IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.685 OF 2016

ABBOTT INDIA LIMITED,
(As successor of Solvay Pharma
India Ltd.)
Unit 3-4, Corporate Park, Sion-Trombay Road,
Bombay-400 071. ... Petitioner

Versus

1. The Assistant Commissioner of Income-tax
Circle 2(1)(1), Room No.561, 5th Floor,
Aayakar Bhavan, Maharshi Karve Road,
Mumbai-400 020

2. The Commissioner of Income tax-2,
Aayakar Bhavan, Maharshi Karve Road,
Mumbai-400 020.

3. Union of India
Through the Secretary,
Department of Revenue, Ministry of
Finance, Government of India,
North Block,
New Delhi-110 001 ... Respondents

* * *

Mr. Madhur Agarwal i/b Atul K. Jasani for the Petitioner.
Mr. Suresh Kumar for the Respondents.

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CORAM : DHIRAJ SINGH THAKUR &
KAMAL KHATA, JJ.

RESERVED ON : 4 JANUARY 2023

PRONOUNCED ON : 10 FEBRUARY 2023

: J U D G M E N T :

Per DHIRAJ SINGH THAKUR, J.

. In the present Petition, the Petitioner challenges the notice dated 27 March 2015 issued by Respondent No.1 issued under Section 148 of the Income Tax Act, 1961 ("the Act") for the purpose of reopening of the assessment for the assessment year 2008-09. The Petitioner also challenges the Order dated 16 December 2015 passed by Respondent No.1 rejecting objections filed by the Petitioner challenging the validity of the re-assessment proceedings.

2 Briefly stated the material facts are as under :

3 The Petitioner claims that it is engaged in the business of pharmaceutical formulations. M/s Solvay Pharma India Ltd., which was engaged in a similar business, was merged with the Petitioner company with effect from 1 January 2011. The present Petition is with regard to the assessment pertaining to assessment year 2008-09 and accordingly it is stated that reference to the Petitioner in the present Petition should be deemed to mean and include reference to the erstwhile Solvay Pharma India Limited.

4 A return of income was filed for the assessment year 2008-09 on 30 September 2008, in which the Petitioner *inter alia* claimed Rs.48,34,49,690/- as expenditure on gifts as a part of sales promotion expenses. Besides this, the Petitioner claimed an amount of Rs.2,24,14,000/- as expenditure on account of distribution of samples of medicines manufactured by the Petitioner and debited under the category 'physician sample'. Both these expenses were claimed as deduction in computing the total income of the Petitioner.

5 The Petitioner's case was selected for scrutiny assessment. A detailed questionnaire dated 9 August 2011 was served upon the Petitioner requiring the Petitioner to furnish the details as regards :

(i) Publicity and propaganda
(ii) Legal and professional
(iii) Conference Expenses

6 A detailed response dated 23 November 2011 was filed to the aforesaid show cause notice under Section 143(2) of the Act giving details as were sought. The same are also on record in the present Petition.

7 Finally an Order of assessment came to be passed under Section 144C read with Section 143(3) of the Act.

8 With regard to issue of dis-allowance on account of gift expenses, the Order of assessment reads as under :

> "The assessee had claimed gifts amounting to Rs.2,31,82,889/- during the year as apart of sale promotion expenses. The assessee was asked to furnish the details of these gifts made along with the name of the recipient of the gift, the reason for giving these gifts and resultant benefit accrued to the company. The assessee was not able to furnish these details, in as much as the names of the recipients could not be furnished. Accordingly, the genuineness of these expenses is in doubt and the assessee has not been able to establish that these have been incurred wholly and exclusively for the purpose of business. Accordingly, on an estimate basis, 10% of these expenses are disallowed and an addition of Rs.23,18,288/- is made to the total income of the assessee. Penalty proceedings u/s 271(1)(c) have been initiated."

9 Notice dated 27 March 2015 impugned in the present Petition, was issued under Section 148 of the Act, which sought to re-assess the income of the Petitioner for the assessment year 2008-09 on the ground that the assessessing officer had reason to believe that the income of the Petitioner for the relevant assessment year had escaped assessment within the meaning of Section 147 of the Act. Reasons were furnished to the Petitioner vide communication dated 9 September 2015, which read as under :

"Board vide Circular No.5/2012 (F.No.225/142/2012-ITA.II), dated 01.08.2012 stated that Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (the regulations) on 10.12.2009 imposed 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).

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 sub-section denies claim of any such expenses, 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 is not be admissible under Section 37(1) of the Income Tax Act being an expense prohibited by the law.

Verification of records revealed that the assessee had debited expenses on physician sample of Rs.224.14 lakhs. It was further noticed that the assessee had incurred expenses on gift item given to healthcare professional of Rs.231.82 lakhs. The expenses as gifts, travel facility, hospitality, cash or money grant given to medical practitioner and their professional associations are prohibited as per above circular. The Board Circular is retrospective in nature and applicable to A.Y. 2008-09 also.

Therefore, I have reason to believe that income chargeable to tax has escaped assessment for A.Y. 2008-09 by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. Accordingly, the assessment for A.Y. 2008-9 is reopened u/s 147 by issue of notice u/s 148 of the I.T. Act 1961. The notice is being issued of the seeking approval for re-opening

from the Pr. CIT-2, Mumbai."

10 From a reading of the reasons, it thus, becomes clear that the basis for re-opening of the assessment was based upon the following :-

(i) that the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 on 10 December 2009 imposed a prohibition on the medical practitioner and their professional associations form taking any Gifts, Travel facility, Hospitality, Cash or monetary grant from the pharmaceutical and allied health sector industries.

(iii) that the Board had issued a Circular No.5 of 2012 in that regard.

(iii) that since there was a prohibition as referred to above, by explanation to Section 37(1), which envisages denial of expenses which are incurred for the purpose, either offence or prohibited by law.

(iv) that the claim of the expenses being expenses prohibited by law were inadmissible under Section 37(1).

(v) that, therefore, the expenses incurred on gift items, travel facility, hospitality, cash or monetary grant given to the heath care professionals amounting to Rs.231.82 lakhs being prohibited, could not have been allowed as revenue expenditures.

(vi) that the assessing officer had reason to believe that the income chargeable to tax escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment.

11 Objections were filed to the reopening notice issued under Section 148 of the Act, which came to be rejected by virtue of the

Order dated 16 December 2015. In its Order dated 16 December 2015, while rejecting the objections to re-opening, the assessing officer *inter alia* held as under :

> "2. .....
>
> Para 2.1.2 – The assessee has claimed expenditure under the head 'physicians Sample' and 'Gifts to Healthcare Professionals' at Rs.224.14 lacs and Rs.231.82 lakhs respectively. These expenditures are considered as non-admissible being prohibited by law. The assessee to that extent has failed to disclose full and true materials facts. The assessee was aware of the decision taken on 18.12.2009 by the Medical Council and thus should not have claimed such deduction. Even otherwise the claim being prohibited by law can be withdraw by re-opening of the case."

12 The basis of the challenge to the re-opening of the assessment is primarily on the ground, firstly, that there was no failure on the part of the Petitioner to disclose fully and truly the material facts which was a condition precedent as per Section 147. Secondly, that the action for re-assessment was nothing but a change of opinion and, lastly, that there was no tangible material based upon which the assessment could be re-opened.

13 Mr. Suresh Kumar, learned Counsel for the Revenue, on the other hand, contended that the case of the Petitioner was a fit case for re-opening inasmuch as a claim which was otherwise prohibited

by the terms of regulations framed by Medical Council of India could not have been allowed as deduction in terms of the specific prohibition contained under Section 37(1) of the Act. It is stated stated that the Board Circular dated 1 August 2012 had reiterated the regulations of Medical Council of India and that it were retrospective in nature and applicable for the assessment year 2008-09 also.

14 We have heard learned Counsel for the parties.

15 Admittedly, the impugned notice issued under Section 148 of the Act in the present case had been issued on 27 March 2015 in regard to assessment year 2008-09. It was, thus, issued beyond the period of four years from the end of the relevant assessment year. According to the proviso to Section 147, in a case where an assessment under sub-section (3) of Section 143 or this Section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to the tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under Section 139 or in response to a notice issued under sub-section (1)

of Section 142 or Section 148 or to disclose *inter alia* fully and truly all material facts necessary for his assessment for that assessment year. It is also an admitted fact that in the present case the Order of assessment dated 16 December 2015 passed by the assessing officer was an Order under Section 143(3) of the Act.

16 On the basis of the reasons furnished to the Petitioner, which form basis for re-assessment, it is seen that while the assessing officer had alleged that that the assessee had failed to disclose fully and truly all material facts necessary for assessment, the reasons do not at all reflect as to what were those material facts, which had not been disclosed by the Petitioner, which if disclosed would have led the assessing officer to bring to tax such income in the scrutiny assessment. Infact, in the case of **Hindustan Lever Ltd. Vs. R.B. Wadkar, Assistant Commissioner of Income-Tax and Others**[1], this Court held :

> " .....The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. The reasons are the manifestation of the mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide the link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing

1 2004 ITR 332 Vol.268

> Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish the vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment."

17 On a perusal of the reasons furnished to the Petitioner and referred to in earlier paragraphs hereinabove, it is clear that the assessing officer had not at all discussed as to what was the material which was not disclosed by the assessee fully and truly, which was otherwise necessary for assessment. On the contrary, it can be seen from the record that during the scrutiny assessment, the assessing officer had called upon the Petitioner to give requisite details as regards the claim on account of expenses incurred on publicity and propaganda, which were furnished by virtue of communication dated 23 November 2011. Although in the Order of assessment, the assessing officer had entertained a doubt regarding genuineness of the expenses, which as per him had not at all been established to have been incurred wholly and exclusively for the purpose of business, yet he had proceeded to disallow on an estimate basis expenses to the tune of 10 per cent and made an addition of Rs.2,31,82,889/- to the total income of the assessee.

Therefore, it cannot be said that the Petitioner had not disclosed the relevant material facts during the assessment proceedings. The Petitioner was only obliged to disclose the material primary facts and was certainly not obliged to refer to the statutory provisions or the regulations of 2002 at the time of filing the return or during the course of the assessment proceedings.

18 The argument of learned Counsel for the Revenue justifying an action of the assessing officer for re-opening the assessment is untenable for the reason that the assessment u/s 143(3) of the Act could only be re-opened in terms of Section 147 of the Act and not otherwise. The argument that the claim was allowed contrary to the Board Circular issued in the year 2012 would not by itself authorize the assessing officer unless the jurisdictional conditions prescribed under the proviso to Section 147 had been satisfied, which in the present case, does not appear to have been satisfied at all. The impugned notice is liable to be quashed and set aside on this ground alone.

19 The other contention of Mr. Madhur Agarwal, learned Counsel for the Petitioner was that the Circular dated 1 August 2012 issued by the CBDT and the amendment incorporated in regulation 6.4 of

the Regulations of 2002 in 2009 were not at all applicable to the assessment year 2008-09 and, therefore, it was urged that the assessing officer could not have any basis for his 'reason to believe' that the claim was prohibited in terms of Section 37 r/w the CBDT circular dated Circular No.5/2012 (F.No.225/142/2012-ITA.II), dated 01.08.2012 and the regulations of 2002.

20 In this context it becomes necessary to briefly refer to the regulations of 2002 as also the CBDT circular dated 1 August 2012.

21 The Medical Council of India in exercise of powers conferred under the MCI Act 1956 framed the regulations called the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002. These regulations pertain to the professional conduct, etiquette and ethics for medical practitioners.

22 Chapter 6 of the regulations in particular deals with certain acts which would be construed as unethical like advertising his professional skill or practice soliciting patients directly or indirectly etc.

Regulation 6.4 of the said regulations envisaged as under :

6.4 Rebates and Commission :

6.4.1 A physician shall not give, solicit, or receive nor shall he offer to give solicit or receive, any gift, gratuity, commission or bonus in consideration of or return for the referring, recommending or procuring of any patient for medical, surgical or other treatment. A physician shall not directly or indirectly, participate in or be a party to act of division, transference, assignment, subordination, rebating, splitting or refunding of any fee for medical, surgical or other treatment.

6.4.2 Provisions of para 6.4.1 shall apply with equal force to the referring, recommending or procuring by a physician or any person, specimen or material for diagnostic purposes or other study/work. Nothing in this section, however, shall prohibit payment or salaries by a qualified physician to other duly qualified person rendering medical care under his supervision.

23 However, vide notification dated 10 December 2009 the aforementioned regulations were amended to include Clause 6.8. This was incorporated for the reason that the existing regulations prescribed conditions and regulations for medical practitioners only and did not cover their relationship with the pharmaceutical and allied health industry. The regulation prescribed as under :

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 and 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) .....

(f) .....

(g) .....

(h) .....

24 It was in the aforementioned backdrop that the Board issued the Circular No.5/2012 dated 1 August 2012 for sensitizing its officers that receipt of gifts, cash, travel facilities and hospitality from the pharmaceutical or allied health sector being prohibited under the regulations of 2002 would be inadmissible under Section 37 being prohibited by law. The Circular reads as under :

> **"Inadmissibility of expenses incurred in providing freebees to Medical Practitioner by Pharmaceutical and allied Heath Sector Industry.**
>
> 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 and 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 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....

4. It is....."

25 It is, thus, clear that the Circular No.5/2012 referred to the position of the regulations of 2002 after its amendment in the year 2009 and, therefore, neither the circular nor regulation 6.8 incorporated w.e.f. 10 December 2009 would be applicable to the instant case pertaining to assessment year 2008-09.

26 It is settled that law to be applied is the one that is in force in the relevant assessment year, unless otherwise provided expressly or by necessary implication - **CIT Vs. Insthmian Steamship Lines**[2] and **Reliance Jute & Industries Ltd. Vs. Commissioner of Income-tax**[3].

2 [1951] 20 ITR 572 (SC)

3 [1979] 2 Taxman 417 (SC)

27 Learned Counsel for the Respondents, Mr. Suresh Kumar, placed reliance upon the case of **Apex Laboratories (P) Ltd. Vs. Deputy Commissioner of Income-tax LTU[4].** This was a case where the assessee being a pharmaceutical company had incurred expenditure by giving freebies to the medical practitioners and accordingly, claimed exemption for the said expenditure under Section 37(1) of the Act for the assessment year 2010-11. The assessing officer partially allowed the exemption claimed by the assessee on the expenses so incurred by placing reliance upon Circular No.5/12. The CIT (Appeals), Tribunal, as also the jurisdictional High Court upheld the said Order and subsequently, also by the Apex Court.

28 However, in the aforementioned case, two features needs to be highlighted, firstly, that the claim before the Apex Court pertained to the assessment yea 2010-11, to which amendment incorporated in the Regulations 2009 was squarely applicable. The second thing which needs to be highlighted is that in the aforementioned case, the revenue had permitted partial exemption for expenses incurred till 14 December 2009 and held the assessee eligible for the benefit under Section 37(1) but disallowed the expenses incurred thereafter in view of the amendment of 2009. The Apex Court in

4 [2022] 135 taxmann.com 286 (SC)

fact in the judgment **Apex Laboratories (P.) Ltd**. (supra), has also clearly held that "the CBDT Circular being clarificatory in nature and was in effect from the date of implementation of Regulation 6.8 of 2002 Regulations, i.e. from 14 December 2009."

29 In our opinion, since the CBDT Circular No.5/12 as also Regulation 6.8 of 2002, were not applicable to the case of the Petitioner for the relevant assessment year 2008-09, there would be no tangible material or basis for the assessing officer to have 'reason to believe' that income for the said assessment year 2008-09 had escaped assessment.

30 Be that as it may, we allow this Petition and set aside the impugned notice 27 March 2015 and impugned Order dated 16 December 2015 are quashed with no Order as to costs.

(KAMAL KHATA, J.) **(DHIRAJ SINGH THAKUR, J.)**