

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "A" : DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI L.P. SAHU, ACCOUNTANT MEMBER

ITA.No.732/Del./2019
Assessment Year 2015-2016

M/s. Aishika Pharma Pvt. Ltd., New Delhi. PAN AAGCA2654M C/o. Sh.Vivek Bansal, 2 nd Floor, B-3/4, Safdarjung Enclave, New Delhi-029.	vs	The ITO, Ward-2(1), New Delhi.
(Appellant)		(Respondent)

For Assessee :	Shri I.P.Bansal And Shri Vivek Bansal, Advocates
For Revenue :	Shri P.V. Gupta, Sr. D.R.

Date of Hearing :	23.04.2019
Date of Pronouncement :	29.04.2019

ORDER

PER BHAVNESH SAINI, J.M.

This appeal by assessee has been directed against the Order of the Ld. CIT(A)-1, New Delhi, Dated 19.12.2018, for the A.Y. 2015-2016, challenging the addition of Rs.57,27,412/- under section 37 of the Income Tax Act, 1961.

2. Briefly the facts of the case are that assessee is a resident Company and filed return of income declaring income of Rs.2,48,070/-. **The assessee-company was engaged in the business of Trading/Marketing of medicines during the year.** During the year under consideration, the assessee company has claimed expenditure of Rs.54,27,412/- on account of business promotion expenses. The assessee company was asked to furnish the details of expenditure claimed as business promotion expenses. The assessee company explained that it is engaged in the business of trading/marketing of medicines and in the era of acute competition of present times and to survive and run its business viably among the national/multinational brands like Cipla, Ranbaxy etc., the assessee company has to incur massive expenditure on sales promotions. Sales promotion includes continuous and constant meetings/seminars/knowledge dissemination with doctors/medical practitioners/medical stores in the areas of operation of the company. Continuous sales promotion campaigns like free medical camps/blood donations

camps/free check-up camp with refreshment and free distribution of medicines/kits etc., The A.O. did not find explanation of assessee to be satisfactory as the assessee's claim of deduction of expenditure incurred to provide freebies to Medical Practitioners is against the Indian Medical Council (Professional Conduct Etiquette and Ethics) Regulations, 2002. Hence, the same is not allowable under Section 37(1) of Income Tax Act, 1961. The A.O. also referred to CBDT Circular No.5/2012, Dated 01.08.2012 for inadmissibility of expenses incurred in providing freebies to medical practitioners by pharmaceutical and allied Health Sector Industry. The text of the same is reproduced in the assessment order which prohibits Medical Practitioners and their professional associations from taking any Gift, Travel facility, Hospitality, Cash or monetary grant from the pharmaceutical and allied Health Sector Industries, in which, A.O. was also directed to examine the same issue and take appropriate action. Further, explanation of assessee was called for with reference to the above Board Circular. The assessee, in response thereto,

submitted that assessee arranges seminars, discussion panel of eminent doctors and inviting of other doctors to participate in seminars on a topic related to therapeutic area and blood donation camps and the assessee makes an endeavour to create awareness amongst certain class of key doctors about the product of the assessee company and its new developments in the area of medicine in order to provide correct diagnosis and treatment of the patients. The said activities by the assessee company are to make aware of the products of the assessee company to the knowledge of the Doctors and to bring its medicines to the market. Since the pharmaceutical companies make aware of such kind of products/medicines to the notice of the Doctors by conducting seminars as mentioned hereinabove by incurring certain expenditure, the said expenditure is definitely in the nature of sales and business promotion and pleaded that the same has to be allowed.

2.1. With respect to gift articles like diaries, pen sets, calendars, paper weights, injection boxes etc., embossed with bold logo of its brand name and the product, the

assessee company submitted that all these gift articles are very cheap and low cost articles which bears the name of assessee company and it is purely for the promotion of its product and brand name etc. and these articles cannot be reckoned as freebies given to the Doctors. It was further submitted that since the assessee company is engaged in trading and marketing or even manufacturing of pharmaceuticals products, it can promote its sale and brand only by arranging seminars, conferences and thereby creating awareness/update knowledge with the latest development of the medicines amongst doctors about the new research in the medical field and therapeutic areas around the world and this exercise would help for correct diagnosis and treatment of the patients. Therefore, the assessee company pleaded that the said expenditure be allowed as business expenditure. In support of its contention, the assessee company relied upon the Order of the ITAT, Mumbai Bench in the case of DCIT-8(2), Mumbai vs. PHL Pharma (P.) Ltd., [2017] 163 ITD 10 (Mumbai-Tribu.) in which the Tribunal has upheld the Order of the

Ld. CIT(A) in deleting the similar disallowance. The A.O. however, did not accept the contention of assessee and submitted that Board Circular is in line with Section 37(1) of the I.T. Act, 1961. The A.O. relied upon Judgment of Hon'ble Punjab & Haryana High Court in the case of CIT vs. Kap Scan and Diagnostic Centre (P.) Ltd., [2012] 344 ITR 476 (P & H) in which it was held that "*commission paid to Doctors for referring patients is not an allowable deduction.*" The A.O. also noted that the assessee's act of incurring expenditure or providing freebies is an offence. The A.O, therefore, following the Board Circular above, rejected the claim of assessee and disallowed the business promotion expenses of Rs.54,27,412/- under section 37 of the I.T. Act, 1961.

3. The assessee challenged the addition before the Ld. CIT(A). The Ld. CIT(A) on the same reasoning as given by the A.O. and following the decision of Hon'ble Punjab & Haryana High Court in the case of CIT vs. Kap Scan and Diagnostic Centre (P.) Ltd., (supra) and Order of ITAT, Delhi Bench in the case of DCIT vs. OCHOA Laboratories Ltd.,

[2017] 85 taxmann.com 168 (Delhi.Tribu.) confirmed the addition and dismissed the appeal of assessee.

4. Aggrieved by the Order of the Ld. CIT(A), the assessee is in appeal before the Tribunal. Learned Counsel for the Assessee reiterated the submissions made before the authorities below and submitted a detailed chart of business promotion expenses as per the ledger account and submitted that the business promotion expenses are not in the nature of gift or freebies as noted by the authorities below. The details are in the nature of expenses incurred for medical camps held for business purposes. Ball pens distributed with logo of the assessee, organizing camps, small snacks provided at the camps and relates expenses which were not in the nature of gifts provided to the professional Doctors or Medical Practitioners etc. Therefore, the very basis of the authorities below was wrong in disallowing the expenditure. He has referred to various replies filed before the authorities below in which assessee has specifically pleaded that it is engaged in the business of trading/marketing of medicines and these expenses were

incurred only for business promotion. He has submitted that CBDT Circular No.5/12 dated 01.08.2012 is not applicable to Pharma Companies. He has submitted that the said Circular have been considered by the ITAT, Mumbai Bench in the case of DCIT-8(2), Mumbai vs. PHL Pharma (P.) Ltd., (supra), in which the assessee company was a Pharmaceutical Company engaged in business of providing Pharma Marketing, Consultancy and Detailing services to develop mass market for pharma products. In this case, the assessee claimed advertisement and sales promotion expenses and customer related management expenses, key accounting management expenses, gift articles and cost on sample. The Tribunal, in this case noted that Medical Council of India has no jurisdiction to pass any Order or Regulation against any Hospital or any Health Care Centre in the aforesaid Circular. The Medical Council Regulation is applicable to Medical Practitioners, then, it cannot be made applicable to Pharma or allied Health Care Companies. Therefore, Section 37(1) of the I.T. Act, would not be

applicable in such cases. The Tribunal, ultimately has held as under :

“Expenditure incurred by assessee Pharma. Company for customer relationship management, key account management, gift articles, free medicine sample, advertisement article sales promotion could not be considered as freebies given to doctors, they were purely for brand recognition; allowable as business expenditure and were not impaired by Explanation 1 to section 37(1).”

4.1. Learned Counsel for the Assessee submitted that authorities below have relied upon decision of Hon’ble Punjab & Haryana High Court in the case of CIT vs. Kap Scan and Diagnostic Centre (P.) Ltd., (supra) in which *“commission was paid by Diagnostic Centre to private Doctors for referring patients for diagnosis was not allowed as business expenses”*. In the case of DCIT vs. OCHOA Laboratories Ltd., [2017] 85 taxmann.com 168 (Delhi-Tribu.) it was held that *“providing free air travel, stay and food in hotels, local car conveyance, etc., to doctors for prescribing medicines of assessee-pharma company being in*

contravention of public policy, the amount was correctly disallowed with reference to Explanation to section 37(1) of the I.T. Act, 1961.” Learned Counsel for the Assessee, therefore, submitted that both these decisions are distinguishable on facts. He has, therefore, submitted that addition may be deleted.

5. On the other hand, Ld. D.R. relied upon the Orders of the authorities below.

6. We have considered the rival submissions and perused the material available on record. The authorities below have rejected the claim of assessee of claiming expenses on account of business promotion. The assessee is admittedly engaged in the business of trading and marketing of medicines. During the year under consideration, the assessee claimed that due to competition in the Pharma Industry, the assessee company shall have to incur expenditure on business promotion which includes constant meetings/seminars/knowledge dissemination with doctors/medical practitioners/medical stores in the areas of operation of the company. The assessee company in this way organized

medical camps/blood donations camps/free check-up camp etc., and on such occasion, incurred expenditure including distribution of medicines /kits etc., with logo of assessee company and refreshment and dinner etc. The list of expenditure as per ledger account is filed which shows that business promotion expenses have been incurred mostly on medical camps organized with tea and snacks, ball pens, purchased for distribution to Doctors and Hospitals, with logo of the assessee company, organizing cardiac camps, Doctors meetings for various products for awareness of their product with refreshment and dinners etc., The authorities below have not commented upon these expenditure incurred by the assessee company for business promotion. The assessee company in this way made aware the Professionals of the product in which assessee company was giving small gifts having logo and brand name of the assessee company and product name have been mentioned. Copies of the bills and certificates from the concerned persons are filed which supports the explanation of assessee company that assessee company did not provide any gifts to the professionals for

referring any patient or customer. The expenditure incurred by assessee company are thus not in the nature of freebies provided to any of the professionals. The activity of the assessee company for incurring the sale promotion expenses are to make the persons connected with business of the assessee company, aware of its product and research work carried out by the company for bringing the medicine in the market and its results are based on several efforts made by the assessee company. Since the assessee company make aware of such kind of product to the key persons in the market, then only it can successfully launch its product/ medicine. Thus, these expenditure were purely incurred for business promotion of the assessee company. The authorities below, rejected the claim of assessee company considering that assessee company has provided freebies to the Medical Practitioners and referred to the provisions contained under Indian Medical Council (Professional Conduct Etiquette and Ethics) Regulations, 2002 and also referred to CBDT Circular No.5/2012, Dated 01.08.2012. The said Circular have been considered by the ITAT,

Mumbai Bench in the case of DCIT-8(2), Mumbai vs. PHL Pharma (P.) Ltd., (supra), in which it was clearly held that said Regulations and Board Circular are not applicable to Pharma and allied Health Care Companies. Therefore, there is no question of application of Section 37(1) of the I.T. Act. The issue is, therefore, covered in favour of the assessee by the Order of ITAT, Mumbai Bench, in the case of DCIT-8(2), Mumbai vs. PHL Pharma (P.) Ltd., (supra). The authorities below have also referred to decision of Hon'ble Punjab & Haryana High Court in the case of CIT vs. Kap Scan and Diagnostic Centre (P.) Ltd., (supra) and Order of ITAT Delhi Bench in the case of DCIT vs. OCHOA Laboratories Ltd., (supra), which are clearly distinguishable on facts and would not be applicable to the facts and circumstances of the case. Considering the nature of the business promotion expenses incurred by the assessee company in the light of Order of ITAT, Mumbai Bench, in the case of DCIT-8(2), Mumbai vs. PHL Pharma (P.) Ltd., (supra), we are of the view that whatever expenses incurred by the assessee company are only on account of business promotion expenses which are

allowable under the provisions of the I.T. Act. The authorities below have failed to provide as to what offence have been committed by the assessee company on incurring such expenses under any Law. Therefore, there is no question of applying Explanation to Section 37(1) of the I.T. Act, 1961, against the assessee company. We, accordingly, set aside the Orders of the authorities below and delete the entire addition.

7. In the result, appeal of Assessee allowed.

Order pronounced in the open Court.

Sd/-
(L.P. SAHU)
ACCOUNTANT MEMBER
Delhi, Dated 29th April, 2019.
VBP/-
Copy to

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT 'A' Bench, Delhi
6.	Guard File.

// BY Order //

Assistant Registrar : ITAT Delhi Benches :
Delhi.