

**IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'E' BENCH,
NEW DELHI**

**BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SMT BEENA A. PILLAI, JUDICIAL MEMBER**

**ITA No. 1773/DEL/2016
(A.Y. 2011-12)**

M/s Ozone Pharmaceuticals Ltd
Ozone House, I, LSC, Block A-3
Janakpuri, New Delhi

Vs.

The Pr. C.I.T
Delhi - 7
New Delhi

PAN : AAACO 0056 H

[Appellant]

[Respondent]

**Date of Hearing : 06.08.2018
Date of Pronouncement : 07.08.2018**

Assessee by : Shri Ashwani Taneja, Adv
Shri Saurabh Goel, CA

Revenue by : Smt. Shefali Swaroop, CIT- DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

This appeal filed by the assessee is directed against the order of the Principal Commissioner of Income Tax, Delhi - 7, New Delhi dated 02.03.2016 framed u/s 263 of the Income-tax Act, 1961 [hereinafter referred to as 'the Act'] pertaining to assessment year 2011-12.

2. The assessee claims that the ld. PCIT erred in assuming jurisdiction u/s 263 of the Act and further erred in holding that the assessment order framed u/s 143(3) of the Act is erroneous and prejudicial to the interest of the Revenue.

3. Facts on record show that assessment was framed u/s 143(3) of the Act vide order dated 14.03.2014. The total income as per computation of income was Rs. 1,89,63,522/- which was assessed at Rs. 2,34,01,280/- under normal provisions of the Act and book profit u/s 115JB of the Act was computed at Rs. 2,79,87,877/-.

4. Assuming the powers vested upon him by provisions of section 263 of the Act, the ld. PCIT called for record and found that the assessee has purchased sales promotions material for doctors amounting to Rs. 2,11,25,462/-. The ld. PCIT further found that the assessee has paid Rs. 8,64,059/- on account of gifts and commission to doctors against sale. The ld. PCIT was of the opinion that the total freebies given by the assessee was Rs. 2,19,89,512/-. The ld. PCIT was of the firm belief that this is inadmissible u/s 37(1) of the Act and was of the opinion that the assessment order framed u/s 143(3) of the Act is erroneous in so far as it is prejudicial to the interest of the Revenue.

5. The assessee was issued a show cause to explain as to why the assessment order dated 14.03.2014 should not be set aside, since it was erroneous and prejudicial to the interest of the Revenue as the AO has allowed the freebies in violation of the CBDT Circular No. 5/12. The assessee filed detailed reply explaining the nature of expenditure and pointed out that the said circular is not applicable on the facts of the case.

6. After considering the facts and detailed submissions, the Id. PCIT concluded as under:-

"Thus, it is held that the losses of Rs. 11,72,46,749/- brought forward from earlier years should first be set-off against business income claimed exempt u/s 10A by the assessee. Accordingly, the exemption of Rs. 10,81,46,880/- claimed u/s 10A by the assessee and also so allowed by the assessing officer gets reduced to **NIL** and the balance business loss be allowed to be carried forward after due verification from record. If an excess set-off of the same has been allowed in any other assessment year, it must also be rectified u/s 154 by the AO. The order dt. 14.03.2014 of the assessing officer is set-aside with observations as above for passing of a fresh assessment order after giving the assessee reasonable opportunity of being heard."

7. It can be seen from the conclusion of the ld. PCIT that the findings of the PCIT are devoid of any application of mind. The ld. PCIT initiated the proceedings u/s 263 of the Act for different reasons and concluded on totally different reasons. Neither the computation of income nor the assessment order mentions any claim of exemption u/s 10A of the Act by the assessee. Such callous approach of the ld. PCIT is sufficient to quash his order.

8. For the sake of adjudication, we would like to highlight some other facts of the case. While framing assessment order u/s 143(3) of the Act at para 4, the AO extensively discussed sales promotion expenses and gave a categorical finding that 7.5% of expenses claimed on sales promotion and incentives are disallowed and, accordingly, disallowed Rs. 1,08,92,321/-. The assessee agitated the matter before the CIT(A).

9. After considering the facts and detailed submissions, the ld. CIT(A) held as under:-

"The AO added back Rs. 1,08,92,321/- representing 7.5% of expenses claimed on sales promotion and incentives amounting to

Rs,14,52,30,941/- in the P & L A/c. The said disallowance was made on the ground that bills/vouchers relating to this expense was not furnished fully and there was failure on the part of the appellant to substantiate its claim that the said expense had yielded substantial growth in the business of the appellant company. The AO has stated that in the past similar disallowance has been made on these grounds. I have carefully considered the assessment order and the submissions made by the AR. It is noted that complete details in respect of these expenses were submitted before the AO by the appellant company. The AR stated that since the appellant company is in the business of manufacturing and trading of allopathic medicines it requires vast sales promotion activity, The AO has not pointed out any specific defect in the bills/vouchers produced before him. It is not the case of the AO that the expenses claimed is not genuine or incurred for non business purpose. As per the assessment order the appellant was asked to show cause as to why disallowance should not be made at 10% of the expenses claimed. The AO however, disallowed 7.5% of the expenses claimed finally. There appears to be no ground for adhoc disallowance. It is also noted that such disallowance was deleted by the CIT(Appeals) in A. Y. 2004-05, the Hon'ble ITAT in A. Y. 2006-07, and again by the CIT(Appeals) for A. Y. 2008-09, 2009-10 & 2010-11. Since no cogent reason is put forth by the AO for the disallowance and the fact that the appellant has been consistently allowed relief over the years, I do not see any reason to uphold the

disallowance. The addition of Rs. 1,08,92,321/- is ordered to be deleted. These grounds of appeal are ruled in favour of the appellant."

10. From the above, it is abundantly clear that the issues raised by the Id. PCIT in his notice u/s 263 of the Act were not only subject matter of assessment, but also part of appellate proceedings before the first appellate authority. The Doctrine of Merger is clearly established.

11. In our considered opinion and understanding of law, the Id. PCIT cannot assume jurisdiction for the issues which were subject matter of appeal before the CIT(A) and have been categorically decided by the first appellate authority.

12. Considering the facts of the case from all possible angles, the order of the Id. PCIT framed u/s 263 of the Act deserves to be quashed. We, accordingly, set aside such order and restore that of the Assessing Officer.

13. In the result, the appeal of the assessee in ITA No. 1773/DEL/2016 is allowed.

The order is pronounced in the open court on 07.08.2018.

Sd/-

**[BEENA PILLAI]
JUDICIAL MEMBER**

Sd/-

**[N.K. BILLAIYA]
ACCOUNTANT MEMBER**

Dated: 07th August, 2018

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	