Apex Laboratories Pvt. Ltd SPL (Civil) No. 23207 of 2019 Supreme Court of India Against Assessee

Issues discussed and addressed:

Issue No 1 Section 37 Incentives or freebies given to the doctors directly resulted in exposing them to the "odium of sanctions, leading to a ban on their practice of medicine. Those sanctions are mandated by law, as they are embodied in the code of conduct and ethics, which are normative, and have legally binding effect.

Facts of the case with respect to issue No 1:

On 01.08.2012, the Central Board of Direct Taxes (hereinafter, "CBDT") issued a circular, which clarified that expenses incurred by pharmaceutical and allied health sector industries for distribution of incentives (i.e., "freebies") to medical practitioners are ineligible for the benefit of Explanation 1 to Section 37(1), which denies the application of the benefit for any purpose which is an 'offence' or 'prohibited by law'.

Accordingly the expenditure of ₹ 4,72,91,159/- incurred towards gifting freebies such as hospitality, conference fees, gold coins, LCD TVs, fridges, laptops, etc. to medical practitioners for creating awareness about the health supplement 'Zincovit', was be added back to the total income of assessee during the assessment.

Assessee attempted to establish that the 2002 Regulations were enforceable only against medical practitioners and not the donors, i.e., pharmaceutical companies.

Held by the Authorities with respect to Issue No 1:

Section 37 is a residuary provision. Any business or professional expenditure which does not ordinarily fall under Sections 30-36, and which are not in the nature of capital expenditure or personal expenses, can claim the benefit of this exemption for "any purpose which is an offence or which is prohibited by law".

Section 2(38) of the General Clauses Act, 1897 defines 'offence' as "any act or omission made punishable by any law for the time being in force". Under the IPC, Section 40 defines it as "a thing punishable by this Code", read with Section 43 which defines 'illegal' as being applicable to "everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action". It is therefore clear that Explanation 1 contains within its ambit all such activities which are illegal/prohibited by law and/or punishable.

Though the memorandum to the Finance Bill, 1998 elucidated the ambit of Explanation 1 to include "protection money, extortion, hafta, bribes, etc.", yet, ipso facto, by no means is the embargo envisaged restricted to those examples. It is but logical that when acceptance of freebies is punishable by the MCI (the

range of penalties and sanction extending to ban imposed on the medical practitioner), pharmaceutical companies cannot be granted the tax benefit for providing such freebies, and thereby (actively and with full knowledge) enabling the commission of the act which attracts such opprobrium.

The incentives (or "freebies") given by Apex, to the doctors, had a direct result of exposing the recipients to the odium of sanctions, leading to a ban on their practice of medicine. Those sanctions are mandated by law, as they are embodied in the code of conduct and ethics, which are normative, and have legally binding effect. The conceded participation of the assessee- i.e., the provider or donor- was plainly prohibited, as far as their receipt by the medical practitioners was concerned. That medical practitioners were forbidden from accepting such gifts, or "freebies" was no less a prohibition on the part of their giver, or donor, i.e., Apex.

M/s. Ecohomes Township LLP ITA NO. 5888/MUM/2019 Mumbai ITAT Against Assessee

Issues discussed and addressed:

Issue No 1	Revised Return of Income	If the return of income is revised within the prescribed time it does not mean that revised return of income has to be accepted without there being proper reasons for the revision and its acceptability. In the given case assessee has not revised the balance sheet and Profit and Loss Account based on the change of method of accounting adopted by the assessee but only filed the revised return of income. It is immaterial whether assessee followed the revised method of account in the subsequent assessment year, what is relevant is whether the assessee has followed the proper method of accounting to declare the revenue for this assessment year.

Facts of the case with respect to issue No 1:

The assessee is a developer and has undertaken project of developing the property jointly with TATA Housing Development Company Ltd and a joint development agreement in this regard was entered into by both the parties on 11.11.2010. The income is mainly derived from the income from business and profession.

The assessee filed its return of income declaring total income at ₹.1,70,65,640/- which was processed u/s 143(1). Subsequently, assessee filed revised return of income revising the total income at ₹.NIL. Assessing Officer after going through the submissions observed that assessee declared the income from the joint development project and the same was further revised to Nil income.

The AO observed that the assessee has filed audited balance sheet and profit and loss account wherein receipts from TATA Housing which has shown to the tune of ₹.18,89,66152/-. In the said profit and loss

account the assessee declared profit before tax of ₹.1,70,03,143/-. Further he observed that assessee has entered into a JDA with TATA Housing wherein the assessee is entitled for 24% of the gross project receipts and TATA Housing is entitled for 76%. In the said development agreement with the TATA Housing, it is also mentioned that the construction cost of Residential House Units (RHU) proportionate will be borne by the assessee and proportionate to TATA Housing and it was stated that TATA Housing will borne the cost of construction only to the extent of ₹.800/- Per Sq.ft any cost of construction exceeds ₹.800/- sq.ft the excess cost shall be adjusted from the 24% share which TATA Housing will give to the assessee.

Assessing Officer observed that assessee has relied upon the Accounting Standard 9 and Accounting Standard 7 as well as Guidance Note 2012 for the purpose of revised computation of income which was rejected by AO and assessment was made based on original return on the premises that the assessee is not at all responsible for construction of the project and the entire construction is to be done by TATA Housing. Further he observed that it is pertinent to mention that when ₹.18.89,00,000/- is being accounted by the assessee as its share of 24% received from TATA Housing, it means that the sales of the project have taken place and TATA is liable for said amount.

Held by the Authorities with respect to Issue No 1:

The assessee finalized the balance sheet by following the method of proportionate completion method as per AS-7, subsequent to finalization of the balance sheet assessee has filed original return of income by declaring the profit as per audited balance sheet. Subsequently assessee received a certificate of status/statement from TATA Housing Development Company Ltd. as per which project was completed less than 25% of the total project.

As per the guidelines given in GN-2012 the revenue shall not be recognized in a project unless the stage of completion of the project reaches 25%. In order to follow GN-2012 assessee filed the revised return of income by following the method prescribed in GN-2012.

The accounting standards are adopted to present the financial statement reliably. Therefore, even to change the accounting standard, the assessee has to declare the impact of change in such accounting standard/policy in the financial statements. Assessee decided to change the policy based on the status of the project it has to first modify the balance sheet and declare the impact. But in this case assessee preferred only to file revised return of income.

Assessee and the TATA Housing Development Company Ltd. jointly developed the project and as per the joint development agreement assessee has brought proportionate land for the project and as per the joint

development agreement assessee would receive the sale consideration based on the gross sales effected by the TATA Housing Development Company Ltd., and not based on the stage of project completion. Therefore, the gross revenue and the related cost for the project will depend upon the receipt of gross consideration from the TATA Housing Development Company Ltd., not depends upon stage of completion of the project. Therefore, merely because assessee has received a certificate of statement from the TATA Housing Development Company Ltd. that the project completed is less than 25% it does not mean that assessee has to modify the method of accounting or the revenue from the project.

In the given case assessee is an LLP and no doubt accounting standard and guidance note is applicable to the assessee, however, the revenue sharing method and revenue declared by the assessee as per JDA are not based upon the project completion rather it depends upon the gross sales effected by the TATA Housing Development Company Ltd. Therefore, as per the facts on record the GN–2012 has no application to the case of the assessee.

Nishith Madanlal Desai Writ Petition No. 2727 of 2013 Bombay High Court In favour of Assessee

Issues discussed and addressed:

Issue No 1 Section 147 Once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure.

Facts of the case with respect to issue No 1:

Assessee-Individual was subjected to reassessment proceedings for AY 2006-07 which Revenue sought to justify by submitting that the Assessee utilised the loan availed from HDFC Ltd. for investment in debentures and not acquisition of property and claimed deduction of interest u/s 57 instead of Section 24 which could not be considered as true disclosure of material facts on Assessee's part.

Held by the Authorities with respect to Issue No 1:

All the points raised in the reasons recorded are considered in the assessment proceeding and all the relevant details for loan availed and its utilisation were duly submitted by the Assessee. Once a query is raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment.

There can be no doubt that the duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee, however, does not extend beyond the full and truthful disclosure of all primary facts. Once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn.

If from primary facts more inferences than one could be drawn, it would not be possible to say that the assessee should have drawn any particular inference and communicated it to the assessing authority. The Explanation to Section has not the effect of enlarging the section, by casting a duty on the assessee to disclose "inferences" to draw the proper inferences being the duty imposed on the Income Tax Officer. Therefore, it can be concluded that while the duty of the assessee is to disclose fully and truly all primary relevant facts, it does not extend beyond this.

Judgments Relied upon by the Authorities with respect to Issue No 1:

a. Calcutta Discount Co. Ltd. V/s. Income Tax Officer (1961) 41 ITR 191 (SC)
b. Aroni Commercials Ltd. [2014] 44 taxmann.com 304 (Bombay)

Dr. D.Y. Patil Educational Academy ITA Nos.1033, 1034 & 1035/M/2021 Mumbai ITAT

In favour of Assessee

Issues discussed and addressed:

Issue No 1 Section 153C For the assessment year which do not abate, proceedings u/s 153A/153C of the Act does not empower the AO to adjudicate the issues which are not based on any incriminating material found during the course of search and, hence, in such cases the AO does not have jurisdiction to make additions/disallowances which are not based on any incriminating material found during the course of search.

Facts of the case with respect to issue No 1:

Pursuant to search and seizure operation at the Assessee's Vice President, proceedings u/s 153C was initiated on the Assessee for AYs 2011-12 to 2013-14, whereby Revenue noted that development fees received was also shown as part of corpus fund and thus by invoking Section 11(1)(d), disallowed exemption on such development fees and also denied set-off of carried forward of losses.

Held by the Authorities with respect to Issue No 1:

Assessments were completed u/s 143(3) at nil income and that absence of any incriminating material was not under dispute as the Revenue challenged the additions on the merits only. Hence when original assessment has already been completed under section 143(3) of the Act the same cannot be disturbed by way of passing assessment order under section 153C of the Act, unless there is incriminating materials seized during the search operations.

Judgments Relied upon by the Authorities with respect to Issue No 1:

a. CIT vs. Continental Warehousing Corporation 374 ITR 645 Bombay high Court
b. All Cargo Global Logistics Ltd. vs. DCIT (2012) 18 ITR 106 (SB of ITAT) confirmed by the Hon'ble Bombay High Court in ITA No.1414 of 2013.

Charu Agarwal ITA No.1367/Del/2020 Delhi ITAT In favour of Assessee

Issues discussed and addressed:

Issue No 1 Section 54 If the land on which the building is constructed is a long term capital gain and the amount received towards the sale of such land when it is assessed as a long term capital gain and taxed. In view of Section 54(1) if that consideration from the sale of the land is utilized in acquiring a residential house, the benefit from exemption is to be extended. The

land which is adjoining the residential house is entitled to benefit under Section 54(1) of the Act but the land on which the residential house would not be entitled to such benefit, one cannot impute any such intention to the legislature.

Facts of the case with respect to issue No 1:

Assessee-Individual was subjected to scrutiny assessment for AY 2017-18 wherein Revenue rejected Assessee's claim under Section 54. Assessee had sold a residential plot in two parts, resulting in a capital gains of Rs.6.57 Cr. and invested the same in purchasing a residential house. The property transferred comprised of a house and land appurtenant to it, demarcated between Assessee and other co-owners, and her share in the same was sold during the year under consideration. Revenue denied the claim under Section 54 on the grounds that at the time of execution of the sale deed, the capital asset was a plot and not a house and made an addition of Rs.6.11 Cr.

Held by the Authorities with respect to Issue No 1:

The AO denied the claim of the assessee on the ground that the assessee, during the year under consideration and at the time of execution of sale deed has described the property as a plot. He, therefore, held that there is no relevance whether there was a house in the past or not and the only fact is that at the time of executing the sale deed the capital asset is a plot and, therefore, the exemption claimed by the assessee u/s 54 cannot be allowed. The AO further held that the assessee did not furnish the satisfaction of condition u/s 54F and, therefore, the same cannot be allowed to the assessee.

ITAT accepted the argument of the assessee that the property that was sold is a house property and land appurtenant thereto. The assessee has furnished the copy of the valuation report by the registered valuer who valued the property after inspection of the same and the assessee has also filed house tax and water tax receipts, etc. to evidence that the property that was sold was a building along with land and not only land. Merely because in the sale deed and agreement to sell the description of the property was mentioned as land, the same cannot go against the assessee to deny the benefit of deduction u/s 54 of the IT Act.

Judgments Relied upon by the Authorities with respect to Issue No 1:

a. Zaibunnisa Begum Andhra Pradesh High Court
b. C.N. Anantharam vs. ACIT vide ITA No.1012 to 2008, order dated 10th day of October, 2014 Karnataka High Court

REFEX Industries Limited ITA Nos.2938 & 2939/Chny/2017 Chennai ITAT In favour of Assessee

Issues discussed and addressed:

Issue No 1 Business Loss The main purpose of investment was not to acquire any manufacturing capacity or any infrastructural capacity but the main purpose was to boost assessee's sales. Therefore, the investments could not be said to be in capital field rather the same were meant to improve the top line of the business by way of higher revenue profits.

Facts of the case with respect to issue No 1:

Assessee-Company, engaged in refilling/ processing of refrigerant hydro fluorocarbons, was subjected to assessment wherein Revenue observed that the assessee claimed administrative expenses of Rs.1953.43 Lacs on account of Advance written off, Invocation of corporate guarantee and Investment written-off. All the above write-offs arose out of loss suffered by the assessee on account of investment made by the assessee in its wholly owned subsidiary company (WOS). It was submitted that in order to have a strong foothold in the international market which would serve assessee's larger business interest, the assessee decided to acquire a company) in Singapore which was carrying on similar business as that of assessee. As the laws in Singapore did not permit direct investment, the assessee floated WOS. M/s STPL through which it started acquiring the shares of KERPL. For the same, due compliance was made with the requirement of the Companies Act, 1956, RBI & SEBI etc. As the target business was in another country, the assessee and STPL took steps to conduct due diligence and thorough background check of KERPL and its promoters before the deal could be finally concluded. Since STPL had no funds, the assessee incurred aggregate expenses of Rs.770.16 Lacs on account of professional fee, legal fee, travelling etc. These were grouped under the head 'Loans and Advances' in the Balance Sheet with an intention to recover the same from STPL. However, the assessee could not acquire 90% stake in KERPL but stopped at 51% which resulted into disagreement between the assessee and KERPL and the assessee agreed for reversing of entire transaction at a price much lower than the original price at which the earlier 51% was invested by STPL. Accordingly, the amount of Rs.770.16 Lacs as due from STPL became irrecoverable and the same was written-off and claimed as business expenditure.

Held by the Authorities with respect to Issue No 1:

All the three write-off were part and parcel of the same transaction and arose in the course of assessee's efforts to run its business more smoothly and in a more profitable manner. Had the acquisition been materialized, the assessee would have benefitted by way of increase in business and better trading results. Therefore, it could be well said that the acquisition was in the normal course of assessee's business with a

view to improve trading results. Any loss arising therefore, thus, was to be viewed as loss in the revenue field and not in capital field as erroneously held by lower authorities. All the above stated facts would lead to a conclusion that the investments were in furtherance of business interest of the assessee and were made out of commercial expediency. The main purpose of investment was not to acquire any manufacturing capacity or any infrastructural capacity but the main purpose was to boost assessee's sales. Therefore, the investments could not be said to be in capital field rather the same were meant to improve the top line of the business by way of higher revenue profits and hence that loss in investment out of commercial expediency would be an allowable deduction.

Judgments Relied upon by the Authorities with respect to Issue No 1:

a. Colgate Palmolive India Ltd. (370 ITR 728) Bombay High Court
b. ACE Designers Ltd. V/s ADIT (120 Taxmann.com 321) Karnataka High Court
c. Patnaik & Co. Ltd. V/s CIT (161 ITR 365) Supreme Court
d. CIT V/s Amalgamation Pvt. Ltd. (108 ITR 895) Madras High Court
e. W.S Industries (India) Ltd (ITA No. 1373/Mds/2008 dated 21- 08-2009 Chennai ITAT

Sandeep S. Dagaria ITA No. 6749/MUM/2018 Mumbai ITAT In favour of Assessee

Issues discussed and addressed:

Issue No 1 Section 68 Assessee duly explained nature and source of loan transaction which are routed through bank. Hence no addition can be made alleging the same as accommodation entry.

Facts of the case with respect to issue No 1:

AO observed that assessee received an unsecured loan from an entity R . When the assessee was asked to justify the transaction, in response, the assessee submitted copy of ITR, confirmation and bank statement from the said party. Further, the assessee submitted that it had taken unsecured loans from several parties by taking account payee cheques only. However, AO rejected the submission of the assessee and made addition with regard to the unsecured loan received from R observing that R was involved in providing accommodation entries. On appeal, CIT(A) deleted the said addition. Aggrieved, Revenue was in appeal.

Held by the Authorities with respect to Issue No 1:

AO proceeded to make addition of unsecured loan merely because R was involved in transactions of bogus purchases. Further, the AO rejected the evidences submitted before him by the assessee such as copy of ITR, confirmation and bank statement from the said party. Further, the loan transaction was only routed through bank and there was nothing on record brought by the AO to believe that the said transaction was non-genuine. Further, CIT(A) also observed that nature and source of the loan transaction were properly explained by the assessee with the help of various judicial decisions. Hence, the CIT(A) was justified in deleting the addition made on account of unsecured loan received from R.

Netesoft India Ltd ITA No. 5359/Mum/2017 Mumbai ITAT In favour of Assessee

Issues discussed and addressed:

Issue No 1 Set off and Carry Forward of Losses Set-off of LTCL on sale of quoted equity shares would be allowable to the assessee against LTCG earned on sale of properties keeping in view the fact that LTCG on similar transactions of sale of quoted equity shares were exempt from tax under section 10(38).

Facts of the case with respect to issue No 1:

Assessee earned long-term capital gains (LTCG) of Rs. 127 lakhs on sale of certain properties. Assessee had also reflected LTCG on sale of quoted equity shares for Rs. 48 lakhs which was claimed exempt under section 10(38) since sale transactions were charged to Securities Transaction Tax (STT). At the same time, assessee

suffered long-term capital loss (LTCL) of Rs. 311 lakhs on similar sale of quoted equity shares transactions which were also subjected to payment of STT. Assessee, in its computation of income, claimed set-off of this loss against LTCG aggregating to Rs. 175 lakhs earned on properties and equity shares. The balance amount was carried forward to subsequent year. AO denied set-off and carry forward of stated losses on the ground that since long-term capital gains were exempt from tax, losses of similar nature would not be available for such adjustment.

Held by the Authorities with respect to Issue No 1:

Concept of income including losses would apply only when entire source was exempt from tax and not in cases were only one particular stream of income was falling in exempt provisions. The income contemplated under section 10(38) was only a part of source of capital gains on shares and only a limited portion of source was treated as exempt and not entire capital gains. Accordingly, assessee would be entitled or set-off of long-term capital losses of Rs. 311 lakhs against aggregate long-term capital gains of Rs. 175 lakhs and entitled to carry forward unutilized losses.

Judgments Relied upon by the Authorities with respect to Issue No 1:

a. Raptakos Brett & Co. Ltd. v. Dy. CIT (2015) 58 taxmann.com 115 (Mum-Trib)
b. Royal Calcutta Turf Club v. CIT (1983) 144 ITR 709 (Cal.)

Kind Attention:

Gujarat High Court has in the case of Kishorebhai Bhikhabhai Virani v. ACIT (2015) 367 ITR 261 (Guj) has taken a view against assessee.

Pransukhlal Mafatlal Hindu Swimming Bath & Boat Club Trust ITA No. 684/Mum/2019

Mumbai ITAT In favour of Assessee

Issues discussed and addressed:

Issue No 1 Section 11 Where main object or purpose of assessee s charitable trust was promotion of sports and swimming, merely because trust collected certain charges from coaching campus, same could not alter its character of being charitable.

Facts of the case with respect to issue No 1:

Assessee-trust claimed exemption under section 11. Main object of the assessee trust was promotion of swimming and other allied sports on no profit basis. AO noticed that assessee had earned income by way of

guest fee and learn to swim fee. Accordingly, AO held that assessee's activity was in the nature of business, trade or commerce and, therefore, AO disallowed exemption in view of proviso to section 2(15).

Held by the Authorities with respect to Issue No 1:

Providing sports facilities to general public without restriction to any caste, creed, religion or profession squarely fall within the definition of "charitable purpose" as defined under section 2(15). Assessee was running its activities in accordance with its main object and continued to provide services to its members by collecting nominal fee. Further, assessee has deficits from its core activity of promoting swimming for all the years. The assessee's collection from its members was less than the amount spent for its objects. But, for income from investments, assessee was always incurring deficit for all the years. Further, if the object or purpose of an institution is charitable, the fact that institution collects certain charges does not alter the character of the institution. it is not necessary that it should provide something for nothing or for less than it costs or for less than the ordinary price. Accordingly, assessee was not hit by proviso to section 2(15) and, therefore, assessee was entitled for exemption under section 11.