**IN THE INCOME TAX APPELLATE TRIBUNAL**
**"D" Bench, Mumbai**

**Before Shri G. Manjunatha, Accountant Member**
**and Shri Ravish Sood, Judicial Member**

**ITA No.2344/Mum/2018**
**(Assessment Year: 2012-13)**

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| M/s Medley Pharmaceuticals Ltd.<br>D-2, Medley Houses, 16th Road,<br>MIDC Area, Andheri (East),<br>Mumbai – 400 093<br><br>PAN – AAACM2764J | Vs. | Dy. Commissioner of Income<br>Tax-10(2)(2),<br>Mumbai |
| **(Appellant)** | | **(Respondent)** |

**ITA No.1212/Mum/2019**
**(Assessment Year: 2012-13)**

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| Medley Pharmaceuticals Ltd.<br>D-2, Medley House, 16th Road,<br>MIDC Area, Andheri (East),<br>Mumbai<br><br>PAN – AAACM2764J | Vs. | Dy. Commissioner of Income Tax,<br>Central Circle – 44,<br>Aayakar Bhavan, M.K. Road,<br>Mumbai |
| **(Appellant)** | | **(Respondent)** |

Appellant by: Shri Prakash Jothwani, A.R
Respondent by: Shri. H.N. Singh, D.R

Date of Hearing: 24.06.2020
Date of Pronouncement: 22.07.2020

## O R D E R

**PER RAVISH SOOD, JM**

The present appeals filed by the assessee are directed against the respective orders passed by the CIT(A)-51, Mumbai, dated 31.12.2018 and 20.02.2018, which in turn arises from the respective orders passed by the A.O under Sec.143(3) of the Income Tax Act, 1961 (for short 'Act'), dated 27.03.2015 AND under Sec.143(3) r.w.s 147,

dated 20.12.2017. As certain issues involved in the present appeals are inextricably interlinked or in fact interwoven, the same are being taken up and disposed off together by way of a consolidated order. We shall first advert to the appeal filed by the assessee against the order of the CIT(A), which in turn arises from the assessment framed by the A.O under Sec.143(3) r.w.s 147, dated 20.12.2017. The assessee has assailed the impugned order on the following grounds of appeal before us:

**"GROUND NO. 1 RE-OPENING ASSESSMENT U/S. 147**

**i. 'Subject matter of original assessment proceedings'**

a. The learned CIT(A) erred in not treating the re-assessment proceedings as invalid, although during the original assessment proceedings, detailed documents were furnished to substantiate the 'Sales Promotion expenses', which only after examining all the facts and explanations and application of mind did the AO disallow Rs.5.37 crores as expenses related to Doctor's Gifts/Expenses.
b. The learned CIT(A) failed to take into consideration that the re-opening proceedings was nothing but a change of opinion.
c. The learned CIT(A) erred in holding that the information provided during the original assessment proceedings was not complete in terms of its nature, however the same was not substantiated with any evidence.
d. The learned CIT(A) failed to take into consideration that the AO himself in his reasons for re-opening has stated in Para 2 : *"On perusal of the details of sale promotion expenses of Rs. 15,91,18,528/- filed by Assessee . . . ",* which shows that the re-assessment proceedings are nothing but a change of opinion regarding the break-up of sales promotion expenses, which was already furnished to AO during original assessment proceedings.
e. The learned CIT(A) failed to take into consideration that a change of opinion, cannot be regarded as information within the meaning of Sec.147 and does not confer jurisdiction upon the AO for valid initiation of re-assessment proceedings.
f. The learned CIT(A) erred in confirming the reassessment on the basis of similar disallowance being made in AY 2013-14, although there was no mention of the same in the Reasons for Re-opening provided by the AO.

**ii. No failure to disclose material facts'**

The learned CIT(A) erred in re-opening assessment, although he has not made any finding that there was a failure to disclose primary facts at the time of original assessment proceedings.

**iii. No 'New Tangible material' - Change of opinion**

a. The learned CIT(A) erred in re-opening assessment for this year, without substantiating valid 'reasons to believe" that income chargeable to tax had escaped assessment.
b. The learned CIT(A) failed to show any 'new tangible material' to justify the conclusion that income had escaped assessment.
c. The learned CIT(A) failed to take into consideration that no new material has come on record, no new information has been received and there is no change in fact or legal position; it is merely change of opinion by fresh application of mind on the same set of facts.

**Without prejudice**

**GROUND NO. 2: SALES PROMOTION EXPENSES OF RS. 6,25,53,800/-.**

i. The learned CIT(A) erred in making an addition of Rs. 6,25,53,800/-, on the ground that that they related to Doctor's gifts/expenses, although the expenses were in the nature of 'Sales Promotion', wholly and exclusively incurred for the purpose of business, the break-up of which is as under:-

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| (i) Product Reminder | : Rs. 2,44,58,807 |
| (ii) Conference expense | : Rs. 1,52,56,668 |
| (iii) Traveling (conference) | : Rs. 1,18,47,054 |
| (iv) Doctor's expense | : Rs. 1,09,91,271 |
| Total | : Rs. 6,25,53,800 |

ii. The learned CIT(A) erred on relying on the CBDT Circular No. 5 of 2012, although the same was with effect from 01-08-2012 and therefore prospective in nature and does not apply to AY. 2012-13.

iii. The learned CIT(A) erred in relying on the guidelines laid down in the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations.

The Appellant craves leave to add, alter or amend the Grounds of Appeal at or before the hearing of the appeal."

2. Briefly stated, the assessee company which is engaged in the business of manufacturing and trading of pharmaceutical products had filed its return of income for A.Y. 2012-13 on 27.09.2012, declaring its total income at Rs.29,29,14,990/-. Original assessment in the case of the assessee was framed by the A.O, vide his order passed under Sec.143(3), dated 27.03.2015, and the income of the assessee was assessed at Rs.49,23,59,750/-. Subsequently, the case of the assessee was reopened under Sec.147 of the Act. In compliance to the notice issued under Sec.148 of the Act, the assessee filed its return of income on 20.04.2017, declaring a total income of Rs. 29,29,14,990/-.

3. In the course of the assessment proceedings the assessee was supplied the copy of the 'reasons to believe' on the basis of which its case was reopened under Sec.147 of the Act. Objections filed by the assessee as regards the validity of the jurisdiction assumed by the A.O for reopening its case were disposed off by a speaking order dated 10.10.2017.

4. As is discernible from the orders of the lower authorities, the concluded assessment in the case of the assessee was reopened, for the reason, that a perusal of the sales promotion expenses booked by the assessee company revealed that it had inter alia claimed deduction for various expenses which were clearly prohibited as per the MCI guidelines, and thus, disallowable as per the 'Explanation' to Sec.37(1) of the Act. On a perusal of the sales promotion expenses, it was observed by the A.O that the same inter alia comprised of viz. (i) conference expenses for doctors:Rs.1,52,56,668/-;(ii) travelling expenses for doctors: Rs.1,18,47,054/-;(iii) other expenses related to doctors: Rs.1,09,91,271/-; and (iv) expenses incurred on product reminders given to doctors : Rs.2,44,58,807/-. Observing, that the aforesaid expenses aggregating to Rs. 6,25,53,800/- incurred by the assessee were not allowable as a deduction as per 'Explanation' to Sec.37(1) of the Act, the A.O disallowed the same.

5. Aggrieved, the assessee assailed the reassessment order before the CIT(A). On a perusal of the order of the CIT(A), we find, that the assessee had assailed the reassessment order primarily on two grounds viz. (i) that, the A.O had reopened the concluded assessment of the assessee company merely on the basis of a change of opinion; and (ii) that, the A.O had erred in disallowing the sales promotion expenses aggregating to Rs.6,25,53,800/- by wrongly bringing the said expenses within the realm of the 'Explanation' to Sec.37(1) of the Act. However, the CIT(A) after necessary deliberations was not persuaded to subscribe to the aforesaid two fold claim raised by the assessee. As regards the claim of the assessee that the A.O had wrongly assumed jurisdiction and had reopened its concluded assessment on the basis of a 'change of opinion', the CIT(A) was not inclined to accept the same. It was observed by the CIT(A), that as the order of the A.O rejecting the assessee's objections to the validity of the reassessment proceedings was not assailed by it any further before the Hon'ble High Court, it could thus

safely be concluded that the assessee after accepting the said order had participated in the re-assessment proceedings. Apart from that, it was observed by the CIT(A), that the reason for reopening the case of the assessee was backed by the fact that a similar disallowance was made in its case for the immediately succeeding year i.e A.Y. 2013-14. It was observed by the CIT(A), that an information culled out from the succeeding year could validly form a basis for reopening the case of an assessee for the preceding year. In support of his aforesaid observations the CIT(A) had relied on the judgments of the Hon'ble High Court of Bombay in the case of (i) Debhashu Services Pvt. Ltd Vs. DCIT (2014) 270 CTR 0036 (Bom); and (ii) Export Credit Guarantee Corporation of India Ltd Vs. Addl. CIT (2013) 350 ITR 651 (Bom). As regards the contentions that were advanced by the assessee to impress upon the CIT(A) that the sales promotion expenses aggregating to Rs.6,25,53,800/- were rightly claimed as an allowable deduction under Sec.37(1) of the Act, the same did not find favour with him. Observing, that the expenses incurred by the assessee towards providing gifts, travelling facility, hospitality, cash or monetary grants to the medical practitioners and their professional associations was clearly prohibited by the guidelines of the Medical Council of India (for short "MCI"), and also the CBDT Circular 5/2012, dated 01.08.2012, the CIT(A) did not find any infirmity in the disallowance of the said expenses by the A.O. On the basis of his aforesaid deliberations the CIT(A) upheld the assessment framed by the A.O and dismissed the appeal.

6. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The ld. Authorized Representative (for short 'A.R') for the assessee, at the very outset of the hearing of the appeal took us through the facts of the case. It was vehemently submitted by the ld. A.R, that the A.O merely on the basis of a change of opinion had reopened the concluded assessment of the assessee company, which was earlier framed by his predecessor under Sec.143(3),

dated 27.03.2015. It was submitted by the ld. A.R that the reopening in the case of the present assessee was not based on any fresh material, but in fact, was on the basis of a new view arrived at in respect of the same material available on record. In support of his aforesaid contention the ld. A.R took us through the copy of the 'reasons to believe' on the basis of which the concluded assessment of the assessee company was reopened. On the basis of the aforesaid facts, the ld. A.R submitted that as the issue as regards the allowability of the sales promotion expenses had been deliberated at length by the A.O in the course of the original assessment proceedings, and a conscious view as regards disallowance of part of such expenses was arrived at by him, reassessment proceedings could not have thereafter been initiated by the successor A.O merely for the purpose of substituting his view as against that arrived at by his predecessor. In order to drive home his contention that the issue under consideration was duly considered, and therein deliberated upon in the course of the original assessment proceedings, the ld. A.R took us through the submissions which were filed by the assessee with the A.O in the course of the original assessment proceedings, Page 52 of the Assesses Paper Book (for short 'APB'). Further, the ld. A.R took us through the original assessment order passed by the A.O under Sec. 143(3), dated 27.03.2015. The ld. A.R took us through Page 5 – Para 4 of the assessment order, which revealed that the A.O in the course of the assessment proceedings had called for the requisite details in respect of the Sales Promotion Expenses that were booked by the assessee during the year under consideration. It was pointed out by the ld. A.R, that the A.O while framing the assessment, had after considering the amendment carried out by MCI on 14.12.2009 in its Indian Medical Council (Professional Conduct, Etiquettes and Ethics) Regulations, 2002, which regulated the code of conduct of doctors and their professional associations as regards their relationship with pharmaceutical industries and allied health sector industry, and also the CBDT Circular No. 5, dated 01.08.2012, which debarred the pharmaceutical companies to claim

deduction u/s 37(1) for expenses incurred on providing freebies to doctors, had disallowed the assessee's claim for expenses insofar the same related to the gifts given to the doctors to the tune of Rs.5,37,46,137/-. In sum and substance, it was the claim of the ld. A.R, that the A.O in the course of the regular assessment had arrived at a conscious view that in lieu of CBDT Circular No. 5, dated 01.08.2012 r.w the IMC (Professional Conduct, Etiquettes & Ethics) Regulation, 2002, out of the Sales Promotion Expenses of Rs.15,91,18,528/-, only the expenses incurred by the assessee for giving gifts to doctors of Rs.5,37,46,137/- were liable to be disallowed. As such, it was the claim of the ld. A.R, that now when the A.O while framing the original assessment, vide his order passed under Sec. 143(3), dated 27.03.2015, had formed an opinion that only the expenses of Rs. 5,37,46,137/- that were incurred by the assessee for giving gifts to doctors were to be disallowed pursuant to the CBDT Circular No. 5/2012, dated 01.08.2012 r.w. the IMC (Professional Conduct, Etiquettes & Ethics), Regulation, 2002, thereafter, merely on the basis of a 'change of opinion', the successor A.O could not have reopened the concluded assessment of the assessee company with a purpose to disallow the other expenses. Adverting to the 'reasons to believe' on the basis of which the concluded assessment of the assessee company was reopened by the A.O, it was the claim of the ld. A.R that the said reopening of the concluded assessment was sought not on the basis of any fresh tangible material, but in fact, on the basis of the same material that was available on record in the course of the original assessment proceedings.

7. Per contra, the ld. Departmental Representative (for short "D.R") relied on the orders of the lower authorities. It was submitted by the ld. D.R, that the A.O remaining well within the realm of his jurisdiction had initiated reassessment proceedings in the case of the assessee. It was averred by the ld. D.R that it was incorrect on the part of the counsel for the assessee to state that the reassessment proceedings were initiated on

the basis of a mere 'change of opinion'. The ld. D.R took us through the bifurcated details of the sales promotion expenses which were incurred by the assessee company during the year under consideration, Page 217 of APB. It was submitted by the ld. D.R, that the A.O while framing the regular assessment had erroneously restricted the disallowance only to the extent of Rs. 5,37,46,137/- i.e the expenses which were incurred by the assessee for giving gifts to the doctors. It was averred by the ld. D.R, that the A.O while framing the assessment had failed to apply his mind and had lost sight of the 'Explanation' to Sec.37(1) of the Act. In sum and substance, it was the claim of the ld. D.R that as the A.O while framing the assessment had ignored the relevant material, therefore, the case was reopened in order to bring to tax the income of the assessee which had escaped assessment. In support of his aforesaid contentions the ld. D.R relied on the judgment of the Hon'ble High Court of Bombay in the case of Export Credit Guarantee Corporation of India Ltd. Vs. Addl. CIT (2013) 350 ITR 651 (Bom) and the judgment of the Hon'ble Supreme Court in the case of ACIT Vs. Rajesh Jhaveri Stock Brokers (P) Ltd. (2007) 291 ITR 500 (SC). On merits, reliance was placed by the ld. D.R on the order of the ITAT, Chennai bench 'C' in the case of TTK Healthcare Limited Vs. DCIT, Corporate Circle-3(1), Chennai (2017) 78 Taxman.com 86 (Chennai) and ITAT, Mumbai Bench 'A' in the case of ACIT, Circle 6(3), Mumbai Vs. Liva Healthcare Ltd. (2016) 161 ITD 63 (Mum). In the backdrop of his aforesaid submissions, it was the claim of the ld. D.R that as the A.O had validly assumed jurisdiction u/s 147 of the Act, therefore, the claim of the counsel for the assessee did not merit acceptance and was liable to be rejected.

8. Rebutting the reliance placed by the revenue on the judgment of the Hon'ble High Court of Bombay in the case of Export Credit Guarantee Corporation of India Ltd. Vs. Addl. CIT (2013) 350 ITR 651 (Bom), it was submitted by the ld. A.R that the same was distinguishable on facts. It was averred by the ld. A.R, that in the said case as there was no

application of mind by the A.O while framing the regular assessment, the Hon'ble High Court taking cognizance of the said factual position had approved the reopening of the assessment. On merits, it was submitted by the ld. A.R that the issue was squarely covered by the order of the Tribunal in the case of Aristo Pharmaceuticals Pvt. Ltd. Vs. ACIT-Range-2(1)(1), Mumbai, (ITA No. 5807/Mum/2017, dated 28.06.2019).

9. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements relied upon by them. As the assessee has assailed the validity of the jurisdiction assumed by the A.O for reopening its case, we shall first deal with the said claim of the assessee. Before us, it is the claim of the Ld. A.R that the A.O had traversed beyond the scope of his jurisdiction, and had merely on the basis of a 'change of opinion' reopened the concluded assessment that was framed by his predecessor under Sec. 143(3), dated 27.03.2015. As observed by us hereinabove, it is the claim of the Ld. A.R, that as could be gathered on a perusal of the 'reasons to believe', the case of the assessee had been reopened merely on the basis of a 'change of opinion', on the same set of facts which were available with the A.O while framing the regular assessment. Rather, it was the contention of the Ld. A.R, that the reassessment proceedings were not based on any fresh material, but in fact, was resorted to on the basis of a new view in respect of the same material available on record. On the contrary, as observed by us hereinabove, the ld. D.R had rebutted the aforesaid contention of the assessee.

10. We have deliberated at length on the issue under consideration in the backdrop of the contentions advanced by the authorized representatives for both the parties, and perused the orders of the lower authorities, as well as the judicial pronouncements relied upon by them. Before we proceed with the adjudication of the aforesaid issue, it would

be relevant to cull out the 'reasons to believe' on the basis of which the case of the assessee was reopened by the A.O, which reads as under :

" The assessee company electronically filed its return of income for A.Y 2012-13 on 27.09.2012 declaring total income of Rs. 29,29,14,990/-. The assessment u/s 143(3) was made on 27.03.2015 at a total income of Rs. 49,23,59,750/-.

On a perusal of the details of sales promotion expenses of Rs. 15,91,18,528/- filed by the assessee, assessee incurred expenses of Rs. 2,80,57,032/- and Rs. 2,28,38,324/- on conference and travelling respectively. As per the further breakup of these expenses, out of the aforementioned expenses, Rs. 1,52,56,668/- and Rs. 1,18,47,054/- on conference and travelling respectively were not incurred for the assessee company but for others, which in its all likelihood were spent towards doctors only. It is further noticed that a sum of Rs. 1,09,91,271/- was incurred by the assessee on account of doctors expenses. The assessee also claimed expenses of Rs. 2,44,58,807/- towards product reminder. These expenses are nothing but amount spent towards various items of gifts (or other items) with the names of the product written over the same and given to doctors so that they got reminded about these products and prescribed the same to patients.

The Medical Council Of India, in exercise of the powers conferred by Section 33 of the Indian Medical Council Act, 1956, with the previous sanction of the Central Government amended the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, (hereinafter referred to as IMC Regulations), wherein clause 6.8 was inserted w.e.f 10.12.2009. As per the amended IMC Regulations, a doctor shall not receive any freebies in the form of gifts, travel facility, hospitality, and cash or monetary grants from any pharmaceutical or allied healthcare industry or their sales people/representative under any pretext. So, the pharmaceutical companies, including the assessee company, are prohibited to make such payments mainly for the purpose of maintaining professional autonomy as contained in clause 6.8.1 of IMC Regulations.

Further, Circular No. 05/2012 dated 01.08.2012 issued by the Central Board of Direct Taxes, New Delhi vide F.No. 225/142/2012-ITA-II clarified that 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 Sec. 37(1) of te Income-tax Act being an expense prohibited by the law. This disallowance shall be made in the hands of such pharmaceutical or allied health section industries or other assessee which has provided aforesaid freebees and claimed it as a deductible expense init account against income.

Explanation to Sub-section (1) of Section 37 of the Act has been inserted by the Finance (No.2) Act, 1988 with full retrospective effect from 01.04.1962 and provides "For removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purposes, 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." So, if any expenditure incurred by an assessee for any purpose which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession.

The CBDT Circular No. 5/2012 issued on 01.08.2012 was challenged by Confederation of Indian Pharmaceutical Industry before Hon'ble High Court of Himachal Pradesh in the case of Confederation of Indian Pharmaceutical Industry Vs. CBDT & Another (CWP No. 10793 of 2013), wherein the High Court in its order dated 26-12-2012 upheld the validity & legality of the Circular stating that what is stated by Explanation to Section 37(1) is what is intended by the Circular and also that IMC Regulation is a very salutary regulation which is in the interest of the patients and the public.

In view of the above, conference & travelling expenses incurred by the assessee for others of Rs. 1,52,56,668/- and Rs. 1,18,47,054/- respectively, doctors expenses of Rs. 1,09,91,271/- and expenses of Rs. 2,44,58,807/- incurred towards product reminder need to be disallowed and therefore, I have a reason to believe that the amount of Rs. 6,25,53,800/- chargeable to tax has escaped assessment for A.Y 2012-13 within the meaning of clause (c) of Explanation 2 of section 1487 of the Income-tax Act, 1961.

In view of the above reasons, notice u/s 148 of the Income-tax Act, 1961 for the A.Y 2012-13 is issued. The notice u/s 148 is issued after obtaining prior approval of the Addl. Commissioner of Income-tax, Range-10(2), Mumbai as required under the provisions of section 151(2) of the Income-tax Act, 1961."

11. On a perusal of the records, we find that the assessee in the course of the original assessment proceedings, vide its letter dated 16.10.2014 filed with the A.O, had inter alia furnished with him the bifurcated details of sale promotion expenses, Page 216-217 of APB. As per the details filed by the assessee, the sale promotion expenses were divided into two sub-heads viz. (i). sales promotion expenses incurred for company : Rs. 6,72,77,399/-; and (ii). sales promotion expenses incurred for others: Rs. 9,18,41,129/-. In so far the sales promotion expenses incurred for others are concerned, we find that the same was comprised of viz. (i). conference expenses : Rs. 1,52,56,668/-; (ii). travelling expenses :Rs. 1,18,47,054/-; (iii). doctors gifts : Rs. 5,37,46,137/-; and (iv). doctors expenses :Rs. 1,09,91,271/-. As can be gathered from the assessment order passed u/s 143(3), dated 27.03.2015, the A.O after perusing the bifurcated details of the sales promotion expenses which were filed by the

assessee with him vide its letter dated 04.12.2014, had taken a conscious view that out of the aforesaid expenses, those that were incurred by the assessee for giving gifts to doctors of Rs. 5,37,46,137/- were to be disallowed u/s 37(1) of the Act. In fact, the A.O while concluding that the expenses incurred by the assessee for giving gifts to doctors were to be disallowed, had categorically referred to the Indian Medical Council (Professional Conduct, Etiquettes and Ethics) Regulations, 2002 (as amended by the MCI on 14.12.2009), AND the CBDT Circular No. 5, dated 01.08.2012. In the backdrop of the aforesaid facts, we are of a strong conviction that the A.O while singling out the expenses incurred by the assessee for giving gifts to doctors, for disallowing the same u/s 37(1), had consciously formed an opinion that the other expenses were not liable to be disallowed. At his stage, we may herein observe, that it is not even the case of the revenue that the assessee had withheld the details as regards the nature of the remaining expenses incurred by the assessee, or that the same were not there before the A.O in the course of the original assessment proceedings. As observed by us hereinabove, the complete bifurcated details of the sales promotion expenses were filed by the assessee in the course of the original assessment proceedings, and the A.O after perusing the same in the backdrop of the Indian Medical Council (Professional Conduct, Etiquettes and Ethics) Regulations, 2002 (as amended by the MCI on 14.12.2009), and also the CBDT Circular No. 5, dated 01.08.2012, had consciously chosen to restrict the disallowance only to the extent the same pertained to such expenses which were incurred by the assessee on giving gifts to doctors. In other words, the A.O after considering the Indian Medical Council (Professional Conduct, Etiquettes and Ethics) Regulations, 2002 (as amended by the MCI on 14.12.2009), and also the CBDT Circular No. 5, dated 01.08.2012, had formed an opinion, that out of the sale promotion expenses only the expenses which were incurred by the assessee for giving gifts to doctors were liable to be disallowed u/s 37(1) of the Act.

12. We have further perused the 'reasons to believe' and find substantial force in the contention of the ld. A.R, that the entire exercise for reopening the concluded assessment of the assessee was embarked upon by the A.O, not on the basis of any fresh tangible material or any new information which had came to his notice subsequent to the culmination of the original assessment proceedings, but on the basis of the same set of facts as were there before his predecessor while framing of the original assessment under Sec. 143(3), dated 27.03.2015. On a perusal of the 'reasons to believe', we find, that the A.O after referring to the amended IMC regulations, and also the CBDT Circular No. 5/2012, dated 01.08.2012 as well as the 'Explanation 1' to sub-section (1) of Sec. 37, had observed, that as per him the expenses incurred by the assessee company viz. (i). conference expenses: Rs. 1,52,56,668/-; (ii). travelling expenses : Rs. 1,18,47,054/-; (iii). doctor expenses :Rs. 1,09,91,271/-; and (iv). product reminder expenses : Rs. 2,44,58,807/-, were to be disallowed. But then, we find that the A.O in the course of the original assessment proceedings had before him the aforesaid bifurcated details of expenses, and also the assistance of the amended IMC regulations, and the CBDT Circular No. 5/2012, dated 01.08.2012. In fact, as observed by us hereinabove, the A.O after conscious deliberations in the course of the regular assessment proceedings, had as per his wisdom concluded, that only the expenses to the extent incurred by the assessee for giving gifts to doctors amounting to Rs. 5,37,46,137/- (out of the sale promotion expenses) were to be disallowed u/s 37(1) of the Act. As such, in our considered view, the A.O while framing the regular assessment u/s 143(3), dated 27.03.2015, had consciously formed an opinion that out of the sales promotion expenses only the expenses incurred by the assessee for giving gifts to doctors of Rs. 5,37,46,137/- were liable to disallowed u/s 37(1) of the Act, as per the IMC regulations (as amended by the MCI on 14.12.2009) and the CBDT Circular No. 5/2012, dated 01.08.2012. In the backdrop of our aforesaid observations, we find substance in the claim of the ld. A.R, that the reassessment proceedings were initiated by the

A.O, not on the basis of any fresh tangible material or any new information which had came to his notice subsequent to the culmination of the original assessment proceedings, but on the basis of the same set of facts as were there before his predecessor at the time of framing of the regular assessment under Sec. 143(3), dated 27.03.2015. As observed by us hereinabove, a careful perusal of the reasons recorded by the A.O, reveals beyond doubt, that the A.O in the garb of reopening the case of the assessee, had on the basis of the same set of facts as were available on record and had been deliberated upon by his predecessor at the time of framing of the original assessment, tried to substitute his view, as against that which was arrived at by his predecessor. In fact, we are unable to comprehend as to what new 'material' or 'information' had came up before the A.O, which would have justified the reopening of the concluded assessment of the assessee. We would not hesitate to observe, that the A.O holding a conviction that his predecessor while framing the regular assessment was in error in not disallowing the impugned sale promotion expenses, which as per him were not allowable as per 'Explanation' to Sec. 37(1) of the Act, had thus, with the sole objective of substituting his view as against that of his predecessor, had therein sought to disallow the same by reopening the case of the assessee. We are afraid that such a substitution of a view of a successor A.O cannot form a justifiable basis for reopening the case of an assessee. In fact, we find that the **Hon'ble Supreme Court** in its landmark judgment in the case of **CIT Vs. Kelvinator of India (2010) 320 ITR 561 (SC)** observing, that merely on the basis of a 'change of opinion' the case of an assessee cannot be reopened, had held as under:-

> "*On going through the changes, quoted above, made to s. 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, reopening could be done under above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the AO to make a back assessment, but in s. 147 of the Act (w.e.f. 1st April, 1989), they are given a go by and only one condition has remained, viz., that where the AO has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post 1st April, 1989, power to reopen is much wider. However, one needs to*

*give a schematic interpretation to the words "reason to believe" failing which, we are afraid, s. 147 would give arbitrary powers to the AO to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The AO has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the AO. Hence, after 1st April, 1989, AO has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to s. 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in s. 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the AO. We quote hereinbelow the relevant portion of Circular No. 549, dt. 31st Oct., 1989 [(1990) 82 CTR (St) 1], which reads as follows :*

"*7.2 Amendment made by the Amending Act, 1989, to re-introduce the expression 'reason to believe' in s. 147.*—A number of re*presentations were received against the omission of the words 'reason to believe' from s. 147 and their substitution by the 'opinion' of the AO. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of Court rulings in the past and was well settled and its omission from s. 147 would give arbitrary powers to the AO to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended s. 147 to reintroduce the expression 'has reason to believe' in place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new s. 147, however, remain the same."*

Further, following the judgment of the 'Full bench' of the Hon'ble High Court of Delhi in the case of Kelvinator of India (supra), which had been upheld by the Hon'ble Apex Court, the **Hon'ble High Court of Bombay** in the case of **Asteroids Trading & Investment P. Ltd. Vs. DCIT (2009) 308 ITR 190 (Bom)**, had held, that an A.O is precluded from assuming jurisdiction to initiate reassessment proceedings on the basis of a 'Change of opinion', observing as under:

*"8. Perusal of the record shows that the petitioner had made full disclosure necessary for claiming deduction under s. 80M. The AO after applying his mind to the relevant records had made a specific order allowing the deduction. A perusal of the record shows that now respondent No. 1 proposes to reopen the assessment because according to him deduction under s. 80M was wrongly allowed, and, therefore, he was of the opinion that the income has*

*escaped assessment. Though, in the notice respondent No. 1 has used the phrase "reason to believe", admittedly between the date of the order of assessment sought to be reopened and the date of forming of opinion by respondent No. 1, nothing new has happened and there is no change of law, no new material has come on record, no information has been received. It is merely a fresh application of mind by the same officer to the same set of facts. Thus, it is a case of mere change of opinion, which, in our opinion, does not provide jurisdiction to respondent No. 1 to initiate proceedings under s. 148 of the Act. It can now be taken as a settled law, because of a series of judgments of various High Courts and the Supreme Court, which have been referred to in the judgment of the Full Bench of the Delhi High Court in the case of Kelvinator of India Ltd. (supra) referred to above, that under s. 147 assessment cannot be reopened on a mere change of opinion."*

We further find, that the **Hon'ble High Court of Bombay** in the case of **Asian Paints Ltd. Vs. DCIT (2008) 308 ITR 195 (Bom)** observing, that as no new information/material was received by the A.O, therefore, the fresh application of mind by the A.O to the same set of facts and material which were available on record at the time of framing of the assessment, but had inadvertently remained omitted to be considered would tantamount to review of order, which is not permissible as per law, had therein held as under:

*"10. It is further to be seen that the legislature has not conferred power on the AO to review its own order. Therefore, the power under s. 147 cannot be used to review the order. In the present case, though the AO has used the phrase "reason to believe", admittedly between the date of the order of assessment sought to be reopened and the date of formation of opinion by the AO, nothing new has happened, therefore, no new material has come on record, no new information has been received; it is merely a fresh application of mind by the same AO to the same set of facts and the reason that has been given is that the some material which was available on record while assessment order was made was inadvertently excluded from consideration. This will, in our opinion, amount to opening of the assessment merely because there is change of opinion. The Full Bench of the Delhi High Court in its judgment in the case of Kelvinator (supra) referred to above, has taken a clear view that reopening of assessment under s. 147 merely because there is a change of opinion cannot be allowed. In our opinion, therefore, in the present case also, it was not permissible for respondent No. 1 to issue notice under s. 148".*

Further, the **Hon'ble High Court of Bombay** in the case of **ICICI Prudential Life Insurance Co. Ltd. Vs. ACIT (2010) 325 ITR 471 (Bom)**, relying on the judgment of the Hon'ble Supreme Court in the case of *Kelvinator of India (supra),* had held as under:

23. *Though the power to reopen an assessment within a period of four years of the expiry of the relevant assessment year is wide, it is still structured by the existence of a reason to believe that income chargeable to tax has escaped assessment. The Supreme Court, in a recent judgment in Kelvinator of India Ltd. (supra) while drawing upon the legislative history of s. 147 held that the expression 'reason to believe' needs to be given a schematic interpretation in order to ensure against an arbitrary exercise of power by the AO. The judgment of the Supreme Court emphasises that the power to reopen an assessment is not akin to a power to review the order of assessment and a mere change of opinion would not justify a recourse to the power under s. 147. Unless the AO has tangible material to reopen an assessment, the power cannot be held to be validly exercised. The Supreme Court has held thus :*

*"...Therefore, post-1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words 'reason to believe' failing which we are afraid s. 147 would give arbitrary powers to the AO to reopen assessments on the basis of 'mere change of opinion', which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The AO has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain precondition and if the concept of 'change of opinion' is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of 'change of opinion' as an inbuilt test to check abuse of power by the AO. Hence, after 1st April, 1989, AO has power to reopen, provided there is 'tangible material' to come to the conclusion that there is escapement of income from assessment. Reasons must have a link with the formation of the belief."*

24. *In the present case, for all the assessment years in question, and a fortiorari for asst. yr. 2004-05, what the AO has purported to do is to reopen the assessment on the basis of a mere change of opinion. That the AO had no tangible material is evident from the circumstance that the reasons which have been disclosed contain a reference to the same basis, namely the existence of a nil surplus/deficit in Form 1 which was drawn to the attention of and was present to the mind of the AO during the assessment proceedings under s. 143(3). Consequently, it is evident that there is an absence of tangible material before the AO".*

Also, the Hon'ble High Court of jurisdiction in the case of **Aventis Pharma Ltd. Vs. Asst. CIT (2010) 323 ITR 570 (Bom)**, reiterating its aforesaid view that reassessment proceedings cannot be permitted on the basis of a 'Change of opinion', had held as under:-

*"There is merit in the submission which has been urged on behalf of the assessee that there was no tangible material before the AO on the basis of which the assessment could have been reopened and what is sought to be done is to propose a reassessment on the basis of a mere change of opinion. This, in view of the settled position of law is impermissible. No tangible material is shown on the basis of which the assessment is sought to be*

*reopened. In the absence of tangible material, what the AO has done while reopening the assessment is only to change the opinion which was formed earlier on the allowability of the deduction. The power to reopen an assessment is conditional on the formation of a reason to believe that income chargeable to tax has escaped assessment. The power is not akin to a review. The existence of tangible material is necessary to ensure against an arbitrary exercise of power. There is no tangible material in the present case.*

13 . At this stage, we may herein observe, that as per the mandate of law, even where a concluded assessment is sought to be reopened by the A.O within a period of 4 years from the end of the relevant assessment year, it is must that the A.O has fresh material or information with him, that had led to the formation of belief on his part that the income of the assessee chargeable to tax has escaped assessment. Our aforesaid view is fortified by the judgments of the **Hon'ble High Court of Bombay** in the case of **NYK Lime (India) Ltd. Vs. DCIT (No.2) [2012] 346 ITR 361 (Bom)** and **Purity Tech Textile Pvt. Ltd. Vs. ACIT & Anr. [2010] 325 ITR 459 (Bom)**.

14. In so far, the judicial pronouncements pressed into service by the ld. D.R are concerned, we find that the same being distinguishable on facts would not assist the case of the revenue. We shall deal with the judgments/orders relied upon by the revenue, as under;

(i). Export Credit Guarantee Corporation of India Ltd. Vs. Addl. CIT (2013) 350 ITR 651 (Bom).

(a). In the case before the Hon'ble High Court, the A.O while framing the regular assessment u/s 143(3) of the Act, was completely silent in respect of each one of the five points on the basis of which the assessment was sought to be reopened. In fact, no query was raised by the A.O in the course of the original assessment proceedings in respect of the aforesaid issues, which therein revealed that there was no application of mind by the A.O at all to any of the points on the basis of which the assessment was thereafter sought to be reopened.

(b). Fact pattern of the case before us is distinguishable as against that of the aforementioned case. In the present case, the A.O while framing the original assessment vide his order passed u/s 143(3), dated 27.03.2015 had called for the complete details of the sales promotion expenses, and after perusing the same had consciously formed an opinion that as per the IMC regulations (as amended by the MCI on 14.12.2009) and CBDT Circular No. 5/2012, dated 01.08.2012 only the expenses incurred by the assessee for giving gifts to doctors of Rs. 5,37,46,137/- were liable to disallowed u/s 37(1) of the Act. As such, we are of the considered view, that unlike the facts involved in the aforesaid case before the Hon'ble High Court, the A.O in the case before us, had in the course of the regular assessment proceedings deliberated upon the assessee's claim for deduction of sales promotion expenses, and had pursuant thereto concluded that only part of such expenses were liable to be disallowed. In the back drop of our aforesaid observations, we hold a conviction that as the case of the assessee before us is factually distinguishable as in comparison to the case before the Hon'ble High court, support drawn by the ld. D.R from the same would not assist its case.

(ii). ACIT Vs. Rajesh Jhaveri Stock Brokers (P) Ltd.
(2007) 291 ITR 500 (SC)

(a). In the aforesaid case, the Hon'ble Apex Court had observed, that the scope and effect of s. 147 as substituted with effect from 1st April, 1989, as also ss. 148 to 152 was substantially different from the provisions as they stood prior to such substitution. It was observed, that under the old provisions of Sec. 147, separate Clauses. (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. It was noticed, that under the pre-

amended law, to confer jurisdiction under s. 147(a) two conditions were required to be satisfied, firstly the AO must have reason to believe that income chargeable to income-tax had escaped assessment, and secondly, he must also have a reason to believe that such escapement has occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions, as noticed by the Hon'ble Court were cumulatively required to be satisfied before the AO could have jurisdiction to issue notice under Sec. 148 r/w Sec. 147(a). But under the substituted Sec. 147 existence of only the first condition would suffice. In other words, it was observed by the Hon'ble Court that if the A.O for whatever reason had a reason to believe that income of the assessee had escaped assessment, it would confer jurisdiction with him to reopen the assessment. At the same time, it was observed by the Hon'ble Court that both the conditions must be fulfilled if the case of the assessee falls within the ambit of the proviso to s. 147.

(b). Admittedly, as observed by the Hon'ble Apex Court in its aforesaid judgment in the case of Rajesh Jhaveri Stock Brokers (P) Ltd.(supra), as per the main provision of Sec. 147 of the Act, if the A.O for whatever reason had a reason to believe that income of the assessee had escaped assessment, it would confer jurisdiction with him to reopen the assessment. But then, the issue before us is as to whether a concluded assessment can be reopened by the A.O on the basis of a change of opinion. In so far the observations of the Hon'ble Apex Court as regards the issue pertaining to 'change of opinion' were concerned, the same we find were rendered in context of a fact situation where the issuance of a notice u/s 148 was preceded by an intimation issued u/s 143(1)(a) of the Act. It was observed by the Hon'ble Apex Court, that as there was no

assessment under Sec 143(1)(a), the question of change of opinion on a notice subsequently issued u/s 148 would not arise. As the case before us is distinguishable both on facts and the issue therein involved, we are afraid that the reliance placed by the ld. D.R on the aforesaid judicial pronouncement would also not assist his case.

On the basis of our aforesaid observations, we are of the considered view that as the reopening in the case before us had been resorted to by the A.O on the basis of a 'change of opinion' as regards the allowability of deduction of the sales promotion expenses, on the same set of facts and material as were there before his predecessor who had framed the regular assessment vide his order passed under Sec. 143(3), dated 27.03.2015, the same in light of the aforesaid settled position of law cannot be sustained, and on the said count itself is liable to be vacated. We thus not being able to persuade ourselves to subscribe to the view taken by the CIT(A) as regards the validity of the jurisdiction assumed by the A.O u/s 147 of the Act, set aside his order. Resultantly, the assessment framed by the A.O u/ss. 143(3) r.w.s 147, dated 20.12.2017 is quashed for want of jurisdiction. **Ground of appeal No. 1** is allowed in terms of our aforesaid observations.

15. Although, we have set aside the assessment for want of jurisdiction, however, for the sake of completeness and in order to avoid multiplicity of litigation we shall deal with the contentions advanced by the ld. A.R as regards the merits of the case. As observed by us hereinabove, it is the claim of the ld. A.R that the sale promotion expenses aggregating to Rs. 6,25,53,800/-,comprising of viz. (i) conference expenses for doctors:Rs.1,52,56,668/-;(ii)travelling expenses for doctors: Rs.1,18,47,054/-;(iii)other expenses related to doctors: Rs.1,09,91,271/- ; and (iv) expenses incurred on product reminders given to doctors : Rs.2,44,58,807/-, were rightly claimed as an allowable deduction by the assessee under Sec.37(1) of the Act. It is the claim of the ld. A.R, that the lower authorities misconceiving the facts and the settled position of

law had in the backdrop of the CBDT Circular No. 5, dated 01.08.2012 r.w the IMC (Professional Conduct, Etiquettes & Ethics) Regulation, 2002, wrongly disallowed the aforesaid expenses which were incurred by the assessee wholly and exclusively for the purposes of its business, and were not in the nature of an expense that was prohibited under law. Per contra, the ld. D.R had supported the orders of the lower authorities in context of the issue under consideration. In order to fortify his contention that the aforesaid expenses were rightly disallowed by the lower authorities, the ld. D.R had drawn support from the order of the ITAT, Chennai bench 'C' in the case of TTK Healthcare Limited Vs. DCIT, Corporate Circle-3(1), Chennai (2017) 78 Taxman.com 86 (Chennai) and that of the ITAT, Mumbai Bench 'A' in the case of ACIT, Circle 6(3), Mumbai Vs. Liva Healthcare Ltd. (2016) 161 ITD 63 (Mum).

16. We have given a thoughtful consideration to the contentions advanced by the authorised representatives for both the parties in context of the merits of the additions/disallowance made by the A.O, perused the orders of the lower authorities and the material available on record, as well as the judicial pronouncements relied upon by them. Before us, the ld. A.R has assailed the adverse inferences drawn by the lower authorities as regards the allowability of the aforesaid expenses as a deduction, on multiple grounds viz. (i) that though the Medical Council Regulations, 2002 would apply to medical practitioners but the same were not applicable to the pharmaceutical companies; (ii) that as the CBDT Circular No. 5 of 2012, dated 01.08.2012 imposing prohibition on the medical practitioners and their professional associations from taking any gifts, travel facility, hospitality, cash or monetary grant from the pharmaceutical and allied healthcare sector industries was applicable prospectively, therefore, the same was not applicable in the case of the assessee for the year under consideration i.e A.Y. 2012-13; and (iii) that the circular issued by CBDT cannot impose an obligation adverse to an assessee.

17. After deliberating at length on the issue under consideration, we find, that the issue that the expenses wholly and exclusively incurred by a pharmaceutical company in the normal course of its business towards gifts, travel facility, conference expenses or similar freebies to medical practitioners or their professional associations would not be hit by the 'Explanation 1' to Sec. 37 of the Act, is covered by the order of a coordinate bench of the Tribunal i.e **ITAT "A" Bench, Mumbai in the case of Aristo Pharmaceuticals Pvt. ltd. Vs. ACIT (ITA No. 6680/Mum/2012, dated 26.07.2018)**. In the aforesaid order, the Tribunal had after exhaustive deliberations observed, that a perusal of the provisions of the Indian Medical Council Act, 1956, revealed that the scope and ambit of the statutory provisions relating to professional misconduct of registered medical practitioners under the Indian Medical Council Act, 1956, is restricted only to the persons registered as medical practitioners with the State Medical Council and whose name is entered in the Indian Medical Register maintained under Sec. 21 of the said Act. Further, it was observed, that the scheme of the Indian Medical Council Act, 1956 neither deals with nor provides for any conduct of any association/society, and only regulates the conduct of registered medical practitioners and not the pharmaceutical companies or allied health sector industries. Apart from that, the Tribunal in its said order had also drawn support from the order of the **Hon'ble High Court of Delhi** in the case of **MAX Hospital., Pitampura Vs. Medical Council of India [CWP No. 1334/2013, dated 10.01.2014]**. In the aforesaid case, the Medical Council of India (MCI) had filed an 'Affidavit' before the High Court, wherein it was deposed by the council that its jurisdiction was limited only to take action against the registered medical professionals under the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, and it had no jurisdiction to pass an order affecting the rights/interest of the petitioner hospital. In the backdrop of its exhaustive deliberations the Tribunal had concluded that even if the assessee had incurred expenditure on distribution of 'freebies' to doctors

and medical practitioners, the same though may not be in conformity with the Indian Medical Council (Professional Conduct, Etiquette and Ethics) regulations, 2002, but then, as the same only regulates the code of conduct of the medical practitioners/doctors, therefore, in the absence of any prohibition on the pharmaceutical companies in incurring of such sales promotion expenses it cannot be held to have incurred an expenditure for a purpose which is an offence or is prohibited by law. The Tribunal while concluding as herein above had observed as under:

> "20. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record. We find that our indulgence in the cross appeals filed by the assessee and the revenue has been sought for adjudicating the allowability of the sales promotion expenses incurred by the assessee on the distribution of articles to the stockists, distributors, dealers, customers and doctors, in the backdrop of the CBDT Circular No. 5/2012, dated 01.08.2012 and the MCI regulations. We find that it is the case of the revenue that as per the CBDT Circular No. 5/2012, dated 01.08.2012 any expense incurred by a pharmaceutical or allied health sector industry in providing any "freebies" to medical practitioners or their professional associations in violation of the regulation issued by Medical Council of India which is a regulatory body constituted under the Medical Council Act, 1956, would be liable to be disallowed in the hands of such pharmaceutical or allied health sector industry or any other assessee which had provided such "freebies" and claimed the same as a deductible expense against its income in the accounts.
>
> 21. We have deliberated at length on the issue under consideration and after perusing the regulations issued by the Medical Council of India, find that the same lays down the code of conduct in respect of the doctors and other medical professionals registered with it, and are not applicable to the pharmaceuticals or allied health sector industries. Rather, a perusal of the provisions of the Indian Medical Council Act, 1956, reveals that the scope and ambit of statutory provisions relating to professional conduct of registered medical practitioners under the Indian Medical Council Act, 1956 is restricted only to the persons registered as medical practitioners with the State Medical Council and whose name are entered in the Indian Medical Register maintained under Sec. 21 of the said Act. We are of the considered view that the scheme of the Indian Medical Council Act, 1956 neither deals with nor provides for any conduct of any association/society and deals only with the conduct of individual registered medical practitioners. In the backdrop of the aforesaid facts, it emerges that the applicability of the MCI regulations would only cover individual medical practitioners and not the pharmaceutical companies or allied health sector industries. Interestingly, the scope of the applicability of the MCI regulations was looked into by the Hon'ble High Court of Delhi in the case of Max Hospital, Pitampura Vs. Medical Council of India (CWP No. 1334/2013, dated 10.01.2014). In the aforementioned case the MCI had filed an 'Affidavit' before the High Court,

wherein it was deposed by the council that its jurisdiction is limited only to take action against the registered medical professionals under the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, and it has no jurisdiction to pass any order affecting the rights/interest of the petitioner hospital. We are of the considered view that on the basis of the aforesaid deposition of MCI that its jurisdiction stands restricted to the registered medical professionals, it can safely be concluded that the MCI regulations would in no way impinge on the functioning of the assessee company which is engaged in the business of manufacturing and sale of pharmaceutical and allied products. We thus, in the backdrop of our aforesaid deliberations are of the considered view that the code of conduct enshrined in the MCI regulations are solely meant to be followed and adhered by medical practitioners/doctors, and such a regulation or code of conduct would not cover the pharmaceutical company or healthcare sector in any manner. We are further of the view that in the backdrop of our aforesaid observations, as the Medical Council of India does not have any jurisdiction under law to pass any order or regulation against any hospital, pharmaceutical company or any healthcare sector, then any such regulation issued by it cannot have any prohibitory effect on the manner in which the pharmaceutical company like the assessee conducts its business. On the basis of our aforesaid observations, we are unable to comprehend that now when the MCI has no jurisdiction upon the pharmaceutical companies, then where could there be an occasion for concluding that the assessee company had violated any regulation issued by MCI. We thus, in terms of our aforesaid observations are of the considered view that even if the assessee had incurred expenditure on distribution of "freebies" to doctors and medical practitioners, the same though may not be in conformity with the Indian Medical Council (Professional Conduct, Etiquette and Ethics) regulations, 2002 (as amended on 10.12.2009), however, as the same only regulates the code of conduct of the medical practitioners/doctors, therefore, in the absence of any prohibition on the pharmaceutical companies in incurring of such sales promotion expenses, the latter cannot be held to have incurred an expenditure for a purpose which is an offence or is prohibited by law. In this regard we are reminded of the maxim "*Expressio Unius Est Exclusio Alterius*", which provides that if a particular expression in the statute is expressly stated for a 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 assesses. Thus, now when the MCI regulations are applicable to medical practitioners registered with the MCI, then the same cannot be made applicable to pharmaceutical companies or other allied healthcare companies.

22. We shall now advert to the CBDT Circular No. 5/2012, dated 01.08.2012. We find that the aforesaid CBDT Circular reads as under:-

> *"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 freebies (freebies) to medical practitioner 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 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 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."*

We may herein observe that a perusal of the aforesaid CBDT Circular reveals that the "freebies" provided by the pharmaceutical companies or allied health sector industries to medical practitioners or their professional associations in violation of the provisions of Indian Medical Council (Professional Conduct, Etiquette and Ethics) regulations, 2002 shall be inadmissible under Sec. 37(1) of the Income Tax Act, 1961, as the same would be an expense prohibited by the law. We are of the considered view that as observed by us hereinabove, the code of conduct enshrined in the notifications issued by MCI though is to be strictly followed and adhered by medical practitioners/doctors registered with the MCI, however the same cannot impinge on the conduct of the pharmaceutical companies or other healthcare sector in any manner. We find that nothing has brought on record which could persuade us to conclude that the regulations or notifications issued by MCI would as per the law also be binding on the

pharmaceutical companies or other allied healthcare sector. Rather, the concession made by the MCI before the Hon'ble High Court of Delhi in the case of Max Hospital Vs. MCI (CWP No. 1334/2013, dated 10.01.2014) fortifies our aforesaid view that MCI has no jurisdiction to pass any order or regulation against any hospital, pharmaceutical company or any healthcare sector. We further find that MCI had by adding Para 6.8.1 to its earlier notification issued as "Indian Medical Council Professional (Conduct, Etiquette and Ethics) Regulations, 2002" had even provided for action which shall be taken against medical practitioners in case they contravene the prohibitions placed on them. We find from a perusal of Para 6.8.1 that in case of receiving of any gift from any pharmaceutical or allied health care industry and their sales people or representatives, action stands restricted to the members who are registered with the MCI. In other words the censure/action as had been suggested on the violation of the code of conduct is only for the medical practitioners and not for the pharmaceutical companies or allied health sector industries. We are thus of the considered view that the regulations issued by MCI are *qua* the doctors/medical practitioners registered with MCI, and the same shall in no way impinge upon the conduct of the pharmaceutical companies. As a logical corollary to it, if there is any violation or prohibition as per MCI regulation in terms of *Explanation* to Sec. 37(1), then the same would debar the doctors or the registered medical practitioners and not the pharmaceutical companies and the allied healthcare sector for claiming the same as an expenditure."

18. Apart from that, we are also in agreement with the alternative contention advanced by the ld. A.R, that though a benevolent CBDT Circular may apply retrospectively, but then, a circular imposing a burden on an assessee has to apply prospectively only. Resultantly, now when the CBDT Circular No. 5/2012 was issued only as on 01.08.2012, the same would thus not be applicable to the case of the assessee before us i.e for the period relevant to A.Y 2012-13. In fact, the aforesaid issue as regards the prospective applicability of the CBDT Circular No. 5/2012, dated 01.08.2012 was also looked into by the tribunal in the case of **Aristo Pharmaceuticals Pvt. ltd. Vs. ACIT (ITA No. 6680/Mum/2012, dated 26.07.2018)**, wherein it was observed as under :

"25. We thus, in the backdrop of the aforesaid settled position of law as regards the prospective applicability of an oppressive circular, are of the considered view that as the CBDT as per its Circular No. 5/2012, dated 01.08.2012 had enlarged the scope of Indian Medical Council Regulation, 2002, and had made the same applicable to the pharmaceutical companies, thus the same cannot be reckoned to have a retrospective effect. We find that a coordinate bench of the Tribunal viz. ITAT, Mumbai in the case of Syncom Formulations (I) Ltd. Vs. DCIT-8(3), Mumbai (ITA No. 6428 & 6429/Mum/2012, dated 23.12.2015) for A.Ys 2010-11 and 2011-12 had

concluded that the aforesaid CBDT Circular No. 5/2012, dated 01.08.2012 would not be applicable to the A.Ys 2010-11 and 2011-12, as the same was introduced w.e.f. 01.08.2012. We thus, in terms of our aforesaid observations are of the considered view that the aforementioned CBDT Circular No. 5/2012, dated 01.08.2012 would not be applicable to the case of the assessee before us for A.Y. 2011-12."

19. We are further of the considered view, that even otherwise, the enlargement of the scope of MCI regulation to the pharmaceutical companies by the CBDT is *de hors* any enabling provision either under the Income Tax Act or under the Indian Medical Council Regulations. In our considered view, though the CBDT can tone down the rigours of law in order to ensure a fair enforcement of the provisions by issuing circulars for clarifying the statutory provisions, however, it is divested of its powers to create a new impairment adverse to an assessee, or to a class of assesses, without any sanction or authority of law. We find that the aspect that the CBDT is divested of it powers to enlarge the scope of MCI regulation by extending the same to pharmaceutical companies without any enabling provision either under the Income tax Act or the Indian Medical Regulations, was also deliberated upon by the Tribunal in the case of **Aristo Pharmaceuticals Pvt. ltd. Vs. ACIT (ITA No. 6680/Mum/2012, dated 26.07.2018)**, wherein it was observed as under :

"23. We find that the CBDT as per its Circular No. 5/2012, dated 01.08.2012 had enlarged the scope and applicability of Indian Medical Council Regulation, 2002, by making the same applicable even to the pharmaceutical companies or allied healthcare sector industries. We are of the considered view that such an enlargement of the scope of MCI regulation to the pharmaceutical companies by the CBDT is without any enabling provision either under the Income Tax Act or under the Indian Medical Council Regulations. We are of a strong conviction that the CBDT cannot provide *casus omissus* to a statute or notification or any regulation which has not been expressly provided therein. Still further, though the CBDT can tone down the rigours of law in order to ensure a fair enforcement of the provisions by issuing circulars for clarifying the statutory provisions, however, it is divested of its power to create a new impairment adverse to an assessee or to a class of assessee without any sanction or authority of law. We are of the considered view that the circulars which are issued by the CBDT must confirm to the tax laws and though are meant for the purpose of giving administrative relief or for clarifying the provisions of law, but the same cannot impose a burden on the assessee, leave alone creating a new burden by enlarging the scope of a regulation issued under a different act so

as to impose any kind of hardship or liability on the assessee. We thus, are unable to persuade ourselves to subscribe to the rigours contemplated in the CBDT Circular No. 5/2012, dated 01.08.2012, which we would not hesitate to observe, despite absence of anything provided by the MCI in its regulations issued under the Medical Council Act, 1956, contemplating that the regulation of code of conduct would also cover the pharmaceutical companies and healthcare sector, however provides that in case a pharmaceutical or allied health sector industry incurs any expenditure in providing any gift, travel facility, cash, monetary grant or similar freebies to medical practitioners or their professional associations in violation of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, the expenditure incurred on the same shall be disallowed in the hands of such pharmaceutical or allied health sector industry. We are of the considered view that the burden imposed by the CBDT vide its aforesaid Circular No. 5/2012, dated 01.08.2012 on the pharmaceutical or allied health sector industries, despite absence of any enabling provision under the Income Tax law or under the Indian Medical Council Regulations, clearly impinges on the conduct of the pharmaceutical and allied health sector industries in carrying out its business. We thus, in the absence of any sanction or authority of law on the basis of which it could safely be concluded that the expenditure incurred by the assessee company on sales promotion expenses by way of distribution of articles to the stockists, distributors, dealers, customers and doctors, is in the nature of an expenditure which had been incurred for any purpose which is either an offence or prohibited by law, thus conclude that the same would not be hit by the *Explanation* to Sec. 37(1) of the Act."

20. As regards the reliance placed by the ld. D.R on the order of the ITAT, Mumbai Bench 'A' in the case of ACIT, Circle 6(3), Mumbai Vs. Liva Healthcare Ltd. (2016) 161 ITD 63 (Mum) is concerned, we find that the Tribunal while disposing off the appeal in the case of Aristo Pharmaceuticals Pvt. ltd.(supra), had considered the said order. Be that as it may, in the case of Liva Healthcare Ltd. (supra), though the Tribunal had incorporated the relevant provisions and clauses of the Indian Medical Council Regulation 2002, however, it had not elaborated or dwelled upon the issue as to how this MCI regulation which was strictly meant for medical practitioners and doctors could be made applicable to pharmaceutical companies. In so far reliance placed by the ld. D.R on the order of the ITAT, Chennai Bench 'C' in the case of TTK Healthcare Ltd. Vs. Dy. CIT, Corporae Circle 3(1), Chennai (2017) 78 taxmann.com 86 (Chennai) is concerned, we find that in the said case too the issue as regards the applicability of the MCI regulations to the pharmaceutical

industry was not gone into. Also, the aspect that the burden imposed by the CBDT vide its aforesaid Circular No. 5/2012, dated 01.08.2012 on the pharmaceutical or allied health sector industries, despite absence of any enabling provision under the Income Tax law or under the Indian Medical Council Regulations, which thus clearly impinges on the conduct of the pharmaceutical and allied health sector industries in carrying out its business, was also not deliberated upon. We thus in terms of our aforesaid observations and respectfully following the view taken by the co-ordinate bench of the Tribunal i.e **ITAT "A" Bench, Mumbai**, in the case of **Aristo Pharmaceuticals Pvt. ltd. Vs. ACIT (ITA No. 6680/Mum/2012, dated 26.07.2018),** are of the considered view, that the expenditure of Rs. 6,25,53,800/-incurred by the assessee towards sales promotion expenses viz. (i) conference expenses for doctors:Rs.1,52,56,668/-;(ii) travelling expenses for doctors: Rs.1,18,47,054/-;(iii).other expenses related to doctors: Rs.1,09,91,271/-; and (iv) expenses incurred on product reminders given to doctors: Rs.2,44,58,807/- would not be hit by the "Explanation" to Sec. 37 of the Act. Accordingly, on the basis of our aforesaid observations, we are of the considered view, that the A.O even otherwise on merits was not justified in disallowing the sale promotion expenses of Rs.6,25,53,800/-, by bringing the same within the realm of the 'Explanation' to Sec. 37(1) of the Act. **Ground of appeal No. 2** is allowed in terms of our aforesaid observations. Before parting, we may herein observe, that as we have already quashed the reassessment proceedings for want of jurisdiction, therefore, our observations recorded as regards the merits of the case would be rendered as academic in nature.

21. The appeal of the assessee is allowed in terms of our aforesaid observations.

## ITA No.1212/Mum/2019
## A.Y.2012-13

22. We shall now advert to the appeal filed by the assessee against the order passed by the CIT(A)−51, Mumbai, dated 31.12.2018, which in turn arises from the regular assessment order passed by the A.O under Sec. 143(3), dated 27.03.2015. The assessee has assailed the impugned order by raising the following grounds of appeal before us:

"GROUND NO. I Alleged Concealed Sales arising out of alleged concealed Production:

The CIT (A) erred in allowing partial relief against the addition of Rs. 14,56,98,623/- made by A.O., for the alleged concealment of Sales arising out of alleged concealed Production of goods.

The CIT (A) has erred in allowing the wastage of Raw Materials input to the extent of the standard percentage as per Drug Price Control Order (DPCO) wherever the percentage of wastage exceeds the standard percentage. The CIT (A) has erred in ignoring the factors which were responsible for wastage more than the standard percentage as per DPCO.

GROUND No. II: Allowing 80IB exemption in respect of increased Business Income due to addition on account of alleged conceal concealed Production:

Without prejudice to Ground No. I

The CIT(A) erred in not allowing 80IB exemption on the increased Business Income of eligible Units, due to the additions made on account of Concealed Production.

The CIT (A) has failed to appreciate that since such addition was made to the Business Profits of each Unit of Production, such increased Business Profit of eligible Units was eligible to be exempted u/s 80IB, and should have been allowed.

GROUND NO. III: Disallowance of Rs.5,37,46,137/- out of Sales Promotion Expense:

The CIT (A) has erred in upholding the disallowance of Rs. 5,37,46,137/- made by AO, out of Sales Promotion expenses, as resulting into freebies to the Doctors, as per the circular of CBDT dated 01.08.2012 & Rules made by MCI.

The CIT (A) erred to appreciate that the said circular of CBDT was dated 01.08.2012 whereas the expenditure of Sales Promotion were made before 31 March 2012, and hence the said CBDT Circular was not applicable for Asst. Year 2012-13.

GROUND No. IV : Not allowing 80IB exemption in respect of disallowed Sales Promotion expenses:

Without prejudice to Ground No. III

The CIT (A) erred in not giving exemption u/s 80IB in respect of increased Business Profits of eligible Units, due to disallowance of Sale Promotion expenses.

The CIT (A) has failed to appreciate that the disallowance of Sales Promotion expenses increased the Business Profit of 80IB eligible Units, and hence the increased Profits were eligible for exemption u/s 80IB.

The Appellant craves leave to add, alter, amend or withdraw any grounds of Appeal, as and when so advised."

23. Briefly stated, the assessee company had filed its return of income for A.Y. 2012-13 on 27.09.2012, declaring its total income at Rs.29,29,14,990/. Subsequently, the case of the assessee was selected for scrutiny assessment under Sec. 143(2) of the Act. The A.O while framing the assessment vide his order passed under Sec. 143(3), dated 27.03.2015 observed, that the composition of the raw materials of the drugs/pharmaceutical formulations manufactured by the assessee company, as against that consumed in manufacturing of the finished products revealed, that the quantity of the finished products reported by the assessee was unreasonably less. In sum and substance, the A.O was of the view that the excessive consumption of raw material revealed that the assessee had not correctly reported its production. In the backdrop of his aforesaid observations, the A.O called upon the assessee to put forth an explanation as regards the excessive consumption of raw material vis-a-vis the finished products. As the assessee failed to come forth with an explanation to the satisfaction of the A.O, he therein concluded that the assessee had under reported his production and had carried out sales outside its books of accounts. The value wise under reporting of the production of finished goods by the assessee for its various units was worked out by the A.O as under:

| Sr. No. | Name of Unit | Value of unrecorded production unit-wise |
|---|---|---|
| 1. | Jammu Unit | Rs. 6,93,86,721 |
| 2. | Daman Unit-II | Rs. 2,56,91,314 |
| 3. | Daman Unit-III | Rs. 2,35,39,058 |

| | | |
|---|---|---|
| 4. | Daman Unit-IV | Rs. 2,70,81,530 |
| | Total | Rs.14,56,98,623 |

Further, the reasoning given by the A.O for concluding that the assessee had suppressed its production, and had carried out unrecorded sales of finished goods outside its books of accounts, was based on his following observations recorded in the assessment order:

"3.4 Hence, in the absence of any explanation from the assessee, undisclosed sales are computed for the following reasons:

(a) The production of the company is done mechanically through state of art of technology involved in this manufacturing projects of the assessee.

(b) There are almost negligible or almost no waste of raw material.

(c) In the process of manufacturing of syrup and drugs, there cannot be a change that the medicine/ capsules/herbals products can be overweight.

(d) The theoretical reply given by the assessee during the course of assessment proceedings has also been considered in connection with the above.

(e) It is important to mention that the pharmaceutical products are life saving products and there cannot be even a minute variation in the composition.

(f) The product are made under the latest machine and equipments to achieve the desired specification.

(g) The raw material / input of the pharma product are usually very costly and no one will prefer to waste the costly inputs.

(h) There is no colour and coating and in the composition of the product which means the colour and coating and also add to the total weight/volume of the formulation, thereby resulting in minor substituting of the main ingredients.

(i) Nowhere been in the formulation has this kind of a seriously high variation and consumption are recorded.

The lesser product reported by the assessee viz. the consumption of the main ingredients, brings out very clearly that the assessee is not recording the full production of finished goods and he is selling the same outside the books of accounts. Therefore the AR was not able to explain the variation and consumption and short reporting of production.

(j) The difference of production which is not reported by the assessee has been calculated in quantity and value of the four units i.e. Jammu, Daman-II, Daman-III and Daman-IV.

(k) The unit wise calculation of extra production not reported by the assessee is placed as Annexures A,B,C and D forming part of the assessment order

| | | | | |
|---|---|---|---|---|
| Jammu | - | 1 | - | Table A |
| Daman II | - | 2 | - | Table B |
| Daman III | - | 3 | - | Table C |
| Daman IV | - | 4 | - | Table D |
| Summary | - | | - | Table E |

The assessee has claimed deduction u/s 80IA for Jammu unit. Since the excess production calculated for the excess consumption sold out of the books is not allowable deduction u/s 80IA since these are sold outside the books and the CA. certificate is not certified by the chartered Accountant."

On the basis of his aforesaid observations, the A.O made an addition of Rs.14,56,98,623/- towards suppressed sales of the assessee for the year under consideration. Also, the A.O observed that the assessee had claimed deduction for expenses of Rs. 5,37,46,137/- in respect of gifts given to doctors. Observing, that the aforesaid expenses were not allowable as per the CBDT Circular No. 5, dated 01.08.2012 r.w. the Indian Medical Council (Professional conduct, Etiquettes & Ethics) Regulation, 2002, the A.O disallowed the same as inadmissible under Sec. 37(1) of the Act. On the basis of his aforesaid observations, the A.O assessed the income of the assessee company at Rs.49,23,59,750/-.

24. Aggrieved, the assessee assailed the assessment order before the CIT(A). After exhaustive deliberations, the CIT(A) found favour with the claim of the assessee that the basis of computation of wastages, and the ultimate suppression of production as observed by the A.O in the assessment order was scientifically unsustainable. In fact, it was observed by the CIT(A), that in any scientific manufacturing process leading to production of various drugs it cannot be presumed or surmised that one plus one is always equal to two. It was observed by the CIT(A), that as per the Drug Price Control Order (DPCO) issued by the government, a specific range of wastages in the process of manufacturing of pharmaceuticals drugs was prescribed. As such, the CIT(A) was of the view that the theoretical basis that was taken by the A.O for computing

the wastages claimed in the manufacturing process of various drugs was factually explained and scientifically supported by the documents submitted by the assessee. At the same time, the CIT(A) held a conviction that the wastages had to be within the limits prescribed under the DPCO. Accordingly, the CIT(A) concluded that the wastages exceeding the DPCO norms, as per the details submitted by the assessee were to be held to be unexplained. On the basis of his aforesaid observation, the CIT(A) directed the A.O to work out the suppressed production of the assessee on the basis of the wastages of raw material exceeding those prescribed by the DPCO for each drug. As regards the disallowance of the assessee's claim for deduction of an amount of Rs.5,37,46,137/-, that was claimed by the assessee to have been incurred for giving gifts to doctors, the CIT(A) finding no infirmity in the view taken by the A.O confirmed the said disallowance. Before the CIT(A), the assessee had also claimed, that insofar its income was enhanced pursuant to the additions made by the A.O towards suppressed sales, its entitlement towards claim of deduction u/s 80IB would also be consequentially raised. However, the CIT(A) was not inclined to accept the said claim of the assessee. It was observed by the CIT(A), that the claim for deduction under Sec. 80IB was based on satisfaction of a set of conditions and legal requirements as specified in the Act. As per the CIT(A), one of the important requirement was verification and authentication of the said claim for deduction by the auditor in the statutory 'Form 10CCB'. Observing, that the said mandatory requirement would not be satisfied by the assessee insofar addition was made in its hands towards suppressed production, the CIT(A) after relying on certain judicial pronouncements rejected the aforesaid claim of the assessee.

25. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The ld. A.R at the very outset of the hearing of the appeal submitted, that though the CIT(A) had accepted the fact as regards the wastage of raw material in the course of the

manufacturing process in the pharmaceutical industry, but then, he had erred in sustaining a miniscule disallowance i.e to the extent the wastage of raw material was found to be in excess of that prescribed under DPCO for the various drugs/pharmaceutical formulations. It was submitted by the ld. A.R, that the disallowance which remained pursuant to the directions of the CIT(A) worked out to a miniscule amount of Rs.11 lakhs, as against the exorbitant disallowance of Rs.14,56,98,623/- that was made by the A.O. It was further submitted by the ld. A.R, that the order of the CIT(A) had been accepted by the revenue and had not been assailed any further before the tribunal. It was the claim of the ld. A.R, that the sustaining of the aforesaid disallowance was only backed by an estimation, and not on the basis of any concrete material proving the same to the hilt. Alternatively, it was submitted by the ld. A.R that the unproved wastage of raw material cannot ipso facto lead to an inference of suppressed production and unaccounted sales by the assessee. It was submitted by the ld. A.R, that though no disallowance/addition for the impugned wastage of raw material was called for in the hands of the assessee, however, even otherwise the disallowance, if any, was liable to be restricted only to the extent of the cost of the excess raw material wastage as was debited by the assessee in its books of accounts.

26. Per contra, the ld. D.R relied on the order of the lower authorities.

27. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. On a perusal of the order of the CIT(A), we find that he had after exhaustive deliberations found favour with the claim of the assessee that the basis of computation of wastage and the ultimate suppression of production as concluded by the A.O in the assessment order was scientifically unsustainable. The CIT(A) while concluding as hereinabove, had observed as under:

"(4) Based on the above discussion and analysis of the assessment order, submission and arguments of the Appellant Company, various remand reports, documentary support filed by the Appellant Company the following conclusion emerges:

(i) The AO's basis of computation of excess raw material consumption is based on an absolutely theoretical presumption that the raw material formulation shown on the packing of the particular drug should match with the total consumption of the raw material of the drug. Such presumption has no factual or scientific basis.

(ii) It has been argued and proved that in a pharmaceutical industry the yield of the formulation is around 97 to 97 1/2 %. The DPCO order also prescribes the wastage of raw material between 1.55-12 %.

(iii) There are factors which affect the manufacturing process and are responsible for the excess raw material consumption. These factors includes overages, salt factor, potency, loss on drying, sampling and yield etc.

(iv) The Batch Manufacturing Record (BMR) is a crucial record maintained by the pharmaceutical companies wherein specific detail like batch size, complete formulation, actual raw material issued, date of commencement and completion of batch, production equipment used in these processes and final finished goods output are given.

(v) The Appellant Company has included the scan copy of the relevant portion of the BMR which is a crucial and conclusive document. The BMR also gives a clear Picture of actual raw material input and the ultimate finished goods produced for these batches.

(vi) The sample of the Finished Goods Transfer Note (FGTN) also has been filed for each of the respective BMR submitted which give the final output of the hatch which is transferred to the finished goods warehouse

(vii) The complete set of argument along with BMR were produced during the second remand proceeding. The AO has examined and analysed threadbare and has not found any infirmity in the Appellants argument."

After concluding as hereinabove, the CIT(A) was of the view that wastage to the extent the same was within the limit prescribed under the DPCO norms was to be accepted. But then, the CIT(A) observed that insofar wastage exceeding the DPCO norms was concerned, the same was to be held to be unexplained, and the correlating production was to be treated as the suppressed production of the assessee, which was sold by it outside its books of account. As such, the CIT(A) directed the A.O to compute the suppressed/unaccounted sales of the assessee.

28. We have given a thoughtful consideration to the view taken by the CIT(A), and to the extent he had observed that the wastage up to the limits prescribed by the DPCO norms was to be accepted, we concur with him. At the same time, we are unable to persuade ourselves to subscribe to his view that the excess wastage of raw material would ipso facto lead to an inference of suppressed/unaccounted production carried out by the assessee. In our considered view, the aforesaid observation of the CIT(A) de hors any material evidencing the factum of suppressed/unaccounted production carried out by the assessee, cannot be accepted. Unexplained wastage of raw material, in our understanding can only lead to a consequential addition/disallowance of the cost of such raw material as had been debited by the assessee in its 'books of accounts' for the year under consideration. Accordingly, we modify the order of the CIT(A) and therein direct the A.O to restrict the disallowance in respect of the excess raw material wastage in terms of our aforesaid observations. **Ground of appeal No. I** is partly allowed.

29. In so far the claim of the assessee that pursuant to the enhancement made by the A.O, its entitlement for deduction u/s 80IB would also be modified, we are unable to find favour with the same, and concur with the view taken by the CIT(A) who has rightly rejected the same. **Ground of appeal No. II** is dismissed.

30. We shall now advert to the sustaining of the disallowance of Rs.5,37,46,137/-, that was incurred by the A.O in respect of the gifts items/freebies given by the assessee to doctors. As we have dealt with this issue at length while disposing off the Ground of appeal No. 2 of the assessee in ITA No. 2344/Mum/2018, therefore, our order therein passed shall apply *mutatis mutandis* in context of the issue under consideration. Accordingly, on the same terms, the addition of Rs.5,37,46,137/- made by the A.O cannot be sustained, and is thus deleted. **Ground of appeal No. III** is allowed in terms of our aforesaid observations.

31. As the disallowance of Rs. 5,37,46,137/- had been vacated by us on merits, as hereinabove, therefore the **Ground of appeal No. IV** having been rendered as infructuous, is dismissed, as such

32. The appeal of the assessee is partly allowed.

31. Resultantly, the appeal of the assessee in ITA No.2344/Mum/2018 is allowed, while for its appeal in ITA No. 1212/Mum/2018 is partly allowed in terms our aforesaid observations.

Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board.

| | |
|---|---|
| Sd/- | Sd/- |
| (G. Manjunatha) | (Ravish Sood) |
| ACCOUNTANT MEMBER | JUDICIAL MEMBER |

मुंबई Mumbai; दिनांक 22.07.2020
P.S Rohit

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

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

सत्यापित प्रति //True Copy//

**आदेशानुसार/** BY ORDER,
**उप/सहायक पंजीकार** (Dy./Asstt. Registrar)
**आयकर अपीलीय अधिकरण,** मुंबई **/ ITAT, Mumbai**