IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "A", BANGALORE

Before Shri George George K, JM & Shri B.R.Baskaran, AM

ITA No.1921/Bang/2016 : Asst.Year 2007-2008
ITA No.1922/Bang/2016 : Asst.Year 2008-2009
ITA No.1923/Bang/2016 : Asst.Year 2009-2010
ITA No.1924/Bang/2016 : Asst.Year 2010-2011
ITA No.1925/Bang/2016 : Asst.Year 2011-2012

M/s. Vascular Concepts Limited No.19, S.V.Complex Bellary Road, Hebbal Bengaluru – 560 024. **PAN : AAACM8353R.**	v.	The Dy.Commissioner of Income-tax, Central Circle 1(4) Bangalore.
(Appellant)		(Respondent)

Appellant by : Sri.K.R.Vasudevan, Advocate
Respondent by : Sri.Rajesh Kumar Jha, CIT-DR

Date of Hearing : 05.01.2021		**Date of Pronouncement : 15.02.2021**

O R D E R

Per Bench :

The Hon'ble High Court of Karnataka vide judgment dated 22.04.2019 had set aside the order of the Tribunal dated 29.01.2018 and directed the Tribunal to consider the issue afresh in terms of the judgment in the case of CIT v. GMR Energy Limited (GMR Energy Limited case in ITA No.358 of 2018 judgment dated 08.01.2018).

2. The brief facts of the case are as follow:

The ITAT vide common order dated 29.01.2018 had disposed of the above appeals. The common order of the ITAT dated 29.01.2016 was concerning seven appeals relating to A.Y's 2007-2008 to A.Y's 2013-2014 in ITA Nos.1921/Bang/ 2016 to 1927/Bang/2016, respectively. The order of the ITAT

dated 29.01.2018 was in two parts. The first part was concerning A.Ys 2007-2008 to A.Ys 2011-2012 and the second part was concerning A.Y's 2012-2013 and 2013-2014. In all the appeals, the assessee had raised the grounds challenging the notice issued u/s 153A of the I.T.Act. Apart from challenging the notice, the assessee had raised grounds relating to merits on three issues, viz.,

(i) disallowance of business promotion expenses,

(ii) disallowance of discount given to the customers, and

(iii) disallowance of bad debts written off (this issue is not there for A.Y's 2007-2008 to A.Y's 2009-2010)

2.1 In the first part of the ITAT's order concerning A.Y's 2007-2008 to 2011-2012 in ITA No.1921/Bang/2016 to 1925/Bang/2016 (cases which we are concerned now), the Tribunal quashed the assessment orders by holding that the notice issued u/s 153A of the I.T.Act was not valid on the ground that no incriminating material was found for these years, whose assessment has already been concluded u/s 143(3) of the I.T.Act. While doing so, the Tribunal placed reliance on various judicial pronouncements as detailed in the order. Since the assessments for A.Y's 2007-2008 to 2011-2012 were quashed, the issues on merits were not adjudicated (para 10 at page 14 of the Tribunal order).

2.2 As regards the second part, the ITAT's order concerning A.Y's 2012-2013 and 2013-2014, the Tribunal upheld the issue of notice u/s 153A of the I.T.Act and the assessment order passed. Then the Tribunal proceeded to adjudicate the issue on merits, including the above three issues viz., (i) disallowance of

business promotion expenses, (ii) disallowance of discount given to customers, and (iii) disallowance of bad debts written off.

2.3 Aggrieved by the order of the ITAT dated 29.01.2018 concerning ITA Nos.1921/Bang/2016 to 1925/Bang/2016 pertaining to A.Y's 2007-2008 to 2011-2012, the Revenue preferred appeals to the Hon'ble High Court u/s 260A of the I.T.Act. As regards the A.Y's 2012-2013 and 2013-2014, the Revenue did not file appeals to the Hon'ble High Court. Therefore, the order of the ITAT dated 29.01.2018 concerning A.Y's 2012-2013 and 2013-2014 (which is on merits) has attained finality.

2.4 The Hon'ble High Court vide judgment dated 22.04.2019, allowed the appeal of the Revenue. The Hon'ble High Court set aside the order of the Tribunal concerning A.Y's 2007-2008 to 2011-2012 (ITA No.1921/Bang/ 2016 to 1925/Bang/2016) and directed the ITAT to consider the issues afresh in terms of High Court judgment in the case of M/s.GMR Energy Limited (judgment of GMR Limited dated 08.01.2019). In the case of M/s.GMR Energy Limited, the Hon'ble High Court upheld the proposition that the conditions precedent for application u/s 153A of the I.T.Act is that there should be a search u/s 132 of the I.T.Act and initiation of proceedings u/s 153A of the I.T.Act is not dependent on any undisclosed income being unearthed during the search.

3. Pursuant to the Hon'ble High Court judgment dated 22.04.2019, the above appeals were finally heard by the ITAT

on 05.01.2021. The learned AR during the course of hearing submitted a note stating that he is instructed to submit that the assessee is only pressing grounds relating to the merits, viz., grounds No.12 to 15. The three issues on merits are as follows:-

(i) Disallowance of business promotion expenses (for A.Y's 2007-2008 to 2011-2012)

(ii) Disallowance of discount to customers (for A.Y's 2007-2008 to 2011-2012)

(iii) Disallowance of bad debts written off (concerning A.Y's 2010-2011 and 2011-2012)

3.1 The learned AR submitted that the above three issues on merits were decided by the ITAT for assessment years 2012-2013 and 2013-2014. It was stated that the order of the ITAT for assessment years 2012-2013 and 2013-2014 has attained finality as no appeal was preferred by the Revenue before the Hon'ble High Court. It was submitted that the same decision / directions rendered for A.Y's 2012-2013 and 2013-2014 may be taken in these assessment years as well.

We shall adjudicate each of the issues as under.

(i) <u>Disallowance of business promotion expenses (for assessment years 2007-2008 to 2011-2012 – Ground No.12)</u>

4. The Tribunal in its earlier order dated 29.01.2018 for assessment years 2012-2013 and 2013-2014 elaborately discussed the above issue in para 13 to 18. The Tribunal at para 17 and 18 held that the expenses incurred on doctors

before 01.08.2012 is to be allowed as revenue expenditure. The relevant finding of the Tribunal reads as follow:-

> *'13. Now coming to the merits, the ld. Counsel for the assessee has assailed the order of the CIT(Appeals) with regard to the additions made after making disallowances of business promotion expenses claimed u/s. 37 of the Act. In this regard, the facts in brief borne out from the record are that the assessee has debited a sum of Rs.7,68,77,000 as business promotion expenses for AY 2012-13 and Rs.8,25,00,000 in AY 2013-14, for which the assessee could not furnish the details of Doctorwise expenditure nor could it furnish the confirmation letter from the Doctor. Consequently, the AO has observed that the details of business promotion expenses incurred by the assessee on various Doctors is not available. The Notification issued by Medical Council of India (MCI) through which MCI has imposed prohibition on Medical Practitioners and Professional Association from taking any gift, travel facility, hospitality from pharmaceuticals or allied health sector industries was also examined by the AO. The AO further took a note of CBDT Circular No.5/12 dated 01.08.2012 wherein it was clarified that u/s. 37 of the Act such type of expenditure which are prohibited by law cannot be allowed. The AO accordingly held that since this expenditure was incurred on Doctors, it is not allowable as deduction under the provisions of section 37(1) of the Act. Accordingly, a show cause notice was issued to the assessee and since the assessee could not furnish the details of expenditure Doctorwise and their confirmation letters, the AO did not allow the claim of expenditure.*
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> *14. Aggrieved the assessee preferred an appeal before the CIT(Appeals) but did not find favour with him.*
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> *15. Now the assessee is before us with the submission that as per the reasons given by the AO, only Rs.1,39,80,582 out of Rs.8,25,00,000 can be disallowed under the expenses relating to Doctors and the balance disallowance must be deleted as it is unrelated to Doctors but incurred for the purpose of business. The ld. Counsel for the assessee further contended that the CBDT Circular mentioned hereinabove is prospective in nature effective from 01.08.2012, therefore the expenses incurred prior to that date amounting to Rs.72,24,991 does not come under the scope of the Circular, hence requires to be allowed. It was further contended that the balance amount was incurred after 01.08.2012 on those Doctors, who have attended the Conference & Seminar as faculty members and not as delegates. In support of this contention, he invited our attention to Notification of MCI, according to which medical practitioner shall not accept any travel facility inside or outside the country as delegate. In the case in hand, the Doctors have attended Seminars & Conference not as delegates, but as faculty members, therefore no disallowance can be made having invoked the Notification of MCI and Explanation to 37(1) of the Act. In support of his contentions, the ld. Counsel for the assessee has placed reliance upon the order of Tribunal in the case of DCIT v. PHL Pharma Pvt. Ltd., 146 DTR 0149, Simcon Formulation (India) Pvt. Ltd. v. DCIT of Mumbai Tribunal*

and Hon'ble Delhi High Court judgment in the case of Max Hospital v. MCI in W.P.C. No.1334/Del/2013 dated 10.01.2014.

16. The ld. DR, on the other hand, has placed reliance upon the order of the CIT(Appeals). Besides it was also contended by the ld. DR that no details are available on record as to whether the Doctors have attended the Conferences & Seminars as faculty members or as delegates. The onus is upon the assessee to establish these facts. In the absence of any evidence in this regard, the revenue has rightly disallowed the claim.

17. Having carefully examined the orders of authorities below in the light of rival submissions, we find that the AO has disallowed the business promotion expenses claimed by the assessee only on the ground that they were incurred on Doctors who attended Seminars & Conferences. The revenue has placed reliance upon the Notification issued by the MCI whereby the MCI in exercise of its statutory powers amended Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 on 10.12.2009 and imposed a prohibition on Medical Practitioners and Professional Associations from taking any gift, travel facility, hospitality, cash or monetary grant from pharmaceuticals or allied health sector industries. Thereafter, the CBDT has issued a Circular dated 01.08.2012 clarifying that section 37(1) of the I.T. Act provides for deduction of any revenue expenditure (other than those falling under sections 30 to 36) from the business income if such income is laid out/extended wholly or exclusively for the purpose of business or profession. However, the explanation appended to this sub-section denies claim of any such expense, if the same has been incurred for a purpose which is either an offence or prohibited by law. Though Explanation 1 to section 37 was inserted by the Finance Act, 2014 w.e.f. 01.04.2015, but before that CBDT has also issued a clarification vide Circular dated 01.08.2012 not to allow such expenditure u/s. 37(1) of the Act which are prohibited by law, meaning thereby, before 01.08.2012 the expenditure incurred upon the Doctors to attend Seminars & Conferences may be the business expenditure of the assessee, but the same cannot be allowed after 01.08.2012 as it was prohibited by Notification issued by the MCI. Therefore, we find force in the contention of the assessee that expenditure incurred till 01.08.2012 should be allowed as an expenditure towards business inasmuch as the AO has simply disallowed the entire expenditure having invoked the Circular issued by the CBDT. This aspect was examined by the Tribunal in the case of DCIT v. PHL Pharma Pvt. Ltd. reported in146 DTR 0149 in which it was held that Explanation I below section 37(1) provides an embargo upon allowing expenditure incurred by the assessee for any purpose, which is an offence or which is prohibited by law. In that case the assessment year involved was AY 2010-11 and CBDT issued Circular in 2012 and the Tribunal held that since no evidence has been brought on record which prohibits pharmaceutical company to incur any development or sales promotion expenses, the Tribunal allowed the expenditure. The relevant observations of the Tribunal are extracted hereunder for the sake of reference:-

"5. We have considered the rival contentions made by ld. CIT DR as well as ld. Sr. Counsel, Mr J.D. Mistry, perused the relevant finding given in the

impugned orders and material referred to before us. The entire controversy revolves around, whether the expenditures in question incurred by the assessee (a pharmaceutical company) is hit by Explanation 1 below section 37(1) in view of CBDT Circular dated 01.08.2012, interpreting the amendment dated 10.12.2009 brought in Indian Medical Council Regulation 2002 or not. The break-up of sales promotion expenses, which has been disallowed by the AO, are as under:

Sr.No	Particulars of expenses	Amount (in Rs.)
1	Customer Relationship Management expenses (CRM)	7,61,96,260
2	Key Account Management expenses(KAM)	2,56,68,509
3	Gift Articles	9,20,22,518
4	Cost of samples	3,60,85,320
Total		22,99,72,607

The nature of aforesaid expenses has already been explained above. Now whether the nature of such expenditure incurred by the assessee is to be disallowed in view of the CBDT Circular dated 01.08.2012. For the sake of ready reference, the said CBDT Circular No.5/2012 is reproduced hereunder:

"INADMISSIBILITY OF EXPENSES INCURRED IN PROVIDING FREEBEES TO MEDICAL PRACTITIONER BY PHARMACEUTICAL AND ALLIED HEALTH SECTOR INDUSTRY "

Circular No. 5/2012 [F. No. 225/142/2012-ITA.II], dated 1-8- 2012

It has been brought to the notice of the Board that some pharmaceutical and allied health sector Industries are providing freebees (freebies) to medical practitioners and their professional associations in violation of the regulations issued by Medical Council of India (the 'Council') which is a regulatory body constituted under the Medical Council Act, 1956.

2. The council in exercise of its statutory powers amended the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (the regulations) on 10-12-2009 imposing a prohibition on the medical practitioner and their professional associations from taking any Gift, Travel facility, Hospitality, Cash or monetary grant from the pharmaceutical and allied health sector Industries.

3. Section 37(1) of Income Tax Act provides for deduction of any revenue expenditure (other than those failing under sections 30 to 36) from the business Income if such expense is laid out/expended wholly or exclusively for the purpose of business or profession. However, the explanation appended to this subsection denies claim of any such expense, if the same has been incurred for a purpose which is either an offence or prohibited by law. Thus, the claim of any expense incurred in providing above mentioned or similar freebees 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. This disallowance shall be made in the hands of such pharmaceutical or allied health sector Industries or other assessee which

has provided aforesaid freebees and claimed it as a deductible expense in its accounts against income.

4. It is also clarified that the sum equivalent to value of freebees enjoyed by the aforesaid medical practitioner or professional associations is also taxable as business income or income from other sources as the case may be depending on the facts of each case. The Assessing Officers of such medical practitioner or professional associations should examine the same and take an appropriate action. This may be brought to the notice of all the officers of the charge for necessary action."

From the perusal of the aforesaid Board Circular, it can be seen that heavy reliance has been placed by the CBDT on the Circulars issued by the Medical Council of India, which is the regulatory body constituted under the 'Medical Council Act, 1956'. One such regulation has been issued is "Indian Medical Council Professional Conduct, Etiquette and Ethics) Regulations, 2002". The said regulation deals with the professional conduct, etiquette and ethics for registered medical practitioners only. Chapter 6 of the said regulation/notification deals with unethical acts, whereby a physician or medical practitioners shall not aid or abet or commit any of the acts illustrated in clause 6.1 to 6.7 of the said regulation which shall be construed as unethical. Clause 6.8 has been added (by way of amendment dated 10.12.2009) in terms of notification published on 14.12.2009 in Gazette of India. The said clause reads as under:-

"6.8 Code of conduct for doctors and professional association of doctors in their relationship with pharmaceutical and allied health sector industry. 6.8.1 In dealing with Pharmaceutical and allied health sector industry, a medical practitioner shall follow and adhere to the stipulations given below:

a) Gifts: A medical practitioner shall not receive any gift from any pharmaceutical or allied health care industry and their sales people or representatives.

b) Travel facilities: A medical practitioner shall not accept any travel facility inside the country or outside, including rail, air, ship, cruise tickets, paid vacations etc. from any pharmaceutical or allied healthcare industry or their representatives for self and family members for vacation or for attending conferences, seminars, workshops, CME programme etc as a delegate.

c) Hospitality: A medical practitioner shall not accept individually any hospitality like hotel accommodation for self and family members under any pretext.

d) Cash or monetary grants: A medical practitioner shall not receive any cash or monetary grants from any pharmaceutical and allied healthcare industry for individual purpose in individual capacity under any pretext. Funding for medical research, study etc. can only be received through approved institutions by modalities laid down by law / rules / guidelines

adopted by such approved institutions, in a transparent manner. It shall always be fully disclosed.

e) Medical Research: A medical practitioner may carry out, participate in work, in research projects funded by pharmaceutical and allied healthcare industries. A medical practitioner is obliged to know that the fulfilment of the following items (i) to (vii) will be an imperative for undertaking any research assignment / project funded by industry for being proper and ethical. Thus, in accepting such a position a medical practitioner shall:-

(i) Ensure that the particular research proposal(s) has the due permission from the competent concerned authorities.

(ii) Ensure that such a research project(s) has the clearance of national/ state / institutional ethics committees / bodies.

(iii) Ensure that it fulfils all the legal requirements prescribed for medical research.
(iv) Ensure that the source and amount of funding is publicly disclosed at the beginning itself.

(v) Ensure that proper care and facilities are provided to human volunteers, if they are necessary for the research project(s).

(vi) Ensure that undue animal experimentations are not done and when these are necessary they are done in a scientific and a humane way.

(vii) Ensure that while accepting such an assignment a medical practitioner shall have the freedom to publish the results of the research in the greater interest of the society by inserting such a clause in the MoU or any other document / agreement for any such assignment.

f) Maintaining Professional Autonomy: In dealing with pharmaceutical and allied healthcare industry a medical practitioner shall always ensure that there shall never be any compromise either with his / her own professional autonomy and / or with the autonomy and freedom of the medical institution.

g) Affiliation: A medical practitioner may work for pharmaceutical and allied healthcare industries in advisory capacities, as consultants, as researchers, as treating doctors or in any other professional capacity. In doing so, a medical practitioner shall always:

(i) Ensure that his professional integrity and freedom are maintained.

(ii) Ensure that patients' interests are not compromised in any way.

(iii) Ensure that such affiliations are within the law.

(iv) Ensure that such affiliations / employments are fully transparent and disclosed.

h) Endorsement: A medical practitioner shall not endorse any drug or product of the industry publically. Any study conducted on the efficacy or otherwise of such products shall be presented to and / or through appropriate scientific bodies or published in appropriate scientific journals in a proper way". [Emphasis added is ours]

6. On a plain reading of the aforesaid notification, which has been heavily relied upon by the department, it is quite apparent that the code of conduct enshrined therein is meant to be followed and adhered by medical practitioners/doctors alone. It illustrates the various kinds of conduct or activities which a medical practitioner should avoid while dealing with pharmaceutical companies and allied health sector industry. It provides guidelines to the medical practitioners of their ethical codes and moral conduct. Nowhere the regulation or the notification mentions that such a regulation or code of conduct will cover pharmaceutical companies or health care sector in any manner. 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, before us the learned senior counsel, Shri Mistry brought to our notice the judgment of Hon'ble Delhi High Court in the case of Max Hospital vs. MCI in WPC 1334/2013 judgment dated 10.01.2014, 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. Relevant portion of the said judgment reads as under:

"6. The Petitioner's grievance is twofold. Firstly, that since the Medical Council of India (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (the Regulations) have been framed in exercise of the power conferred under Section 20-A read with Section 33 (m) of the Indian Medical Council Act, 1956, these regulations do not govern or have any concern with the facilities, infrastructure or running of the Hospitals and secondly, that the Ethics Committee of the MCI acting under the Regulations had no jurisdiction to pass any direction or judgment on the infrastructure of any hospital which power rests solely with the concerned State Govt. The case of the Petitioner is that the Petitioner hospital is governed by the Delhi Nursing Homes Registration Act, 1953. It is urged that in fact, an inspection was also carried out on 22.07.2011 by Dr. R.N. Dass, Medical Superintendent (Nursing Home) under the Directorate of Health Services, Govt. of NCT of Delhi and the necessary equipments and facilities were found to be in order which negates the observations dated 27.10.2012 of the Ethics Committee of the MCI. It is also the plea of the Petitioner hospital that the Petitioner was not provided an opportunity of being heard and thus the principles of natural justice were violated.

7. In the counter affidavit filed by the Respondents, it is not disputed that the MCI under the 2002 Regulations has jurisdiction limited to taking action only against the registered medical practitioners. Its plea however, is that it has not passed any order against the Petitioner hospital therefore; the Petitioner cannot have any grievance against the impugned order. ……

8. It is clearly admitted by the Respondent that it has no jurisdiction to pass any order against the Petitioner hospital under the 2002 Regulations. In fact, it is stated that it has not passed any order against the Petitioner hospital. Thus, I need not go into the question whether the adequate infrastructure facilities for appropriate post-operative care were in fact in existence or not in the Petitioner hospital and whether the principles of natural justice had been followed or not while passing the impugned order. Suffice it to say that the observations dated 27.10.2012 made by the Ethics Committee do reflect upon the infrastructure facilities available in the Petitioner hospital and since it had no jurisdiction to go into the same, the observations were uncalled for and cannot be sustained. " [Emphasis added is ours]

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. The relevant provision of section 37(1) reads as under:

"(1) Any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the heads "profits and gains of business or profession"

Explanation 1 – For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure."

The aforesaid provision applies to an assessee who is claiming deduction of expenditure while computing his business income. 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 Explanation1 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."

18. We therefore following the view taken in the aforesaid order of the Tribunal hold that expenditure incurred on Doctors before 01.08.2012 be allowed as revenue expenditure, but the nature of expenditure incurred thereafter on Doctors is required to be examined by the AO – whether it was incurred on Doctors to attend the seminars as delegates or faculty members. Hence, the order of the CIT(Appeals) is set aside in this regard and the matter is restored to the AO to adjudicate the issue afresh in the terms indicated above."

4.1 In the earlier proceedings before the ITAT, the AR had filed five paper books (in total 887 pages). It was submitted that the details of the year-wise break up of business promotion expenses are placed at page 409 of the paper book. The learned AR submitted that the Assessing Officer had disallowed the entire business promotion expenses. It was stated that in assessment year 2007-2008 out of the total business promotion expenses of Rs.3,41,00,217 only Rs.1,21,06,967 is incurred on Doctors' expenses, which only ought to have been considered for disallowance, if at all u/s 37 of the I.T.Act. Further, it was submitted from the evidences produced (Page 409 of paper book), it is clear that the Doctors related expenses are towards expenditure incurred for the Doctors attending on the conference as a faculty (Euro PCR, Sing Live, TCT). It was further submitted that the complete list of Doctors and members who had attended the conference along with the confirmation letters from them registering the attendance of

conference was submitted to the Assessing Officer and the details of the same is placed at pages 764 and 765 of the paper book. It was submitted that the travel expenses were paid to the travel agent who did the travel arrangement and conference expenses were paid directly to the conference organizer as a package, which consisted of cost as a group. The learned AR by placing reliance on the orders of the Mumbai Bench of the Tribunal in the case of DCIT v. PHL Pharma Private Limited (relied on by the Tribunal in its order dated 29.01.2018) and in the case of DCIT v. Bayer Pharmaceuticals Private Limited (ITA No.6222/Mum/2018 order dated 18.09.2019) submitted that the legal principle enunciated in these orders of the Tribunal are as follows:-

(i) On the specific question as to whether the payments to doctors are prohibited w.e.f. 10.12.2009 as per MCI guidelines, it was held that MCI guidelines are applicable only for medical practitioners and not for pharma companies (page 3, 5 of Bayer order).

(ii) As a logical corollary, if there is any violation of MCI regulation in terms of Section 37(1), it is meant for medical practitioners and not for pharma companies (page 6 of Bayer order)

(iii) CBDT Circular dated 1.08.2012 enlarging the scope of MCI regulation to pharma companies is without any enabling provisions either under Income Tax Act or under MCI regulations (page 7 of Bayer order)

(iv) Even after the Circular, if the assessee satisfies the A.O. that the expenses are not in violation of the MCI guidelines, it can be claimed as deduction (page 8 of Bayer order).

(v) In any case, the CBDT circular cannot have retrospective effect it was specifically held that the CBDT circular is not applicable to A.Y. 2010-11 and 2011-12 as it was introduced w.e.f. 1.08.2012 (page 7 of Bayer order).

4.2 The AR, in view of above legal principles enunciated, submitted that -

(i) MCI guidelines are not applicable to the assessee. Hence the Explanation 1 to Section 37(1) does not apply to the assessee.

ii) The CBDT circular has prospective effect and does not apply at all to the years in appeal

iii) In any case, the expenses incurred by the assessee on the doctors are not freebies and are not of the nature prohibited by the MCI guidelines and are allowable as deduction as they are not covered under Explanation 1 to Section 37(1).

iv) Pursuant to the Tribunal's order, the A.O has passed OGE to the Tribunal order, accepting our contention and allowed the entire expenses as deduction for A.Y 2012-13 and 13-14. (The OGE are placed on record).

v) The decision of the Hon'ble tribunal for A.Y 12-13 and A.Y 13-14 are taken on the above set of facts and principles and are squarely applicable to the years in appeal (A.Y 2007-08 and 2011-12). Even the A.O and the CIT(A) have passed orders for these years relying on their orders for A.Y. 2013-14 and hence the decision of the Hon'ble tribunal for A.Y. 2013-14 is squarely applicable to A.Y. 2007-08 and 2011-12

4.3 The learned Departmental Representative, on the other hand, has filed two written submission, wherein he has contended that there is no harm in following the earlier order of the Tribunal dated 29.01.2018 and giving similar directions for these appeals also. However, the learned DR submitted that the cut off date mentioned as 01.08.2012 for disallowance of business promotion expenses, is not correct and the same should be interpreted from the date of amendment to the MCI Regulations (Regulation 6.8) dated 10.12.2009. In other words, the learned DR submitted that the Hon'ble ITAT ought to replace the phrase *"expenditure incurred on doctors before 01.08.2012 be allowed as revenue expenditure"* in direction issued on the ITAT order dated 29.01.2018 with *"expenditure incurred on doctors before 10.12.2009 be allowed as revenue expenditure"* in the present appeals. The gist of the DR's submission are as follows:-

(i) The decision on which the Hon'ble Tribunal order dated 29.01.2018 had relied on (PHL Pharma case) did not hold that disallowance was to be made only after 01.08.2012.

(ii) Any violation of the MCI Regulations, effective from 10.12.2009, came under the embargo placed by Explanation u/s 37(1) after 10.12.2009.

(iii) Circular 5/2012 of the CBDT is clarificatory on the scope of Explanation 37(1).

(iv) The decision of the Hon'ble Tribunal has been rendered without the knowledge of Explanation u/s 37(1) of the Act.

4.4 We have heard rival submissions and perused the material on record. From CBDT Circular No.5/2012 dated

01.08.2012 and MCI Regulation 6.8 (published in Gazette on 14.12.2009) it is clear that expenditure incurred by the assessee on doctors alone is liable for disallowance by virtue of Explanation 1 to section 37 of the I.T.Act. This also made clear in ITAT order dated 29.01.2018. However, we notice for these A.Y's, the A.O. had disallowed the entire expenditure under the head `business promotion expenses', which included expenses on cath lab, marketing, travel of staff, paramedicines etc. We make it clear that if at all any disallowance is called for, only the expenditure related to doctors alone should have been disallowed by the A.O.

4.4.1 The further question is, what is the cut off date of disallowance of expenses relating to doctors, whether it is 01.08.2012 or 14.12.2009. The ITAT in order dated 29.01.2018 by following the Mumbai ITAT order in PHL case (supra) had held that expenditure incurred on doctor before 01.08.2012 be allowed as revenue expenditure. The CBDT Circular No.5/2012 dated 01.08.2012, clearly states that any expense incurred in violation of MCI Regulations dated 10.12.2009, is inadmissible u/s 37(1) of the I.T.Act w.e.f. 01.08.2012 (i.e. prospectively). Prior to 01.08.2012, the expenditure relating to doctors were to be allowed as deduction. When MCI has issued the regulation 6.8 from 10.12.2009, the same is binding only on its members, namely, doctors. The pharma companies are not bound by MCI regulations. The CBDT Circular No.5/2012 dated 01.08.2012, extended the applicability of MCI Regulation 6.8 to pharma companies and other health sectors companies. Therefore, expenditure incurred by pharma companies on doctors can

only be disallowed, if at all from the date of issuance of Circular No.5/2012. In these cases, we are not concerned whether CBDT has power to issue Circular No.5/1012, which enlarged the scope of MCI Regulations to pharma companies without any enabling provision either under Income-tax or under MCI Regulations. As mentioned earlier, the limited question is only regarding applicability whether it applicable from 01.08.2012 or 14.12.2009. This issue has been considered in various ITAT orders. The Tribunal in PHL Pharma's case (supra) has held as follows:-

> *"9.....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 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 same CBDT circular had come up for consideration before the co-ordinate Bench of the ITAT, Mumbai Bench in the case of Syncom Formulations (I) Ltd. (in ITA Nos.6429 & 6428/Mum/ 2012 for A.Ys 2010-11 and 2011-12, vide order dated 23.12.2015), wherein Tribunal held that CBDT circular would not be applicable in the A.Ys 2010-11 and 2011-12 as it was introduced w.e.f. 01.08.2012."*

4.4.2 Similar view was held in the following cases:

(i) Bayer Pharmaceutical P. Ltd. ITA No.6222/ Mum/2018 – A.Y. 2011-12.
(ii) Medley Pharmaceuticals Ltd. ITA No.2344/Mum/ 2018 A.Y.2012-13.
(iii) Aristo Pharmaceuticals Ltd. ITA No.5553/Mum/ 14 & 5479/Mum/15 A.Y. 2011-12 & 2012-13.

4.4.3 No contra decision has been brought to our notice. Therefore, in the light of the above said ITAT order and ITAT order dated 29.01.2018 in assessee's own case for A.Y. 2012-

2013 and 2013-2014, we hold that expenditure relating to doctors incurred by the assessee prior to 01.08.2012 need to be allowed as revenue expenditure. Since we are concerned with A.Y's 2007-2008 to 2011-2012, the CBDT Circular No.5/2012 dated 01.08.2012 does not have effect on these cases. Accordingly, we direct the A.O. to delete the disallowance of business promotion expenses in A.Y. 2007-2008 to 2011-2012. Hence ground No.12 is allowed.

Disallowance of discount to customers (Ground No.13) (concerning A.Y's 2007-2008 to 2011-2012)

5. The learned AR submitted the following:-

(i) The year-wise details of discounts submitted to the A.O. are at pages 713 and 714 of the paper book.

(ii) The invoice-wise details of the discounts and the ledger extracts were submitted to the A.O. – letter dated 26th November, 2014 to the A.O. at page 764 of the paper book.

(iii) Reconciliation statement of discount for each of the hospitals / parties which were given credit discounts along with the ledger extracts of all the parties were furnished to the A.O. – pages 459 to 714 of the paper book.

(iv) For A.Y.2013-2014, the Hon'ble Tribunal in its order dated 29.01.2018 has given a direction that, (a) discounts given in the invoice itself should be allowed without

making any further enquiry, and (b) discounts given to hospitals may be allowed after making enquiry.

(v) Pursuant to the Tribunal's order, the A.O. has passed OGE to the Tribunal order, accepting our contention and allowed the discounts as deduction for A.Y. 2012-2013 and 2013-2014. The OGE are submitted.

Prayer

In the light of the above facts, it is our submission that the facts are similar for the years A.Y. 2007-2008 and 2011-2012 and the above decision / direction is applicable to these years also.

5.1 The DR in his written submission dated 30.12.2020 had agreed that the matter may be remanded back to the A.O. for examination in terms of the ITAT order dated 29.01.2018 for A.Y.'s 2012-2013 and 2013-2014.

5.2 We have heard rival submissions and perused the material on record. The ITAT in its order dated 29.01.2018 for A.Y.'s 2012-2013 and 2013-2014, had discussed in detail the above issue at para 19 to 25. The ITAT set aside the issue to the A.O. to re-adjudicate, after making necessary enquiry and verification, with certain directions. The relevant discussion and finding of the ITAT for A.Y's 2012-2013 and 2013-2014 read as follows:-

"19. The next ground in both the appeals relate to the disallowances of discounts given to the customers. In this regard, facts in brief borne out from the record are that in the assessment year 2013-14, assessee has debited a sum of Rs.23,55,30,000/- as discount into audited financials, but it was disallowed by the AO having noted that the assessee failed to furnish

evidence for payment of discount and confirmation letters from its customers. The AO ignored the credit notes and the credit note ledger produced before him on the basis of certain information revealed during the course of enquiry.

20. Assessee preferred an appeal before the CIT(A) with the submissions that recording of the sale transaction is an unilateral practice followed in any business organizations. In many a times, the sale amount recorded in the books are not realized for various reasons. When the sale ultimately fortifies, the initially recorded price may not be realized and if there is a shortfall in the realization for any compelling business reasons, the same cannot be treated as sales returns and such shortfall, if any, is passed out for discount for which credit note is raised from the customers. Therefore, the realized of the realizable price is only considered for profit or loss. It was further contended before the CIT(A) that the fundamental reason for this practice is only to tax the real income as held through various judicial pronouncements. The explanations and evidences furnished by the assessee were confronted to the AO and a remand report was called from him.

21. The CIT(A) re-examined the claim of the assessee but was not convinced with it.

22. Now the assessee is before us. During the course of hearing, the learned counsel for the assessee invited our attention to certain facts with the submission that AO disallowed the discount given by credit notes on the assumption that the gross sales shown in the financial statements was of Rs.156,77,20,000/- after allowing discount and discount was already allowed in the sale invoice and such discount was duly considered in VAT return. After filing the sales tax return, the assessee company has claimed further discount allowed by way of credit notes of Rs.23,55,30,000/- in the audited financial statements. The above assumption of the AO is erroneous as the sales shown in the audited financial statement is gross sales less discount which is evident in the audited financial statement 2013-14 which is available at page 139-159 of the paperbook. He further invited our attention to page 151 of the compilation wherein gross sales revenue of Rs.156,77,20,000/- is shown and discount shown is Rs.23,55,13,000/- and the net sale revenue is Rs.1,33,89,107/-. Breakup of which is available at page 159 of the compilation. The discount reconciliation summary available at page 713-714 in the paperbook was also furnished before the AO to establish the fact that discount of Rs.23,55,30,000/- include the discount given in invoice of Rs.1,16,91,000/- and the sales shown is a gross sales and not net of discount. It was further submitted that the AO was confused with regard to discount allowed in the sales invoice credit notes and sales returns, the method of accounting followed by the assessee. The AO has disallowed the discount on the ground that assessee has resorted into suppressing its sales by booking huge discounts with the colour of credit notes. Such discounts allowed vide credit notes have been disallowed based on few random confirmations received from the customers who have denied of having received and accounted all credit notes issued by the assessee as against the total customer base of 600 plus hospital. In support of his contentions, reliance was placed upon the judgment in the case of CIT Vs. Leader Valves Ltd., 295 ITR 273 (P&H) and the Hon'ble Supreme Court

judgment in the case of Southern Motors v. State of Karnataka and Ors, in Civil Appeal Nos.10972 – 10978 of 2016 dated 18.01.2017. He also placed reliance upon the judgment of the Hon'ble Kerala High Court in the case of IFB Industries Ltd., Vs. State of Kerala, copy of which is placed at page No. 878-887 of the compilation.

23. The learned DR, on the other hand has placed reliance upon the order of the CIT(A).

24. Having carefully examined the material available on record in the light of rival submissions, we find that the assessee has given the discounts on its gross sales. Sometimes discount was given at the time of issuing of invoice. The AO has doubted the discount given by the assessee on its different sales on the basis of the statement of those parties to whom the discount was given. During the course of assessment proceedings, the receipt of discount was accepted by certain recipients and it was also explained by few hospitals. The discrepancies in amount of payment and the discount were also explained by certain hospitals. Through letter it was explained by Pragma Hospital that there are 2 types of patients being served cashless by the hospitals because these payments are made to the hospital by some insurance companies. For the first type of patient who make cash payment whenever any stunt deployed in the patient, the vascular concept of the company/assessee directly sells and bills of these stunts to the patients and patients directly make the payment to the company. Company's representatives come every fortnight and monthly and collect the payment as the representatives of the company come and collect the payment of discount regularly, they do not maintain that record. It was further clarified that payment from hospital was received separately and also they give the receipt separately while stunt payment receipt is given by the company. For the second type of patients who are served cashless hospitals purchase the stunts from the assessee and make the payment by cheque. All these aspects were required to be examined by the lower authorities but they have disallowed the entire payment of discount having doubted the genuineness of payment without having examined the clarification furnished by the assessee.

25. We have also considered the Revenue's contention that sufficient opportunities were given to the assessee to explain the discrepancy in discounts and genuineness of substantial amount of discount given to the buyers. But we find that assessee has furnished the details of persons to whom the stunts were sold and the AO has collected the evidences only from few persons. The contention of the assessee that sometime discounts were given in the invoice itself were also not properly appreciated or examined by the AO. When certain hospitals have categorically stated that there are two types of patients and one type of patient cashless treatment is to be given by the hospital in that case the hospital purchase the stunts from the assessee company and wherever the cashless treatment is not given, the patient is required to purchase the stunts. The stunt would be directly sold to the patient and the corresponding entries with regard to sale of the stunt is not recorded in the books of accounts of the hospital and the hospital representatives collect the discount by the company agreed upon given by the company. These aspects need to be examined by the AO. In the light of

these facts, we are of the considered view that the issue was not been properly examined by the lower authorities and they have disallowed the claim of the assessee by making superficial observation. Therefore, in the interest of justice, we set aside the order of the CIT(A) in this regard and direct the AO to readjudicate the issue after making necessary enquiry and verification. If the assessee succeeds in establishing that most of the time the discount was given in the invoice itself, the same may be allowed without making a further necessary enquiry. So far as other aspect with regard to discount given to the hospital on cashless treatments or on paid treatment, the issue requires proper examination by making necessary enquiry. Accordingly, the issue is restored back to the AO for fresh adjudication."

5.3 The direction of the ITAT in above order are two folds, namely –

(a) Discounts given in the invoice itself should be allowed without making any further enquiry; and

(b) Discounts given to hospitals may be allowed after making enquiry.

5.4 Pursuant to the ITAT order, the A.O. passed order u/s 143(3) r.w.s. 254 of the I.T.Act (copy placed at pages 62 to 73 of the paper book dated 19.08.2020), wherein, the A.O. after examination of confirmation of parties produced by the assessee, allowed certain discounts given to customer and disallowed portion where assessee failed to produce the details.

5.5 In light of the ITAT order dated 29.01.2018 for A.Y's 2012-2013 and 2013-2014, we restore the issue of discount given to customer, to A.O. for *de novo* consideration with following directions, namely -

(a) Discounts given in the invoice itself should be allowed without making any further enquiry; and

(b) Discounts given to hospitals may be allowed after making enquiry.

The A.O. shall take confirmation from the parties as they have taken for A.Y.'s 2012-2013 and 2013-2014 and shall take decision in accordance with law.

5.6 Therefore ground No.13 in these appeals are allowed for statistical purposes.

Disallowance of bad debts written off (Ground No.15 for A.Y. 2010-2011 & Ground No.14 for A.Y. 2011-2012)

6. The learned AR has made the following submissions on the above issue:-

(i) The details of each of the customers in whose case there were write off of bad debts were furnished to the A.O.- letter dated 26th November, 2014 – pages 764 to 768 of paper book. The details are placed as Annexure to the assessment order for A.Y. 2013-2014.

(ii) The detailed reasons for each of the parties in whose case bad debts had been claimed were furnished – letter dated 26th November, 2014 – pages 766 to 768 of paper book.

(iii) Reconciliation statement along with the ledger extract of each of the parties was furnished to the A.O. – pages 459 to 714 of the paper book.

(iv) It is submitted the provisions of the Income Tax Act requires that, prior to the debt being written off as bad, it is essential that the same is accounted in the books first as income. Accordingly, the details of accounting of such sales

income were furnished to the A.O. in the copies of the ledger extracts of the customers, where the appellant has recorded the sales income and upon the non-recoverability of some dues, it had written them off as bad. Hence the requirement of law for claiming bad debts had been fulfilled.

(v) The A.O. has disallowed the bad debts claim only on the ground that the evidence to show that the debts have become bad and the efforts made to recover them were not furnished. This no more a requirement of law to claim bad debts.

(vi) The decision of the Hon'ble Tribunal for A.Y. 2013-2014 applies to A.Y. 2011-2012 and 2012-2013.

Prayer

Since the requirement of law for claiming bad debts as expenditure has been fulfilled and the disallowance has been made for extraneous reasons, the claim may be allowed, following the decision of the Hon'ble Tribunal in A.Y. 2013-2014.

6.1 The DR in his written submission dated 30.12.2020 has stated that the matter may be remanded back to the A.O. for examination and allow the claim in terms of section 36 of the I.T.Act.

6.2 We have heard rival submissions and perused the material on record. This issue has been discussed in detail in the Hon'ble Tribunal's order for A.Y's 2012-2013 and 2013-2014 at paragraphs 26 to 29 of the order, wherein the A.O. has been directed to allow the claim of bad debts. The relevant

discussion and finding of the ITAT concerning above issue reads as follow:-

> *"26. Next ground relates to the disallowance of bad debts written off. In this regard, our attention was invited to the fact that AO has made the disallowance of bad debt having observed that assessee has not established that amount has gone bad inspite of all efforts taken by him. In this regard, the learned counsel for the assessee has contended that after the amendment, the bad debt is required to be written off in the books of account and the assessee is not required to establish that bad debt has become bad. The learned counsel for the assessee further contended that assessee has taken the same amount into P & L account. Therefore, the condition required under section 36(2) is fulfilled. Therefore, the disallowance of bad debt made by the AO is incorrect and the same should be allowed. It was further contended that the CIT(A) did not examine these aspects and confirmed the disallowance.*
>
> *27. The learned DR placed the reliance upon the order of the CIT(A).*
>
> *28. Having carefully examined the orders of authorities below in the light of rival submissions, we find force in the contentions of the assessee that after the amendment and as per the Circular No.12/2016 dated 30.05.2016 it is not necessary for the assessee to establish that debt has become irrecoverable. It is enough that bad debt is irrecoverable in the accounts of the assessee. This position has been clarified by the Apex Court through its judgment in the case of TRF Vs. CIT 323 ITR 0397. Thereafter the Board has also issued a Circular in the light of the judgment of the Apex Court and clarified the position that the claim of bad debt in the previous year shall be admissible under section 36(1)(vii) of the Act if it is written off as irrecoverable in the books of accounts of the assessee for that previous year if it fulfills the condition stipulated in section 36(2) of the Act. The Board has also advised the authorities concerned that no appeal may henceforth be filed on this ground and appeal already filed if any on this issue before various grounds in the Tribunal may be withdrawn as not pressed upon. The issue was also examined by jurisdictional High Court in the case of Amco Batteries Vs. ACIT 232 Taxmann 0351 and Their Lordships have also held that once assessee writes off a claim in its books of account treating it as a bad debt under section 36(1)(vii) r.w.s. 36(2), the assessee is entitled for deduction of the said amount.*
>
> *29. Turning to the facts of the case, nothing has been established by the Revenue that condition stipulated under section 36(2) was not fulfilled with respect to any of the debts which were written off by the assessee during the previous year. Under these circumstances, we are of the view that disallowance made by the Revenue authorities is incorrect as the assessee is only required to write off the bad debts and is not required to establish that it has become really bad. Accordingly, we set aside the order of the CIT(A) and direct the AO to allow the claim of bad debt raised by the assessee."*

6.3 Pursuant to ITAT's order, the A.O. has allowed the claim of bad debts. The relevant portion of A.O.'s finding reads as follow:-

> *"During the A.Y. 2012-13 the assessing officer disallowed the bad debts of Rs.5,14,84,187/- in the assessment order. Aggrieved by the assessment order appeal is filed before the ITAT Bangalore and ITAT Bangalore by considering the Supreme Court judgment in the case of TRF v. CIT 323 ITR 0397 and jurisdictional High Court order in the case of Amco Batteries vs. ACIT 232 Taxmann 0351 has deleted the addition made by the A.O. and allowed in the favour of assessee company."*

6.4 For these assessment years as well, the Revenue has not established that conditions stipulated u/s 36(2) of the I.T.Act was not fulfilled with respect to any of the debts which were written off by the assessee during the previous years. Under these circumstances, we are of the view that disallowance made by the Revenue authorities is incorrect as the assessee is only required to write off the bad debts and is not required to establish that it has become really bad. Accordingly, we direct the A.O. to allow the claim of bad debt raised by the assessee.

6.5 Therefore, ground No.15 for Asst.Year 2010-2011 and Ground No.13 for Asst.Year 2011-2012 are allowed.

7. In the result, the appeals filed by the assessee for Asst.Year's 2007-2008 to 2011-2012 are partly allowed for statistical purposes, as indicated above.

Order pronounced on this 15th day of February, 2021.

Sd/-	**Sd/-**
(George George K)	**(B.R.Baskaran)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Bangalore; Dated : 15th February, 2021.
Devadas G*

Copy to :

1. The Appellant.
2. The Respondent.
3. The CIT(A)-11, Bangalore.
4. The Pr.CIT (Central), Bangalore.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore