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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ITA 321/2017

BOSTON SCIENTIFIC INDIA PVT. LTD

..... Appellant

Through: Mr. M.S. Syali, Senior Advocate with
Mr. Mayank Nagi, Advocate.

versus

ASSISTANT COMMISSIONER OF INCOME TAX Respondent

Through: Mr. Rahul Kaushik, Senior Standing
counsel.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE PRATHIBA M. SINGH

ORDER

24.08.2017

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1. This appeal under Section 260A of the Income Tax Act, 1961 ('Act') is by the Assessee, Boston Scientific India Private Limited, against an order dated 30th November 2016 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 6806/Del/2015 for the Assessment Year ('AY') 2011-12.

2. **Admit.** The following question is framed for consideration:

"Whether the ITAT was justified in law in upholding the entire disallowance of Rs.40,20,548 while discussing the disallowance of only Rs. 13,14,548 and not the other two disallowances in the sums of Rs.19,06,000 and Rs. 8 lakhs?

3. The facts in brief are that the Assessee is a subsidiary of Boston Scientific International B.V., Netherlands ('BSI') and is primarily engaged in

promotion, marketing, presales and related activities for medical products/instruments sold by the BSI in India. Such products include wide range of cardiology and related medical devices. It is stated that subsequent to the AY in question, the Appellant also started trading in such products in India.

4. On 9th May 2012 the Assessee filed its return of income for the AY in question declaring an income of Rs. 69,48,386. Notice under Section 143 (2) of the Act was issued to the Assessee by the AO on 7th August 2013 and the return was picked up for scrutiny. A reference was made by the AO to the Transfer Pricing Officer ('TPO') under Section 92CA (1) of the Act for determination of the Arm's Length Price ('ALP') of the international transactions undertaken by the Assessee with its Associated Enterprise ('AE').

5. The TPO passed an order on 7th January 2015 recommending TP adjustment in the sum of Rs. 1,50,76,722. On the basis of the said order of the TPO, the AO passed a draft assessment order under Section 144C of the Act on 20th February 2015 making a TP adjustment as proposed by the TPO.

6. The Assessee filed objections before the Dispute Resolution Panel ('DRP') on 27th March 2015 challenging the adjustment suggested by the TPO. While disposing of the objections by its order dated 19th October 2015 the DRP *suo motu* picked up the deduction of expenditure incurred by the Assessee under the head 'advertisement and business promotion expenses' and 'travel expenses' debited to the Profit & Loss (PL) account. This was not the subject matter of the draft assessment order.

7. By order sheet notice dated 20th July 2015, the Assessee was called upon by the DRP to show cause why the expenditure incurred by it on doctors should not be disallowed in light of Medical Council of India Guidelines ('MCI Guidelines') read with the Circular No. 5/2012 issued by the Central Board of Direct Taxes ('CBDT') on 1st August 2012. The Assessee filed its reply on 27th August 2015. However, the DRP in its order dated 19th October 2015 observed that the said expenses included 'gifts and freebies' and therefore, it should be disallowed in view of Explanation to Section 37 (1) of the Act read with the aforementioned CBDT Circular. The AO was directed to quantify the amount of disallowance after taking into account the complete details of the said expenditure.

8. On 30th November 2015, the AO passed a final assessment order under Section 143 (3) read with Section 144C of the Act incorporating the directions issued by the DRP. The AO on the specific heads of 'advertisement and business promotion' and 'travel related expenses' made the following disallowances:

- (i) Expenditure of Rs. 13,14,548/- was stated to be constituting freebies provided to medical consultants and other doctors, disallowable in view of Explanation to Section 37(1) of the Act, read with CBDT Circular No. 5/2012 dated 1st August 2012.
- (ii) Expenditure of Rs. 19,06,000/- incurred on conducting seminars, conventions, meetings etc. for the purposes of Appellant's business, on the ground that details were scanty despite ample opportunity being given to the Assessee.
- (iii) Expenditure of Rs. 8,00,000/- incurred on sponsorship for organizing conference/seminar. This was disallowed on the ground that the payment was made after the event had taken place.

9. Aggrieved by the above order, the Assessee filed an appeal before the ITAT. It was *inter alia* contended by the Assessee that

(i) The DRP did not have the jurisdiction u/s 144C (8) of the Act, to rake up grounds that did not constitute the subject matter of the draft assessment order.

(ii) Such expenses were not in the nature of 'freebies' or 'gifts' given to medical personnel and *ex facie* not covered by the CBDT Circular No. 05 of 2012.

(iii) CBDT Circular No. 05/2012 was not applicable to the year under consideration i.e. A Y 2011-12.

(iv) The MCI Guidelines were applicable to the doctors/medical practitioners and not the Assessee.

(v) Without prejudice to the above contentions, the expenditure in question was wholly and exclusively for the purposes of business of the Assessee.

10. By the impugned order dated 30th November 2016, the ITAT set aside the determination of interest chargeable on receivables and remanded the issue to the file of the TPO. The disallowance of Rs. 13,14,548 on account of expenditure incurred on (i) consultancy/honorarium fee (ii) registration, sponsorship and training, was upheld. The ITAT held that the aforementioned CBDT circular prohibited such expenditure.

11. At the outset Mr. M.S. Syali, learned Senior counsel appearing for the Assessee, pointed out that the ITAT failed to deal with the challenge raised by the Assessee to the disallowance of other specific items of expenditure, i.e., Rs. 19,06,000 and Rs. 8 lakhs incurred in relation to sponsorship for

organizing conferences and seminars for the purpose of the Assessee's own business. Mr. Syali further pointed out that the aforementioned CBDT Circular was prospective in nature.

12. Even assuming the said Circular applied, the ITAT had wrongly placed the onus on the Assessee to show that the expenditure was incurred *bona fide* and for the purpose for which it was shown to have been incurred. Mr. Syali pointed out that the complete details of the expenditure incurred were in fact placed before the ITAT and therefore, nothing further needed to be done in that regard as far as the Assessee is concerned. Reliance was placed on the decision of the Himachal Pradesh High Court in ***Confederation of Indian Pharmaceutical Industry (SSI) v. Central Board of Direct Taxes (2013) 353 ITR 388 (HP)*** and of the Gujarat High Court in ***Commissioner of Income Tax-III v. Ashok J. Patel (2014) 43 Taxmann.com 227 (Guj)***.

13. Mr. Rahul Kaushik, learned Senior standing counsel appearing for the Revenue was unable to dispute that the ITAT had failed to answer two of the questions raised before it pertaining to the expenditure of Rs. 19,06,000 and Rs. 8 lakhs incurred by the Assessee for organizing seminars and conferences even what was disallowed by the AO under Section 37 (1) of the Act. Mr. Kaushik further submitted that in view of CBDT Circular 05 of 2012 it was plain that the expenditure so incurred could not have been allowed by the AO as the Assessee has failed demonstrate it was for the purpose of the Assessee's business and was a valid expenditure in terms of the MCI Guidelines.

14. At the outset it must be noted that Section 37 (1) of the Act is in the nature of a residuary clause covering business expenses that are not covered under Sections 30 to 36 of the Act. Such expenses however must have been incurred “wholly and exclusively” for the purposes of the business of the Assessee. An Explanation was inserted in Section 37 by Finance (No.2) Act 1998 with effect from 1st April 1962 which stated that if the expenses were incurred for any purpose which is an offence or which is prohibited by law, they shall not be deemed to have been incurred for the purposes of business or profession and no deduction on that score shall be allowed with respect to such expenditure.

15. It is in this context that the MCI Guidelines need to be understood. This is contained in the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (‘IMC Regulations’), which govern the expenses, conduct and professional etiquette of medical personnel. Under Article 6.4.1 of the IMC Regulations ‘a physician shall not receive, solicit, or receive nor shall he offer to give solicit or receive any gift, gratuity, commission or bonus in consideration of a return for referring, recommending or procuring of any patient for medical, surgical or other treatment. Further Regulation 6.8.1 which was inserted in terms of the Notification published on 14th December 2009 in the Gazette of India states, as under:

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.

16. It may be noted here that Regulation 6.8.1(b) has been further substituted by Notification published on 1st February 2016 which reiterates that a medical practitioner should not accept any travel facility inside the country or outside, including rail, road, air, ship, cruise tickets, paid vacation etc. from any pharmaceutical or allied healthcare industry “for self and family members for vacation or for attending conferences, seminars, workshops, CME Programme etc. as a delegate.” It also sets out that what action shall be contemplated in the event of violation of specific guidelines.

17. The MCI guidelines have attained the force of law with the aforementioned Circular No. 5/2012, paras 3 and 4 of which read as under:

“3. Section 37(1) of the Income-tax Act provides for deduction of any revenue expenditure (other than those falling 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 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.

Thus, the claim of any expense incurred in providing above mentioned or similar freebies in violation of the provisions of the 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 freebies and claimed it as a deductible expense in its accounts against income.

4. It is also clarified that the sum equivalent to value of freebies 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 specific case. The Assessing Officers of such medical practitioner or professional associations should examine the same and take appropriate action. This may be brought to the notice of all the officers of the charge for necessary action.”

18. Although the Assessee had raised an issue before the ITAT that the above Circular is prospective and does not apply to the AY in question, that issue appears not to have been examined by the ITAT.

19. From the written submissions filed by the Assessee before the ITAT, apart from contending that CBDT's circular did not apply to the AY in question, it was also stated that a consultancy agreement had been entered into by the Assessee with Dr. Anil Saxena, who is a renowned name in the field of electrophysiology in North India, for providing consultancy/advisory services to the Assessee. A copy of the consultancy agreement with Dr. Anil Saxena for the AY 2011-12 was placed before the ITAT. It was pointed out that honorarium was paid to Dr. Saxena during the AY in question for the consultancy services provided by him under the said consultancy agreement after deducting tax at source. The said expenditure was therefore stated to be genuine business expenditure. It was contended that the payment of such consultancy fee does not fall within the purview of MCI Regulations. A reference was made to Clause (g) of the MCI Regulations which permit a

medical practitioner to work for pharmaceutical and allied healthcare industries in advisory capacities, as consultants, as researchers etc.

20. As regards the travel, boarding and lodging expenses paid for Dr. Saxena to attend a Medical Advisory Board meeting for Asia pacific region held at Japan, so as to gain better understanding of latest developments in the field of electrophysiology, these expenses were connected with the honorarium/ consultancy fees and represent costs for availing the services of the consultant doctor. Such expenditure incurred on such consultant doctors does not, according to the Assessee, fall within the purview of CBDT Circular No. 5/2012 read with the MCI Regulations.

21. It was also contended that the doctors attended these events/conferences in their personal capacity to enhance their own knowledge/understanding; they were not under any obligation to purchase, prescribe or recommend the Assessee's products to other doctors or represent the Assessee in these conferences. What was prohibited was sponsorship of the travelling expenses and attending the conference and events as 'delegates' on behalf of the pharmaceutical and allied industries. It was stated that such travel facilities provided by the Assessee to the doctors/medical practitioners' fall outside the purview of Circular No. 5 of 2012 read with MCI Regulations.

22. The above contentions of the Assessee were not dealt with by the ITAT in the impugned order. On merits, the ITAT in paras 51 and 52 of the impugned order held:

“51. The Assessee in the paper book has filed brochure, bills and travel details of the doctors and the destination where the seminars

have been conducted but did not bring anything on record to show that such seminars were actually conducted at the respective venues (inside and outside the country) during the respective doctors' trips. Further, the LD. AR referred to consulting agreement that has been entered into between the Assessee and one Dr. Anil Saxena which has been placed at page 405 to 407 of the paper book. As per this agreement Dr. Anil Saxena would be paid a minimum amount of USD 1800 per day or pro-rata per hour, of the services rendered which represents the fair market value. It also says that the invoice shall include an itemised list of the services rendered and all appropriate supporting documents for the services provided by Dr. Anil Saxena. However from the records placed before us we do not find any search details that has been provided in order to establish that Dr. Anil Kumar Saxena has actually delivered any lectures, attended any meetings, provide training courses and seminars for Assessee etc. It is further pertinent to note that Dr. Anil Kumar Saxena is associated with Escorts Heart Institute and Research Centre. Similar is an agreement entered into by Assessee with one Dr. Shakir Hussain who is associated with Max Super Speciality Hospital. From these agreements it is difficult to make out whether these doctors have entered into agreements with Assessee in their individual capacity or on behalf of respective hospitals with whom they are associated, as its representative.

52. As the Assessee has incurred expenses in the garb of marketing the cardiac machine, onus is upon the Assessee to prove that the expenses incurred do not violate any law that may be applicable. The burden lies upon the Assessee which has not been evidences/materials. Merely by placing the bills of payments, the travel details, the hotel details where the doctors were stationed and the seminars/conferences were conducted does not prove that in reality the conferences were actually attended by such doctors. Assessee has also not demonstrated that the doctors by participating in such conferences/accepting the hospitality extended by the Assessee has not contravened any MCI Regulations.”

23. Mr. Syali is right in his contention that the ITAT placed an unfair burden on the Assessee to prove that the above expense was incurred bonafide for

the business purposes of the Assessee. The Assessee had placed before the ITAT all the relevant details thereby discharging the initial onus. Thereafter, it was open to the Revenue to prove to the contrary. It was not going to be possible for the Assessee to show that Dr Saxena “actually delivered any lectures, attended any meetings, provide training courses and seminars for Assessee etc.” The ITAT appears not to have considered the legal position as explained in *Commissioner of Income Tax v. United Hotels Limited (2009) 177 Taxman 417 (Del)* and *CIT v. Ashok J. Patel (supra)* as regards burden of discharging the initial onus.

24. It is also not in dispute that the ITAT dealt only with one of the disallowances in the sum of Rs. 13,14,548 and not the other two disallowances in the sum of Rs. 19,06,000 and Rs. 8 lakhs. Since the ITAT has not dealt with these aspects, the Court is of the view that it is necessary to remand the matter to the ITAT.

25. Even as regards the disallowance in the sum of Rs. 13,14,548 which was considered by the ITAT, since the ITAT proceeded on surmises and conjectures and failed to deal with the contentions of the Assessee in that regard, it is only fair that the ITAT considers the entire appeal of the Assessee on merits afresh.

26. For all the aforementioned reasons, the Court sets aside the impugned order of the ITAT and remands the entire matter to it for reconsideration in regard to the three disallowances including the question whether the CBDT's Circular No. 05/2012 dated 1st August 2012 would apply to the AY in question. In other words, all contentions of the Assessee raised in the

appeal before the ITAT would be considered afresh. The contentions of the Revenue in relation thereto are also permitted to be urged before the ITAT. The ITAT, without reference to its earlier order, shall decide the entire appeal on merits afresh in accordance with law.

27. The question framed is answered in the negative i.e. in favour of the Assessee and against the Revenue. The Assessee's appeal before the ITAT will be listed before it on 9th October, 2017 for further steps in terms of this judgment.

28. The appeal is disposed of in the above terms.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

AUGUST 24, 2017

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