

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/TAX APPEAL NO. 1087 of 2008**

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NATIONAL DAIRY DEVELOPMENT BOARD

Versus

ADDL. COMMISSIONER OF INCOME TAX

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Appearance:

MR SN SOPARKAR, SENIOR ADVOCATE WITH MR BANDISH
SOPARKAR FOR MRS SWATI SOPARKAR(870) for Appellant No. 1
MR VARUN K PATEL for Opponent No.1

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CORAM: **HONOURABLE THE CHIEF JUSTICE MR. JUSTICE ARAVIND
KUMAR**
and
HONOURABLE MR. JUSTICE ASHUTOSH J. SHASTRI

Date : 12/10/2022
ORAL ORDER

(PER : HONOURABLE THE CHIEF JUSTICE MR. JUSTICE ARAVIND KUMAR)

1. This Court while admitting the appeal had formulated the following substantial questions of law :

“(B) *Whether, on the facts and in the circumstances of the case, the ITAT was right in law in confirming disallowance of deduction u/s. 36(1)(viii) for Rs.9,90,00,000?*

“(C) *Whether, on the facts and in the circumstances of the case, the ITAT was right in law in holding that ‘dairying’ is not industry or agricultural development or development of industrial facility for the purpose of Section 36(1)(iii) of the Income Tax Act, 1961?*

“(D) *Whether, on the facts and in the circumstances of the case, the ITAT was right in law in holding that in absence of share capital,*

deduction u/s. 36(1)(viii) cannot be allowed?

(E) *Whether, on the facts and in the circumstances of the case, the ITAT was right in law in concluding that grant given to various cooperative societies is not deductible expenditure u/s.36(1)(xii) of the Act and holding that the same are not in the nature of expenditure?*

(F) *Whether, on the facts and in the circumstances of the case, the ITAT was right in law in holding that in absence of approval to deed of variation the payment of Rs.5,61,56,408/- being contribution made to National Dairy Development Board Employees Group Gratuity Funds cannot be allowed?"*

2. The assessee is a corporate body created by an Act of Parliament called National Dairy Development Act, 1987. Assessee claims the status of a company as per the definition of company under the provisions of the Income Tax Act. The assessee does not have authorized, issued or paid up share capital. It has not been incorporated as a company under the Companies Act, 1956. The assessee has no shareholders either in the Government sector or in the banking/institutional sector.

3. The issue involved in this appeal is relatable to the assessment year 2003-04. The return of income filed

by the assessee discloses that it had declared taxable income of Rs.81,03,26,249/-, which came to be processed under Section 143(1) of the Act and refund of Rs.15,26,18,119/- came to be issued to the assessee. Subsequently, further refund of Rs.16,13,021/- was issued. After issuance of notice under Section 143(2) of the Act, the scrutiny assessment proceeding was commenced and assessment order came to be passed on 31.03.2003. The deduction claimed under section 36(1) (viii) of the Act for Rs. 9,90,00,000/- was disallowed on the ground that assessee was notified as a Public Financial Institution (for short 'PFI') on 23.02.2004 namely it falls in the subsequent year; the activity of dairy business cannot be termed as agricultural activity; finances advanced to dairy cooperatives could not be covered under the category of 'milk food' as classified under Clause 27 of the of the First Schedule of the Industrial (Development and Regulation) Act, 1951 (hereinafter referred to as 'the Industrial Act' for short); the mandate of the provision required that the aggregate

of the amount carried to special reserve account created for the purpose should not exceed twice the amount of the paid up share capital, it could not create any reserve as there is no paid up share capital and therefore, the limit upto which special reserve can be created was indeterminable vide assessment order dated 15.06.2005 (Annexure 'A'). The assessee being aggrieved by the said order filed an appeal before CIT (Appeals), who dismissed the same by order dated 18.01.2006 affirming the order of the Assessing Officer. Further appeal before the Tribunal did not yield any result to the appellant - assessee and the claim of the appellant came to be negated by the ITAT vide order dated 08.08.2007 (Annexure C) by affirming the order of the Assessing Officer and CIT (Appeals). However, the Tribunal held that claim of the assessee as regards status of Public Financial Institution, it had applied on 10.07.2002 i.e. within the year of assessment order under consideration and the notification granting status of PFI was on 23.02.2004, which relates back to the date of application

and the time taken by the Department of Company Law Affairs was not attributable to the assessee. Hence, the ITAT did not agree with the view expressed by CIT (Appeals) on the issue of status of the assessee as PFI. However, it held that conditions prescribed under section 36(1)(viii) were not complied by the assessee and held as such it would not be entitled to the deduction. Hence, this Appeal.

RE: SUBSTANTIAL QUESTION OF LAW (E) :

4. This substantial question of law (E) is taken up at first for adjudication and it is being held that it would not arise, inasmuch as against the order of the Tribunal dated 08.08.2007, present appeal has been filed and during the pendency of the present appeal, assessee had filed a miscellaneous application before the ITAT in MA 214/AHD/2007, which came to be allowed vide order dated 28.08.2009, whereunder Tribunal has recalled its earlier order on this issue and remitted the matter to the Assessing Officer in ITA No.454/AHD/2006 on 21.04.2011

and as a result of the same, Assessing Officer undertook the exercise of redoing the assessment on this issue namely disallowance of Rs.10,31,34,920/- given to various cooperative societies which was claimed as deductible expenditure under Section 36(1)(xii) of the Income Tax Act, 1961 (for short 'the Act'), and it came to be restricted or in other words the disallowance was retained to the extent of Rs.61,08,550/- which triggered the second round of litigation and ultimately landed before the ITAT in ITA No.2098/AHD/2014 and Tribunal by order dated 31.05.2017 upheld the contention of the assessee and the disallowance made by the AO came to be set aside. The Revenue has not filed any appeal against the said order of the Tribunal and thereby the finding recorded by the ITAT in ITA No.2098/AHD/2014 dated 31.05.2017 has attained finality. In that view of the matter, examining, adjudicating and answering the substantial question of law No.'E' would only be academic in nature and as such, we do not propose to examine the same in the teeth of subsequent development that has taken place.

5. We have heard the arguments of Mr. S.N. Soparkar, learned Senior Advocate assisted by Mr. Bandish Soparkar, learned advocate appearing for the appellant and Mr. Varun K. Patel, learned Standing Counsel appearing for the respondents on substantial questions of law 'B' to 'D' and 'F'.

6. It is the contention of Mr. Soparkar, learned advocate appearing for the assessee that Tribunal having accepted that assessee is a specified entity as defined under clause (a)(i) of Explanation to Section 36(1)(viii), it ought to have further held that activities carried on by the assessee would be an activity of agricultural development and as such it would fall within the definition of eligible business as defined under clause (b) to Explanation to section 36(1)(viii) of the Act. He would further contend that meaning of agricultural development as defined under the then existing section 35C of the Act is identical to the words or expression found in sub-clause (A) of clause (b) to Explanation to section 36(1)(viii) and

as such denying the claim for deduction for Rs.9,90,00,000/- by disallowing the claim is erroneous and liable to be quashed. Hence, they have prayed for answering the substantial questions of law in favour of the assessee.

6.1 They would contend that as long as the business entity namely recipients carry on the activity of agricultural development for which the finance is being provided by the assessee, AO could not have disallowed the deduction claimed in that regard by the assessee as recipients are carrying on the agricultural activity. He would contend that AO, CIT (Appeals) and ITAT have completely misunderstood the activity of “agricultural development” to “agricultural activity” which are separate, distinct and independent and have no bearing and would have no nexus while interpreting the eligible business as defined under clause (b) to Explanation of section 36(1)(viii). He would also submit that Tribunal has not given any finding on this issue at all though CIT (Appeals) has extensively dealt with and disagreed with

the contention of the assessee by referring to the findings recorded by the CIT (Appeals) on the issue of interpretation of words “agricultural development” as defined in clause (b) for the purposes of assessee being declared as carrying on “eligible business”.

6.2 He would submit that finding recorded by the CIT (Appeals) by referring to the propositions of law are citations relied upon are all relating to agricultural activity vis-a-vis with reference to section 10 of the Act which provides for exemption of agricultural income from the purview of Income-Tax Act, 1961 by virtue of Entry 46 in List 2 of Schedule VII of the Constitution of India and the businesses which are eligible or in other words to be construed as “specified entity” to be an “eligible business”, and such entity should be carrying on the activity of “agricultural development” and not “agricultural activity” and as such he assails the findings of CIT (Appeals). He further contends this finding of CIT (Appeals) which had been urged before the Tribunal as

being erroneous has not at all been considered, adjudicated and answered by the Tribunal and as such substantial question of law – C requires to be answered in favour of the assessee as the agricultural activity of the beneficiary to whom the assessee has financed having carried on the business of agricultural development would be entitled to the benefit of allowance as permissible under section 36(1)(viii) of the Act.

6.3 He would further contend that as long as “specified entity”, carrying on “eligible business” viz. carrying on the activity of industrial development, there cannot be any disallowance of the claim under section 36(1)(viii). He would draw the attention of the Court to section 3(bb) of the Industries (Development and Regulation) Act, 1951 to contend industries specified in First Schedule to the said enactment is to be construed as an existing industrial undertaking as defined under clause (i) of section 3 and he specifically refers to Entry 27 of the First Schedule which defines different industries of the food processing industries to be construed as an

industrial undertaking, which includes the industry engaged in the “milk foods” manufacturing as an industry and as such the authorities erred in arriving at a conclusion that end product of those industries manufacturing the “milk foods” are not turning out any new product and as such the entity to whom the assessee has advanced finances, cannot be brought under the definition of eligible business is an erroneous finding.

6.4 He would contend that own funds available with the assessee is to be understood and construed as the expression ‘Share Capital’ and ‘General Reserves’ as indicated under the proviso to Sub-section (viii) of Section 36 of the Income Tax Act, 1961.

6.5 He would contend that once the authorities have held that assessee would fall under the specified entity as indicated in the Explanation by virtue of proviso, the benefits flowing from Section 36(1)(viii) cannot be denied, as it is not the intention of the legislation but on

the other hand it is for extending the benefit flowing to the specified entities and as such, the authorities ought to have allowed the deduction even in the absence of the Share Capital of assessee not being there. On these grounds, he has prayed for answering the substantial questions of law No.(B), (C),(D) and (E) in favour of the assessee and against the Revenue. Per contra, Shri Varun Patel has supported the order of the Tribunal.

7. Now, coming down to substantial question of law No.(F), Mr. Bandish Soparkar, learned advocate appearing for the appellant assessee has submitted that conclusion arrived at by the authorities below and finding recorded in respect of contribution made to National Dairy Development Board Employees Group Gratuity Funds disallowed to the extent of Rs.5,61,56,408/- is concerned, is not only erroneous but also contrary to the provision itself. It has been submitted that it is not in dispute that no contribution has been made and further, it is also not in dispute that approval for the said Gratuity Fund Scheme, namely 'National Dairy Development

Board Employees Group -cum Life Insurance Scheme was already granted on 19.10.1972 and it was merely a deed of variation to the said scheme, which was to be informed to the authority and same has already been done by the appellant assessee. On the contrary, law does not require to seek any approval, once it had already been granted on earlier occasion. If any variation is to be made, same is to be put to the notice of Income Tax Authorities and same having been done, finding which has been recorded to the contrary on this issue being erroneous is liable to be set aside by answering the substantial question of law in favour of assessee. To substantiate this contention, Mr. Soparkar has drawn our attention to the relevant provisions of the Act, namely Section 40A sub-section (7) to contend any contribution made towards Gratuity fund is allowable for deduction. It has further been submitted that it is also not in dispute that actual payment has been made and therefore, on account of there being no information/ approval during the intervening period, it is not open for the authorities to misconstrue the provision

and disallow the deduction.

7.1 Learned advocate Mr. Soparkar has further drawn our attention to yet another provision from 4th Schedule of the Income Tax Act, 1961 and by referring to Rule 4 contained in Part-C thereof, it has been contended that earlier approval which was granted in 1972 was never withdrawn at any point of time and for the purpose of arriving at a conclusion, as has been done by authorities below, first of all, there has to be withdrawal of earlier approval of scheme, which is not the case of the authority also. By referring to Rule 4 and 6 of Part-C of schedule-IV, which relates to application for approval, Mr. Soparkar has submitted that if any alteration in the rules, constitution, object or conditions of fund is made at any point of time after date of application for approval, trustees of fund are required to forthwith communicate such alteration to the assessing authority and in default, the consequences narrated in sub-rule of Rule 4 would follow, and as such, by drawing our attention to the communication dated 23.9.2003, he would contend that

such variation of scheme in the form of deed of variation having been intimated to the authorities and it was duty acknowledged by them, would demonstrate that revival has taken place and it relates back to original approval and therefore, contribution which has been made in the interregnum period deserves to be allowed and same has resulted in a serious error committed by the original authority and successively, the authorities have committed an error. As a result of this, substantial question of law No.(F) deserves to be answered in favour of assessee.

7.2 Learned advocate Mr. Soparkar has drawn our attention to the finding which has been arrived at by the Appellate Tribunal in paragraphs 66 and 68 of the appellate order, which is impugned in the present appeal, and has contended that this breach by an authority is clearly in contrast to the provisions of the Act. Hence, he has prayed for answering the substantial question of law in favour of the assessee.

7.3 As against this, learned advocate Mr. Varun K. Patel appearing on behalf of revenue has vehemently contended that on the basis of material on record, concurrent finding of fact is arrived at by all the authorities below against the assessee in respect of substantial question No.(F). It has been contended that submission made on this issue by learned advocate for assessee is quite innocuous and not in conformity with the relevant provisions of the Act. On the contrary, authorities have clearly found that Gratuity Trust of the assessee which was accorded original approval under Income Tax Act way back on 19.10.1972 by CIT- Gujarat, had lapsed and has never been renewed nor sought any approval for long period of 15 years and record revealed that during relevant period as on 31.3.2003, appellate Gratuity Trust had undisputedly no approval. As a result of this, by a specific letter dated 17.8.2004, the assessee was required to explain as to how the claim of deduction in respect of contribution of Rs.5,61,56,408/- is allowable. Mr. Patel has specifically drawn our attention to the fact

finding authority's conclusion that original approval had already lapsed and pursuant to amendemnt to Gratuity Act, monetary ceiling limit was revised from Rs.1 lakh to Rs.3.5 lakh and accordingly, assessee was under an obligation to seek approval and was required to submit a deed of variation for approval and it was only pursuant to letter dated 23.9.2003, i.e. much after close of financial year 2002-03, Trust moved a deed of variation for approval.

7.4 He has further submitted that it is an undisputed position prevailing on record that deed of variation was made on 27.3.2003 and relevant provisions mandate that any contribution to gratuity fund is allowable on actual payment basis and pending approval of deed of variation does not make the fund unrecognized. When this was the stand taken by the assessee, which was examined by the authorities below and upon scrutiny found that it was only at the fag-end of current financial year, i.e. on 31.3.2003, assessee had moved an

application to revive the said gratuity policy and as such, the Trust gratuity Policy remained inoperative for long period of 15 years. It was also found by authority that deed of variation which was submitted was almost a new deed with new terms and conditions and therefore, when such are the terms, same would require specific approval of CIT and until then, it remained unrecognized fund and consequently, no contribution could be allowed to the assessee as a deduction in computing the income of the assessee. The assessee on the contrary has committed a breach of trust reposed in it by allowing the Gratuity Policy to lapse and remained dormant for 15 years. That being the situation, according to Mr. Patel, the conclusion arrived at by the authorities below is justified in the background of aforesaid undisputed fact. To strengthen his submission, learned advocate Mr. Patel has drawn our attention to the communications dated 23.9.2003, 1.4.2004, 12.4.2004 as well as 17.8.2004, to contend that it was not merely an intimation which was required to be given but it was a specific approval of an authority. As a

result of this, authorities have rightly come to conclusion against the assessee.

7.5 Learned advocate Mr. Patel to strengthen his submission has made a reference to the decision delivered by Punjab & Haryana High Court almost on a similar issue, i.e. reported in 275 ITR 570 and by referring to paragraph 1, 8, 14 and 15 of said judgment has submitted that almost in similar situation, after analyzing the relevant provisions, High Court held that ordering deduction of such contribution was not justified and as such, view is taken against the assessee in respect of this issue.

7.6 Further it has been brought to the notice of this Court that by virtue of Section 40A (7)(a) and (b), stand taken by assessee is impermissible. He would further submit that a conjoint reading of said clause would clearly indicate that contribution must be towards an approval to gratuity fund and same having not been done, authorities have rightly disallowed such deduction. Yet,

another provision has been shown which is contained in Section 43B which also indicates deduction has to be only on the basis of actual payment and by referring to explanation, he would contend sum contributed of previous year shall not be entitled to any deduction since at relevant point of time, approval of scheme undisputedly was not available. Hence, he has prayed for substantial question of law being answered against the assessee and in favour of revenue.

8. In order to answer the substantial questions of law at (B), (C), (D) and (F), we are of the considered view relevant provision of Income Tax Act, 1961, which has been pressed into service by both parties and relevant for resolving the issue in question, requires to be extracted and accordingly they are extracted hereinbelow :

“Other deductions.

36. (1) *The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28-*

(i) to (vii) xxxxxxxx

(viii) in respect of any special reserve created by a financial corporation which is engaged in providing long-term finance for industrial or agricultural development in India or by a public company formed and registered in India with the main object of carrying on the business of providing long-term finance for construction or purchase of houses in India for residential purposes, an amount not exceeding forty per cent of the total income (computed before making any deduction under this clause and] Chapter VIA) carried to such reserve account:]]]

Provided that the corporation or, as the case may be, the company] is for the time being approved by the Central Government for the purposes of this clause: Provided further that where the aggregate of the amounts carried to such reserve account from time to time exceeds twice the amount of] the paid-up share capital (excluding the amounts capitalised from reserves) of the corporation or, as the case may be, the company], no allowance under this clause shall be made in respect of such excess.

Explanation.- In this clause,-

" **(a)** —"specified entity" means,—

- (i) a financial corporation specified in section 4A of the Companies Act, 1956 (1 of 1956); (ii) a financial corporation which is a public sector company;
- (iii) a banking company;
- (iv) a co-operative bank other than a primary agricultural credit society or a primary co-operative agricultural and rural development bank;
- (v) a housing finance company; and
- (vi) any other financial corporation including a public company;

(b) "eligible business" means,—

[(i) in respect of the specified entity referred to in sub-clause (i) or sub-clause (ii) or sub-clause (iii) or sub-clause (iv) of clause (a), the business of providing long-term finance for—

- (A) industrial or agricultural development;
- (B) development of infrastructure facility in India;
- or
- (C) development of housing in India;]

(ii) in respect of the specified entity referred to in sub-clause (v) of clause (a), the business of providing long-term finance for the construction or purchase of houses in India for residential purposes; and

(iii) in respect of the specified entity referred to in sub-clause (vi) of clause (a), the business of providing long-term finance for development of infrastructure facility in India;

(c) to (h) xxxxxxxx"

RE : SUBSTANTIAL QUESTION OF LAW (B) :

9. The assessee claimed deduction of Rs.9.90 Crores under Section 36(1)(viii) of the Act. The assessee contended before the AO and reiterated before the appellate authority and also before the Tribunal that as a provider of long term finance for agricultural and industrial development it is entitled to claim deduction of Rs.9.90 Crores, which amount was equivalent to the reserve created for the purpose. The assessing officer declined to allow the deduction on the ground that notification declaring the assessee as a financial institution was issued on 23.02.2004, which fell in the subsequent year. It was also held that finances advanced to dairy cooperatives which basically are producing and

marketing milk could not be covered under item milk food which is classified as a food processing industry under Clause 27 of the Industrial Regulation Development Act, 1951. The assessing officer further held that provision mandates that aggregate of the amounts carried to special reserve account created for the purpose should not exceed twice the amount of paid up share capital; it could not create any reserve as there is no paid up share capital and the special reserve being not determinable, such exemption cannot be granted. The claim for deduction was also disallowed on the ground that the assessee was not a public financial institution - PFI during the year. This order of CIT was upheld by the CIT (Appeals) and affirmed by the ITAT.

10. A plain reading of the Section 36 would indicate that deductions provided in clauses enumerated therein would be allowed in respect of the matters dealt with therein, while computing income as referred to in Section 28 of the Act.

11. A Taxing Statute is to be strictly considered. In the classic passage, Lord Cairns stated the principle thus :

“if the person sought to be taxed comes within the letter of the law he must be taxed, however, great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however, apparently within the spirit of law the case might otherwise appear to be.”

12. In other words, if there be admissible in any statute, what is called an equitable, construction, certainly, such a construction is not admissible in a Taxing Statute, where you can simply adhere to the words of the Statute, vide ***Partington v AG (1869) LR 4 HL 100 at page 122 - referred to in IRC versus Duke of Westminster - (1936) A.C. 1 P. 24 (HL).***

“In a Taxing Act, one has to look merely at what is clearly said. there is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.”

13. In ***IRC versus Duke of Westminster, (1936) A.C. 1 p. 24 (HL)***, Lord Tomlin while refuting doctrine of “the substance of the matter”, observed :

“It is said that in revenue cases there is a doctrine that the Court may ignore the legal position and regard what is called ‘the substance of the matter’. This supposed doctrine seems to rest for its support upon a misunderstanding of language used in some earlier cases. The sooner this misunderstanding is dispelled, and the supposed doctrine given its quietus, the better it will be for all concerned, for the doctrine seems to involve substituting ‘the uncertain and crooked cord of discretion’ for ‘the golden and straight metwand of the law.’”

14. The Hon’ble Apex Court in the case of ***M/s Geo Miller & Co. Pvt. Ltd. & Ors. versus State of M.P. & Ors., reported in AIR 2004 SC 3552 : (2004) 5 SCC 209***, has observed :

“30. It is a well settled position of law that in interpreting taxing statutes, one must have regard to the strict letter of the law. If the person/entity sought to be taxed comes within the letter of the law he must be taxed.”

15. In determining the liability of a subject to tax, regard must be had to the strict letter of law and if the revenue would satisfy the Court that case falls strictly within the provisions of the law, necessarily the assessee

has to be taxed. In interpreting the Taxing Statute, equitable construction are entirely out of place. The Court would look into the words of Statute and interpret them. Taxing Statute cannot be interpreted on any presumption or assumptions. It cannot import the provisions in the Statute so as to supply any assumed deficiency. The Hon'ble Apex Court in the matter of ***Martand Dairy and Farm versus UOI*** reported in ***AIR 1975 SC 1492***, observed : -

"Taxation consideration may stem from administrative experience and other factors of life and not artistic visualisation or neat logic and so the literal, though pedestrian interpretation must prevail."

16. Keeping the aforesaid principle in mind when Clause (viii) of subsection (1) of Section 36 is perused, it would clearly indicate that deductions would be allowed to an assessee as provided in the clauses enumerated in respect of the matters dealt with therein or enumerated therein, in promoting the income referred to in section 28. In other words, there cannot be any scope for adding,

deducting or adopting interpretative process to define or explain the words.

17. In the instant case, the assessee in computation of the income has claimed deduction of Rs. 9.90 crores contending that it has provided long term financing for agricultural development and therefore eligible for deduction under section 36(1)(viii) of the Act to the extent of profit derived from such activities subject to creation of special reserve. The assessee to become eligible for claiming deduction has to be -

“(i) a financial corporation engaged in providing long term finance for industrial or agricultural development or development of infrastructural facility; or

(ii) a public company registered in India, engaged in providing long term finance for construction or purchase of houses in India for residential purposes any amount not exceeding 40% of the total income.”

18. The conditions precedent is, such assessee : -

“(a) should create and maintain a special reserve;

(b) aggregate of the amount carried to special

reserve account from time to time exceeds twice the amount of the paid up share capital excluding the amounts capitalised from reserves and no allowance under said clause would be made in respect of such expenses.”

19. Tribunal accepted the contention of assessee though negatived by Assessing Officer and CIT (Appeals) since the assessee had applied for status of Public Financial Institution on 10.07.2002 i.e. within the assessment year 2003-04 and by applying the principles laid down by the Hon'ble Apex Court in the case of ***Marshall Sons & Co. versus ITO. reported in (1996) 88 Taxman 619***, held that it would relate back to the date of application.

20. The activity of dairy business cannot be construed as agricultural activity. At this juncture, it would be apt and appropriate to note the contention of the assessee which is to the effect that section 3(bb) of Industrial Act, defines an industrial undertaking specified in the First Schedule of the said enactment to be an existing industrial undertaking and as such when Clause

27 of the First Schedule is perused, it would indicate that “milk foods” activity is construed as “food processing industry”, and therefore, the activity of the petitioner is to be construed as an industrial development or in other words, it is to be accepted that agricultural development would also be an industrial activity. While interpreting the provisions of Fiscal Statute, the meaning attached in other Statutes cannot be imported. In the absence of interpretation by reference, it would be improper to interpret the words in accordance with its definition found in another Statute and more particularly when such other Statute is not dealing with any cognate subject.

21. In the matter of ***Maheshwari Fish Seed Farm versus Tamilnadu State Electricity Board*** reported in ***2004 (4) SCC 705***, it has been held to the following effect : -

“16. The learned senior counsel for the appellants invited our attention to the definition of term 'agriculture' as given in definition sections or interpretation clauses of several other enactments such as sub-section (2) of Section 2 of Tamil Nadu Agricultural Produce

Marketing (Regulation) Act, 1987, clause (b) of Section 2 of Tamil Nadu Agricultural University Act, 1971, clause (a) of [Section 2](#) of Agricultural and Rural Debt Relief Scheme, 1990, so defining the term 'agriculture' as to include therein 'pisciculture'. These definitions were pressed in service by Shri Iyer, the learned senior counsel, to support his submission for a similar meaning being assigned in the present case. Suffice it to observe that the common parlance meaning of the term 'agriculture', in the context in which it has been used and is arising for determination before us, cannot be determined by reference to definition given in other statutes. This we say for more reasons than one. Firstly, none of the statutes referred to by Shri Iyer, the learned senior counsel, can be called statutes in pari materia. Secondly, it is common knowledge that the definition coined by the Legislature for the purpose of a particular enactment is often an extended or artificial meaning so assigned as to fulfill the object of that enactment. Such definitions given in other enactments cannot be freely used for finding out meaning to be assigned to a term of common parlance used in an altogether different setting. And lastly, as Justice G.P. Singh points out in "Principles of Statutory Interpretation" (9th Edition, 2004, at page 163):

"[I]t is hazardous to interpret a statute in accordance with a definition in another statute and more so when such statute is not dealing with any cognate subject or the statutes are not in pari materia."

The same view has been taken in the decision of this court in [CIT v. Benoy Kumar](#) which we

have extensively referred to earlier in this judgment.”

22. In ***Jagatram Ahuja versus Commissioner of Gift Tax reported in AIR 2000 SC 3195***, it has been held that Statutes which are not in *para materia* cannot be looked into.

23. It is trite law that exemption notification is to be read strictly and burden is on the assessee to prove that item falls within the four corners of such exemption notification. An exemption notification should be given a liberal meaning. Recourse to other principles or cannons of interpretation of Statute would be resorted to only in the event of the same giving rise to anomaly or absurdity. The exemption given under the notification or Statute must be construed having regard to the purpose and object sought to be achieved. The Hon'ble Apex Court in the case of ***Krishi Upaj Mandi Samiti, New Mandi Yard, Alwar versus Commissioner of Central Excise and Service Tax, Alwar reported in (2022) 5 SCC 62***,

has held : -

“8. The exemption notification should not be liberally construed and beneficiary must fall within the ambit of the exemption and fulfill the conditions thereof. In case such conditions are not fulfilled, the issue of application of the notification does not arise at all by implication.

8.1 It is settled law that the notification has to be read as a whole. If any of the conditions laid down in the notification is not fulfilled, the party is not entitled to the benefit of that notification. An exception and/or an exempting provision in a taxing statute should be construed strictly and it is not open to the court to ignore the conditions prescribed in the relevant policy and the exemption notifications issued in that regard.

8.2 The exemption notification should be strictly construed and given a meaning according to legislative intendment. The Statutory provisions providing for exemption have to be interpreted in light of the words employed in them and there cannot be any addition or subtraction from the statutory provisions.

8.3 As per the law laid down by this Court in a catena of decisions, in a taxing statute, it is the plain language of the provision that has to be preferred, where language is plain and is capable of determining a defined meaning. Strict interpretation of the provision is to be accorded to each case on hand. Purposive interpretation can be given only when there is an ambiguity in the statutory provision or it results in absurdity, which is so not found in the present case.

8.4 Now, so far as the submission on behalf of the respondent that in the event of ambiguity in a provision in a fiscal statute, a construction favourable to the assessee should be adopted is concerned, the said principle shall not be applicable to construction of an exemption notification, when it is clear and not

ambiguous. Thus, it will be for the assessee to show that he comes within the purview of the notification. Eligibility clause, it is well settled, in relation to exemption notification must be given effect to as per the language and not to expand its scope deviating from its language. Thus, there is a vast difference and distinction between a charging provision in a fiscal statute and an exemption notification."

24. It is in the teeth of the above authoritative pronouncements of the Hon'ble Apex Court, the findings recorded by the Assessing Officer disallowing the contention that the dairy activity is covered within the definition of Industry necessarily has to be upheld by extracting the said finding. It reads :

"9.5 Further to the above xxxxxxxxx. However, during the course of proceedings, it is claimed that Dairy activity is covered within the definition of Industry under clause 27 of First Schedule to Industrial Development Regulation Act. The claim of the assessee that it is engaged in providing long term finance for industrial development is considered based on its claim that dairy activity is covered within the definition of industry as per clause 27 of the first schedule of Industrial Development Regulation Act. However, on going through the aforesaid clause 27 of the First Schedule of IDR Act, it is seen that dairy industry is not covered within its ambit. Clause 27 classified for food processing industries include therein the following :

- 1) Canned fruits and fruit product.
- 2) Milk Food
- 3) Malted Foods
- 4) Flour
- 5) Other processed food

Clearly the case of the assessee does not fall in any of the categories mentioned in Cl. 27 of the First Schedule of IDR Act. The assessee has not specified in any of the submissions as to under which of the categories in Cl. 27, the dairy cooperatives etc would fall. At best it may claim that the dairy, dairy cooperatives would fall in the categories of milk food. The word "Milk Food" generally means value addition made to plain milk so as to bring the value added product as a food. Therefore, it is apparent that the dairy cooperatives / unions will not be covered within the definition of Industry. In view of the above and also in view of the facts that the assessee itself has not identified the specific category in Cl. 27 of the Schedule to which milk cooperatives / unions could be equated, the claim that the assessee is engaged in providing long term finance for industrial or agricultural development remains unsubstantiated and hence fails."

25. Insofar as the contention of the appellant - assessee that section 35C also provided for allowing deduction, the amount of expenditure relatable to "agricultural development" and the expression used in section 36(1)(viii)(b)(i)(A) requires to be considered for the purposes of outright rejection, inasmuch as the very provision namely section 35C itself provides that where any Company or a co-operative society is engaged in the manufacture or processing of any article or thing which is made from, or uses in such manufacture or processing as raw material, any product of agriculture, animal

husbandry, or diary or poultry farming, and has incurred after the 29th day of February, 1968 [but before the 1st day of March, 1984], whether directly or through an association or body which has been approved for the purposes of this section by the prescribed authority, any expenditure in the provision of any goods, services or facilities specified in clause (b) to a person (not being a person referred to in clause (b) of sub-section (2) of section 40A) who is a cultivator, grower or producer of such product in India, the company (or co-operative society) shall, subject to the provision of this section, be allowed a deduction of the amount of such expenditure incurred during the previous year. Whereas said provision pressed into service would not include or extend to the expression or phrase **“Industrial or agricultural development”** by taking within its sweep the dairy or animal husbandry activity.

26. In that view of the matter, contention raised by the appellant – assessee cannot be accepted. Hence, we

are of the considered view that providing long term finance for industrial or agricultural development to various diary cooperations cannot be covered as long term finance extended for agricultural or industrial development.

27. In that view of the matter, substantial question of law formulated in B, C and D is answered in the affirmative i.e. against the appellant - assessee and in favour of revenue.

RE : SUBSTANTIAL QUESTION OF LAW (F) :

28. The assessee claimed deduction of Rs. 5,61,56,408/- made on account of payment of gratuity. In the note attached to the computation of income at para 12, it was stated by the assessee before the Assessing Officer that a sum of Rs. 1,47,14,669/- was paid to the employees as gratuity during the year, whereas the net debit of Rs. 1,31,70,181/- charged to the account treated as inadmissible. It is further stated that during the

Assessment Year, an amount of Rs. 5,61,56,408/- was contributed to NDDB employees group gratuity cum life assurance scheme and as such claimed deduction. Undisputedly, as on the date of year ending i.e. on 31.03.2003, gratuity trust has no approval. The gratuity trust was originally approved under the Income Tax Act by the Commissioner of Income Tax Gujarat by order dated 19.10.1972. However, to claim deduction, it was contended that the assessee had submitted a communication dated 23.09.2003 to the Department and was awaiting the approval and non approval does not amount to 'non recognition'. Hence, it was contended that in terms of section 43B(b) of the Act, any contribution to the gratuity fund is allowable on actual payment basis.

29. At this juncture, we have perused the said letter dated 23.09.2003 produced by the appellant - assessee itself. The contents of the said letter speaks for itself. It reads :

“National Dairy Development Board Employees’ Group Gratuity-cum-Life Assurance Scheme” was recognized with effect from 01.11.1971 under Rule 2(1) of Part C of the 4th Schedule of the Income Tax Act 1961 vide order No. OSD45-4/72 dated 19th October, 1972 issued by the Commissioner of Income Tax, Gujarat - I, Ahmedabad.

The Scheme proposed to enhance the maximum limit of benefit under the scheme. Accordingly a Deed of Variation has been executed. A cop of the same is enclosed for your kind approval.”

30. The said letter was followed by yet another letter dated 01.04.2004 seeking approval. The contents of said letter reads :

“Sub. : Approval of Deed of Variation

Dear Sir

Your Kind attention is drawn to our letter no P&A-EC:GRATY:13670 dated 23rd Sept. 2003 on the subject mentioned above.

Vide above letter, we had submitted a Deed of Variation of National Dairy Development Board Employees’ Group Gratuity-cum-Life Assurance Scheme, for approval.

We would request you to kindly confirm having noted the “Deed of Variation”.

31. Section 43B indicates that certain deduction to be made only on actual payment and explanation (attached to said provision) indicates that assessee shall

not be entitled to any deduction under this section in respect of such sum in computing the income of previous year in which sum is actually paid by him. Now, in the context of this, a perusal of Section 40A(7) also deserves to be taken note of. It reads thus:-

“(7) (a) Subject to the provisions of clause (b), no deduction shall be allowed respect of any provision' (whether called as such or by any other name) made by the assessee for the payment of gratuity to his employees on their retirement or on termination of their employment for any reason.

(b) Nothing in clause (a) shall apply in relation to any provision made by the assessee for the purpose of payment of a sum by way of any contribution towards an approved gratuity fund, or for the purpose of payment of any gratuity, that has become payable during the previous year.

Explanation. For the removal of doubts, it is hereby declared that where any provision made by the assessee for the payment of gratuity to his employees.cn their retirement or termination of their employment for any reason has been allowed as a deduction in computing the income of the assessee for any assessment year, any sum paid out of such provision by way of contribution towards an approved gratuity fund or by way of gratuity to any employee shall not be allowed as a deduction in computing the income of the assessee of the previous year in which the sum is so paid.]”

32. Further, fourth Schedule attached to the Act of 1961 Part-C thereof also requires to be taken note of. Section 4 of Part-C which relates to approval of gratuity fund has to be made in writing by trustees of fund to the assessing officer by whom the employer is assessable and shall be accompanied by a copy of instrument under which the fund is established. Sub-section (2) an imposes an obligation on an assessee that if any alteration in the rules, constitutions, objects, or conditions of fund is made at any time after date of application for approval, the trustees of fund shall have to forthwith communicate such alterations to the assessing officer concerned and in default of such communication, any approval given shall be deemed to have been withdrawn from date on which alteration took place. Section 6 of Part-C imposes liability on the trustee of cessation of approval since Section 7 deals with contributions by employer, when deemed to be income of employer. Since these sections are relevant to the controversy involved, we deem it proper to reproduce Sections 4, 6 and 7 hereunder:-

“Application for approval.

4. (1) An application for approval of a gratuity fund shall be made in writing by the trustees of the fund to the Income-tax Officer by whom the employer is assessable and shall be accompanied by a copy of the instrument under which the fund is established and by two copies of the rules and, where the fund has been in existence during any year or years prior to the financial year in which the application for approval is made, also two copies of the accounts of the fund relating to such prior year or years (not being more than three years immediately preceding the year in which the said application is made)] for which such accounts have been made up, but the Commissioner may require such further information to be supplied as he thinks proper.

(2) If any alteration in the rules, constitution, objects or conditions of the fund is made at any time after the date of the application for approval, the trustees of the fund shall forthwith communicate such alterations to the Income-tax Officer mentioned in sub-rule (1), and in default of such communication, any approval given shall, unless the Commissioner otherwise orders, be deemed to have been withdrawn from the date on which the alteration took effect.

Liability of trustees on cessation of approval.

6. If a gratuity fund for any reason ceases to be an approved gratuity fund, the trustees of the fund shall nevertheless remain liable to tax on any gratuity paid to any employee.

7. Where any contributions by an employer (including the interest thereon, if any) are repaid to the employer, the amount so repaid shall be deemed for the purposes of income-tax

to be the income of the employer of the previous year in which they are so repaid."

33. Section 8 of this Part-C has provided a remedial measure to an employer - assessee that in the event of concerned competent officer is refusing to accord approval to gratuity fund or order withdrawing such approval can file an appeal within 60 days, which reflects that it is an obligation on an assessee to seek approval to gratuity fund. Conjoint reading of this provision would clearly indicate that contribution shall have to be with approved gratuity fund created, as reflecting from sub-section (7) of Section 40A and undisputedly, here, there was no approval of the scheme at relevant point of time and on the contrary, said gratuity policy/ scheme had remained dormant and inoperative for long period of 15 years and therefore, it appears that authorities have rightly come to a conclusion against the assessee in respect of this issue.

34. Yet, another circumstance which practically is not in dispute is that original scheme got approval vide

order dated 19.10.1972 which had undisputedly lapsed as on 31.3.2003. There was no approval to the gratuity trust/scheme as is reflected from record. As a consequence of it, vide letter dated 17.8.2004, appellant assessee was required to explain as to why claim of deduction as sought for is allowable on the facts. On conjoint reading of the aforesaid provisions and literal meaning reflecting therefrom, it would clearly indicate that revenue authorities have not committed any mistake. In fact, it has been brought to our notice that almost in a similar situation, an issue had cropped up before Punjab & Haryana High Court and on interpretation of relevant provisions and several decisions, the Court had come to a conclusion that assessee was not entitled to claim any deduction in respect of the provisions for gratuity for the year 1978-79. Said decision is also of much assistance to the revenue. In said case also, necessary conditions for grant of approval of gratuity fund was not established. That being so, case is made out by revenue on this issue.

35. At this stage, we may further refer to Section 2 of Part-C of Schedule-IV, which deals with approval and withdrawal of approval. Sub-section (2) mandates that an authority shall communicate in writing to the trustees grant of approval with date on which approval is to take effect and where approval is granted subject to those conditions. Said sub-rule thus reads as under:-

"2.

(2) The "Principal Chief Commissioner or] Chief Commissioner or "Principal Commissioner or] Commissioner] shall communicate in writing to the trustees of the fund the grant of approval with the date on which the approval is to take effect and where the approval is granted subject to conditions, those conditions."

36. Now, in juxtaposition of this mandate contained under the provisions, a perusal of documents which are sought to be relied upon by learned advocate Mr. Soparkar to contend that specific approval is not required, a mere intimation is to be made in absence of any withdrawal of earlier approval, at this stage, we may state that for long period of 15 years, scheme remained

inoperative, without continuance of approval and when we see communications which are sought to be relied upon clearly indicate that even assessee was also in clear understanding about the requirement of approval. In no uncertain terms, said communications dated 23.9.2003, 1.4.2004, 12.4.2004 and 17.8.2004 indicate that it is the appellant - assessee who submitted deed of variation on 23.9.2003 onwards and sought specific approval. Not only this communication dated 23.9.2003 but subsequent reminders also clearly suggest that what has been sought for is approval and as such, the assessee itself was conscious about the situation of seeking approval. As a result of this, a conjoint effect of sequence of events, as stated above, and in view of the literal meaning of relevant provisions, we are of the considered opinion that no error is committed by the authorities below in disallowing deduction sought for by the assessee and as such, we hereby answer the substantial question No.(F) in favour of the revenue.

37. At this stage, we remind ourselves to the proposition of law laid down by catena of decisions, that penal statute and tax statute are to be construed strictly and it is not open for the Court to legislate or to read down the provision if provision is unambiguous and clear in language. If the language of statute is clear and without any ambiguity, rather it is the duty of the Court to give full effect to the said provision. Mere hardship to be caused is not relevant ground to interpret the statute in a different manner than what has been contemplated.

38. The law on the issue is propounded emphatically by the Hon'ble Apex Court in a very recent decision reported in **(2022) 5 SCC 62** and we deem it proper to quote the relevant observations contained therein. It reads :

“8.1 It is settled law that the notification has to be read as a whole. If any of the conditions laid down in the notification is not fulfilled, the party is not entitled to the benefit of that notification. An exception and/or an exempting provision in a taxing statute should be construed strictly and it is not open to the court to ignore the conditions prescribed in the relevant policy and

the exemption notifications issued in that regard.

8.2 The exemption notification should be strictly construed and given a meaning according to legislative intendment. The Statutory provisions providing for exemption have to be interpreted in light of the words employed in them and there cannot be any addition or subtraction from the statutory provisions.

8.3 As per the law laid down by this Court in a catena of decisions, in a taxing statute, it is the plain language of the provision that has to be preferred, where language is plain and is capable of determining a defined meaning. Strict interpretation of the provision is to be accorded to each case on hand. Purposive interpretation can be given only when there is an ambiguity in the statutory provision or it results in absurdity, which is so not found in the present case."

39. Aforesaid circumstances are clearly indicating that the stand taken by the the assessee in respect of this substantial question of law is not possible to be digested and the conclusion arrived at by the authorities below is not possible to be construed either perverse or illegal or not in conformity with the provisions of the Act. As a

result of which, we answer the substantial question of law
(F) in favour of the revenue and against assessee.

(ARAVIND KUMAR,CJ)

(ASHUTOSH J. SHASTRI, J)

GAURAV/BH/AM

