

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**INCOME TAX REFERENCE No. 106 of 1997**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE D.A.MEHTA**

**HONOURABLE MR.JUSTICE Z.K.SAIYED**

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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, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**COMMISSIONER OF INCOME-TAX - Applicant(s)**

**Versus**

**M/S.VADILAL INDUSTRIES LTD. - Respondent(s)**

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**Appearance :**

MR BB NAIK for Applicant(s) : 1,  
MR SN SOPARKAR for Respondent(s) : 1,

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**CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA**

**and**

**HONOURABLE MR.JUSTICE Z.K.SAIYED**

**Date : 09/04/2008**

**ORAL JUDGMENT**

**(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)**

1. The Income Tax Appellate Tribunal, Ahmedabad, Bench-B, has referred the following two questions for the opinion of this Court under sec. 256(1) of the Income Tax Act, 1961 (the Act), at the instance of the Commissioner of Income Tax.

1. "Whether, the Appellate Tribunal is right in law and on facts in holding that disallowance under section 37(3A) was required to be considered on the net amount and not the gross amount?
2. Whether, the appellate Tribunal is right in law and on facts in holding that the CIT(A) should have entertained the additional ground with regard to expenditure of Rs. 4,14,955/- on account of payments made to the suppliers of skimmed milk, when the assessee had claimed the said amount for asstt. Year 1986-87?

2. The Assessment Year is 1985-86 and the relevant accounting period is the year ended on 30.6.1984. In the assessment framed under sec. 143(3) of the Act, the Assessing Officer adopted the figure of Rs. 17,36,625/- for applying the provisions of Sec. 37(3A) of the Act as being gross expenditure towards the advertisement, publicity and sales promotion. The plea of the assessee that the only amount which could be considered for the purposes of working out the limit for disallowance was Rs. 46,470/- because the assessee had recovered Rs. 16,90,155/- from the dealers of the Assessee Company was turned down by

the Assessing Officer. The assessee did not succeed in appeal before the Commissioner (Appeals) on this count.

3. During the course of hearing before the Commissioner (Appeals), an additional ground of appeal was sought to be raised in relation to a sum of Rs. 4,14,955/- which was the amount paid to suppliers of skimmed milk. The need for raising additional ground of appeal arose because the assessee's claim relating to deduction of the same amount for Assessment Year 1986-87 had been disallowed by the Assessing Officer and confirmed by Commissioner (Appeals) for the said year.

4. The assessee carried the matter by way of second appeal before the Tribunal. In relation to the first issue regarding disallowance under sec. 37(3A) of the Act, the Tribunal has held that the said provision along with other sub-sections like (3B), (3C) and (3D) of section 37 are part of section 37(1) of the Act; that an expenditure which is not claimed as deduction under sec. 37(1) of the Act cannot be taken into consideration for the purpose of working out limit for disallowance under sec. 37(3A) of the Act. The Tribunal has recorded thus: "under sec. 37(1) any expenditure not being expenditure of nature described in sec. 30 to 36 and not being in the nature of capital expenditure or personal expenditure of the assessee laid down are expended wholly and exclusively for the purpose of business shall be

allowed in computing the income chargeable under the head profits and gains from business. What can be allowed as deduction is an amount what is claimed as deduction. If the assessee does not claim the expenditure anywhere either in the return or in a letter same cannot be allowed or disallowed as a deduction. The assessee has claimed an expenditure of Rs. 46,473/- only. Therefore, the disallowance if any has to be considered from this amount only.”

5. In relation to the second issue, after setting out the relevant dates in paragraph No. 4 of the order, the Tribunal has recorded following findings:

“We have give the full details of the date which are relevant to the issue in question. There is no dispute that the expenditure has been incurred and is of allowable nature. The question is whether the assessee's intention were bonafide or not in claiming the expenses for 86-87 and ot debiting the accounts for 85-86. We are of the opinion that the decision of the Supreme Court in Gujarat Gravure cited supra is not applicable to the facts of this case. There was a finding by the A.O. That the claim of the assessee was not allowable for 86-87 as it pertained to A.Y. 85-86.

Here the claim was for 86-87 and a finding was given that the same was available for

85-86. The assessee at the very first opportunity moved before the CIT(A) with an additional ground of appeal.

In this case the assessee was under genuine impression that the amounts in question were allowable in 86-87 and not in 85-86. The assessee came to know for the first time that the amounts in question pertained to 85-86 when auditors report was under process. However, as the return for A.Y. 85-86 was already filed. The moment it was found that no such claim was allowable for 86-87 it moved with immediate urgency to the CIT(A) for permitting it to raise that additional ground of appeal. There is no dispute that such a claim in this case is allowable for 85-86.

6. Mr. B.B. Naik learned Standing Counsel for the applicant – Revenue submitted that the disallowance under sec. 37(3A) of the Act has to be made by reading the said section along with sub-section (3B) of the Act and the Tribunal has committed an error in referring to and relying upon the provisions of sec. 37(1) of the Act. According to the learned counsel, once the conditions prescribed in sec. 37(3B) of the Act were fulfilled, the Assessing Officer had only to work out and apply the limit and the prescribed percentage laid down in sec. 37(3A) of the Act without looking at any other provisions of the Act.

It was, therefore, urged that the finding of the Tribunal on this count is required to be reversed.

7. In relation to the second issue, Mr. Naik has submitted that the Appellate Authority was vested with a discretion, whether to admit the additional ground of appeal or not; the Appellate Authority had exercised such a discretion, and the Tribunal ought not to have interfered with the exercise of such discretion.

8. On behalf of the assessee, learned advocate has pointed out in relation to the first issue that the Tribunal was correct in holding that there was no expenditure which was claimed. There can be no question of allowance or disallowance of an amount which is not claimed. In support of the submission, reliance has been placed on the decision of the Apex Court in the case of **Indian Molasses Co. (Private) Ltd. vs. Commissioner of Income Tax, West Bengal,** reported in (1959) 37 ITR 66, to submit that the meaning of the term "expenditure" means something which is gone irretrievably.

9. In relation to the second question, it was submitted that on facts, the Tribunal's order was justified, and the Tribunal having applied correct legal propositions laid down by various decisions referred to by the Tribunal, no interference was called for.

10. In so far as the first question is concerned, the scheme of the Act requires in the first instance, an assessee to make a claim of an amount which is expended. If a claim is made, the Assessing Officer is required to determine whether such a claim or any part thereof, is allowable in light of the provisions of the Act. Thereafter, after allowability or otherwise, of an amount is decided, the last step would be of actually making allowance or disallowance.

11. Under sec. 37 of the Act any expenditure, which is not of the nature described in sections 30 to 36 and section 80(VV) of the Act, is allowable provided the expenditure is; (1) not in the nature of capital expenditure; (2) not in the nature of personal expenses of the assessee and; (3) laid out or expended wholly and exclusively for the purposes of the business or profession. Therefore, the first question that would arise is as to what is the nature of the claim made by the assessee in the present case. Whether the expenditure under the head of "Advertisement and Sales Promotion Account" is an expenditure qualified for such a deduction ? The question of partial disallowance by applying the limit prescribed under Section 37(3A) of the Act comes into the play only thereafter.

12. Therefore, the first thing is to determine what is the expenditure claimed by the assessee; is it the gross amount debited to the "Advertisement and Sales

Promotion Account”, or is it the net amount after considering the credit to the “Advertisement and Sales Promotion Account”. To determine the same, the pronouncement of the Apex Court as to the meaning of the term “expenditure” in the case of Indian Molasses Co. (Private) Ltd., (supra) may be usefully reproduced. It is stated that: “Expenditure” is equal to “expense” and “expense” is money laid out by calculation and intention though in many uses of the word this element may not be present, as and when we speak of a joke at another's expense. But the idea of “spending” in the sense of “paying out or away” money is the primary meaning and it is with that meaning that we are concerned. “Expenditure” is thus what is “paid out or away” and is something which is gone irretrievably.”

13. Applying the aforesaid tests to the facts of the case, it is not possible to state that the gross amount debited to the “Advertisement and Sales Promotion Account” was the amount which was paid out or paid away, nor can it be termed to be something gone out irretrievably. In fact, the corresponding credit side of the very same account shows that a major portion of the amount had already been recovered by the assessee - company from its dealers and in the circumstances, it is not possible to accept the contention of the revenue that the gross amount is an amount of expenditure incurred. If there is no expenditure, there could be no question of making any claim for deduction. In absence of any

claim there can be no question, whether the amount is allowable or otherwise. In other words, there cannot be any disallowance of an amount which is not a claimed as deduction. The Tribunal has recorded a finding that the assessee has claimed an expenditure of Rs. 46,473/- only; that would be the only amount which would come up for consideration as being allowable or otherwise under sec. 37(1) of the Act. The scheme of the Act itself envisages that only after amount is determined under sec. 37(1) of the Act as being allowable and the same falls within any of the specified categories of sec. 37(3B) of the Act, can the question of partial disallowance under sec. 37(3A) of the Act arise.

14. In the aforesaid fact situation, and the position of law, as stated hereinbefore, there is no infirmity in the finding of the Tribunal that for the purposes of disallowance under sec. 37(3A), if any, only the sum of Rs. 46,473/- can be taken up for consideration.

15. In relation to the second question, the Tribunal has found as a matter of fact that there is no dispute that the expenditure in question has been incurred and is of allowable nature. The assessee had claimed deduction for the Assessment Year 1986-87 but having failed up to the stage of Commissioner (Appeals), made a claim for Assessment Year 1985-86 in the pending appeal before the Commissioner (Appeals). That in fact, the claim of the assessee

was genuine, the intention was bonafide in making the claim for the Assessment Year 1986-87 and, therefore, the Tribunal has held that in absence of any other evidence to point out to the contrary the assessee was entitled to raise an additional ground of appeal for the Assessment Year 1985-86 before the Commissioner (Appeals).

16. In the case of **New India Industries Ltd. vs. Commissioner of Income Tax, reported in 207 ITR 1010,** this High Court has held that additional ground of appeal can be raised before the Appellate Authority and while determining whether the Appellate Authority should exercise discretion in favour of permitting raising of such a ground, the Appellate Authority must be satisfied that the ground raised was bonafide and that the same could not have been raised earlier for good reason. That the satisfaction of the Appellate Authority is always taken on the facts and circumstances of each case and no rigid principle or any hard and fast rule can be laid down for this purpose. The aforesaid principles have been borne in mind by the Tribunal while determining the issue raised before the Tribunal.

17. In the circumstances, taking into consideration the findings of the Tribunal, there is no infirmity in law so as to enable the High Court to take a different view of the matter. It is an admitted position that proceedings for Assessment Year 1985-86 were pending on the day the additional ground was

raised before Commissioner (Appeals) and that the amount was otherwise allowable as deduction is not in dispute. The Tribunal was, therefore, justified in holding that Commissioner (Appeals) should have entertained the additional ground with regard to expenditure of Rs. 4,14,955/- on account of payments made to the suppliers of skimmed milk regardless of the fact that the assessee had claimed the said amount for Assessment Year 1986-87 because the said claim for Assessment Year 1986-87 had already been disallowed.

18. Accordingly, both the questions are answered in the affirmative, that is, in favour of the assessee and against the Revenue. The Reference stands disposed of accordingly. There shall be no order as to costs.

(D.A. MEHTA, J.)

(Z.K. SAIYED, J.)

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