

**IN THE INCOME TAX APPELLATE TRIBUNAL  
"F" BENCH, MUMBAI**

**SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER  
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER**

**ITA No. 1081/MUM/2022  
(Assessment Year: 2011-12)**

**UCB India Private Limited,**  
Building No. P3, Unit No. 103,  
1<sup>st</sup> Floor, Prithvi Complex,  
Kalher Pipe Line, Kalher Bhiwandi,  
Thane - 421302  
[PAN: AAACU1627L]

..... **Appellant**

**Assisnt Commissioner of Income  
Tax, 8(3)(1),**  
Aayakar Bhavan, Mumbai

Vs

..... **Respondent**

**Appearance**

For the Appellant/Assessee : Shri Nishant Thakkar  
Shri Hiten Chande  
For the Respondent/Department : Ms. Vranda U. Matkari

**Date** : 28.04.2023  
Conclusion of hearing : 27.06.2023  
Pronouncement of order

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**ORDER**

**Per Rahul Chaudhary, Judicial Member:**

1. The present appeal is directed against Assessment Order dated, 29/01/2016, passed under Section 143(3) read with Section 144C(13) of the Income Tax Act, 1961 [hereinafter referred to as 'the Act'] for the Assessment Year 2011-12, as per directions issued by Dispute Resolution Panel-2, Mumbai- [hereinafter referred to as 'the DRP'] under Section 144C(5) of the Act.
2. The Appellant has raised 28 grounds of appeal directed against the rectification order passed by the Assessing Officer under Section

154 of the Act assessing total income of the Appellant at INR 36,25,23,522/- as against returned income of INR 20,81,12,869/- after making disallowance of sales promotion expenses of INR 11,30,18,798/-.

- (a) Ground No. 1 is general in nature.
  - (b) Ground No. 2 to 17 challenged the jurisdiction of the Assessing Officer to pass rectification order under Section 154 of the Act.
  - (c) Ground No. 18 to 23 are directed against the merits of the addition sales promotion expenses of INR 11,30,18,798/-.
  - (d) Ground No. 24 is directed against charging of tax at the rate of 30% (plus surcharge and education cess) on addition of INR 4,13,91,854/- made in the Assessment Order under Section 143(3) of the Act with stands settled as per direct tax Vivad Se Vishwas Act, 2020.
  - (e) Ground No. 25 and 26 pertains to consequential levy of interest under Section 234B of the Act.
  - (f) Ground NO. 27 and 28 are directed against charging of interest under Section 220(2) of the Act.
3. The relevant facts in brief are that the Appellant filed return of income for the Assessment Year 2011-12 on 28/09/2011 declaring total income of INR 20,81,12,896/-. The case of the Appellant was selected for scrutiny and notice under Section 143(2) and 142(1) were issued to the Appellant. In response thereto the Appellant filed details/documents and after considering the same the Assessing Officer completed the assessment vide Assessment Order dated 29/01/2016 at total income of INR 25,83,11,749/- after making addition of transfer pricing adjustment of INR 3,20,67,090/- and disallowance of e-connectivity charges of INR 1,81,31,790/-.

4. It is admitted position that during the assessment proceedings for the Assessment Year 2011-12 specific query regarding sales promotion expenses was raised by the Assessing Officer vide notice dated 11/02/2015 and in response thereto, the Appellant filed reply dated 05/03/2015 giving details of sales promotion expenses and thereafter, reply, dated 11/03/2015, placing on the assessment record copy of the order passed by the Tribunal in the case of the Appellant for the Assessment Year 2002-03 and 2003-04 [ITA No. 428 & 429/Mum/2007, dated 06/02/2009] wherein the Tribunal had, in identical facts and circumstances, allowed deduction for the sales promotion expenses. The Assessing Officer after considering the reply/explanation furnished by the Appellant and after taking into consideration the aforesaid decision of the Tribunal allowed deduction for sales promotion expenses and did not make disallowance in respect of the same.
5. Subsequently, notices dated 18/03/2020, 23/12/2020 and 28/12/2020 and were issued by the Assessing Officer seeking to rectify the Assessment Order, dated 29/01/2016 in exercise of power of rectification of mistake apparent on record in terms of Section 154 of the Act. In response, the Appellant filed reply dated 26/03/2020 and 30/12/2020 challenging the proposed rectification on the ground of jurisdiction as well the proposed addition of sales promotion expenses on merits. However, the Assessing Officer was not convinced and passed rectification order dated 31/03/2021, inter alia, making disallowance of sales promotion expenses of INR 11,30,18,798/-
6. Being aggrieved by the order dated 31/03/2021, passed under Section 154 of the Act rectifying the Final Assessment Order, dated

29/01/2016, passed under Section 144C(1) read with Section 143(3) of the Act.

7. When the appeal was taken up for hearing the Learned Authorised Representative for Appellant submitted that there was a delay in filing the present appeal as the Appellant had approached the Hon'ble Bombay High Court disposed the aforesaid Writ Petition No. 2240 of 2021 filed by the Appellant, in writ jurisdiction for quashing of the order impugned. Vide order dated 23/02/2022, the Honb'le Bombay High Court disposed off the petition with the following direction:

*"1] Pursuant to the order passed on 20.04.2022, Dr. Ashish Kate has filed the affidavit which is taken on record. Explanation offered is accepted.*

*2] After the petition was heard for some time, Mr. Thakkar, on instructions, seeks leave to withdraw the petition with liberty to raise all points including the jurisdiction of Assessing Officer to issue notice and/or passing an order under Section 154 of the Act before the appellate authority.*

*3] Mr. Thakkar states that an appeal will be filed within 20 days from today. Statement is accepted. If there is delay upto 20 days, that delay stands condoned."*

8. As per the above directions, the Appeal was preferred with the period 20 days granted by the Hon'ble High Court. In view of the aforesaid, the Learned Authorised Representative for Appellant submitted that the appeal be treated as having filed in time. The Learned Departmental Representative did not have any objection in view of the order, dated 23/02/2022, passed by the Hon'ble Bombay High Court. Accordingly, the appeal is treated as having been filed in time.

9. Learned Authorised Representative for Appellant briefly explained the contentions raised before the Hon'ble Bombay High Court regarding the Rectification Order being barred by limitation and thereafter, pressed into service Ground No. 2 to 17 challenging the jurisdiction of the Assessing Officer to pass the assessment order. The Learned Authorised Representative for Appellant the Assessing Officer submitted that the sales promotion expenses were allowed by the Assessing Officer after due inquiry/verification and after applying mind to the details/documents filed by the Appellant during the assessment proceedings. In identical facts and circumstances, the Tribunal had allowed deduction for sales promotion expenses for the Assessment Years 2002-03 and 2003-04 and a copy of the common order, dated 06/02/2009, passed by the Mumbai Bench of the Tribunal in the case of the Appellant for the Assessment Years 2002-03 and 2003-04 [ITA No. 428 & 429/Mum/2007, dated 06/02/2009] was also provided to the Assessing Officer vide letter dated 11/03/2015. Thus, there was no error in the order passed by the Assessing Officer let alone error apparent on record. He further submitted that the Circular No 5 of 2012, was issued by the Central Board of Direct Taxes (CBDT) was issued on 01/08/2012, and therefore, the same did not apply to the Assessment Year 2011-12 which ended on 31/03/2011. The judgment of the Hon'ble Supreme Court in the case of Apex Laboratories Pvt. Ltd. Vs. Deputy Commissioner of Income Tax, LTU: [2022] 442 ITR 1 (SC)[22-02-2022] came much later on 22/02/2022. He further submitted that the Tribunal had, vide order, dated 26/12/2016, passed in the case of the Appellant for the Assessment Years 2004-05 (ITA No. 6681 & 6454/Mum/2013), 2005-06 (ITA No. 6682 & 6455/Mum/2013 (and 2007-08 (ITA No. 6558 & 6456/Mum/2013), after taking into

consideration Circular No. 5 of 2012 issued by CBDT and the decision of Mumbai Bench of the Tribunal in the case of Syncom Formulations (ITA No. 6429 & 6428/Mum/2012, dated 23/12/2015) deleted the disallowance of sales promotion expenses made by the Assessing Officer. Thus, as on the date on which the Assessing Officer passed the Rectification Order, the decision of the Tribunal in the case of the Assessee for the Assessment Years 2002-03 & 2003-04, and Assessment Years 2004-05, 2005-06 & 2007-08, dated 06/02/2009 and 26/02/2016, respectively, were in force and the Assessing Officer was bound to follow the same. In any case, the issue of deduction for sales promotion expenses was not free from doubt and fell into the category of debatable issue falling outside the scope of Section 154 of the Act. The Learned Authorised Representative for Appellant supported the aforesaid submission by the following judicial precedents : (i) CIT Vs. Palani Andavar Cotton & Synthetic Spinners Ltd. : [2010] 326 ITR 339 (Madras), (ii) Commissioner of Income Tax, Allahabad Vs. Sincere Construction: [2015] 54 taxmann.com 31 (Allahabad), (iii) Rallis India Ltd. Vs. Assistant Commissioner of Income Tax, Range 1(3) [2010] 323 ITR 54 (Bombay), (iv) Commissioner of Income-tax (Central), Ludhiana Vs. Max India Ltd.: [2007] 295 ITR 282 (SC), (v) Commissioner of Income-tax Vs. K. Venkateswerarao : [1998] 169 ITR 330 (Andhra Pradesh), (vi) Commissioner of Income Tax Vs. Schlumberger Sea Co. Inc. : [ 2003] 264 ITR 331 (Calcutta), (vii) Jiyajerrao Cotton Mills Ltd. Vs. Income-tax Officer : [1981] 130 ITR 710 (Calcutta).

10. Per contra, the Learned Departmental Representative submitted that the Appellant's contention regarding disallowance of expense of INR.11,30,18,789/- was not correct. During the relevant previous year the Appellant had debited to Profit & Loss Account sales

promotion expenses which were in the nature of freebies given to doctors/clinics. The Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002, dated 10.12.2009 imposed a prohibition on the medical practitioner and their professional associations from taking any gifts travel facility, hospitality, cash, or monetary grant from the pharmaceutical and allied health sector industries. As per CBDT's Circular No. 5 of 2012, dated 01.08.2012, any expenses incurred in providing freebies in violation of the provisions of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002 were inadmissible under Section 37(1) of the Act, being an expenses prohibited by the law. Hence, sales promotion expenses of INR 11,30,18,789/- ought to have been disallowed under Section 37(1) of the Act. He further submitted that the Circular No. 5 of 2012 dated 01/08/2012, being clarificatory in nature, was effective from the date of implementation of the aforesaid Regulation, i.e., from 14/12/2009. The Assessing Officer failed to follow the aforesaid circular which was binding upon the Assessing Officer while passing the Assessment Order dated 29/01/2016 resulting in a mistake apparent on record which was rectified by the Assessing Officer in exercise of powers under Section 154 read with Section 116 of the Act. In order to support his contentions the Ld. Departmental Representative also placed reliance of the decision of the Hon'ble Supreme Court in the case of Apex Laboratories Private Limited (supra). On the basis of the aforesaid, the Ld. Departmental Representative submitted that the Assessing Officer was within jurisdiction to pass rectification order in terms of Section 154 read with Section 116 of the Act.

11. We have considered the rival submissions and perused the material

on record including the judicial precedents cited by both the sides during the course of hearing.

12. Section 154 of the Act provides that with a view to rectifying any 'mistake apparent from the record' an income-tax authority referred to in Section 116 of the Act may amend order passed by it under the provisions of the Act. Therefore, the power vested under Section 154 of the Act is for rectification of 'mistake apparent on record'. In the case of Jiyajerrao Cotton Mills Ltd (supra), cited by the Learned Authorised Representative for Appellant, it was held by the Hon'ble Calcutta High Court as under:

*"The law as to what is a mistake rectifiable under s. 154 of the I.T. Act, 1961, as being apparent from the record is well settled. A glaring and obvious mistake can be corrected under the said section but a debatable issue on the question or which required investigation and arguments as to facts or law to find out if there was a mistake cannot be rectified under the said section."*

13. Thus, a debatable issue would mean a debatable issue would be one that requires investigation and arguments as to the facts or law to find out if there is a mistake cannot be subject matter of rectification. In the case before us, clearly, the issue relating to allowability of sales promotion expenses in the hands of the Appellant was not settled in favour of the Revenue. On one hand there was Circular No. 5 of 2012, dated 01/08/2012, issued by CBDT which provided that the deduction for sales promotion expense in violation of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002 should be disallowed, and on the other hand there was two decision of the Tribunal in Appellant's own case. Vide common order dated 06/02/2009, pertaining to Assessment Years 2002-03 & 2003-04 [ITA No 428 & 429/Mum/2007], the Tribunal had allowed deduction for sales promotion expenses claimed by the Appellant in identical facts and



circumstances. Further, vide common order dated 26/02/2016, passed in appeals pertaining to Assessment Years 2004-05 (ITA No. 6681 & 6454/Mum/2013), 2005-06 (ITA No. 6682 & 6455/Mum/2013 (and 2007-08 (ITA No. 6558 & 6456/Mum/2013), the Tribunal had deleted the adhoc disallowance made by the Assessing Officer in respect of gift articles. The Assessing Officer had made disallowance by placing reliance upon the aforesaid regulations and the circular, however, the Tribunal deleted the addition by placing reliance upon the decision of the Tribunal in the case of Syncom Formulation Vs. DCIT (ITA No. 6429& 6428/Mum/2012, dated 23/12/2015) wherein it was held that the Circular No. 5 of 2012 issued by CBDT would apply prospectively with effect from 01/08/2012. Thus, the issue was clearly debatable on law. The Assessing Officer did not have the benefit of the judgment of Hon'ble Supreme Court in the case of Apex Laboratories Pvt. Ltd. (supra) at the time of exercising jurisdiction as the same came much later on 22/02/2022. Further, in our view, even on facts, the issue required investigation. We note that the Assessing Officer has, in paragraph 4-5 of the Rectification Order, recorded as under:

*"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. It is noticed from the perusal of P & L a/c, a break-up of the sales promotion expenses has been reproduced which is as follows:*

<i>Sr. No.</i>	<i>Particulars of expenses</i>	<i>Amounting (In INR)</i>	<i>Broad Nature of Expenses</i>
<i>1</i>	<i>Rent/Op Lease Mfg Faculty</i>	<i>2,62,304.00</i>	<i>Hotel booking for events and cycle meets</i>
<i>2</i>	<i>Consulting Fees (Publishing Printing)</i>	<i>81,41,775.19</i>	<i>Honorarium Fees paid to advisory Board doctors (Key Opinion Leaders)</i>

			<i>to dissipate knowledge of assessee's products to other doctors across India.</i>
3	<i>Market Research Fees</i>	<i>22,80,530.9</i>	<i>Market search for new product study/subscription for medical transaction</i>
4	<i>Congress Organ Fees</i>	<i>20,000.00</i>	<i>Scientific exhibition at Congress</i>
5	<i>Speaker Programs</i>	<i>453,299.00</i>	<i>Sponsorship of speaker programs/Indian medical journal sponsorship</i>
6	<i>Odd. Supplies Purch. (Sales Promotion)</i>	<i>8,19,081.27</i>	<i>Field Stationers Field training materials</i>
7	<i>Printing &amp; Reproduct (Sales Promotion)</i>	<i>1,54,199.00</i>	<i>Field Stationers Field training materials</i>
8	<i>Brand &amp; Gimmick Exp. (Advertisement)</i>	<i>2,32,40,604.27</i>	<i>Brand recalling giveaways items like pen/doctors utility appliances like apron/gloves/nylon disposable bags/op. table cover</i>
9	<i>Media Expenses</i>	<i>-6,48,000.00</i>	<i>Negative figure</i>
10	<i>Promotion Expenses</i>	<i>10,78,571.39</i>	<i>Small expenses on field visits/Round Table meetings with doctors for arranging snacks, tea etc. "These are incurred mostly by employee on field and claimed as reimbursement.</i>
11	<i>Public Relation Expenses</i>	<i>1,37,64,709.53</i>	<i>Meetings conducted by field persons to facilitate CME-Continuous Medical Education (BY senior doctors to junior doctors in institutions, HOPE meeting, patients education at clinics.</i>
12	<i>Publishing Printing</i>	<i>2,96,00,376.24</i>	<i>Leave Behind leaflets, Virtual Aids for doctor visits, other field</i>

			<i>stationeries etc.</i>
13	<i>Congress Subscript</i>	<i>2,15,51,520.44</i>	<i>Field trainings and medical congress</i>
14	<i>Documentation - Book (Promotional Expenses)</i>	<i>1,22,99,827.00</i>	<i>Expenses incurred on medical books</i>
	<i>Total</i>	<i>11,30,18,798.22</i>	

*5. Nevertheless, it is evident from the breakup of sales promotion expenses as tabulated above that by the narration of expenses, the expenses are in the nature of freebies to medical practitioners and are in the violation of the provisions of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 which need to be disallowed."*

14. On perusal of column 'Broad Nature of Expenses' of the table forming part of Paragraph 4 of the Rectification Order (*reproduced hereinabove*), it was not apparent the all the sales promotion expenses were incurred on freebies. To the contrary, the broad nature of expenses given in the table suggested that the sales promotion expenses were not in the nature of freebies such as 'Market Research Fee', 'Off Supplies Puch (Sales Promotion)', 'Printing & Reproduct (Sales Promotion)', and 'Documentation Books (Promotional Expenses)'. The balance expenses could have included expenses on freebies. However, this was a matter of investigation as it was not apparent that the sales promotion expenses of INR 11,30,18,796/- was incurred on freebies. Thus, the issue of allowance of sales promotion expenses (including freebies) in the hands of the Appellant was debatable and required investigation and arguments on facts and in law. Thus, it cannot be said that allowance of deduction of sales promotion expenses by the Assessing Officer resulting in a mistake apparent on record. Therefore, absent mistake apparent on record, the action of the Assessing Officer fell beyond the scope of Section 154 of the Act. Accordingly, order dated 29/01/2016, passed by the Assessing

Officer under Section 154 of the Act is quashed. Ground No. 2 to 5 raised by the Appellant are allowed. Ground No. 6 to 17 raised by the Appellant are disposed off as being infructuous. Since we have quashed the order dated 29/01/2016 as being without jurisdiction, Ground No. 1, and 18 to 28 also disposed off as being infructuous.

15. In result the present appeal is allowed.

Order pronounced on 27.06.2023.

**Sd/-**  
**(Prahsant Maharishi)**  
**Accountant Member**

**Sd/-**  
**(Rahul Chaudhary)**  
**Judicial Member**

मुंबई Mumbai; दिनांक Dated : 27.06.2023  
Alindra, PS

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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