2018*, order dated 07.12.2018
- viii. *Torrent Pharmaceuticals Ltd. vs. DCIT in ITA No. 164/Ahd/2018*, order dated 08.08.2018
- ix. *IPCA Laboratories Ltd. vs. DCIT*, [2024] 161 taxmann.com 511 (Mumbai – Trib.)

6. Per contra, the Ld. CIT-DR submitted that the AO had not considered the CBDT Circular dated 01.08.2012 regarding disallowance of freebies to medical practitioners and their professional associates by pharmaceutical and allied health sector industries and, therefore, his order was erroneous and prejudicial to the interest of the Revenue. Accordingly, the Ld. PCIT had rightly exercised the revisional jurisdiction to set aside the matter for fresh examination of this issue. The Ld. CIT.DR also submitted that though it was not explicitly mentioned in the notice, the Explanation-2 to Section 263 of the Act was implicitly invoked by the PCIT. He further submitted that the order of the AO was cryptic, only accepting the returned income of the assessee, and there was no evidence of application of mind by the AO on this issue. The ld. CIT-DR also submitted that the decisions relied upon by the Ld. Counsel were distinct on facts and he strongly supported the order of the PCIT.

7. In rejoinder, the Ld. Sr. Counsel submitted that once the AO had made enquiries and applied his mind and was satisfied with the claim of the assessee, there was no requirement that such satisfaction should be documented and recorded in the assessment order. He reiterated that the order of the AO was not at all erroneous and, therefore, the assumption of jurisdiction by the Ld. PCIT under Section 263 of the Act, was not proper.

8. We have considered the rival submissions. There is no dispute to the fact that the Ld. PCIT had inherent power to review the order of the AO, if the order of the AO is found to be

erroneous and prejudicial to the interest of the revenue. We have to, therefore, examine whether the basic condition that the order of the AO was erroneous and prejudicial to the interest of the revenue was satisfied in this case and if so, how this fact was brought out in the order under Section 263 of the Act passed by the Ld. PCIT.

9. The Ld. PCIT has observed in the notice under Section 263 of the Act dated 17.02.2023 that the business promotion expense claimed by the assessee was in the nature of freebies/monetary grant for promoting products and was required to be disallowed. Further that the AO had passed the assessment order without making proper enquiry and the required addition in respect of this claim. It is not apparent as to on what basis the Ld. PCIT had arrived at such conclusion. It is found that the assessee has debited business promotion expenses of Rs.5,12,01,872/- in Schedule 20 of its P&L account. The AO vide notice under Section 142(1) of the Act dated 18.01.2020 had called for details of sales promotion expenses alongwith the documentary evidences. In response, the assessee had filed the reply dated 22.01.2020, whereby the details of these expenses was furnished and nature thereof was also explained. Thereafter, the AO had issued another notice under Section 142(1) of the Act dated 28.01.2020 and the details of sales promotion expenses was called for in specific format, which was furnished by the assessee vide letter dated 17.03.2020. The break up of business promotion expenses as furnished by the assessee is found to be as under:

Sr. No.	Nature of expenses	Amount (Rs.)
1	<i>Advisory fees to doctors</i>	<i>1,68,02,443</i>
2	<i>Discount given to customer</i>	<i>18,64,661</i>
3	<i>Reimbursement for expenses</i>	<i>1,26,33,954</i>
4	<i>Fixtures and other installations</i>	<i>5,31,516</i>
5	<i>Tour and Travelling and car rentals</i>	<i>44,13,861</i>
6	<i>Mobile Phone expenses</i>	<i>32,99,162</i>
7	<i>Medical instruments, Surgical, LCD/TV, Laptop/computer</i>	<i>20,30,258</i>
8	<i>Dress Materials</i>	<i>8182535</i>
9	<i>other miscellaneous items</i>	<i>1443482</i>
	<i>Total</i>	<i>5,12,01,872</i>

10. Further, the details of above sub-expenses was also furnished by the assessee and nature of each item of expenditure was explained. For example, it is found that the payment of Rs.1,68,02,443/- in respect of advisory fee to Doctors was made to 1572 Doctors and the details in the format of date, voucher no., name of Doctor, fees paid, TDS rate etc. was furnished by the assessee. Similar details in respect of all other expenses was filed by the assessee before the AO.

11. Thus, it is apparent from the above facts that the details of business promotion expenses was called for and examined in detail by the AO in the course of assessment proceeding. After examining the details as brought on record by the assessee, the AO has taken a considered decision that no disallowance on account of business promotion expenses was called for. It is evident from the details of business promotion expenses that the expenditure was not in the nature of freebies/monetary grant and

that all the payments were not made to Doctors as observed by the Id. PCIT. There was advisory fee payment of Rs.1,68,02,443/- which can be held as payment to Doctors and liable for disallowance. This payment was explained and justified by the assessee on the basis of agreement with the respective Doctors for giving advisory information for the drugs effect on the patients coming to their clinic. This expenditure was explained to be of professional in nature and TDS under Section 194J of the Act was also deducted thereon, wherever applicable. This payment being in the nature of professional fee and not being as monetary grant to Doctors, was accepted by the AO after considering the explanation of the assessee and examining the sample copy of agreement with Doctors as brought on record in the course of assessment proceeding. The observation of the Ld. PCIT that this payment was in the nature of grant to Doctors and that no TDS was made on these payments is, therefore, not found correct. The Ld. PCIT has relied upon CBDT Circular No.5//2012 and the Supreme Court judgement in the case of *Apex Laboratories (P) Ltd v DCIT 135 taxmann.com 286* in her order. To invoke the applicability of CBDT Circular and the Apex Court decision, it has to be first established that freebies were given to medical practitioners, only thereafter the disallowance can be made in respect of such freebie and payment made to the Doctors. When the matter was examined by the AO in the course of assessment proceedings and no freebie was found to be provided to the Doctors, there was no question of any disallowance in accordance with the Board's Circular, under Section 37 of the Act.

12. It has been held by the Hon'ble Jurisdictional High Court in the case of *CIT vs. Kamal Galani (supra)* that once the Assessing Officer carried out detailed inquiries, it was not open for the Commissioner to reopen the issue on mere apprehension and surmises. The Explanation-2 to Section 263 of the Act stipulates that the order of the AO will be deemed to be erroneous and prejudicial to the interest of the revenue, if such order is passed without making enquiries for verifications which should have been made or if the order is passed allowing any relief without enquiring into the claim. This condition is not found fulfilled in this case as the AO had made detailed inquiries on the issue of business expenditure in the course of assessment proceedings. It was held by the Hon'ble Delhi High Court in the case of *CIT Vs. Sunbeam Auto Ltd. - (2011) 332 ITR 167 (Delhi)* that one has to see from the records as to whether there was application of mind before allowing the expenditure and one has to keep in mind the distinction between 'lack of inquiry' and 'inadequate inquiry'. If there was any enquiry, even inadequate, that would not by itself give occasion to the Commissioner to pass order under Section 263 of the Act merely because he has a different opinion in the matter. It is only in cases of 'lack of inquiry' that such a course of action would be open. The present case cannot be treated as a case of 'lack of inquiry' as the AO had deeply examined the issue in the course of assessment proceeding. Even if the inquiry was not adequate in the opinion of the Ld. PCIT, this doesn't give him jurisdictional power to review the order of the AO. The scope of Commissioner's power under Section 263 of the Act would be available when the AO conducts no enquiry

or no proper enquiry or doesn't apply his mind to the legal issues arising out of the material on record; only then the revisional power is available. In the present case, the AO did conduct proper inquiries based on which he came to a legal conclusion, which was plausible and, therefore, the Ld. PCIT was not justified in invoking the revisional jurisdiction u/s 263 of the Act directing further inquiries or taking different view in the matter.

13. The Co-ordinate Bench of this Tribunal in the case of Torrent Pharmaceuticals Ltd. (supra) had held as under:

“9.2 A bare reading of the Circular gives a somewhat impression that the Explanation 2 was inserted for the purpose of providing clarity on the expression ‘erroneous in so far as it is prejudicial to the interest of the Revenue’. The Explanation being clarificatory would not lead to dilution of the basic requirements of Section 263(1) of the Act. The provisions of Section 263 although appears to be of a very wide amplitude and more particularly after insertion of Explanation 2 but cannot possibly mean that recourse to Section 263 of the Act would be available to the Revisional Authority on each and every inadequacy in the matter of inquiries and verification as perceived by the Revisional Authority. The Revisional action perceived on the pretext of inadequacy of enquiry in a plannery and blanket manner must be desisted from. The object of such Explanation is probably to dissuade the AO from passing orders in a routine and perfunctory manner and where he failed to carry out the relevant and necessary inquiries or where the AO has not applied mind on important aspects. However, in the same vain where the preponderance of evidence indicates absence of culpability, an onerous burden cannot obviously be fastened upon the AO while making assessment in the name of inadequacy in inquiries or verification as perceived in the opinion of the Revisional Authority. It goes without saying that the exercise of statutory powers is dependent on existence of objective facts. The powers outlined under s.263 of the Act are extraordinary and drastic in nature and thus cannot be read to hold that an uncontrolled, unguided and uncanalised powers are vested with the competent authority. The powers under s.263 of the Act howsoever sweeping are not blanket nevertheless. The AO cannot be expected to go to the last mile in an enquiry on the issue or indulge in fleeting inquiries. The action of the Revisional Commissioner based on such expectation requires to be struck down.”

9.3 The use of expression ‘which should have been made’ in clause (a) to Explanation 2 to Section 263 of the Act is significant. This impliedly

tests the action of AO on the touchstone of reasonableness and rationality in approach. It clearly suggests that context also holds the key in the matter of enquiry. The action of the AO requires to be evaluated contextually. If the aforesaid Explanation is read in a abstract manner de horse the test of reasonableness and context, the powers of Revisional CIT would be rendered invincible and almost every assessment order can be possibly frustrated. A nuanced understanding of Explanation suggests that inadequacy in inquiry ought to be of cardinal nature to ignite the potent powers of review.”

14. In that case one of the issue involved was business advancement expense and the Ld. PCIT had set aside the order of the AO under Section 263 of the Act. It was held that only in a very gross case of inadequacy in enquiry or where the enquiry is per se mandated on the basis of record before the AO and such enquiry was not conducted; the revisional power can be exercised to invalidate the action of the AO. In the present case, the AO had made the enquiry, applied his mind and came to the conclusion that no disallowance under Section 37 of the Act was called for. The Ld. PCIT had not brought anything adverse on record to substantiate her allegation that the claim of the assessee was liable to be disallowed under Section 37 of the Act. The Ld. PCIT has also not brought out any inadequacy in the enquiry as conducted by the AO in the course of assessment proceeding rather the entire foundation of the order u/s 263 of the Act is found to be based on change of opinion. As per the provision of Section 263 of the Act, the Ld. PCIT is empowered to conduct further enquiry as deemed necessary, but no such enquiry was conducted to prove that the claim of the assessee was not admissible. The Ld. PCIT has only examined the details and evidences filed before the AO in the course of assessment and on that basis she had a different opinion about the admissibility of

the claim. The powers under Section 263 of the Act cannot be exercised only on the basis of change of opinion. It had to be first established that order was erroneous and prejudicial to the interest of the revenue and, this condition is not found fulfilled in this case.

15. In view of the above facts, we are of the considered opinion that the present order of the Ld. PCIT is not tenable in law as the foundation to exercise the revisional jurisdiction u/s 263 of the Act is missing in the present case. Therefore, the order of the PCIT passed u/s 263 of the Act is quashed and set aside.

16. In the result, appeal preferred by the assessee is allowed.

This Order pronounced on 05/07/2024

Sd/-
(SUCHITRA RAGHUNATH KAMBLE)
JUDICIAL MEMBER

Ahmedabad; Dated 05/07/2024

S. K. SINHA

True Copy

Sd/-
(NARENDRA PRASAD SINHA)
ACCOUNTANT MEMBER

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Ahmedabad
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, अहमदाबाद / ITAT, Ahmedabad