

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ 'C' अहमदाबाद ।
IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, AHMEDABAD

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER

अपील सं./ ITA No.3461/Ahd/2014

निर्धारण वर्ष/Asstt. Year: 2011-2012

Shri Ram Krupa Medicare P.Ltd. 44, Haribhakti Colony Old Padra Road Baroda 390 007. PAN : AAECs 3818 F	Vs.	ITO, Ward-4(3) Baroda.
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अपील सं./ ITA No.2863/Ahd/2016

निर्धारण वर्ष/Asstt. Year: 2012-2013

Shri Ram Krupa Medicare P.Ltd. 44, Haribhakti Colony Old Padra Road Baroda 390 007. PAN : AAECs 3818 F	Vs.	ACIT, Cir.2(1)(1) Baroda.
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अपील सं./ ITA No.2888/Ahd/2016

निर्धारण वर्ष/Asstt. Year: 2012-2013

ACIT, Cir.2(1)(1) Baroda.	Vs.	Shri Ram Krupa Medicare P.Ltd. 44, Haribhakti Colony Old Padra Road Baroda 390 007. PAN : AAECs 3818 F
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अपीलार्थी/ (Appellant)	प्रत्यर्थी/ (Respondent)
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Assessee by :	Shri Sanket Bakshi, CA
Revenue by :	Shri Lalit P. Jain, Sr.DR

सुनवाई की तारीख/**Date of Hearing** : 25/09/2018
घोषणा की तारीख /**Date of Pronouncement**: 27/09/2018

आदेश/ORDER

PER RAJPAL YADAV, JUDICIAL MEMBER:

Assessee and Revenue are in cross appeals against order of Id.CIT(A)-2, Vadodara dated 30.8.2016 passed in Asstt.Year 2012-13. In Asstt.Year 2011-12 assessee alone is challenging the order of Id.CIT(A).-II, Baroda dated 9.10.2014.

2. So far as appeal of the Revenue is concerned, it has been pointed out that tax effect by virtue of relief given by the Id.CIT(A) is concerned, it is below Rs.20 lakhs, and therefore, the present appeal of the Revenue is not maintainable in view of CBDT Circular No.3 of 2018 dated 11.7.2018 which is made applicable on pending appeal also. The Id.DR has not controverted to this factual position.

3. We find that the appeal of the Revenue is presented on 4.11.2016. On 11.7.2018 the CBDT has issued Instructions bearing No. 3 of 2018 prohibiting its subordinate authorities from filing of the appeal to the Tribunal against the order of the CIT(A) where the tax effect by virtue of the relief given by the CIT(A) is less than Rs.20 lakhs. The instructions have been made applicable with retrospective effect, meaning thereby, these instructions are applicable on pending appeals also. In the present case, the disputed addition is of Rs.45 lakhs, and therefore, the “tax effect” as per CBDT Circular is tax on the total income assessed minus the tax that would have been chargeable had such total income been

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reduced by the amount of income in respect of the issue against which appeal is filed, would be less than Rs.20 lakhs. Therefore, the present appeal of the Revenue is hit by the CBDT Circular and hence not maintainable. Further, Id.DR has not pointed out whether the case of the Revenue fall within the ambit of exceptions provided in the Circular or not. Thus, keeping in view the above CBDT circular and provisions of section 268A of the Income Tax Act, we are of the view that the present appeal of the Revenue deserves to be dismissed. It is accordingly dismissed.

However, it is observed that in case on re-verification at the end of the AO it comes to the notice that the tax effect is more or Revenue's case falls within the ambit of exceptions provided in the Circular, then the Department will be at liberty to approach the Tribunal for recall of this order. Such application should be filed within the time period prescribed in the Act. In view of the above, the appeal of the Revenue is dismissed due to low tax effect.

4. Now we take both appeals of the assessee. First common issue agitated by the assessee in Asstt.Year 2011-12 (ground no.1 and 2) and in Asstt year 2012-13 (ground no.1, 2 and 3) is that, whether the Id.CIT(A) has rightly confirmed partial disallowance of expenditure incurred by the assessee towards gift expenses, business promotion expenses and entertainment in both years. Facts on all vital points are common in both years therefore, for facility of reference, we take the facts from the assessment year 2011-12.

5. Brief facts are the assessee is engaged in the business of cardiac care and diagnosis and prevention of heart disease centre etc. It has filed its return of income for the Asstt.Year 2011-12 on 28.9.2011 declaring loss at Rs.1,49,536/-. In the Asstt.Year 2012-13 it has filed return of income on 27.9.2012 declaring total income of Rs.63,96,030/-. At the relevant time the assessee was running three divisions viz. Baroda Heart Institute & Research Institute, Baroda Heart Institute & Critical Care Centre and Indrapuri Diagnostic Centre. At the relevant time, it was running these three divisions and the details of divisions including their activities read as under:

<i>Sr.No.</i>	<i>Name of division</i>	<i>Nature of Activity</i>
1.	<i>Baroda Heart Institute & Research Institute</i>	<i>Runs cardiac care and diagnosis and prevention of heart disease centre</i>
2.	<i>Baroda Heart Institute & Critical Care Centre</i>	<i>Cardiac care and other general disease centre</i>
3.	<i>Indrapuri Diagnostic Centre.</i>	<i>Echo and TMT test</i>

6. On scrutiny of the accounts it revealed to the AO that the assessee has debited following expenditure in the profit & loss account:

<i>Sr. No.</i>	<i>Particulars</i>	<i>Amount (Rs.)</i>	
		<i>A.Y.2011-12</i>	<i>A.Y.2012-13</i>
1.	<i>Gift Expenses</i>	<i>11,12,932</i>	<i>4,54,085</i>
2.	<i>Business promotion expenses</i>	<i>1,74,938</i>	<i>4,28,012</i>
3.	<i>Entertainment Expenses</i>	<i>14,01,560</i>	<i>9,17,364</i>
	<i>Total</i>	<i>26,89,430</i>	<i>17,99,461</i>

7. The Id.AO disallowed the above expenditure by holding that these were not incurred for the purpose of business. On appeal, the Id.CIT(A) has confirmed disallowance at Rs.11,57,514/- as against Rs.17,99,461/- debited by the assessee in the Asstt.Year 2012-13. In the Asstt.Year 2011-12, the Id.CIT(A) has confirmed the disallowance of Rs.21,72,749/- as against expenditure debited at Rs.26,89,430/-. As observed earlier, there is no disparity of facts about the nature of expenditure as well as business carried out by the assessee. We find that the Id.CIT(A) has examined each expenditure analytically and exhaustively. The finding of the Id.CIT(A) recorded in the Asstt.Year 2011-12 is worth to note. It reads as under:

“I have considered the facts of the case, the AO's observations and submission made by the AR of the appellant. The expenses disallowed by the AO in the form of gift expenses, business, promotion expenses and entertainment expenses consists of several sub-heads of such expenses. The allowability of the same is being discussed in following paragraph:-

i) Out of gift expenditure an amount of Rs.3,198/- has been incurred for celebrating birthday of staff member, marriage gift etc. Such expenditure has been held to be allowable by me in order dated 16/06/2014 in appellant's own case for AY 2010-11 in appeal no.CAB/III-032/2013-14. Following the same, the expenses are directed to be allowed in the current year also.

ii) An amount of Rs.4,30,724/- and further amount of Rs.2,11,563/- has been spent for giving gifts to doctors. Such gifts were held to be ;disallowable in the decisions in appellant's own case for AY 2010-11. Besides, the discussions made in the appellate order for AY 2010-11, there is one more reason due to which such expenses cannot be allowed as a deduction u/s. 37(1) of the IT Act 1961. In this aspect, it is seen that the Medical Council of India in exercise

of its statutory power vested in it under the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002, imposed prohibition on any medical practitioner or their professional associates from accepting gift, travel facility and hospitality, cash or monetary grant from any pharmaceutical and allied health sector industries on 10.12.2009. In 'pursuance of this, the CBDT issued circular no. 5/12 clarifying that claim of any expenditure incurred in providing above mentioned or similar freebies shall be inadmissible u/s 37 of the Income tax (Act being prohibited under law. Thus, the fact remains that the relevant law was amended as on 10/12/2009 and hence during the previous year 2010-11 such payments made by the appellant were against law. It may be mentioned here that the constitutional validity of circular no. 5/2012 issued by CBDT was challenged before Hon'ble High Court of Himachal in Shimla in CWP no.10793 of 2012. Vide its order dated 26/12/2012, the Hon'ble Court upheld the circular. The Court in its decision has held as follows:-

"37(1) Any expenditure (not being expenditure of the nature described in Sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of .the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under 'the head "Profits and gains of business or profession".

(Explanation -For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose 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.)"

3. Shri Vishal Mohan, Advocate, on behalf of the petitioner contends that the circular goes beyond the section itself. We are not in agreement with this submission. The explanation to Section 37(1) makes it clear that 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 sum [and substance of the circular is also the same. In case the assessing authorities are 'not properly understanding the circular then the remedy lies for each individual assessee to file appeals under the Income-tax Act but the circular which is totally in line with Section 37(1) cannot be said to be illegal. In fact para 4 of the circular quoted hereinabove itself clarifies that the value of the freebies enjoyed by the medical practitioner is also taxable as business income or income from other sources depending on the facts of each case. Therefore, if the assessee satisfies the assessing authority that the expenditure is not in violation of the regulations framed by the medical council then it may legitimately claim a deduction, but it is for the assessee to satisfy the assessing officer that the expense is not in violation of the Medical Council Regulations referred to above."

Thus, as per the decision of the Court, after the amendment of relevant provisions by the Medical Council of India, Section 37(1) automatically came into play even without circular issued by the CBDT. Accordingly the payments made by the appellant were not allowable expenditure as per the provisions of section 37(1) of the IT Act 1961. Hence, the disallowance made by the AO is upheld and this ground also.

iii) The appellant has further given Rs.55,650/- to its staff. But the details of the receipts are not available on record. The AO has also given this finding in the assessment order. During the course of the current appellate proceedings also, no such details have been filed. Hence, this expenditure is also held to be not allowable and the disallowance of the same is upheld,

iv) The appellant has spent an amount of Rs.48,354/- for sponsoring the Marathon. Such expenditure has been held to be allowable in appellant's own case for AY 2010-11. Following the same, the disallowance of the same is directed to be deleted. Similarly, the sum of Rs.39,974/- spent towards doctors meet and

Rs.28,110/- for providing boarding and lodging facility to NABH Inspector are for the business purposes of the appellant and hence the same are directed to be allowed in its computation of income. Similarly, the incentive paid to Mr. Hardik Mod amounting to Rs.58,500/- is for bringing new business to the appellant's concern. Hence, these expenses are directed to be allowed. Accordingly, the entire business promotion expenses of Rs.1,74,938/- are allowed and addition of this amount is directed to be deleted.

v) Now, coming to the disallowance of entertainment expenses, amount of Rs.2,75,000/- incurred towards Farash Khana charges for the Marathon ;and Rs.35,545/- towards giving farewell to employees is directed to be allowed as the same has been incurred for business purposes of the appellant. The marathon expenses have also been allowed in appellant's own case for AY 2010-11.

vi) So far as the balance expenses of Rs.5,56,831/- and Rs.1,34,184/-regarding arranging the LCD at farm houses for IPL matches for doctors etc. are concerned, the same are not allowable on the basis of the discussions made regarding gift expense incurred for doctors above. These expenses are nothing but bribery given to the doctors and hence the same are illegal expenses as per the regulations of Medical Council of India and hence are not allowable as per the provisions of section 37 of the IT Act. How organizing the viewing of IPL matches at farmhouses result into advertisement of the appellant's business has nowhere been explained by the appellant. The appellant earns money from patients and not from .doctors. If the appellant's claim that these expenses are in the nature of advertisement expenses is accepted, then it only means that these are the inducements given by the appellant to doctors to refer more and more patients to its hospitals and again it makes the expenses illegal as per the guidelines of MCI. Hence, disallowance of these expenses are upheld.”

8. The ld.counsel for the assessee at the time of hearing fairly admitted that similar disallowance was made in the Asstt.Year 2008-09

and that disallowance was upheld upto the Tribunal. However, he contended that assessee is in the business of providing medical facilities to the public at large, and therefore, it has to keep good relation with doctors as well as with the staff. Thus, in ordinary course of business it has incurred the above expenditure. This expenditure is allowable under section 37 of the Income Tax Act. On the strength of CBDT circular this expenditure cannot be disallowed to the assessee. He further contended that on account of corporate morality in giving gifts to the doctors, the business expenditure cannot be disallowed. Income from the activities of the assessee is assessed under the head “business income”. On the other hand, the ld.DR relied upon the order of the ld.CIT(A).

9. We have duly considered rival contentions and gone through the record carefully. Section 37 of the Income Tax Act contemplates that any expenditure not being expenditure in the nature described in section 30 to 36 and not being in the nature of capital expenditure or personal expenditure of the assessee, laid out or expended wholly and exclusively for the purpose of business or provision, shall be allowed in computing the income chargeable under the head “profits and gains of business or profession”. The expression “wholly and exclusively” in the section would provide that expenditure should be laid out for the purpose of business only. The stand of the assessee was that expenditure must have been incurred by the assessee voluntarily even without necessity. But if it is for the promotion of business, the deduction would be admissible. However, looking to the nature of expenditure and nature of business

activity of the assessee, it would reveal that these expenditures were not wholly required, in a sense, for the purpose of business or could it be termed that these expenses were exclusively incurred for the purpose of business. The Id.CIT(A) has examined this aspect in details and made reference to the decision of Hon'ble Himachal Pradesh High Court, and thereafter held that these expenses were not incurred for the promotion of the business. As pointed out by the Id.counsel for the assessee, similar expenses were disallowed to it in earlier assessment years upto the level of the Tribunal, though order of the Tribunal has not been placed on record by either parties. But statement made at the Bar is sufficient for holding that such expenditure has been disallowed in the past also. Thus, in order to maintain consistency, these grounds of appeals are rejected in both the assessment years.

10. Next common issue agitated by the assessee in both the year is with respect to depreciation required to be granted to the assessee on the alleged life saving equipments. In the details of assets, on which depreciation has been claimed, the assessee has shown the following machineries:

- “1. Stress Test Machine*
- 2. TMT Machine, TMT Machine with PC Printer/Accessories*
- 3. Trade Mills for Stress Test Machine*
- 4. Regulator, Life pressure Alarm*
- 5. Syringe Pump*
- 6. Patient Monitor System with Accessories and Modules New ICU Monitors*
- 8. Vital Signs View Station*
- 9. KLV 46W400A Sony LCD TV & DAV DZ87 ow sony HT*

- 10.Heat Exchanger and Lithium Bromide
- 11.Pluga make 100 mm Summersibale Pump set Model
- 12.IPB Module for Monitor V24
- 13.1 Big trolly with 3 tray and small trolly with 2 tray
- 14.OT Instrument with OT table and Different Light Sets
- 15.Opthalmic Sight Saving Equipments
- 16.Microscope
- 17.Monitors, 40" Monitor, Multipa Monitor for ICU
- 18.AMD Diplomax PHACO Machine
- 19. Neotech Chair Unit and OT Table
- 20.Horizontal Cylinder gas sterilizer with vacuum pump”

11. According to the assessee, these are part of plant & machinery of the assessee-company, and these are life saving equipments. Therefore, it claimed depreciation at the rate of 40%. On the other hand, the Id.AO has granted depreciation at the rate of 15%. On appeal, the Id.CIT(A) confirmed this stand of the AO by recording following finding:

“I have considered the facts of the case, the AO's observations and submission made by the AR of the appellant. The AO has clearly stated that the 20 assets/ list of which has been given in the assessment order, are not eligible for depreciation @ 40% as per new appendix I(III)(3)(xia) of the IT Act 1962. The only submission made by the appellant during the course of the appellate proceedings are that these assets are in the nature of spares/auxiliary equipment. But the same has not been explained by the appellant by giving even a single example. One fails to understand as to how Stress Test machines, TMT machines, trade mills etc. can be held to be .auxiliary equipment of the life saving equipments. The list given in appendix I(III)(3)(xia) of the IT Rules 1962 is very specific and names of the machines listed in this appendix are quite clear. The list nowhere says that the auxiliary equipment of such equipment will also be held to be eligible for depreciation @ 40%. Thus, on account of the fact that these 20 machines are not specifically mentioned in the appendix, and the appellant has failed to file any explanation as to how these

matches can be held to be part of the life saving equipment listed in this appendix, the disallowance made by the 'AO is upheld and this ground of appeal is dismissed.”

12. With the assistance of the ld.representatives, we have gone through the record carefully. We have perused Appendix I(III(3)(xia) of the Income Tax Rules, 1962, which is available at page no.1.474 of Income Tax Rules – TAXMANN (2018) edition. We find that a list of life saving medical equipments has been given in this Appendix on which depreciation at the rate of 40% is permissible. Where rate of depreciation has been provided on specific machinery, it is not to be granted on each and every machinery installed at the hospital. Thus, the ld.CIT(A) has rightly rejected the stand of the assessee. The depreciation is to be granted on the basis of rate provided in the table given in the Income Tax Rules. The machinery on which depreciation has been claimed by the assessee at 40% is not being provided in the Appendix. Therefore, the depreciation on such machinery is at 15% which has rightly been upheld by the ld.CIT(A). This ground of appeal is rejected in both years.

13. In the next ground of appeal, the assessee has claimed depreciation on certain electrical installation at 15% which has been restricted by the AO to 10%. While dealing with this issue in the Asstt.Year 2011-12, the ld.CIT(A) has taken note of the finding given by the AO as well as submissions made by the assessee. Thereafter, the ld.CIT(A) has upheld disallowance. The discussion made by the ld.CIT(A) reads as under:

“6. The third ground of appeal is as follows:-

"3. The Id. AO erred in fact and in law in restricting the claim of depreciation on electrical installation to 10% instead of 15% claimed by the Appellant and thereby disallowing depreciation of Rs.2,08,952/-

6.1. The AO has stated in his order as follows:-

"7.0 Disallowance of excess Depreciation on Electric Installation:-

7.1 On verification of depreciation chart annexed along with the return of income, it is noted that the assessee company has claimed depreciation of @ 15% on its electrical installation having W.D.V as on 01.04.2010 of Rs.39,30,030/- and addition made during the years of Rs.2,49,000/- on 24.06.2010. However, as per ,new appendix I of the Income Tax Rules, the rate of allowable depreciation on electrical installation is 10%, worked out to Rs.4,17,903/- depreciation on electrical installation is 10%, worked out to Rs.6,26,855/-. Thus, as per the provisions of Income Tax Rule, 1962, the assessee company claimed excess depreciation exceeded by 2,08,952/~. Accordingly, the excess claim of depreciation on electrical installation worked out to Rs.2,08,952/- is disallowed and added to the total income of the assessee."

6.2. During the course of appellate proceedings, the AR of the appellant has made the following submission:-

1. Vide Ground No. 3, the Appellant has challenged the action of AO in restricting the claim of depreciation on electrical installation to 10% instead of 15% claimed by the Appellant and thereby making addition of Rs. 2,08,952/- to the income of the Appellant.

2. It may be mentioned that the Appellant has purchased the electrical items like LDB Panel, box for X-Ray machine, industrial cable of various size for running the medical equipments, PCC panels etc. The purchase of electrical items was made at Baroda Heart & Multi Speciality Hospital, Bharuch. The equipments

purchased were used to run the medical equipments. The electrical fittings form part and parcel of the medical equipments. Therefore, depreciation on the same has to be allowed @ 15% being part of plant & machinery. Further, the Appellant has claimed the depreciation based on the rates mentioned in the Income Tax Rules, 1962.

3. *We may also like to clarify that the electrical installations in the case of the Appellant do not form part of "Furniture and Fittings including electrical fittings". Note 5 under the Appendix defines "Electrical fittings" include electrical wiring, switches, sockets, other fittings and fans etc. We submit that the electrical installations referred to above form part of machinery and not furniture & fixtures. These are not in the form of fittings like fans etc or in the nature of furniture and fittings. In view of the same higher rate of depreciation is required to be allowed.*

4. *The Appellant in case of furniture and fittings is claiming depreciation @ 10 % only.*

5. *Considering the above we request your kind office to allow the depreciation on electrical installation @ 15% as claimed by the Appellant.*

6.3. *I have considered the facts of the case, the AO's observations and submission made by the AR of the appellant. Again, the appellant has failed to explain with supporting evidences that the electric installation is in the nature of part and parcel of the medical equipments. The industrial cable of various sizes for running the medical equipments, PCC penal etc. are in the nature of electrical wiring and other fittings only. Hence, the disallowance made by the AO is upheld and this ground of appeal is dismissed."*

14. With the assistance of the ld.representtives, we have gone through the record. We find that depreciation has been restricted at the rate of 10% by the ld.AO because the assessee failed to demonstrate that electrical panel installed by it was part of the machinery. He considered

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electrical installation as independent asset than the medical equipments. The Id.CIT(A) has considered all these aspects in right perspective and no interference is called on this issue. Hence, this ground of appeal is also rejected.

15. In the result, all appeals of the assessee are dismissed. Appeal of the Revenue is dismissed due to low tax effect.

Order pronounced in the Court on 27th September, 2018 at Ahmedabad.

**Sd/-
(AMARJIT SINGH)
ACCOUNTANT MEMBER**

**Sd/-
(RAJPAL YADAV)
JUDICIAL MEMBER**