

Concept Pharmaceuticals (P.) Vs. Inspecting Assistant

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : May-12-1999

Reported in : (2000)73ITD174(Mum.)

Appellant : Concept Pharmaceuticals (P.)

Respondent : inspecting Assistant

Judgement :

1. This is an assessee's appeal directed against the order of the CIT(A)-VIII, Mumbai dated 11-11-1988 for the assessment year 1985-86.

2. The assessee is a private limited company (Industrial). The assessment year involved is 1985-86 for which the previous year ended by 30-6-1984. The assessee, which is hereinafter called the company for short, filed its return of income on 31-7-1985 disclosing a sum of Rs. 6,88,200. It had filed a revised return on 30-9-1986 declaring a sum of Rs. 11,18,530. According to the assessee-company, the revised return is a return filed under the Amnesty Scheme in force at that time. However, the Assessing Officer had refused to treat the return as Amnesty return. However, he completed the assessment by his order dated 30-3-1988 on a total income of Rs. 16,36,468. While completing the assessment, he treated a sum of Rs. 4,00,625 which represented peak of raw material purchased by payment of cash as income derived from other sources. The refusal to treat the revised return as Amnesty return was contested before the CIT(A) in appeal against the assessment order. The learned CIT(A) found his impugned orders that the assessment was made as a sequel to and on the basis of materials seized

during the search and seizure operations which took place from 20-5-1986 to 30-5-1986.

The surrender of such concealed income so detected in the search proceedings does not come under the umbrella of Amnesty Scheme. For this reason, the learned CIT(A) justified the action of the Assessing Officer in refusing to treat the revised return as amnesty return. The Assessing Officer treated the sum of Rs. 4,00,625 as income from other sources. His reasons for doing so are mentioned in para 3 of his orders. He states in that para that the company is one of the concerns of M/s. Lupin Laboratories (P.) Ltd. in which there was a search require operation under section 132 on 20-5-1986. In the course of the search, it was found that the company was used to making purchases from certain parties who were not identifiable. Though the purchase of raw material were seemed to have been paid off by cheques, actually there purchases where cash purchases. In the revised return of income, the company has offered a sum of Rs. 4,00,625 by way of peak of such cash purchases from the following parties : 3. In the peak working, the company has taken the peak of the invoices of the purchases made by it in the relevant previous year. In fact, all the purchases are cash purchases and as soon as the invoices are received, the company used to pay cash. The subsequent cheque payments were actually routed back to the company. These cheques were later on encashed and the available cash utilised again to make cash purchases.

In this manner, the peak working of the cash purchases from the above parties in the relevant previous year worked out to Rs. 4,00,625. The figure given by the company also tallied with this method of working in this case. It is assessed to tax as income from other sources.

4. Following arguments were addressed by Shri S. E. Dastur, learned advocate for the company. It is difficult to prove that raw material was purchased from the two parties mentioned above. The so-called peak worked out by the Assessing Officer namely, Rs. 4,00,625 was offered by the company in its revised return and it has claimed that this return was an Amnesty return. It is further contended that nothing has been seized from the Lupin group of industries. Nothing has been seized during the search regarding the purchases from the two parties mentioned above.

In fact, the company had filed its letter dated 23-7-1986 before the CIT (City VI), Bombay. The said petition is filed by Lupin Laboratories (P.) Ltd. The company which is the assessee before us belongs to Lupin group of companies or is one of the group companies of Lupin group. Our attention was drawn to para No. 7 of the said letter, which is as follows : "7. In respect of certain purchases of raw materials, we have proved that in all cases materials have been received. In case where certain further particulars were required for example identification of the parties, they have informed us that till such information is made available to you, and addition may be made. On that basis and in the spirit of true and complete disclosure and on the basis of a peak working, an amount of Rs. 27.80 lakhs has been determined, and considering other relevant facts, it has been agreed that an amount of Rs. 19.33 lakhs may be considered as additional income for taxation." "On the above basis, the total amount of additional income for taxation comes to Rs. 185.00 lakhs (rounded). This addition may be made to the total income and the total taxable income ascertained after such deductions the company may be entitled to on the facts and in law and considering the assessments hitherto made and disclosures made under Voluntary Disclosure Scheme." "We may clarify that this letter is being filed in the cases of the taxable entities in respect of whom raids under section 132 proceedings had been carried out by the department. We have not been furnished with copies of any of the statements in respect of the persons whose statement were recorded. They have assured us that the approach in the matter has been one of mutual trust and, therefore, the contents of this letter may be considered in the same spirit.

According to us, everything pertaining to the section 132 proceedings is covered by this letter. We may repeat that all these contents are on the basis of the overall agreement which has been made." 7. The break-up of the total additional income offered for taxation as per para 14 quoted above is given as under at the end of para 16 : For Packing materials 121.00 Rs. (lakhs) On Expense accounts 8.56 Rs. (lakhs) Statutory disallowances 12.77 Promissory Notes 4.40 8. The computation of income which was originally returned at Rs. 6,88,204 was furnished at page 7 of the Paper Book. The revised computation of income which is sought to be treated by the company as an Amnesty return is furnished at page 6 of the Paper Book according to which the total income offered for taxation was Rs. 11,18,531.

Additions to the extent of Rs. 8,39,052 were made. One of the additions forming part of Rs. 8,39,052 made was with the narration "Raw materials on (peck working basis) Rs. 4,00,625". Particulars of this Rs. 4,00,625 were furnished at page 5 of the Paper Book and since it is important to consider whether the return was Amnesty return or not, following is quoted in extensor :

cash	Unaccounted	Transaction	amount	Date of Bill cleared	Amount available	Total cash
				Rs.	Rs.	Rs.
				26-4-1983	11,856	-
11,856.00	30-5-1983	-	11,856	11,856	8-9-1983	170,500
-	178,500	178,500	-	2-12-1983	89,250	-
-	89,250	-	-	89,250	14-12-1983	89,250
-	89,250.00	26-12-1983	44,625	-	44,625.00	27-12-1983
44,125.00	28-12-1983	44,125	-	44,125.00	7-2-1984	-
89,250	178,500	-	15-2-1984	-	89,250	267,750
-	356,500	-	10-3-1984	-	44,125	400,625
						4,00,625.00

9. Thus, it can be seen that even according to the company, the unaccounted cash introduced was admitted to Rs. 4,00,625. Following facts are important to be noted in this connection. The first return was filed on 31-7-1985 at a time when Amnesty return was not in force disclosing an income of Rs. 6,88,200. Search and seizure operations were conducted under section 132 on 20-5-1986. Statements of Shri S. Srinivas, Finance Manager, Shri Ganesh Narayan Swami, Junior Officer, Materials and Shri Sharad Manohar Mhatre, Stores Clerk dated 21-5-1986 which were all recorded under section 132(4) were furnished in the Paper Book at pages 19 to 45 which were found to be in manuscript and the photocopies of those manuscript statements, were filed as Apart of the Paper Book. Further the statement recorded under section 131 of the Income-tax Act from Shri R. S. Krishnan on 29-5-1986 is furnished at pages 30 to 35 of the Paper Book. Shri R. S. Krishnan was the Material Manager of Lupin Labs. (P.) Ltd. who looked after all raw material, packing material purchases and also was in-charge of transit stores. He was examined under section 131 on 29-5-1986. Shri S. Srinivas, Finance Manager, was examined under section 131 on 30-5-1986. Shri Adhyatma Bandu Gupta was examined on 24-6-1986 under section 132(4). However, in none of their

statements, we have come across the names of M/s. Supreme Pharma and M/s. Midway Traders from whom cash purchases were recorded to have been made by the Assessing Officer. In fact, the original assessment records were asked to be produced by the departmental representative to verify when the Assessing Officer examined or came to know about the cash purchases made from M/s. Supreme Pharma and M/s.

Midway Traders. From the state of records before, us, there is no iota of evidence to show that cash purchases were made from M/s. Supreme Pharma and M/s. Midway Traders. The learned departmental representative was not able to show to us from the lengthy statements recorded from each of the above persons anything about the cash purchases made from the above two parties. Therefore, in the absence of Revenue establishing any justification for the addition of Rs. 4,00,625 as a result of investigations and detections made prior to search proceedings, i.e., on 29-5-1986 as or subsequently, we are unable to reject the argument of the learned counsel for the company that necessary investigation justifying addition of Rs. 4,00,625 must have been made by the Assessing Officer during the assessment proceedings which culminated in the assessment order dated 30-3-1988, and it is quite unlikely that the Assessing Officer had obtained any information whatsoever about M/s. Supreme Pharma and M/s. Midway Traders from any of the seized material during the course of the search. Therefore, the position boils down to this : whether mere stigma of search and seizure can shut out the company from coming under the Amnesty Scheme and filing the revised return, especially when the materials seized in the search proceedings were not looked into and before carrying on further investigation in which material for making addition of Rs. 4,00,625 was gathered. In this connection, the learned departmental representative very strongly relied on the clarification regarding the press-note and circular issued by the Ministry of Finance on 17-2-1986, especially question No. 12 and the answers given thereto, which are as follows : "Q. Can immunity given by the Circular be availed of by assessees whose premises have been searched by the tax authorities 10. The learned counsel for the company invited our pointed attention to question No. 6, question No. 7, question No. 19 and question No. 30 and the answers given in clarification thereto. The clarifications given by letter dated 17-2-1986 were as follows : "Question : Will the

immunity apply in cases where cash credits No. 6 which have been accepted as genuine by the ITO, while making assessment originally are now disclosed as income

Question : Where the investigations in the case of persons other than the assessee indicate concealment of income by the assessee and the assessee makes a true and full disclosures of his income would he be entitled to immunity under these circulars

Question : Kindly clarify the expression 'before detection by the No. 19 department'

Ans. : If the ITO has already found material to show that there has been concealment that would mean the department has detected the concealment. If the ITO only had prima facie belief that would not mean concealment has been detected.

Question : Whether an assessee could make a declaration in No. 30 respect of assets or income which is not the subject-matter of seizure

Ans. : Yes, if it has not been found out in the course of the search."

11. From the above, it is clear that the Amnesty is not available to an assessee where search and seizure proceedings took place in the premises etc. and where clinching material was found to be towards concealed income. However, if during the search proceedings the material gathered or seized is capable of raising a prima facie belief in the minds of the tax authorities that there is strong ground for suspicion about concealment of income, it should not be taken that concealed income is detected. Further in answer to a pointed question it was stated that undeclared income hitherto can be declared under the Amnesty Scheme if it is seen that such undeclared income has no connection whatsoever with the seized material during the search.

Further in order to buttress his argument, the learned counsel for the company Shri S. E. Dastur invited our attention to the judgment of the Calcutta High Court in - Anand Kumar Saraf v. CIT [1994] 75 Taxman 320/[1995] 211 ITR 562. The Head Note of the decision which reflected the ratio in the body of the judgment which is found at page 563 of the reported judgment states as follows : "The Amnesty Scheme was administered by Central Board of Direct Taxes through its various Circulars bearing Nos. 423, 432, 439, 440, 441, 450, 451, 453, 456, 472 and 474, Circular No. 451 dated February 17, 1986 issued by the CBDT, clarifying certain points regarding the Amnesty Scheme for assessees, has clarified that no immunity given by the circular can be availed of by the assessee, whose premises

had been searched by the tax authorities. An assessee could make a disclosure in respect of assets or income which had not been found in the course of the search. As to the meaning of the expression "before detection by the Department", the Central Board of Direct Taxes has further clarified that "if the Income-tax Officer, had already found materials to show that there had been concealment, that would mean that the Department had detected the concealment. If the Income-tax Officer had only prima facie belief that would not mean that the concealment had been detected." Therefore, an assessee whose premises had been searched could not claim immunity and other benefits given in the Amnesty Scheme only in respect of assets or income which had been found and/or seized by the tax authorities before the filing of the revised returns by the assessee concerned and also in those cases where the tax authorities had looked into the seized papers and had carried out some investigation (before the furnishing of revised returns by the assessee) to show that the income declared in the revised return had already been detected by the Department from the papers and documents found and seized in the course of the search." 12. We are satisfied that M/s. Supreme Pharma and M/s. Midway Traders were detected in the investigations perhaps made by the Assessing Officer subsequent to the filing of the revised return by the company on 30-9-1986 under which total income of Rs. 11,18,530 was returned. If really justification for addition of Rs. 4,00,625 can be gathered from the seized material itself and if the department really detected the said amount as a result of search and seizure, necessary proceedings to support his contention would have been filed by the learned departmental representative atleast before us. However, he failed to produce any record. Further he also failed to produce the original record so that we can go through ourselves so as to enable us to know when they were detected.

13. Therefore, in the absence of any such evidence being produced by the departmental representative, we are of the opinion that the ratio of the Calcutta High Court decision, in Anand Kumar Saraf's case (supra) fully applies to the facts of the case and Rs. 4,00,625 should be held to be voluntary surrender, which is quite separate and instinct from search and seizure operations conducted under section 132.

Further, the revised return dated 30-9-1986 should have been taken by the Assessing Officer as an Amnesty return, since time for filing the Amnesty return was extended from time to time and ultimately it was extended upto 31-3-1987. Vide Circular No. 453 dated 4-4-1986 which is reported in (159 ITR (St.) 9), time for filing Amnesty return was extended upto 30-9-1986. Further, under Circular No. 472 dated 15-10-1986 reported in (162 ITR (St) 17), time for filing Amnesty return was further extended upto 31-3-1987 and, therefore, we hold that the revised return filed by the assessee on 30-9-1986 for the assessment year 1985-86 is an Amnesty return and it should have been treated as such. As can be seen from page No. 6 of the Paper Book, total income disclosed under the Amnesty return was Rs. 11,18,531 on which Income-tax and surcharge payable was Rs. 7,04,675. The whole of it is recorded to have been paid as under : 15-12-1984 Rs. 3,38,400.00 31-7-1985 Rs. 78,250.00 3-10-1985 Rs. 48,260.00 Deposit with IDBI Rs. 16,920.00 Bal. paid 29-9-1986 Rs. 2,22,845.00 ----- 14. Thus, the revised return was not only filed, but the whole of the tax payable on the returned income as per the revised return was already paid by the date of the return.

15. The Assessing Officer treated the sum of Rs. 4,00,625 as income from other sources. The learned counsel for the Company contended that treatment of the said sum as income from other sources cannot be allowed to be sustained and it must be treated only as business income.

Following is what we came across at page 3179 in Chaturvedi & Pithisaria's Income-tax Law, 5th Edn. : "Adverting to such Amnesty Scheme, it has been held that while making the assessment under the Amnesty Scheme, the declaration made by the declarant has to be accepted and the declarant is to be assessed on the basis of the declaration made by him/her. At that time the question of asking the source of the income to be assessed would not arise because if the declarant is asked to declare the source of income while making a declaration under the Amnesty Scheme, then the whole purpose of the scheme shall be frustrated.

The Amnesty Schemes are actually formulated to unearth undeclared money and to afford an opportunity to the tax evaders to voluntarily declare the money which had evaded tax and to pay the tax under the scheme." 16. In view of the above

exposition of law by the learned Authors, the question of treating it as income from other sources does not arise, so also there is no question of our treating it even as part of business income. In this connection, the Company also relied upon the decision of the B-Bench of this Tribunal in *Khetshi K. Haria v. Fourth ITO* [1992] 40 ITD 167. Since High Court decision is already cited, we do not feel it necessary to deal with this Tribunal's decision which deals with a case of a penalty under section 271(1)(c).

17. Now, let us come to the second ground which deals with greater disallowance under section 37(3A). The Assessing Officer disallowed Rs. 27,614. In the revised return, the company worked out the disallowance under section 37(3A) at Rs. 14,392. The Assessing Officer stated that as per the tax audit report, advertisement expenditure amounted to Rs. 16,744 and sales promotion expenses amounted to Rs. 49,496. Further, as per the profit and loss account, the company incurred Rs. 55,454 towards maintenance of cars and Rs. 1,16,376 towards hotel payments.

The total came to Rs. 1,27,614 out of which he excluded Rs. 1,00,000 and disallowed Rs. 27,614 under section 37(3A).

18. Before the learned CIT(A), advertisement expenditure of Rs. 16,744 and sales promotion expenses of Rs. 49,496 were not pressed. Regarding the car maintenance expenses, the CIT(A) held that section 37(3A) contained a non obstante provision with respect to certain specific expenses mentioned therein,. The phrase 'expenditure on running and maintenance of motor car' according to him, cannot be construed to refer only to petrol expenses. He rejected the contention of the company who relied upon 4 ITD 221. It was also contended that a sum of Rs. 13,055 disallowed under rule 6D was also included in the said sum of Rs. 1,16,376. The learned CIT(A) directed to exclude the amount of Rs. 13,055 from the computation of disallowance under section 37(3A).

19. In this ground, disallowance of Rs. 27,614 under section 37(3A) was contested. In *Assam Carbon Products Ltd. v. CIT* [1997] 224 ITR 57, 59, 60-61/93 Taxman 729 (Gauhati), it is held that expenditure on insurance and current repairs which are covered by section 31 would not fall within the gamut of section 37(3A).

In CIT v. Ayurved Sewa Ashram Ltd. [1997] 225 ITR 778/93 Taxman 267 (Raj.) 780-81 (Raj.). It is held that the finding of the Tribunal that the amount spent on the repairs and maintenance of car was not covered by section 37(3A) was a finding of fact giving rise to no question of law. In CIT v. Tungabhadra Industries Ltd. [1994] 207 ITR 553 76 Taxman 185, 563-64 (Cal.), it is held that expenditure incurred on repairs and insurance of motor car, which are covered under section 31 and not under section 37(1), could not be disallowed under section 37(3A). Therefore, car maintenance expenses accordingly cannot be included for purpose of disallowance under section 37(3A). The learned CIT(A) already held that Rs. 13,055 should be excluded from the amount of Rs. 1,16,376 which represents hotel payments. Therefore, the disallowance under section 37(3A) is to be worked out afresh in the light of above findings.

20. The third ground relates to disallowance from out of remuneration paid to the Directors. According to the learned CIT(A), the disallowance is to be made by applying provisions of section 40A(5) instead of 40(c). In this connection, we are expected to do no better than following the decision in CIT v. Hico Products (P.) Ltd. (No. 1) [1993] 201 ITR 567/69 Taxman 575. The Bombay High Court in that case thoroughly examined the scope of section 40A(5)(a) and (c) of the Income-tax Act. Speaking about the limits prescribed in sub-clauses (i) and (ii) of clause (a), their Lordships held that these limits apply to payments made to all persons covered by clause (a). The substantive provisions of clause (a) clearly takes within its ambit all persons employed by the company. Had there been no proviso to this clause, this provision and all the limits and ceilings specified in clause (c) would have applied to payments of the nature prescribed in sub-clauses (i) and (ii) of clause (a) made to the employee directors also. But the proviso has carved out the particular category of persons mentioned therein from the substantive provision of clause (a) and has dealt with them differently. It provides a separate ceiling in respect of such persons and that is a ceiling of Rs. 72,000 on the aggregate expenditure and allowance. This aggregate ceiling applies not only to the expenditure mentioned in sub-clauses (i) and (ii) of clause (a) but also to expenditure and allowances referred to in sub-clauses (i) and (ii) of clause (c) of section 40. It is the aggregate of all these four items which cannot exceed Rs. 72,000. No individual ceiling has been put on any of these items of expenditure for

the purposes of allowability as has been done in clause (c) in the case of persons other than those falling under the proviso to clause (a). The limit of expenditure referred to in sub-clause (i) of clause (a) is Rs. 60,000 and the limit in respect of expenditure referred to in sub-clause (ii) is Rs. 1000 per month. But in the case of the employee director and such other persons who are covered by the proviso to clause (a), an aggregate ceiling of Rs. 72,000 has been fixed not only in respect of the expenditure referred to it in the aforesaid two sub-clauses but also those referred to in sub-clauses (i) and (ii) of clause (c) of section 40. From this, it is evident that the legislative intention is to treat the employee directors and other persons mentioned in the proviso differently from other employees in the matter of allowability of expenditure incurred on them. Therefore, the ceiling limit is fixed at Rs. 72,000 in the case of employee directors and over and above Rs. 72,000 disallowance is to be made and hence disallowance of Rs. 13,500 under section 40A(5) cannot be made.

21. In ground No. 4, treatment of the lower authorities that the addition of Rs. 4,00,625 is to be treated as income from other sources is questioned as incorrect. According to the Company, it should be treated as business income in the assessment year 1985-86. We have dealt with this point while discussion ground No. 1 and we have held that once it is accepted as an Amnesty return, source of income cannot be further found out and the nature of the addition determined in the basis of it.

22. The last ground is with reference to the correctness of grant of deduction under section 80HH. According to the company, it should have been determined at Rs. 3,11,311 where as it is restricted by the lower authorities to Rs. 1,40,619. The grievance on behalf of the assessee is that the following items were not considered eligible for deduction under section 80HH : (i) 43B disallowance Rs. 1,69,791 (ii) Share of profits in firm Rs. 3,73,082 (iii) Dividend on shares Rs. 126 (iv) Interest from distributors Rs. 90,671 (v) Profit under section 41(2) Rs. 1,61,760 (vi) Insurance claim Rs. 3,148 (vii) Peak of raw materials purchases Rs. 4,00,625. It is contended that the CIT(A) should have considered Rs. 4,00,625 as business income in computing the deduction under section 80HH. As already stated above, the company claimed relief of Rs. 3,11,311 under section 80HH.

According to it, it is entitled to 80HH relief on all the following six items : 23. out of the above stated six items, the counsel for the company before us did not press his claim in respect of the first three items and he confined his claim only to items No. 4 to 6. The learned CIT(A) had given the following reasoning as to why he was not convinced about the contention that Rs. 4,00,625 should be treated as business income of the company. His reasoning is contained in para 6 which is as below : "The second limb of this ground of appeal, is that without prejudice to the above, the IAC erred in not considering the said income as business income of the appellant. Since the cash remained outside the books in terms of the provisions of section 69A and section 69C the concealment so detected could only be described as income from other sources. The appellant's submissions are, therefore, rejected." 24. In view of these facts which are not controverted by the company, it is to be held that Rs. 4,00,625 was not, in our considered opinion, correctly considered as not forming part of profits of an industrial undertaking situated in a backward area. The learned CIT(A) also held that Rs. 1,69,791 is an outstanding liability towards sales-tax and since the liability does not add to the profit of the company, 80HHC relief cannot be obtained with reference to an admitted liability. We hold that interest from distributors of Rs. 90,671 and profit under section 41(2) of Rs. 1,61,760 should be considered as profits arising from the business conducted by the company which is located in the backward-area entitled to the benefits under section 80HH. Therefore, the Assessing Officer is directed to recompute 80HH relief according to our above findings.