

**IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT**  
**BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM**

**आयकरअपीलसं./ITA No.296/SRT/2017**

**(निर्धारणवर्ष / Assessment Year: (2013-14)**

**(Virtual Court Hearing)**

M/s.Ashutosh Pharmacy, Ashutosh Hospital, Nr.Kshetrapal Mandir, Sagrampura, Surat – 395001.	V s.	The Income Tax Officer, Ward-1(2)(1), Surat.
<b>स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: AASFM 6475 B</b>		
<b>(Assessee)</b>		<b>(Respondent)</b>

Assessee by : Shri Rasesh Shah – CA

Respondent by : Ms.Anupama Singla – Sr.DR

**सुनवाईकीतारीख/ Date of Hearing : 23/06/2021**

**घोषणाकीतारीख/Date of Pronouncement: 05/07/2021**

**आदेश / O R D E R**

**PER DR. A. L. SAINI, ACCOUNTANT MEMBER:**

Captioned appeal filed by assessee pertaining to Assessment Year 2013-14 is directed against the order passed by the Id.Commissioner of Income Tax(Appeals)-2, Surat [Ld.CIT(A)] dated 22.09.2017 which in turn arise out of assessment order passed by the Id.Assessing Officer under section 143(3) of the Income Tax Act, 1961 [hereinafter referred to as “the Act”] dated 28.03.2016.

2. Grievances raised by the assessee are as follows:

*“1. On the facts and circumstances of the case as well as law on the subject, the learned Commissioner of Income Tax(appeals) has erred in partly confirming the action of the assessing officer by sustaining the disallowance of Rs.17,55,630/- out of the total disallowance of Rs.57,55,630/- on account of commission expense instead of treating it as rent expense as claimed by the assessee.*

*2. It is therefore prayed that the above disallowance made by assessing Officer and confirmed by learned Commissioner of Income-tax (Appeals) may please be deleted.”*

3. Brief facts, as discernable from the orders of lower authorities are that during the scrutiny proceedings Assessing Officer found that the assessee has debited an amount of Rs.57,55,617/- on account of commission payment to M/s Ashutosh Hospital. The Assessing Officer (AO) obtained information u/s 133(6) of the Act from M/s Ashutosh Hospital regarding the nature of commission payment. The AO noted that M/s Ashutosh Hospital is a proprietorship concern of Dr. R. R. Chaudhary. The AO observed that assessee firm runs a pharmacy stores and a commission payment has been made which is prohibited by the Explanation to section 37(1) of the Act. The AO also observed that the CBDT has issued Circular No.5 of 2012 dated 01/08/2012 which clarifies about the non-admissibility of expenses incurred in providing freebies to medical practitioner by pharmaceutical and allied health sector industry. As per the stipulations, the AO held that the medical practitioner cannot receive any cash or monetary grants from any pharmaceutical and allied healthcare industry for individual purpose in individual capacity under any pretext. The AO found that as per the agreement executed between the assessee and M/s Ashutosh Hospital, the basis for calculating the so called occupational charges is based on sales made by the medical store and not on the basis of area of store used and other services rendered, therefore the AO disallowed the commission expenses of Rs.57,55,630/-.

4. Aggrieved by the order of the Id.Assessing Officer, the assessee carried the matter in appeal before the Id.CIT(A) who has partly allowed the appeal of the assessee. Aggrieved by the order of the Id.CIT(A), the assessee is in appeal before us.

5. Shri Rasesh Shah, Learned Counsel for the assessee, pleads that premises at which the assessee firm runs its business of medical shop is owned by Dr. R. R. Chaudhary. The furniture and fittings, the general running expenses like electricity bills, municipal taxes etc. are all owned and paid by him. The assessee firm only pays the staff salary and for the stock of medicines. The agreement between the assessee and the hospital clearly states that the amounts to be paid are in consideration of use and occupation of property owned by the hospital. The said expenses were not incurred in providing freebies to medical practitioner, therefore, addition sustained by Id CIT(A) may be deleted.

6. On the other hand, the Ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity.

7. We have heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the Id CIT(A) and other materials brought on record. We note that main grievance of the assessing officer was that the Code of Medical Ethics Regulation, 2002 lays down that any payments made by one doctor to another doctor for procuring patients is prohibited. However, we note that assessee under consideration is not covered by the Code of Medical Ethics Regulation, 2002. That is, the assessee, who runs a medical shop, is not covered by the provision of the Code of Medical Ethics Regulation, 2002. It was submitted by Id Counsel that the patients are not referred to the medical shop

by the hospital and the patients are free to purchase medicines from any medical shop and any person can buy the medicines who is not a patient of the hospital from the medical shop of the assessee. The payment has been made on the total sales of the medicines and not on the basis of any reference made by the hospital for purchasing of medicines from the assessee shop. Considering this factual position, the addition made by the assessing officer is not sustainable in the eye of law.

8.The assessee firm had paid amount of Rs.57,55,630/- to Dr. Rajivraj Ranbirsingh Chaudhary, the sole proprietor of Advanced Surat Traumatology & Orthopedic Surgery Hospital (ASUTOSH). In the agreement between the assessee and the hospital, it is very clearly stated that the amounts to be paid are in consideration of “use and occupation of the property” owned by the hospital. We note that the Id.Counsel has produced before us assessment order passed by the Assessing Officer under section 143(3) of the Income Tax Act, 1961 in the case of the assessee, (M/s.Ashutosh Pharmacy), for the Assessment Year(A.Y.) 2012-13, dated 10.11.2014, wherein we note that Assessing Officer has not made such type of disallowances on account of commission expenses. Since no addition has been made by the Department in the previous assessment year 2012-13, on account of commission expenses, therefore, we are of the view that taking into account the assessee`s same facts, the Department should not disallow the expenses in the assessment year 2013-14, under consideration. It is a well settled legal position that factual matters which permeate through more than one assessment year, if the Revenue has accepted a particular's view or proposition in the past, it is not open for the Revenue to take a entirely contrary or different stand in a later year on the

same issue, involving identical facts unless and until a cogent case is made out by the Assessing Officer on the basis of change in facts. For that we rely on the order of the Hon'ble Supreme Court in RadhasoamiSatsang vs. CIT 193 ITR 321 (SC), wherein it was held as follows:

*"We are aware of the fact that, strictly speaking, res judicata does not apply to income tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year. On these reasoning, in the absence of any material change justifying the Revenue to take a different view of the matter - and, if there was no change, it was in support of the assessee – we do not think the question should have been reopened and contrary to what had been decided by the Commissioner of Income-tax in the earlier proceedings, a different and contradictory stand should have been taken."*

We note that in assessee`s case under consideration, there is no change in facts, that is, facts in the assessment year 2012-13 and in the assessment year 2013-14 are same and identical, therefore we are of the view that the above cited precedents on principle of consistency are squarely applicable to the assessee under consideration. Therefore, we delete that addition of Rs.17,55,630/-,( Rs.57,55,630- Rs.40,00,000) sustained by Id CIT(A).

9. In the result, appeal of the assessee is allowed.

Order is pronounced on 05/07/2021 by placing result on notice board.

**Sd/-**  
**(PAWAN SINGH)**  
**JUDICIAL MEMBER**

**Sd/-**  
**(Dr. A.L. SAINI)**  
**ACCOUNTANT MEMBER**

Surat /दिनांक/ Date: 05/07/2021 /sgr

**Copy of the Order forwarded to**

1. The Assessee

2. The Respondent
3. The CIT(A)
4. Pr.CIT
5. DR/AR, ITAT, Surat
6. Guard File

By Order

// TRUE COPY //

Assistant Registrar/Sr. PS/PS  
ITAT, Surat