IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL NO. 950 of 2006
With
R/TAX APPEAL NO. 1049 of 2006
With
R/TAX APPEAL NO. 951 of 2006
With
R/TAX APPEAL NO. 952 of 2006
With
R/TAX APPEAL NO. 953 of 2006
With
R/TAX APPEAL NO. 954 of 2006
With
R/TAX APPEAL NO. 955 of 2006

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE AKIL KURESHI
and
HONOURABLE MR.JUSTICE B.N. KARIA
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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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COMMISSIONER OF INCOME TAX
Versus
LOK PRAKASHAN LTD.
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Appearance:
MR M R BHATT WITH MRS MAUNA M BHATT(174) for the PETITIONER
MR S N SOPARKAR WITH MR B S SOPARKAR for the RESPONDENT
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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**
and
HONOURABLE MR.JUSTICE B.N. KARIA

Date : 24-25/04/2018
ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. All these Tax Appeals arise out of the common judgement of the Income Tax Appellate Tribunal ['the Tribunal' for short] involving same assessee and similar questions. We may record facts from Tax Appeal No. 950 of 2006. The issue pertains to assessment year 1989-90. In all Tax Appeals, following substantial question of law has been framed:

"Whether the Appellate Tribunal was right in law and on facts in holding that the respondent was entitled to deduction on Weighted Average while allocating the advertisement expenses for the purpose of calculation of deduction u/s. 80-I of the Income Tax Act, 1961?"

2. Additional following question of law arises in Tax Appeals No. 950/2006, 954/2006 and 955/2006:

"Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that even though the contributions towards Provident Fund are made beyond the due date specified in section 36(1)(va) of the Act, no disallowance u/s. 43B of the Act can be made if the same is made before due date of filing of return?"

3. The second of the two questions noted above is possible of a summary disposal. We may presently do so, without entering into detail facts. The respondent-assessee is a publication

house and publishes one of the leading vernacular daily circulated across the State. The Assessing Officer, after putting the assessee to notice, disallowed certain expenditure for the assessee's contribution towards Provident Fund, ESIC etc. on the ground that the contributions were made after the due date. The CIT(A) and the Tribunal deleted such disallowance *inter alia* on the grounds that the period of delay was extremely small running into barely few days and also holding that such disallowance was not justified. From the impugned judgement of the Tribunal, it is not clear whether such payments were in the nature of employer's contribution to the said funds or those of the employees. Depending on this question, the parameters for making additions would change. Counsel for the Revenue would rely on the judgement of Division Bench of this Court in case of **Commissioner of Income Tax vs. Gujarat State Road Transport Corporation** reported in **366 ITR 170** taking a view that non-payment of employees' contribution to the Provident Fund, Employees State Insurance Scheme within the due date specified in section 36(1)(va) would dis-entitle the assessee from claiming deduction thereof. At the same time, as per settled provision, if the late payment to the said funds is of the employer's contribution, such disallowance would not apply. Our attention was drawn to a detailed discussion in the assessment order forming part of Tax Appeal No. 954 of 2006 in which, the Assessing Officer has consciously and consistently referred to such payments as the employees' contribution. Be that as it may, since the question, whether such disallowance should be sustained or not depends on this crucial fact, we would place the matter before the Assessing Officer for giving effect to this order after ascertaining such fact. We make it clear that such disallowance would be made only if the same pertains to the employees' contribution to the said funds and not otherwise. While doing so, the Assessing Officer will also examine whether the delayed payment was within the grace period, as discussed in **Commissioner of Income Tax v. Amoli Organics (P) Ltd.** reported in **41 Taxmann.com 149**. This question thus stands disposed of.

4. We now come to more contentious issue which arises in following factual background:

As noted, the respondent-assessee is a publishing house and publishes a Gujarati news paper which has, besides Ahmedabad edition, four other editions of Rajkot, Surat, Baroda and Mumbai. In Ahmedabad, the assessee had set up two printing units; one at Khanpur and another at Nilgiri. Both situated within the city of Ahmedabad. The Nilgiri unit was eligible for deduction under section 80-I of the Income Tax Act,1961 ['the Act' for short] whereas, the Khanpur unit did not enjoy such benefits. For the said assessment year 1989-90, the assessee filed the return of income which came-up for scrutiny assessment under section 143(3) read with section 147 of the Act at the hands of the Assessing Officer. During such scrutiny assessment, the Assessing Officer noticed that the assessee had claimed deduction under section 80-I of the Act of Rs. 57,26,032/- for the Nilgiri Unit by claiming equal revenue allocation though the proportion of copies of news papers printed at both places was unequal. The Assessing Officer was not convinced about such allocation and therefore, after putting the assessee to notice, examined this question in further detail. The assessee when called upon to explain the position, pointed out that Ahmedabad edition of the news papers represented 66.9% of the total number of copies of the news papers sold. It also represented 67.8% of the total sale amount generated through such sale. It further pointed out that the Ahmedabad edition received 89.97% of the advertisement income. The assessee also pointed out that between Ahemdabad edition, proportion of Khanpur Unit and Nilgiri Unit was 60.35% and 39.65% respectively.

5. The Assessing Officer did not approve the higher allocation of advertisement income in the hands of the eligible unit. He was also not convinced about the Ahmedabad edition receiving 89.97% of the advertisement revenue. He was of the opinion that such figure included advertisement income of other editions also. He noted that in the assessment year 1994-95, he had made adjustment in this head and computed the advertisement income of Ahmedabad edition at 71%. However, in such year, since the circulation of Ahmedabad edition was 45% of the total circulation of the news paper, he

decided to allocate advertisement income to Ahmedabad unit at 80% considering that in current year, Ahmedabad edition circulation was 67.% of the total circulation.

6. He therefore, attributed 80% of total advertisement income of Rs. 13,54,84,703/- i.e. Rs. 10,83,87,762/- to Ahmedabad unit. Having done that he discarded the assessee's contention that such advertisement income was largely generated only out of city sale of news papers and therefore, the profit margins in case of Khanpur and Nilgiri units should be equally devised since majority of such copies sold in the city were printed at Nilgiri unit. He instead, applied the ratio of the total number of copies printed and sold by these two units inter se. He accordingly, allocated the advertisement income in hands of the Nilgiri unit as under:

"2.3 The share of Nilgiri unit in Ahmedabad edition on the basis of number of copies sold is 39.65%. Therefore, the advertisement income related to Nilgiri Unit works out to Rs. 4,29,75,747/- (39.65% of Rs. 10,83,87,762/-). This amount shall be substituted for Rs. 6,08,86,385/- allocated by assessee as in Exhibit-1."

7. The assessee carried the matter in appeal before CIT(A). The assessee contended that the allocation of the advertisement income in proportion of the number of copies printed and circulated by each unit was wholly unjust. Nilgiri Unit had sold majority of its copies within the city of Ahmedabad which was the prime revenue generator and the advertisement

revenue allocation should therefore not be in proportion of the copies printed by the said two units. CIT(A) substantially accepted the assessee's contention but not the formula as such. He was of the opinion that a fair formula should be worked out which would give higher profitability to the city eddition at the same time, not adopting a simple formula of the allocation of advertisement revenue purely on the basis of proportion of the number of copies printed and sold by the two units. He devised the formula which can be expressed as under:

$$\text{Weighted average of advertisement revenue to be allocated to Nilgiri Unit} = 100 \times \frac{X}{Y}$$

X=Percentage of news papers printed and circulated from Nilgiri Unit out of total number of copies of Ahmedabad edition.

Y=Percentage of news papers sold in the city of Ahmedabad and printed at Nilgiri Unit

8. The CIT (A) also cross-checked the result of such a formula. He on random basis selected three news papers and came to the conclusion that the local adds i.e. advertisements relatable to the property and other events in Ahmedabad City such as besna and classified advertisements had contributed to 70.81%, 63.37% 59.33% in the news papers published on 03.06.1990, 18.11.1990 and 15.06.1990 respectively. By such comparison, he was satisfied that his formula did not give any distorted result.

9. The Revenue carried the matter in appeal. Before the Tribunal, Revenue raised several contentions including pointing out that the formula evolved by the CIT(A) had no scientific basis. It was contended that there is only one Ahmedabad edition of the news paper which is circulated within as well as around the city in areas like Surendranagar, Mehsana and whole of north Gujarat. The news papers printed at Nilgiri press and Khanpur press are identical in all respects containing the same articles, the same advertisements, same photographs and same news. Even quality of news prints is same. The Revenue also questioned the very assertion of the assessee that Nilgiri Unit had sold 81% of the copies sold within the city, the remaining 19% being the share of Khanpur Unit. In the alternative, it was also contended that in any case, this would have no effect insofar as the profit allocation to eligible and non-eligible units is concerned.

10. The Tribunal, however, rejected the Revenue's appeal holding that in a situation like the present one, some element of estimation is always inevitable. The Tribunal held that the advertisement in the city circulation bears greater importance. This was also supported by the facts noticed by CIT(A). The assessee was therefore entitled to weighted benefit in the process of allocating advertisement income. The Tribunal approved the CIT(A)'s weighted revenue allocation formula.

11. Against this judgement, the Revenue has filed the present appeal. With varying figures, central issue is common in all appeals.

12. Counsel for the Revenue vehemently contended that the CIT(A) has adopted formula which has no scientific basis. Even if one were to recognize higher importance of Ahmedabad edition news paper considering greater revenue generation as compared to other editions, the formula had to have some scientific parameters and cannot be without any basis which is what precisely the CIT(A) has done in the present case. He opposed the assessee's contention that the allocation of advertisement income between the Nilgiri and Khanpur units should be in the proportion to the sale of news papers within the city. In any case, according to him, there was no evidence produced by the assessee to establish that the news papers sold in the city which were printed at Nilgiri Unit comprised of 81% of the total sales made within the city. Thus, on establishment of the primary fact as well as on application of the formula for allocation of advertisement income, the counsel raised serious objections. He submitted that the assessee had not maintained separate accounts for both units. In absence of any other evidence, the relative proportion of the publication of the Ahmedabad city edition between the two units would be the only safe yardstick for making allocation of advertisement income. Counsel relied on the judgement of **Kerala High Court in case of Malayala**

Manorama Co. Ltd vs. Commissioner of Income Tax reported in **257 ITR 633**.

13. On the other hand, learned counsel Mr. Soparkar for the assessee supported the view of the CIT(A) as approved by the Tribunal. His contentions were that the CIT(A) has evolved a scientific formula which even otherwise provides just result. This could be seen from the proportion of the advertisements representing Ahmedabad events from the three news papers randomly picked and checked by the CIT(A). The fact, that Ahmedabad edition earns greater revenue in the form of advertisement income, is not in dispute. A weighted deduction therefore had to be given for publication of such news paper. Even Assessing Officer accepted this proposition. He however, committed an error in modifying the figures presented by the assessee. This was without any basis.

14. Having heard learned counsel for the parties and having perused documents on record, relevant facts can be recapitulated as under:

1. The assessee has five editions of its Gujarat Samachar daily. These are Ahmedabad, Surat, Baroda and Rajkot and Mumbai editions;

2. Ahmedabad editions are printed at Khanpur and Nilgiri units. The Nilgiri unit is eligible for deduction under section

80-I of the Act whereas Khanpur unit is not.

3. The assessee has not maintained separate accounts for these two units.

4. The news papers printed at both these units are circulated within the city as well as in the surrounding areas including the whole of north Gujarat. The news papers are identical viz. those circulated in Ahmedabad and around Ahemedabad city.

5. The figures of the total publication of the news papers in all five editions are available. The figures of Ahmedabad edition and its proportion to the total publication are also available.

6. According to the assessee, advertisement income relatable to Ahmedabad edition was 89.87%. The Assessing Officer however, slashed down this projection to 80% for the reasons we have already recorded.

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15. On the basis of such facts, we need to judge the rival contentions. We may first address the issue of the Assessing Officer reducing the advertisement income for Ahmedabad edition from 89.87% projected by the assessee to 80%. In the order of assessment, the Assessing Officer merely referred to advertisement income of some other editions being merged

with these figures provided by the assessee without any further elaboration. We do not know if such mixing or merging was in isolated instances or not. Without establishing that such merging was at large scale, he relied on the exercise undertaken by him for earlier year and purportedly projected the figures for the present year. Firstly, we do not approve of this tinkering by the Assessing Officer on a passing observation of the advertisement income including income from certain other editions without citing instances and without even attempt to estimate the level of such intermixing. Equally importantly his projection of the previous years' figures was also erroneous. He noted that in the previous year, the assessee had shown the proportion of Ahmedabad edition at 45% of the total publication by the news paper as compared to 67% of the current year. Since in the previous year he had worked out the advertisement revenue generation for Ahmedabad edition at 71%, he adopted a figure of 80% for the current year. Going simply by proportion of 45:71, the 67% publication of Ahmedabad edition would justify advertisement income allocation of over 100%. Under the circumstances, we would not permit the Assessing Officer to tamper with the assessee's projection of advertisement revenue of Ahmedabad edition at 89.87% of the total advertisement revenue. With varying figures, same scenario would prevail in all assessment years.

16. This would bring us to the central issue where the CIT(A) had substituted the formula adopted by the Assessing Officer for income division between Nilgiri and Khanpur units. Firstly, if we recall, the Assessing Officer having divided the income between the said two printing units in the proportion of their publication inter se, the CIT (A) provided for a complex formula as under:

Weighted average of advertisement revenue to be allocated to Nilgiri Unit = $100 \times \frac{X}{Y}$

X= X=Percentage of news papers printed and circulated from Nilgiri Unit out of total number of copies of Ahmedabad edition.

Y=Percentage of news papers sold in the city of Ahmedabad and printed at Nilgiri Unit

17. Firstly, the Revenue has raised strong objection to the very foundation adopted by the CIT(A) viz. to hold that 81% of the publication in the city of Ahmedabad was printed in Niligir unit. The Revenue contends that, no evidence was led to establish this fact. We find considerable force in this contention. The assessee's representation before the CIT(A) was that for its business considerations out of the total number of copies of the news papers sold in the city, 81 came from the printing house at Nilgiri. In other words, the assessee contended that the Nilgiri unit provided 81% of the news papers sold in Ahmedabad. The rest were supplied by Khanpur

unit. This factual assertion of the assessee was not examined by the CIT(A) before acceptance. We do not find sufficient material produced by the assessee to establish this basic fact. CIT(A) therefore, proceeded on unverified facts.

18. Secondly, we do not find any scientific basis on which, the CIT(A) could have devised such formula. We have tried to gather some justification in his appellate order. Having failed we have also tried to brain-storm with the help of the advocates appearing for the parties. We also tried a few random hypothetical figures of publications State wise as well as Ahmedabad unit wise. We could neither gather any scientific basis nor could find that the formula provides fair results. Perhaps, this latter exercise was not necessary when we first came to a conclusion that the formula had no scientific basis. However, when the CIT (A) and the Tribunal had adopted this formula, before discarding it, we had also undertaken this extra trouble.

19. CIT(A) seems to have given considerable importance to the assessee's assertion that bulk of the Ahmedabad circulation came from Nilgiri unit whereas the bulk of the news paper printed at Khanpur were circulated outside Ahmedabad. Quite apart from such data not being established on record we wonder whether this could be the rational basis for making disproportionate income allocation between the two units. As

noted earlier, the formula devised by the CIT (A) does not even properly project this primary element. Even otherwise, we do not find that this is the rational basis for disproportionate allocation of income between the two units. The news papers remained the same. The news, the articles, the advertisements, the quality of paper and the printing quality were the same. The cost of the news paper also remained the same. Merely because greater number of news papers printed at Nilgiri unit were diverted for circulation in Ahmedabad would not, in our opinion, make any material difference insofar as income allocation is concerned.

20. When we find that the formula devised by the CIT(A) and approved by the Tribunal lacks scientific basis, the same must be discarded. The question is of its substitution. As noted, the assessee had not maintained separate accounts for its two units of Ahmedabad one being eligible for deduction under section 80-I, the other not so eligible. Both printing units printed and published news papers which were marked as Ahmedabad edition. Such news papers were circulated in and around the city of Ahmedabad including North Gujarat. The news papers, in all respects, were identical. The quality of paper used, the printing material and the cost of each such news paper sold in Ahmedabad as well as outside Ahmedabad were the same.

21. Under the circumstances, the most fair and equitable means of dividing the income between the two units would be in the proportion of their internal publication and circulation of Ahmedabad edition. That is what the Assessing Officer has done. We restore the formula.

22. In the result, the question is answered in favour of the Revenue subject to the observations made in the judgement. The Assessing Officer shall recompute the assessee's income from eligible and none-eligible units in the manner provided in this judgement. All Tax Appeals are disposed of accordingly.

(AKIL KURESHI, J)

(B.N. KARIA, J)

JYOTI V. JANI