IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

INCOME TAX APPEAL NO. 41/2019

The Pr.Commissioner of Income Tax-3, Nagpur,
Aayakar Bhawan, Civil Lines, Nagpur. **APPELLANT**

-VERSUS-

M/s Goldline Pharmaceuticals Pvt. Ltd.
R/o Jain Mandir Road, Aath Rasta Square,
Laxminagar, Nagpur – 22. **RESPONDENT**

Shri S.N. Bhattad with Shri Abhishek Bhoot, counsel for the appellant.
Shri S.C. Thakar with Shri R.S. Thakar, counsel for the respondent.

CORAM : A. S. CHANDURKAR AND G.A. SANAP, JJ.

DATE ON WHICH ARGUMENTS WERE HEARD : 06TH DECEMBER, 2021.
DATE ON WHICH JUDGMENT IS PRONOUNCED : 14TH JANUARY, 2022.

JUDGMENT (PER : A.S. CHANDURKAR, J.)

This appeal filed under Section 260A of the Income Tax Act, 1961 (for short, 'the Act of 1961') has been admitted by following substantial questions of law:

> *(i) Whether the Tribunal was justified in deleting the dis-allowance made on account of payments by Pharmaceutical Companies in view of Circular No.5 of 2012 as well as regulations framed by the Medical Council of India?*
>
> *(ii) In the light of Judgment of Himachal Pradesh High Court in the case of Confederation of Indian Pharmaceutical Industry (SSI) Vs. The Central Board of Direct Taxes (CBDT) and orders dated 26.12.2012, whether the Tribunal was justified in allowing the appeal of the assessee*?

2. The facts giving rise to the aforesaid substantial questions of law are that the appellant is engaged in the business of manufacturing and trading of medicines. With regard to Assessment Year 2010-11 it was

noted by the Assessing Officer that the appellant had debited an amount of Rs.3,11,52,609/- towards tour and travel expenses. According to the appellant these expenses were incurred on medical practitioners to enable them to attend various conferences held in different parts of the world. The Assessing Officer disallowed proportionate expenditure to the tune of Rs.17,83,844/-. Being aggrieved by the aforesaid dis-allowance the appellant filed an appeal before the Commissioner of Income Tax (Appeals) who by his order dated 30.09.2014 dismissed the said appeal by upholding the additions made by the Assessing Officer. The appellant then filed an appeal before the Income Tax Appellate Tribunal, Nagpur and by the judgment dated 29.03.2019 the appeal was partly allowed by holding that the dis-allowance of expenditure as made on the basis of C.B.D.T. Circular No.5 of 2012 was without merit. The order passed by the Commissioner of Income Tax (Appeals) was modified and the dis-allowance was restricted to the additions made in the Assessment order. Being aggrieved the Revenue has preferred the present appeal.

3. Shri S.N. Bhattad, learned counsel for the Revenue submitted that in view of the provisions of Section 37(1) of the Act of 1961 alongwith C.B.D.T. Circular No.5 of 2012 the dis-allowance as made on account of expenditure incurred on tour and travel of medical practitioners was legally correct. The Tribunal erred by taking a view that pharmaceutical companies were beyond the scope of the regulations made by the Medical Council of India. Circular No.5 of 2012 being clarificatory in nature it

was applicable to the case in hand and even if such expenses were incurred prior to 01.08.2012 the Assessee was not entitled for the deduction as claimed. Since it was not permissible for a medical practitioner to accept any travel facility or hospitality from pharmaceutical companies, the appellant which was a pharmaceutical company could not seek deduction of business expenditure in that regard. The learned counsel referred to the judgment of the Himachal Pradesh High Court dated 26.12.2012 in **CWP No.10793 of 2012-J** [*Confederation of Indian Pharmaceutical Industry (SSI) Versus The Central Board of Direct Taxes (CBDT) & Another*] in that regard. He further placed reliance on the decisions in *Overseas Trading & Shipping Co.(P) Ltd. Versus Assistant Commissioner of Income Tax* [**(2013) 38 taxmann.com 86**] which judgment of the Gujarat High Court was affirmed by the Hon'ble Supreme Court in [**2014(51) taxmann.com 374**], *Commissioner of Income-tax Versus Bhor Industries (P) Ltd.* [**2006 (284) ITR 319**], *J.K. Panthaki & Co. Versus Income-tax Officer* [**2012 (344) ITR 329**], *Commissioner of Income Tax Versus Kap Scan and Diagnostic Centre P. Ltd.* [**2012 (344) ITR 476**] and *Assistant Commissioner of Income-tax, Circle 6(3), Mumbai Versus Liva Healthcare Ltd.* [**(2016) 73 taxmann.com 171 (Mumbai-Trib.)**]. It was thus submitted that the judgment of the Tribunal be set aside and the order passed by the Commissioner of Income Tax (Appeals) be restored.

4. Shri R.S. Thakar, learned counsel appearing for the respondent-Assessee supported the impugned judgment. According to him, the travel expenses incurred by the Assessee did not result in any monetary payment to medical practitioners and such amounts were directly paid to the other parties from whom services were availed. Referring to the Medical Council of India regulations dated 10.12.2009 as well as C.B.D.T. Circular No.5 of 2012 it was submitted that for attracting the explanation to Section 37(1) of the Act of 1961, the expenditure incurred by an assessee for any purpose should be one which is prohibited by law. Since the Medical Council of India had no jurisdiction to issue any directions to pharmaceutical companies like the assessee there was no question of such companies being prohibited by law in incurring expenditure towards tour and travel of medical practitioners. The said regulations were binding only on medical practitioners and not on persons who were not governed by the Indian Medical Council Act, 1956 (for short, the Act of 1956'). Without prejudice to aforesaid it was submitted that Circular No.5 of 2012 having been issued on 01.08.2012 it would apply prospectively and would have no retrospective effect. Since the expenditure in question pertained to Assessment Year 2010-11 it was not open for the Revenue to rely upon that Circular. It was further submitted that various Tribunals in the State had taken a consistent view that Circular No.5 of 2012 would not be applicable to pharmaceutical companies and the Revenue had accepted those decisions as a result of which such view was binding on the Tribunal. The Tribunal therefore followed the same and there was no

reason to interfere with the impugned order. To substantiate his contentions the learned counsel placed reliance on the decisions of High Court of Delhi in **W.P. (C) 1334/2013** [*Max Hospital, Pitampura Versus Medical Council of India*]. He further placed reliance on the decisions in *Deputy Commissioner of Income Tax Versus PHL Pharma (P) Ltd.* [**(2017) 146 D.T.R. 0149**], *S.R.F. Finance Ltd. Versus Central Board of Direct Taxes* [**(1995) 211 ITR 0861**], *Radhasoami Satsang Versus Commissioner of Income Tax* [**(1992) 193 ITR 321**], *Shree Ganesh Steel Rolling Mills & Another Versus Union of India & Others* [**AIR 1989 Cal 230**] and *Emcure Pharmaceuticals Ltd. Versus Deputy Commissioner of Income Tax* [**(2018) 62 ITR 0744**], **ITA No.6222/Mum/2018** dated 18.09.2019 [*DCIT Circle-1, Thane Versus M/s Bayer Pharmaceuticals Pvt. Ltd.*] and **ITA No.5807/Mumbai/2017** dated 28.06.2019 [*Aristo Pharmaceuticals P. Ltd. Versus ACIT, Range-2(1)(1), Mumbai*]. It was thus submitted that the substantial questions of law ought to be answered in favour of the assessee.

5. We have heard the learned counsel for the parties at length and we have given due consideration to the respective submissions. The factual aspects not being in dispute, the question of applicability of Circular No.5 of 2012 as well as regulations framed by the Medical Council of India being the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002 as amended on 10.12.2009 is required to be considered. As per these regulations the Medical Council of India

imposed a prohibition on medical practitioners and their professional associations from taking any gift, travel facility, hospitality, cash or monetary grant from pharmaceutical and allied health sector industries. As per Circular No.5 of 2012 dated 01.08.2012 claim of any expense incurred in providing the aforesaid or similar freebees in violation of the provisions of the said regulations were held inadmissible under Section 37(1) of the Act of 1961 being an expense prohibited in law. It was further stated that such dis-allowance would be made in the hands of such pharmaceutical or allied health sector industries or other assessee which have provided such freebees and claim the same as a deductible expense in its account against income.

6. Before considering the contention as raised on the applicability of the Medical Council of India Regulations dated 10.12.2009 and the C.B.D.T. Circular No.5 of 2012 to pharmaceutical companies like the assessee, it would be necessary to consider the aspect of retrospective application of the said Circular for the period prior to 01.08.2012. In the present case, the Assessment Year is 2010-11. If it is found that the Circular cannot be given retrospective effect it would not be necessary to then go into the question of its applicability to pharmaceutical companies from 01.08.2012 onwards.

It is seen that the Tribunal through its various benches has consistently held that C.B.D.T. Circular No.5 of 2012 would not have any retrospective effect but would operate prospectively from 01.08.2012.

These decisions are in *M/s Bayer Pharmaceutical Ltd.* (Mumbai Bench), *UCB India Private Ltd.* (Mumbai Bench), *Aristo Pharmaceutical P. Ltd.* (Mumbai Bench) and *M/s Solvay Pharma India Ltd.* (Mumbai Bench). The decision in *Liva Healthcare Ltd.* (Mumbai Bench) that was relied upon by the learned counsel for the Revenue has been distinguished by the Tribunal itself in *Bayer Pharmaceuticals Pvt. Ltd.* and *Aristo Pharmaceuticals P. Ltd.* by observing the peculiar facts therein. The contention of the assessee that all these decisions of the Tribunal were not assailed before the High Court has not been countered by the Revenue.

While holding that C.B.D.T. Circular No.5 of 2012 which creates a burden or liability or imposes a new kind of imparity has thus to be applied prospectively, reliance has been placed by the Tribunal on the decision of the Hon'ble Supreme Court in *Director of Income Tax Versus SRMB Dairy Farming Pvt. Ltd.* [**(2018) 400 ITR 9 (SC)**]. It has been held therein that while beneficial circulars have to be applied retrospectively, oppressive circulars would have prospective application. In view of this it is clear that C.B.D.T. Circular No.5 of 2012 imposes a new kind of imparity and thus the view taken in the aforesaid decisions by the Tribunal is in consonance with the law laid down by the Hon'ble Supreme Court. It is thus clear that the said Circular could not have been applied retrospectively and especially to Assessment Year 2010-11 in the present case. On this count it is not necessary to interfere with the impugned order passed by the Tribunal in this appeal. Substantial question of law no.(i) is answered accordingly by holding that the

Tribunal was justified in deleting the dis-allowance as made by the Commissioner of Income Tax (Appeals).

7. In view of the answer to substantial question of law no.(i) the impugned order of the Tribunal does not deserve to be interfered with. Hence, we do not find it necessary to answer substantial question of law no.(ii) which can be considered in an appropriate case. The contentions of both parties in that regard are kept open.

8. In view of aforesaid, Income Tax Appeal No.41 of 2019 stands dismissed with no order as to costs.

(**G.A. SANAP, J.**) (**A.S. CHANDURKAR, J.**)

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