

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 139 of 2017

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE M.R. SHAH

sd/-

and

HONOURABLE MR.JUSTICE B.N. KARIA

sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	NO
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

PR. COMMISSIONER OF INCOME TAX-4, AHMEDABAD....Appellant(s)

Versus

ZYDUS WELLNESS LIMITED....Opponent(s)

Appearance:

MR NITIN K MEHTA, ADVOCATE for the Appellant(s) No. 1

CORAM: HONOURABLE MR.JUSTICE M.R. SHAH

and

HONOURABLE MR.JUSTICE B.N. KARIA

Date : 14/03/2017

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE M.R. SHAH)

1. Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the learned Income Tax Appellate Tribunal, Ahmedabad dated 06.04.2016 passed in ITA No.1674/AHD/2012 for AY 2009-10, the Revenue has preferred present appeal with the following proposed questions of law.

"A. Whether the Tribunal erred in law and on facts in deleting the

disallowance of claim of depreciation on non -compete fees to the extent of Rs. 1,40,625/- ?

B. Whether the Tribunal erred in law and on facts in deleting the disallowance of claim of depreciation of reduction of Rs. 5,18,761/- from stock of packing material and Rs.27,17,342/- from stock of finished goods ?

C. Whether the Tribunal erred in law and on facts in deleting the disallowance of claim of foreign travel expenses of Rs. 3,20,467/- ?

D. Whether the Tribunal erred in law and on facts in deleting the expenses related to web design charges, trade mark expenses and survey expenses ?

E. Whether the Tribunal erred in law and on facts in deleting the disallowance of Rs. 36,60,981/- made u/s 40(a)(ia) of the Act ?"

2.0. The facts leading to the present appeal in nutshell are as under:

2.1. That the assessee engaged in the business of manufacturing and sale of Neufraceuitcals and trading in low calorie and Cosmeceuticals products filed return of income for AY 2009-10 declaring total income at Rs. 38,53,16,250/-. The case was selected for scrutiny. The assessee claimed the depreciation on non-compete fees; reduction of Rs.5,18,761/- from stock of packing material and Rs.27,17,342/- from stock of finished goods. The assessee also claimed the deduction towards foreign travel expenses. The assessee also claimed the deduction towards expenses related to web design charges, trade mark expenses and

survey expenses. The assessee also claimed the deduction of expenditure of Rs.36,60,981/- under Section 40(a)(ia) of the Act incurred by the assessee company on account of gift article produced for sales promotion. That the AO framed the assessment under Section 143(3) of the Act and determined total income at Rs.39,85,69,781/-. That the AO disallowed the depreciation of Rs. 1,40,625/- on "non compete fees". That the AO also made disallowance of claim of reduction of Rs. 5,18,761/- from stock of Packing material and Rs. 27,17,342/-from stock of finished goods. That the AO also made disallowance of Rs. 3,20,467/-claimed in respect of foreign travel expenses. The AO also disallowed Rs. 53,25,263/- recording web design charges, trade mark expenses and survey expenses claimed by the assessee. The AO also disallowed the expenditure of Rs. 36,60,981/- under Section 40(a)(ia) of the Act incurred by the assessee company on account of gift article produced for sales promotion.

2.2. Feeling aggrieved and dissatisfied with the assessment order passed by the AO in making the aforesaid disallowances claimed under the different heads, the assessee preferred appeal before the learned CIT(A). That the learned CIT(A) allowed the said appeal preferred by the assessee and deleted the disallowance of claim of depreciation- non compete fees to the extent of Rs. 1,40,625/-; deleted the claim of reduction of Rs. 5,18,761/- from stock of Packing material and Rs. 27,17,342/-from stock of finished goods ; deleted disallowance of claim of foreign travel expenses of Rs. 3,20,467/-; deleted the disallowance of Rs. 53,25,263/- recording web design charges, trade mark expenses and survey

expenses claimed by the assessee and also deleted the disallowance of Rs 36,60,981/- under Section 40(a)(ia) of the Act. Consequently, learned CIT(A) allowed the said appeal preferred by the assessee.

2.3. Feeling aggrieved and dissatisfied with the order passed by the learned CIT(A) deleting the aforesaid disallowances made by the AO, the Revenue preferred appeal before the learned Tribunal and by impugned judgment and order, the learned Tribunal has dismissed the said appeal, which has given rise to the present appeal.

3.0. We have heard Shri Nitin Mehta, learned counsel for the Revenue at length.

4.0. Now, so far as proposed question No.A, the same relates to claim of depreciation of amounting to Rs. 1,40,625/- on non compete fees which was capitalized as an intangible asset. The assessee claimed the depreciation of intangible asset in the nature of trade marks, technical know how and non-compete fees. The AO disallowed the depreciation on non compete fees by holding that payment towards non-compete fees were not in the nature of intangible assets eligible for depreciation provided under Section 32 of the Act and therefore, made disallowance of Rs. 1,40,625/-. The aforesaid came to be deleted by the learned CIT(A) placing reliance upon the decision of the Chennai Bench in the case of ITO vs. Mediacorp Technologies Pvt. Ltd(122 TTJ 394) as well as decision of the Pune Bench in the case of Serum Institute of India

Ltd (135 ITD 69(Pune). The learned CIT(A) also noted that the similar claim of the assessee was allowed in earlier assessment year i.e. AY 2007-08 and 2008-09. Thus, the revenue accepted the claim in the earlier two years. Therefore, the learned CIT(A) observed that in such situation and on the same non compete fees without there being any change in the facts, no disallowance of depreciation can be made in the year under consideration. The same has been confirmed by the learned Tribunal. Under the circumstances and considering the fact that the similar claim on non compete fees was allowed in the earlier years and same has been accepted by the Revenue in essence of any change in facts, the assessee is rightly held to be entitled to the depreciation on non compete fees. In the recent decision, the Hon'ble Supreme Court in the case of Commissioner of Income Tax, Delhi IV vs. M/s. Dalaria Promoters & Devels (P) Ltd in Civil Appeal No. 74 of 2007 has observed and held that Rule of consistency does demand that there being no change in circumstances, the similar treatment is required to be given as per previous years.

Under the circumstances, it cannot be said that the learned Tribunal has committed any error in deleting the disallowance of claim of depreciation on non compete fees to the extent of Rs. 1,40,625/-, a similar depreciation was allowed in the earlier assessment year and therefore, being no change in facts in the year under consideration.

5.0. Now, so far as proposed question No.B is concerned, it relates to disallowance of claim of reduction Rs. 5,18,761/- from stock of packing material and Rs.27,17,342/- from stock of finished

goods. The AO disallowed the said claim due to failure on the part of the assessee to produce requisite evidence in respect of its claim of reduction of closing stock. The learned CIT(A) deleted the aforesaid additions by observing in para 4.3, which reads as under:

"I have carefully perused the assessment order and the submissions given by the appellant. The addition has been made by the A. O. by disallowing the claim of reduction of Rs.5,18,761/-from stock of packing material and Rs.27,17,242/- from stock of finished goods. It has been held by the A. O. that no proof regarding the write off has been produced. The report of the technical / audit committee who had verified such stock has not been submitted. The A. O. has further held that the reduction of Rs.27,17,242/- was the provision of damage reduced from the stock of finished goods and it was not an actual write off.

The appellant has submitted that the amount of Rs.5,18,761/-was reduced due to shortage found at the time of physical verification, discontinuation of product, non-moving materials and there were the name of earlier company Carnation Nutra Analog Foods Ltd. printed on this packing materials. The appellant has submitted a list indicating stock of packing material which also gives the detail of the stock that was written off. Regarding the stock of damaged goods, it has submitted a detailed annexure containing location of the goods, quantity rate and value of the stock written off. The write off is duly supported by the procedure followed by the appellant company and is, therefore, fully allowable. There is no requirement of any technical or audit committee before the write off. Regarding the write off of Rs.27,17,242/-, the appellant has given a complete list of the items which were made for write off and it was mentioned that the list was for the provision of damaged goods and on that basis, the write off has actually been made and the goods have been reduced from the overall stock statement. The appellant has, therefore submitted that even if it was mentioned as provision, the stock was actually written off and, therefore, the claim should be allowed.

After considering the various submissions and the evidences placed before me by the appellant, I am inclined to accept the submission made by the appellant. There is a proper procedure which has been followed by

the appellant. The list of packaging material contains clear description .of the goods that were considered to be not usable. Similarly, the list for damaged stock clearly show the material, quantity and description of the various items which were lying at different godowns across the country which were considered to be damaged and accordingly the statement for provision for damage was prepared and on that basis the goods have actually been reduced from the closing stock of finished goods. The appellant has followed due procedure and the auditors must have verified the various lists before finalizing the accounts. There is no requirement of any special report for considering the reduction in stock and the procedure normally followed by the company as per accounting practices has been followed. The claim of the appellant is, therefore, supported by factual evidences is accordingly allowable. The ground of appeal is accordingly allowed."

5.1. The aforesaid has been confirmed by the learned Tribunal. Considering the aforesaid facts and circumstances of the case, more particularly, it was found that the assessee has followed due procedure, maintained the list of packaging material contains clear description of the goods that were considered to be not usable and also the list for damaged stock clearly show the material, quantity and description of the various items which were lying at different godowns across the country which were considered to be damaged and accordingly the statement for provision for damage was prepared and on that basis the goods have actually been reduced from the closing stock of finished goods, it cannot be said that the learned CIT(A) as well as learned Tribunal has committed any error in deleting the disallowance of claim of Rs. Rs. 5,18,761/- from stock of packing material and Rs.27,17,342/- from stock of finished goods. We are in complete agreement with the view taken by the learned Tribunal as well as learned CIT(A).

6.0. Now, so far as proposed question No.C is concerned, the same is with respect to the disallowance of claim of foreign travel expenses of Rs. 3,20,467/-. The AO disallowed the aforesaid expenses on the ground that the assessee could not furnish the details to substantiate the nature of expenses incurred whether they were for personal or business purpose. However, the learned CIT(A) deleted the said disallowance by observing that the assessee has submitted the complete details of employees who have travelled abroad, duration of visit, countries visit, nature and amount of expenses and purpose of travel. The learned CIT(A) also observed that even otherwise considering annual turnover of more than Rs. 195 crores, the foreign travel expenditure of Rs. 3,20,467/- only was required to be allowed, more particularly, when the same was duly supported by documentary evidence. The aforesaid has been confirmed by the learned Tribunal. Considering the facts and circumstances of the case, we are of the opinion that the learned Tribunal as well as learned CIT(A) rightly deleted the disallowance of Rs. 3,20,467/- claimed with respect to foreign travel. We are in complete agreement with the view taken by the learned Tribunal.

7.0. Now, so far as proposed question No. D is concerned, the same relates to the disallowance of Rs. 53,25,263/-regarding web designing charges, trade mark expenses and survey expenses claimed by the assessee. The AO disallowed the said expenditure by treating the same as capital expenditure. On an appeal, learned CIT(A) relying upon the decision of the Delhi High Court in the case of CIT vs. Indian Visit Com Pvt Ltd (176 Taxman 164) held

that in case of expenditure on website, there is no change in the fixed assets of the assessee and no asset has been created but it is a tool for facilitating the business of the assessee and therefore, held expenditure of website to be of revenue nature.

7.1. With respect to trade mark expenses, also and following decision of the Hon'ble Supreme Court in the case of *Finlay Mills Ltd* (20 ITR 475(SC)), the learned CIT(A) held that the trade mark expenses is of revenue in nature as the same does not created any assets or it does not result into any advantage of enduring nature..

7.2. So far as survey expenses is concerned, the learned CIT(A) also observed and held that expenditure incurred on survey number treated as revenue in nature as the survey expenses has been incurred to improve the efficiency of the business by finding out customers preference for sugar substitute, market research for butter margarine evaluation of cosmetic product, software support and maintenance etc. The learned CIT(A) also observed that looking to the nature of the business of the assessee to keep their products constantly updated keeping in view the customer preferences and the market demand and requirement trends, such survey is required. Therefore, the learned Tribunal held survey expenses as revenue in nature. Consequently, learned CIT(A) deleted the disallowance made by the AO with respect to the web designing charges, trade mark expenses and survey expenses. Having heard the learned advocate for the Revenue and the purpose for which aforesaid expenses were made by the assessee and that by the aforesaid expenses no new asset has been acquired

and / or there is no change in the fixed asset of the assessee, we are of the opinion that no error has been committed by the learned Tribunal and / or learned CIT(A) treating the aforesaid expenses as revenue in nature. We confirm the finding recorded by the learned CIT(A) as also learned Tribunal treating the aforesaid expenses as revenue in nature.

8.0. Now, so far as proposed question no.5 is concerned, it relates to disallowance of Rs. 36,60,981/- made u/s 40(a)(ia) of the Act incurred by the assessee company on account of gift article purchased for sales promotion. From the order passed by the AO, it appears that the AO disallowed the said expenditure on the ground that the assessee failed to deduct TDS as per the provision of Section 194 C of the Act. On facts, learned CIT(A) has held that the expenses related to purchase of gift article cannot be termed as work contract and therefore, the provision of Section 194 C are not applicable. The relevant observations of the learned CIT(A) in para 8.3 are as under:

I have carefully perused the assessment order and the submissions given by the appellant. The A. O. has treated the expenditure on certain items of sales promotion expenses amounting to Rs.36,60,981/- as liable for deduction of TDS u/s. 194C of the Act holding it as work contract. The appellant has submitted that it was not a work contract. These expenses were related to purchase of promotional articles and sample expenses which cannot be termed as work contract. The appellant further mentioned the CBDT Circular No. 714 and has submitted that in view of the circular the provisions of section 194C are not attracted.

After considering the material on record, it is noted that the appellant has purchased certain items such as danglers, wall mounted dispensers, printed leaflets, bags etc. with the logo of the company for sales promotion. The

items were in the nature of ready goods and only logo of the company was printed on the items. These items appeared to be the items available in the market off the shelf. The appellant has only added its logo on those items to promote its business. It is nowhere indicated in the assessment order or the facts that the design and description of the article was provided by the appellant. The reliance placed by the A. O. on the decision of ITAT, Pune Bench in case of BDA Limited (Supra) is also not justified as in that case, the specifications of the labels to be printed on liquor bottles were given by the buyer and those labels were specifically printed for the buyer and, therefore, it was in the nature of works contract. In the present case, there are no such facts on record.

In view of the above discussion, the disallowance made by the A. O. u/s. 40(a)(ia) is directed to be deleted. The ground of appeal is accordingly allowed."

8.1. The aforesaid has been confirmed by the learned Tribunal. Considering the fact that merely because the logo of the company was added on the gift article which was to permit its business, it cannot be said that the purchase of goods article was a work contract for which TDS was required to be deducted. Logo was required only for the purpose of identification of the company. Therefore, the same is rightly held to be allowable as business expenditure. We are in complete agreement with the view taken by the learned CIT(A) as also learned Tribunal.

9.0. In view of the above and for the reasons stated above, present appeal fails and same deserves to be dismissed and is accordingly dismissed.

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(M.R. SHAH, J.)

sd/-
(B.N. KARIA, J.)

Kaushik