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आयकर अपीलीय अधिकरण "A" न्यायपीठ मुंबई में।

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

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष ।

BEFORE SRI MAHAVIR SINGH, JM AND SRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ ITA No. 6883/Mum/2016

(निर्धारण वर्ष / Assessment Year 2013-14)

Ajanta Pharma Limited 98, Govt. Industrial Area, Hindustan Naka Charkop, Kandivali (W), Mumbai-400 067	Vs.	The Dy. Commissioner of Income Tax, Central Circle-7(2), Aayakar Bhavan, M.K. Road, Mumbai
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी/ Respondent)
स्थायी लेखा सं./PAN No. AAACA5579P		

अपीलार्थी की ओर से / Appellant by	:	Shri J.D. Mistry, Madhur Aggarwal, AR
प्रत्यर्थी की ओर से / Respondent by	:	Shri Satishchandra Rajore, DR

सुनवाई की तारीख / Date of hearing:	06.08.2019
घोषणा की तारीख / Date of pronouncement :	30.10.2019

आदेश / ORDER

महावीर सिंह, न्यायिक सदस्य/

PER MAHAVIR SINGH, JM:

This appeal of assessee is arising out of the order of the Commissioner of Income Tax (Appeals)-49, Mumbai [in short CIT(A)], in appeal No. CIT(A)-49/IT-180/2015-16 vide dated

21.09.2016. The Assessment was framed by the Dy. Commissioner of Income Tax, Circle-7(2), Mumbai (in short ACIT/ITO/ AO) for the A.Y. 2013-14 vide order dated 30.03.2015 under section 143(3) of the Income-tax Act, 1961 (hereinafter 'the Act').

2. The only issue in this appeal of assessee is against the order of CIT(A) confirming the action of the AO in levying the penalty under section 271(1)(c) & 271AAB of the Act. The assessee has challenged two issues, the first issue is on jurisdiction (i) whether the penalty levied by the AO under section 271AAB of the Act is valid as the initiation of penalty was under section 271(1)(c) of the Act by issuance of notice under section 274 read with section 271(1)(c) of the Act dated 30.03.2015 (ii) the second issue is on merits is as regards to the levy of penalty under section 271AAB on the following items of disallowance: -

Sr. No.	Particulars	Declared under section 132(4)	Return filed under section 139(1)
a.	Expenses incurred on sales promotion	4,31,14,706	8,39,35,025
b.	Expenses incurred on Education/ Training	40,40,000	40,40,000
c.	Reduction in Depreciation	15,95,863	15,95,863
d.	Reduction in claim for deduction under section 35(2AB)	4,67,96,325	4,67,96,325
e.	Discrepancy in Physical Stock at R& D Centre	14,05,680	14,05,680
	Total	9,69,52,574	13,77,72,893

3. Brief facts are that the assessee is engaged in the business of manufacturing, marketing and export of

pharmaceutical products and is assessed to tax regularly. A search action u/s 132 of the Act was carried out on 17-10-2012 at the Offices, Factories, and R&D Centre of the assessee and at the residences of its directors and senior officials. The return of income of the assessee for the year was neither due nor filed on the date of search as the previous year had not ended. The assessee filed its original return of income under section 139(1) of the Act on 26.03.2013 declaring a total income of Rs. 124,62,03,530/- and the assessment under section 143(3) was also made on the same figure of Rs. 124,62,03,530/- on 30.03.2015. In the assessment under section 143(3), there is no addition to the returned income was made and there is no demand on account of tax and interest.

4. During the course to search action, the assessee declared unaccounted additional income under section 132(4) of the Act on the following issues. The assessee claimed that it had voluntarily declared the following items in its return of income filed under section 139(1) of the Act originally. The above chart in Para 3 shows the declared income under section 132(4) of the Act v/s return of income filed under section 139(1) of the Act.

5. In the assessment order under section 143(3) of the Act, the AO at pages 3 to 7 and 9 referred to and stated that penalty under section 271(1)(c) is initiated for furnishing of inaccurate particulars and concealment of income. Further, at page 9 of the assessment order, it is stated that notice should be issued under section 274 read with section 271(1)(c) of the Act for

furnishing of inaccurate particulars and concealment of income. It is further stated that the assessment order is being passed under section 143(3) read with section 153A of the Act after obtaining approval of the Additional Commissioner of Income-tax, Central Circle, Range-VIII, Mumbai. The assessee along with the assessment order received a notice dated 30.03.2015 under section 274 read with section 271 of the Act stating that in the course of proceedings for the assessment year 2013- 14, it appears that the assessee has concealed the particulars of income or furnished inaccurate particulars of income. An opportunity is hereby provided to the assessee to show cause as to why penalty under section 271(1)(c) should not be levied. The AO on 28.08.2015 again stated that penalty proceedings under section 271(1)(c) of the Act have been initiated for assessment years 2007-08 to 2013-14 and an opportunity is provided to the assessee to make submissions as to why penalty under section 271(1)(c) should not be levied.

6. The assessee before us narrated the facts that the AO, thereafter, vide letter dated 14.09.2015 stated that in the notice issued under section 274 of the Act, there is a defect inasmuch as section 271(1)(c) has been mentioned inadvertently instead of section 271AAB of the Act. In view of the provisions of section 292B of the Act, the defect is being corrected and penalty initiated should be read as issued under section 271AAB of the Act. Finally, the AO vide order dated 30.09.2015 levied penalty @ 10% of the undisclosed income of Rs.13,77,72,893/- (as per the assessment order) instead of Rs. 9,69,52,574/- (as disclosed in the statement under section

132(4) of the Act. The breakup of the amount of Rs. 13,77,72,893/- is as follows:-

a. *Inadmissible payments to doctors under the head Sales Promotion expenses : Rs. 8,39,35,025/-*

b. *Personal expenses debited in the books: Rs. 40,40,000/-*

c. *Excess Research & development expenses claimed u/s 35(2AB) Rs.4,67,96,325/-*

d. *Difference in physical R&D stock Rs.14,05,680/-*

e. *Bogus Purchases of capital goods resulting in excess claim of depreciation: Rs. 15,95,863/-*

The Penalty was levied by the AO and confirmed by the CIT(A).
The CIT(A) has decided the issues as under: -

"7.4.2. I find that, the appellant has admitted to erroneous and false nature of the expenses recorded in the books of accounts and has admitted to such undisclosed income in trio course of statement given u/s. 132(4) of the Act. Further, other conditions stated in section 271kAB(a) have been satisfied The assessment year falls within the specified previous year as per clause (b) and the undisclosed income admitted falls within

*the meaning of *undisclosed income as per clause (c) (ii) to Explanation below section 271AAB which is defined as "any income of the specified previous year represented either wholly or partly by any entry in respect of an expenses recorded in the books of account or other documents maintained in the normal course relating to the specified previous year which is found to be false and would not have been found to be so had the search not been conducted. I find that the appellant has wrongly claiming the expense of school fees on children under the guise of training expense year*

Similarly. expenses on bogus purchase and wrong claim of depreciation was being made by making such entries in the books of account. Further, erroneous claim was being made in respect of expenses on consumables, used at other facilities of the company but claimed in the books of R&D facility, leading to excess claim of deduction u/s.35(2AB). Therefore, the said additional income disclosed during the search is based on entries of expenses in the books of account the nature of which

is wrong not bonafide and false The discrepancy with respect to excess stock is covered under the definition of undisclosed income as per Explanation (c)(i) (A) to section 271AAB. In view of above, levy of penalty u/s.271AAB with respect to undisclosed income admitted u/s.132(4) of the Act and disclosed in the return of income under following heads are upheld: -

Sr. No.	Particulars	Declared under section 132(4)
a.	Expenses incurred on Education/ Training	40,40,000
b.	Reduction in Depreciation	15,95,863
c.	Reduction in claim for deduction under section 35(2AB)	4,67,96,325
d.	Discrepancy in Physical Stock at R&D Centre	14,05,680
e.	Expenses incurred on sales promotion	4,31,14,706

7.4.3 It has been submitted with respect to Ground No.4 and 5. that the undisclosed income admitted in the statement u/s 132(4) with respect to expenses on sales promotion was Rs 431,14,706/- and an additional amount of Rs.408,20,319/-, relating to such expenses incurred after the date of search, was disallowed in the return filed u(s139(1) of the Act. In this regard. I find

that the A O has levied the penalty @ 10% of the undisclosed income admitted in the course of search as per clause (a) of section 271AA9 of the Act Therefore, the AO should have restricted the levy of penalty with respect to the amount of undisclosed income of Rs 43114706/-, on account of expenses admitted as undisclosed income in the statement given u/s132(4) of the Act, during the search. since the disallowances of Rs.408.20,3191- has been made by the appellant in the return of income on its own. The A O. is accordingly directed to recompute the quantum of penalty by restricting the undisclosed income on account of inadmissible payment to doctors, for levy of penalty u/s.271AAB to Rs 431.14.706/- and allow appropriate relief to the appellant Ground No.4 and 5 are allowed and Ground No. 7 is partly allowed.

7.4.4 As regards expense on doctors, it has been held in the case of ACIT Vs. Liva Healthcare Ltd reported at (2016] 73 taxmann.com 171 (Mumbai - Trib) that the CBDT circular No 5/2012 dated 1108/2012 is Clarificatory and clarifies

that any expenses incurred in violation of the provisions of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 shall be inadmissible under section 37(1) of the Income Tax Act, being an expense prohibited by the law. Therefore, the additional income offered on this account in the statement u/s 132(4) of the Act, on the basis of entries of expense made in the books of account till the date of search, is liable for penalty u/s 271AAB of the Act. Accordingly, Ground No.9 is dismissed.

7.4.5 In Ground No.6, it has been contended that the A.O. erred in levying penalty with respect to disallowance u/s.35(2AB) when there was no such claim made till the date of search. In this regard, it is noted that the appellant has admitted to erroneous claim in respect of expenses on consumables, used at other facilities of the company but claimed in the books of R&D facility leading to excess claim of deduction u/s 35(2AB) of the Act in Question No 10 and 11 of the statement dated 20.10.2012 given by the Director. Shri Yogesh M. Agrawal. In the

said statement. the appellant has admitted to excess claim u/s 35(2AB) for the FY. 2012-13 till the date of search at Rs 46,796,325/- and this amount has been offered to tax in the return of income filed for A.Y 2013-14. Therefore, the above said contention of the appellant is rejected and levy of penalty u/s.271AAB on the above said amount is upheld. Accordingly, Ground No.6 is dismissed."

Aggrieved, assessee came in appeal before Tribunal.

7. The first contention of the assessee is the penalty is levied by the AO and confirmed by CIT(A) is without issue of notice is invalid and bad in law. The assessee contended that first it wants to argue the matter on merits of the case and it argued merits accordingly. Hence, we will take up the merits of the case. We noted the additions on which penalty has been levied u/s 271AAB of the Act, we will deal with item wise.

8. On the other hand, Ld Sr. DR only relied on the penalty order of the AO and the order of CIT(A).

9. First item under consideration for penalty was expenditure under the Head 'Sales Promotion' being payment to doctors amounting to Rs.8,39,35,025/-. The assessee contended that there is no dispute that expenditure has been incurred by the assessee on sales promotion and payment as specified in the books of accounts of the assessee has been made. It is neither

a case of not recording of expenditure nor a case of wrong recording of expenditure in the books of the assessee. The only question is whether, the expenditure on account of sales promotion can be allowed as a deduction or not. The assessee submits that the said amount cannot be said to be "undisclosed income" so as to come within the ambit of section 271AAB of the Act. The assessee has not claimed the expenses in the return of income on the ground that the said expenses may not come within the ambit of section 37 of the Act in view of Circular No. 5/2012 dated 01.08.2012 issued by the Central Board of Direct Taxes. The assessee submits that the claim and allowability of deduction under the Act would be examination and determination by the assessee at the time of filing of income. Therefore, the assessee argued that once expenditure has been incurred and recorded in the books of the assessee, the same cannot be said to be an 'undisclosed income' on the ground that it is an inadmissible expenditure under the Act. The assessee stated that 'undisclosed income' is defined in clause (c) of the Explanation to section 271AAB of the Act as under:-

"Explanation. —For the purposes of this section,

(c) "undisclosed income" means—

(c) any income of the spec/fled previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents

or transactions found in the course of a search under section 132, which has—

(A) not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year; or

(B) otherwise not been disclosed to the [Principal Chief Commissioner or] Chief Commissioner or [Principal Commissioner or] Commissioner before the date of search; or

(ii) any income of the specified previous year represented, either wholly or partly, by any entry in respect of an expense recorded in the books of account or other documents maintained in the normal course relating to the specified previous year which is found to be false and would not have been found to be so had the search not been conducted.]"

10. The assessee explained that clause (i) is admittedly not applicable as the sales promotion expenses does not represented any money, bullion, jewelry or other valuable article or thing or transaction or document which is not recorded in the books of account. The assessee, then explained that in

the present case, clause (ii) of the Explanation is also not applicable as it is also not a case of expense recorded in the books of accounts which is found to be false or would not have been found to be so had search not been conducted. The assessee stated that as aforesaid expenses have not been found to be false. It is a case where such expenses are not allowable under the provisions of the Act which would be determined by the assessee at the time of filing of return of income. In view of the aforesaid, the assessee argued that section 271AAB of the Act does not apply to 'Sales Promotion expenses' which has not been claimed as a deduction in the return of income.

11. The next item is 'Research and Development Expenses' claimed under section 35(2AB) of the Act amounting to Rs 4,67,96,325/-. The assessee explained that in so far as the research and development expenses are concerned, provisions of section 271AAB of the Act will not be applicable as the same also does not come within the ambit 'undisclosed income' under the said section. The assessee argued that the assessee had not made any claim of such expenses under section 35(2AB) of the Act till the time of the search, as the claim of the same would be made while filing the return of income. The assessee stated that there is no dispute that expenditure has been incurred by the assessee. The only question is whether the same has been used for the purpose of research and development or not, which would be determined only after the audit and finalization of the books of account. Therefore, the assessee argued that for the detailed reasons given for the 'sales promotion expenses', the expenses on Research and development expenses cannot be

said to come within the ambit of undisclosed income under section 271AAB of the Act.

12. The next item of 'Sales promotion expenses' of Rs 4,08,20,319/- incurred after the date of search. It was contended that the AO erred in applying section 271AAB of the Act even to 'sales promotion expenses' of Rs 4,08,20,319/- admittedly incurred subsequent to the date of the search. The assessee explained that the sales promotion expenses incurred after the date of search and disallowed by the assessee voluntarily in filing the return of income, can certainly not come within the ambit of section 271AAB of the Act and, therefore, penalty on this amount of Rs 4,08,20,319/- should be deleted.

13. Without prejudice to the aforesaid submissions, the assessee contended that even otherwise no penalty should be levied under section 271AAB of the Act. He stated that sub-section (1) starts with --- "The Assessing Officer may ... direct that the assessee shall pay by way of penalty" He argued that penalty is not automatically leviable merely because a case of assessee comes within clause (a) of sub-section (1). The power of the AO is discretionary depending on the facts of the case and not mandatory as the term used is "The Assessing Officer 'may' and not "The Assessing Officer 'shall'. The assessee contends that considering the facts of the present case and the submissions, no penalty ought to be levied under section 271AAB of the Act.

14. The next item of 'Inadmissible payments to doctors on account of sales promotion expenses'. The assessee contended

that the sales expenses incurred by any pharmaceutical company is a marketing and sales promotion expense which necessarily required for the purpose of the business of a pharma company and such expenses have been always allowed by the Department. In this regard, the assessee contended as under:-

"a) As held by the Supreme Court time and again, the Circulars issued by the CBDT are not binding on the assessee.

b) The explanation to Section 37(1) states that only if the expenditure incurred by the assessee is prohibited by law, the same will not be allowable as a business deduction."

In the opening portion of the notification No. MCI211(1)/2009(Ethics)/55667, amending the regulations, the Medical Council of India states that the Medical Council of India with the previous sanction of the Central Government, hereby makes the following Regulations to amend the "Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002. Accordingly, the regulation is amended or made by the Medical Council of India and that too with the previous approval of the Central Government. Accordingly, it is stated that these may be at best be an ethical guidelines to be followed by the medical professionals. In view these regulations, the question of any disallowance under the explanation to Section 37(1) of the Act does not arise as what

can be disallowed is only those items of expenses which are prohibited by Law and not prohibited by any ethical guidelines or anything else. It is further explained that the entire Medical Council Regulations are applicable to the medical professionals and not to the pharma companies. On just a plain reading of the regulations it is clear that what it says is that the medical professionals will not accept any gift etc. from pharma companies but nowhere it says that the pharma companies will not give any gift etc. to medical professionals and accordingly the guidelines are only applicable to medical professionals and not to the pharma companies at all.

15. Accordingly, in view of the above legal position, we noted that the entire expenditure incurred by assessee on doctors are pure marketing business expense required and incurred wholly and exclusively for the purpose of the business of the company and is allowable as a business expense u/s 37(1) of the Act as it is not hit by the explanation thereof. However, at the time of search, it was pointed out by the search party that the expenditure may not an allowable business expense based on the interpretation of the explanation taken by the CBDT in its circular, the assessee felt that though it do not agree with the CBDT view based on the above mentioned legal position, it may be a long drawn litigation for us to contest the same in appeals and the finality to the matter may not come before the High Court. The assessee accordingly with a view to avoid long drawn litigation and to buy peace decided to withdraw its claim for deduction of the same in the statement recorded u/s 132(4) of

the Act and included the same as income in the return filed u/s 139 of the Act and also paid the full tax.

16. In so far as the other addition on which penalty is levied, we are of the view that mere because disallowances have been made in the assessment order, the disallowance cannot automatically lead to a penalty under section 271AAB of the Act. The assessee had made full & true disclosure of return of income and had also furnished the full particulars of income. It is an admitted position that no information given in the return was found to be incorrect or inaccurate. All the expenses were genuine business expenses, were paid by account payee cheques, were properly accounted for in the regular books of account and were appropriately disclosed in the financial statements, computation of income and the return of income. It is not as if any statement made or any detail supplied was found to be factually incorrect. Hence, at least, prima facie, the assessee cannot be held guilty of furnishing inaccurate particulars of income or concealed the income. Further it was argued that although, the assessee had good case to argue for allowability of those expenses/claims, it decided to revise its returns and disallow those expense/claims as if with a view to close the proceedings and the long drawn litigation, to cooperate with the department and to buy peace of mind so that it can concentrate on its business rather than going in long drawn litigation. Such disallowances were agreed to be made on the condition that no penalty would be leviable on the said disallowances.

17. In view of the above, we noted that in regard to training expenses of ₹40.40 lakhs incurred during the year and claimed the same as training expenses incurred on education is fully supported by documentary evidences and proofs of payment. There is no dispute regarding genuineness of incurring of such expenses and it is also not the case of revenue that the expenditure is not incurred. Further, the assessee has recorded this expenditure in the books of account maintained during normal course of business. In regard to disallowance of deduction under section 35(2AB) of ₹4,67,96,325/- and R & D stock difference of ₹14,05,680/-. It was contended that the expenses on Research and Development which is entitled for deduction under section 35(2AB) of the Act are as per the books of accounts and recorded in the books of accounts. Further, R&D stock difference was consumed in R&D but stock register maintained by technical persons was not updated as on the date of the search but during search it was pointed out by the search party that a part of the deduction so claimed may not be utilized be allowable in the assessment. Hence, it was thought that it was not appropriate to contest this claim of deduction and it was decided to withdraw the claim of deduction in the statement under section 132(4) of the Act. In regard to reversal of depreciation of ₹15,95,863/-, the names of some of the suppliers appearing on the website of Maharashtra VAT Department as Hawala dealers, the search party took the view that purchase of capital goods, which were capitalized, are not genuine. The assessee has recorded in these books of accounts and purchases made are supported by invoices and payments

are made by cheques and proofs of the same were filed. In regard to inadmissible payments to doctors of ₹8,39,35,025/-, the sales expenses incurred by assessee is a marketing and sales promotion expense which necessarily required for the purpose of the business of a pharma company and such expenses have been always allowed by the Department. These expenses are recorded in the books of accounts and even the payments are made by cheques. It is not the case of Revenue that any of the above expenditure is not recorded in the books of accounts.

18. From the penalty order or the order of CIT(A), it is not coming out that the alleged undisclosed income is false claim of deduction or claim of income is false or claim of expenditure is false. The definition provided in section 271AAB under Explanation (c) of undisclosed income sub-clause (ii) clarifies that any income of the specified previous year represented either wholly or partly by any entry represented in respect of expense recorded in the books of accounts maintained in the normal course of business should found to be false or would not have been found to be so had the search not being conducted. We noted that the aforesaid expenses have not been found to be false or it is not a case of the Revenue that such expenses are not allowable under the provisions of the Act. Here the simplicitor case is that the assessee during the course of search in the statement recorded under section 132(4) of the Act admitted this to be the income to avoid litigation and to buy peace of mind. It is good piece of evidence for making assessment but not for levy of penalty under section 271AAB of



the Act because for levy of penalty falsity of the expense is a pre-requisite under the provision. Hence, we delete the penalty and allow the appeal of the assessee on merits.

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

Order pronounced in the open court on 30.10.2019.

Sd/-

(मनोज कुमार अग्रवाल / MANOJ KUMAR AGGARWAL)
(लेखा सदस्य / ACCOUNTANT MEMBER)

Sd/-

(महावीर सिंह / MAHAVIR SINGH)
(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 30.10.2019

सुदीप सरकार, व.निजी सचिव / Sudip Sarkar, Sr.PS

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai