

(1998) 03 CAL CK 0002

Calcutta High Court

Case No: Income Tax Reference No. 127 of 1993

Commissioner of Income Tax

APPELLANT

Vs

Deys" Medical Stores (MFG.) Ltd.

RESPONDENT

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**Date of Decision:** March 27, 1998**Acts Referred:**

- Income Tax Act, 1961 - Section 256(1), 37(3A)

**Citation:** (1998) 2 ILR (Cal) 452**Hon'ble Judges:** Yad Ram Meena, J; Bijitendra Mohan Ultra, J**Bench:** Division Bench

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**Judgement**

Yad Ram Meena, J.

By this application u/s 256(1) of the Act the Tribunal has referred the following question for the opinion of this Court.

Whether on the facts and in the circumstances of the case and on a proper interpretation of. the Board's Circular No. 240 dated 7-5-1978, the Tribunal was justified, in law in holding that the expenditure incurred for distribution of free samples by the Assessee did not fail within the purview of Section 37(3A) of the Income Tax Act, 1961 ?

2. The Assessee is M/s. Dey's Medical Stores Manufacturing Ltd. It derives income from manufacture and sale of pharmaceutical drugs and chemist. From the return of income filed it appears that the Assessee's declared total business is Rs. 8,77,21,420.00 From the report of the I.T.O. it is found that during the relevant previous year the Assessee has incurred expenses to the tune of Rs. 57,81,232.00 on account of physician's samples for free distribution to the doctors and physicians for their information and, examination. The Assessee was asked to explain as to why the expenses incurred on free samples should not be considered for disallowance u/s 37(3A) of the Act. Income Tax Officer after considering the submissions of the Assessee considered the aforesaid amount for disallowance u/s 37(3A) of the Act." 3.

In appeal, C.I.T.. (Appeals) following the order of the Tribunal directed the Income Tax Officer that the said amount of Rs. 57,21,232.00 should be excluded in computing disallowance u/s 37(3A) of the Act.

4. In appeal before the Tribunal, the Tribunal has held, following its earlier orders passed in the case of the same Assessee, that C.I.T. (Appeals) had rightly directed the Income Tax Officer to exclude that amount for the purpose of disallowance u/s 37(3A) of the Act. Therefore the view taken by the C.I.T. (appeal) has been approved.

5. None appeared for the Assessee. Heard Learned Counsel for the Revenue. The provisions of Sub-section (3A) of Section 37 of the income tax Act reads as under:

3A. Notwithstanding anything contained in Sub-section (1), where the expenditure\* or, as the case may be, the aggregate expenditure incurred by an Assessee on any one or more of the items specified in Sub-section (3-B) exceeds one hundred thousand rupees, twenty per cent of such excess shall not be allowed as deduction in computing the income chargeable under the head "profits and gains of business or profession".

6. Learned Counsel for the Revenue has brought to our notice the Circular No. 240 dated May 17, 1978 issued by the Department wherein In para 12.4 it is clarified that as the terms "publicity" and "sales promotion" have a wide amplitude, expenditure incurred by tax payers on fashion shows, beauty contests, consumer contests, consumer gift offers, and free samples or gifts will fall within the ambit of new Sub-section (3A) of Section 37 of the Income Tax Act.

7. In the case of [Smith Kline and French \(India\) Ltd. Vs. Commissioner of Income Tax](#), Karnataka High Court has considered the similar question and answered the question in favour of the Revenue and against the Assessee holding that distribution of free samples comes within the purview of Sub-section 3A of Section 37 of the Act.

8. The samples are given free to medical practioners. No doubt that is one of the objection free distribution of samples so that message can be given to Dr. about the product and also the product can be tested. But at-the same time the primary object is publicity and boost the sale of the product of the Assessee. Members of the public should not buy the goods only because of inducement and publicity but public should1 have confidence about the curative value of the drugs and such confidence could be created mainly by the medical petitioners by prescribing the said drug. Publicity does not mean the advertisement in news paper or through any media which carries the message to the concerned persons in public it includes the supply of samples of that product. Which not be of publicity will be more effect to boost the sale of product depend upon the product.

9. In case of sale of any particular drug, if the advertisement given in the news paper may not be at any use and layman may not be in possession to undertake the value and proper use of that particular drug.

10. Therefore, medium through which drug could get publicised and earn the goodwill will be the. medium of prescription given by the medical practitioners. In fact the real market of the medicines could only be created through medical practitioners. All the reputation of the drugs chiefly depends upon the medical practitioners "and how they advise their patients to take, such drugs. Not only that, these samples are normally distributed free when a new drug comes in the market. When free samples are distributed to medical practitioners how it can be said that free samples are not distributed for publicity or for promotion of sale ?

11. In fact this the main object for which the free samples are distributed.

12. In view of this factual aspect of the matter, it cannot be said that the expenditure incurred by way of distributing free samples are not coming within the ambit of Sub-section (3A) of Section 37 of the Act.

13. In the result, we answer the question in the negative, that is, in favour of the Revenue and against the Assessee.

14. The application stands disposed of.

Bijitendra Mohan Mitra, J.

15. I agree.