HIGH COURT OF JUDICATURE FOR RAJASTHAN BENCH AT JAIPUR

D.B. Income Tax Appeal No. 9 / 2018

Pr. Commissioner of Income Tax, Jaipur-II, Jaipur.

----Appellant

Versus

M/s. Jaipur Zila Dugadh Utpadak Sahakari Sangh Ltd., Near Gandhi Nagar Railway Station, Jaipur

----Respondent

For Appellant(s) : Mr. R.B. Mathur with Mr. Prateek Kedawat

HON'BLE MR. JUSTICE K.S.JHAVERI

HON'BLE MR. JUSTICE VIJAY KUMAR VYAS

Judgment

05/02/2018

1. By way of this appeal, the appellant has assailed the judgment and order of the tribunal whereby tribunal has dismissed the appeal of the department and confirmed the order of CIT(A) and modified the order of the AO.

2. Counsel for the appellant has framed following substantial questions of law:-

> (i) Whether in the facts and circumstances of the case the ITAT was justified law in upholding the deletion of disallowance of Rs.13121958/- paid as contribution to 'Sparsh trust' registered u/s 12A of the income tax act, 1961, and treating the same as business expenditure in place of donation allowable u/s 80G of the I.T. Act, 1961 despite the fact that the said receipt of donation was declared by the trust as donation income and corresponding expenditure was claimed as application of income.
>
> (ii) Without prejudice to the above whether it can be held that the activities of 'Sparsh

> Trust' are entirely for furthering the business interest of the assessee more so when the assessee does not exercise any control on the manner in which the contribution is spent.
>
> (iii) Because, in the facts and circumstances of the case the ITAT was justified law in upholding the deletion of addition of Rs.1448774/- made for depositing the employees contribution to PF & ESI beyond the prescribed time limit provided in the respective Act.
>
> (iv) Whether in the facts and circumstances of the case, the Tribunal was justified in holding that the employee's Contribution to ESI & CPF are governed by the provision of section 43B and not by section 36(1) (va) r.w.s. 2(24)(x) of IT Act.

3. The facts of the case are that the assessee is a cooperative society which is engaged in the business of procurement of milk, processing it to prepare its products and sale thereof. The Assessing Officer during the course of assessment proceedings disallowed the amount of Rs.13121958/- being contribution made to 'Sparsh Trust' Pashudhan Kalyan and Utpadakta Sanvardhan Sansthan, a trust constituted by the assessee to run programme and for providing services to farmers who are selling milk to primary societies from whom assessee procures milk. The cost incurred on these programme by the trust are reimbursed by assessee.

4. Now the issues no.1 & 2 are squarely covered by the decision of this court in D.B. ITA No.122/2016 (Pr. Commissioner of IT Jaipur-II Jaipur vs. M/s. Jaipur Zila Dugdh Utpadak Sangh Ltd., Jaipur) decided on 11.9.2017 which reads as under:-

"1. In all these appeals since identical questions of law and facts are involved, they are decided by this common judgment.

2. By way of these appeals, the appellant has challenged the judgment and order of the Tribunal whereby the Tribunal has allowed the appeal of the assessee.

3. This court while admitting the appeals framed the following questions of law:-

1. D.B. Income Tax Appeal No. 234 / 2012

"Whether in the facts in the circumstances of the case the ITAT was justified in law in deleting the additions made by the Assessing Officer by way of disallowance of Rs. *8967327/-* contributed to the trust registered u/s. 12AA and holding the said amount to be business expenditure?"

2. D.B. Income Tax Appeal No. 3/ 2016

"Whether the ITAT was justified in law in deleting the additions made by the Assessing Officer by way of disallowance of Rs. *85,66,157/-* contributed to the trust registered u/s. 12AA and holding the said amount to be business expenditure?"

3. D.B. Income Tax Appeal No. 122/ 2016

"Whether in the facts and circumstances of the case the ITAT was justified in law in deleting the additions made by the Assessing Officer by way of disallowance of Rs. *11407817/-* paid as contribution to 'Sparsh trush' registered u/s 12AA of the income tax act, 1961 treating the same is business expenditure in place of donation allowable u/s 80G of the I. T. Act, 1961 despite the fact that the said receipt of donation was declared by the trust as donation income and corresponding expenditure was claimed as application in income."

4. D.B. Income Tax Appeal No.218/2016

"Whether in the facts and circumstances of the case the ITAT was justified in law in deleting the additions made by the Assessing Officer by way of disallowance of Rs. *11939836/-* paid as contribution to 'Sparsh trush' registered u/s 12AA of the income tax act, 1961 treating the same is business expenditure in place of donation allowable u/s 80G of the I. T. Act, 1961 despite the fact that the said receipt of donation was declared by the trust as donation income and corresponding expenditure was claimed as application in income."

5. D.B. Income Tax Appeal No.265/2016

"Whether in the facts and circumstances of the case the ITAT was justified in law in deleting the additions made by the Assessing Officer by way of disallowance of Rs. *12363091/-* paid as contribution to 'Sparsh trush' registered u/s 12AA of the income tax act, 1961 treating the same is business expenditure in place of donation allowable u/s 80G of the I. T. Act, 1961 despite the fact that the said receipt of donation was declared by the trust as donation income and corresponding expenditure was claimed as application in income."

4**.** Counsel for the appellant Mr. Mathur has taken us to the order passed by CIT(A) wherein while considering the issue the CIT(A) observed as under:-

"3.1 I have duly considered the submissions of the appellant. The appellant is a co-operative society engaged in the business of procurement of mild and processing it to prepare milk products. To procure the better quality and quantity of milk, the assessee was providing various facilities to the milch animal owners such as vaccination & medical treatment of animals, emergency services etc. Earlier all these services were provided by the assessee itself but considering difficulties in management and control, it was decided to create a trust for this purpose. Accordingly, a trust in the name of Pasudhan Kalyan and Upbhokta Samvardhan on 12.03.2004. The Sparsh trust was registered U/s 12AA and also granted certificate U/s 80G. The said trust had allegedly carried out various programs in the field of animal productivity enhancement. Accordingly the appellant had contributed amount of Rs.89,67,327/- to this trust during the year under consideration. After careful consideration of the facts, I am not inclined to agree with the contentions of the appellant. The contribution made by the appellant to a trust which is registered U/s 12AA and also granted a certificate U/s 80G is not an expenditure within the meaning of section 37(1) of the IT Act. The fact remains that the assessee has not incurred any expenditure itself on healthcare of milch animals, improvement of breed, supply of nutritional supplements etc. and amount is in the nature of contribution/donation to a trust. The decision of Sri Venkata Satyanarayan Rice mills Contractor Co (233 ITR 101) relied upon by the appellant was rendered in different context since in the cited case, the contribution to Andhra Pradesh Welfare Fund was precondition for grant of export permits and without it, the assessee could not have been in a position to carry its business. In the case of Mysore Kirloskar Ltd (166 ITR 836), the tribunal had disallowed the expenditure to an educational trust on the ground that since the school run by the trust was also open to the children of the persons who were not the employees of the assessee, the expenditure incurred by the assessee could not be said to have been incurred wholly and exclusively for the purpose of the assessee’s business. Moreover, since the Tribunal had not recorded a finding as to whether the donation made by the assessee to the trust could be considered as “expenditure”, the matter was remanded to the Tribunal for decision afresh. However in order to qualify for deduction U/s 37(1), the appellant has to demonstrate that expenditure was laid out fully and exclusively for its business and what was the commercial and business expediency as observed by Hon’ble Court in the case of Sri Venkata Satyanarayana Rice mills Co (supra). In the case of Season Rubber Ltd Vs CIT (311 ITR 15), the assessee made contributions to a school and a hospital development committee and claimed that they were deductible. The Assessing Officer and the Tribunal rejected the claim. On a reference, it was held by Hon’ble Kerala High Court that even though the assessee’s employees were getting treatment from the hospital and the employees’ children were students in the school which got the benefit, the benefit, if at all, was quite remote. It was therefore held that the amounts contributed were not deductible under section 37. In the case of CIT Vs Industrial Corporation of Orissa Ltd (249 ITR 401), It was held that the onus of Proof that a particular expenditure laid out or expended is for the purpose of the business or not is on the assessee. In the cited case, there was nothing on record to establish that the donation of the amount to the Chief Minister’s Relief Fund was directly connected with and related to carrying on its business. No such finding had also been recorded by the Tribunal. As the opposite party had failed to lay necessary factual matrix for its entitlement to deduction, it was not entitled to the deduction of the donation U/s 37 of the I T Act. It was held by Hon’ble Rajasthan High Court in the case of Jaswant Trading Co & Anil Trading Co Vs CIT (212 ITR 24) that provisions of section 37 of the Income-tax Act are general in nature and the provisions of section 80G are specific. Applying the maxim generalia specialibus non derogant if an amount is liable for deduction under section 80G, it cannot be claimed under the general provisions of section 37(1) of the Act. If a particular amount of expenditure falls within the category of donation, then the deduction as provided under section 80G alone is applicable. For the purpose of claiming the benefit under section 37(1), it has to be proved that the expenditure was wholly and exclusively for the purpose of business. There may be a circumstance where an expenditure falls within the category of "wholly and exclusively for the purpose of business or profession" and also under section 80G. In that case the option remains with the assessee to claim the expenditure under either of the aforesaid sections. But where there is no direct nexus to prove that it is wholly and exclusively for the purpose of business or profession, then it cannot be claimed under section 37(1). A future hope for advantage is in the nature of an expectation. The requirement of the section is that there must be a business in existence and the expenditure is wholly and exclusively for the purpose of business. In the cited case, the assessee, who claimed to be a prominent businessman of a locality, made donations to various institutions like the Rotary Club, a sewa mandal, a trust and to the Chief Minister's Drought and Flood Relief Fund and claimed deduction of the same as business of the assessee had increased. The Tribunal found that since there was no scheme or provision for relief to the affected employees of the assessee due to the floods, there was no nexus between the donation and the assessee's business and hence the assessee was not entitled to deduction of the expenditure under section 37 of the Act but was entitled to deduction of 50 percent of the expenditure as provided in section 80G of the Act. On a reference, it was held by Jurisdictional High Court that there was no direct nexus established between the expenditure by way of donations and the business of the assessee and hence the expenditure was not allowable under section 37(1), but 50 percent deduction was allowable under section 80G. In the present case, the appellant has tried to twist the facts by stating that amount of Rs. 89,67,327/- was in the nature of reimbursement of expenses borne by the trust. However as stated by the AO, the assessee was simply contributing to the trust at the rate of Rs.0.05 per litre of milk in terms of clause 6(d) of the trust deed. There was no reimbursement of expenditure as alleged. From the audited accounts of Sparsh trust for AY 08-09, it is seen that out of total expenditure of Rs 80.35 lakhs, a meager amount of Rs 77,860/- was spent on vaccines of animals. The majority of the expenditure was in the nature of honorarium, work incentives and vehicle maintenance. Therefore there was no business expediency as alleged by the assessee. Respectfully following the above decision, the addition of Rs 89,67,327/- made by the AO is confirmed. Since the payment to trust is eligible for deduction U/s 80G, the AO is directed to allow the same after due verification subject to fulfillment of other requirements as per law. This ground of appela is partly allowed.

4. In the third ground of appeal, the appellant has challenged the addition of Rs 3,23,670/- on account of disallowance of contribution to Vikas Yojana Fund. Before me, the counsel of the appellant has argued that the assessee for development of dairy activity at grass root level embarked upon various plan development strategies and programme to increase the volume of production. For increasing the procurement of mild and protecting the dairy farmers from the threat of private mild vendors, the assessee gave incentives to village level mild animal owners/societies to become its member. For this purpose, it gave incentives @ Rs.90 per person and Rs.5000/- per society who got registered with it. During the year, the assessee had incurred expenditure of Rs.3,23,670/- for this purpose by debiting it under the head Vikas Yojna Fund. The AO disallowed the same by observing that the assessee had not detailed as to what activities were carried on by it by making payment to Vikas Yojna Fund and therefore it couldn’t be said to be incidental to the business of the assessee. It was argued that the expenditure claimed under Vikas Yojna Fund was not any contribution but actual expenditure incurred for registering the members and the societies at the village level for which certain incentives/subsidies were given to ensure the

regular procurement of the milk from these persons/societies. This was evident from the expenditure vouchers. Thus the expenditure was incurred wholly and exclusively for the purpose of the business and allowable U/s 37(1). It was also pointed out that as a part of the overall development of the dairy activities in the state, the assessee received grants for revival of the societies from the Apex Society i.e. Rajasthan Co-operative Dairy Federation Limited. These grants were offered for tax by the assessee. These grants were also utilized for enrolling the members/societies at the village level for which expenditure was debited under the head Vikas Yojna Fund. This was evident from the vouchers placed by the assessee. Thus when the grants had been considered as income, the expenditure incurred against these grants was to be allowed as deduction. In view of the above, the disallowance made by the AO was uncalled for and required to be deleted.

5. In support of his contention he relied on the following decisions:-

Jaswant Trading Company and Anil Trading Company vs. Commissioner of Income Tax (21.07.1994 – RAJHC) [1995] 212 ITR 24 (Raj.)

6. We have considered the matter. The Tribunal has found that in the case relied upon by the assessee the donation was made to the Chief Minister's Drought and Flood Relief Fund as there was a scheme/provision of relief to the affected employees of the assessee due to flood. By observing this, the Tribunal said that there was a direct link between the donation and the benefit derived and the nexus was established with the business. In the present case, it was found that there is total lack of such business connection or benefit with the donation made. There was no nexus between the donation and the business, therefore, it was considered not as a business expenditure. The provisions of Section 37 provide that any expenditure (not being expenditure of the nature described in Sections 30 to 36, and not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession". This section has contemplated

that it does not apply in respect of expenditure of the nature described in Sections 30 to 36. The requirement of this section is that the expenditure should be laid out or expended wholly and exclusively for the purposes of the business or profession and the burden to prove that the expenditure incurred by the assessee was wholly and exclusively for the purpose of business or profession is on the assessee. The assessee had failed to prove that the expenditure incurred by it was exclusively for the purpose of business.

7. Besides the above, the provisions of Section 37 are general in nature and the provisions of Section 80G are specific. Applying the maxim generalia specialibus non derogant if an amount is liable for deduction under Section 80G it cannot be claimed under the general provisions of Section 37(1). Section 80G provides that in computing the total income of an assessee, there shall be deducted, in accordance with and subject to the provisions of this section, an amount equal to fifty per cent of the aggregate of the sums specified in Sub-section (2). If a particular amount of expenditure falls within the category of donation, then the deduction as provided under Section 80G alone is applicable. For the purpose of claiming the benefit under Section 37(1), it has to be proved that the expenditure was wholly and exclusively for the purpose of business. The words "wholly and exclusively" eliminate other considerations and there should not be any dispute with regard to the expenditure that the object of it was for the necessity of business. There may be a circumstance where an expenditure falls within the category of "wholly and exclusively for the purposes of the business or profession" and also under Section 80G. In that case, the option remains with the assessee to claim the expenditure under either of the aforesaid sections. But where there is no direct nexus to prove that it is wholly and exclusively for the purpose of business or profession, then it cannot be claimed under Section 37(1) of the Act. The phrase "for the purposes of the business" restricts the expenditure for such purpose and not otherwise. A future hope for advantage is in the nature of an expectation. The requirement of the section is that there must be a business in existence and the expenditure is wholly and exclusively for the purposes of business. A donation may be

having indirect connection with the business as some future advantage might be expected while giving donation to the Chief Minister's Drought and Flood Relief Funds or it may be for the purpose of ego satisfaction. Besides the Chief Minister's Drought and Flood Relief Funds, both the assessees have given donation to the Rotary Club, Pali, and Chima Bai Lalchand Trust. It has nowhere come on record as to in what manner the business of the assessee has been directly affected and there was a direct connection between the expenditure and the business of the assessee.

8. In these circumstances, we are of the view that the Tribunal was justified in holding that there was no nexus established in this case between the donation on the one hand and the business perspective of the firm on the other and, therefore, the same was not allowable as business expenditure under Section 37(1) of the Income Tax Act and only 50 per cent deduction under Section 80G was allowable.

Commissioner of Income Tax vs. Mafatlal Fine Spinning and Manufacturing Co. Ltd. (05.02.2003 – BOMHC), [2003] 263 ITR 140 (Bom).

6. As regards question No. 3 is concerned, Mr. R. V. Desai, learned senior counsel appearing on behalf of the Revenue, relied upon the decision of this court in the case of CIT v. New Shorrock Spg. and Mfg. Co. Ltd. [1995]212ITR355(Bom) , wherein it is held that the ceiling specified in Sub-section (4) of Section 80G applies to the aggregate of the sums in respect of which deduction is claimed and not to the amount of deduction allowed under Sub-section (1) of Section 80G of the Income Tax Act.

7. In the present case, the Tribunal following the decision of the Andhra Pradesh High Court in the case of Hyderabad Race Club v. Addl. CIT [1979]120ITR185(AP) , held that the ceiling laid down by Sub-section (4) was applicable not to the aggregate amount in respect of which the deduction was claimed but to the amount deductible under Sub-section (1) of Section 80G. However, this court in the case of CIT v. New Shorrock Spg. and Mfg. Co. Ltd. [1995]212ITR355(Bom) has disagreed with the decision of the Andhra Pradesh High Court in the case of Hyderabad

Race Club [1979]120ITR185(AP) and held that the ceiling specified in Sub-section (4) applies to the aggregate of the sums in respect of which deduction is claimed and not to the amount of deduction allowed under Sub-section (1) which has to be computed in the manner specified therein. In this view of the matter, we answer question No. 3 in the negative and in favour of the Revenue.

Malayala Manorama Co. Ltd. vs. Commissioner of Income Tax (13.12.2005 – KERHC), [2006] 284 ITR 69 (Ker)

13. We are of the view the abovementioned decisions are not applicable to the facts of this case and to some extent we differ from the decision reported in Madras Refineries Ltd.'s case (supra). We have already pointed out on facts, the amount contributed by the assessee to the relief fund was not utilised wholly or exclusively for its business purpose. The mere fact that indirectly the assessee earned goodwill of the victims and the general public does not mean that the expenditure incurred by the assessee was wholly or exclusively for business purpose. Section 37(1) would apply only in a case where expenditure is laid out or expended wholly or exclusively for the purpose of assessee's business. Amount contributed by the assessee in the present case may bring goodwill or enhance reputation of the assessee among the general public as a good philanthropist and in that process it may boost its business. But that by itself would not be sufficient to claim any deduction under Section 37(1). Burden is entirely on the assessee to establish that the amount laid out or expended by the assessee was wholly or exclusively used for the purpose of its business.

14. We have already indicated the object of the trust was not business promotion and the contribution made by the assessee also was not utilised for business promotion. In Madras Refineries' case (supra) with due respect, the Court has not properly explained the meaning of the words "wholly and exclusively". We have no quarrel about the general proposition made by the Madras High Court. But unless and until the expenditure laid out or expended by the assessee is used wholly or exclusively for its business purpose, no deduction could be made under Section 37(1). Karnataka High Court was dealing with a case where the assessee started a school for education of

children of its employees and claimed deduction of the amount spent by it towards business expenditure. The facts of Kamataka. High Court case are entirely different from the facts indicated in this case. There is no case for the petitioner by making contribution to the trust, the assessee's employees were in any way benefited. Travancore Cochin Chemical's case (supra) is a case where the assessee made contribution to school in which children of its employees are studying. It is in. that context the Division Bench of this Court took the view that the contribution made by the assessee was an expenditure wholly and exclusively for the welfare of its employees and hence was an allowable deduction under Section 37(1) of the Act. Facts of this case stand on a different footing and the decisions cited by the assessee are, therefore, not. applicable to the facts of this case. We are, therefore, of the view that the contribution made by the assessee would, be an allowable deduction under Section 80G of the IT Act and not under Section 37(1) of the Act. We, therefore, fully concur with the view of the Tribunal on that point.

15. Counsel for the assessee submitted that the finding of the Tribunal that the claim under Sections 80-I and 80-IA for deduction in respect of new undertakings of the assessee at Trivandrum and Palakkad stands covered against the assessee, is not correct especially in view of the decision of this Court in Malaysia Manorama Co. Ltd. v. CIT (2002) 257 HE. 633 . In that case assessee claimed allowance of deduction with respect to its share of income from advertisement for the asst. yrs. 1990-91 and 1991-92. This Court took the view that the assessee is entitled to special deduction under Section 80-I of the Act.

16. Counsel submitted, though this decision was specifically pointed out before the Tribunal, Tribunal failed to consider the same. Counsel appearing for the assessee also claimed deduction of the expenditure spent by its executives in the clubs so as to boost the assessee's business. Counsel contended expenditure laid out was exclusively forthe purpose of business and hence was an allowable deduction. Counsel also pointed out that the said issue is covered by the decision

reported in Otis Elevator Co. (India) Ltd. v. CIT. Counsel submitted, that point was also not properly considered by the Tribunal. Counsel, therefore, submitted that in the light of the above-mentioned decisions those claims are liable to be allowed by this Court. Learned Counsel appearing for the Revenue, on the other hand, contended that if it is a case of non-consideration, then the matter has to go back to the Tribunal and this Court without any factual foundation cannot finally adjudicate those claims. We find force in the contention of the counsel for the Revenue. Under such circumstance, we are inclined to uphold the order of the Tribunal disallowing the claim of the assessee under Section 37(1) of the IT Act. With regard to the claims under Sections 80-I, 80-IA and claim for expenditure spent by executives for business promotion, the matter has to go back to the Tribunal for fresh consideration.

Income-tax appeal is disposed of confirming the order of the Tribunal with regard to the finding under Section 37(1) of the IT Act and rest of the issues as directed by this Court would be reconsidered by the Tribunal.

Season Rubber Ltd. vs. Commissioner of Income Tax (15.01.2008 – KERHC), [2009] 311 ITR 15 (Ker)

2. We have heard learned Counsel for the applicant and learned standing counsel for the respondent. We do not think that the assessee is entitled to the claim under Section 37(1) of the Act, because the assessee's prospects are not advanced by making these contributions. Even though learned Counsel contended that the assessee's employees are getting treatment from the hospital and the employees' children are students in the school which got the benefit we find the benefit, if at all, is quite remote and not to any person. We, therefore, answer the question referred, against the assessee and in favour of the Department.

Commissioner of Income Tax vs. Bharat Heavy Electrical Limited (11.09.2012 – DELHC), [2013] 352 ITR 88 (Delhi)

13. Question No. 3 - Whether the expenditure allowed by the impugned order of the Tribunal was justified in respect of the donations made by the assessee and claimed as business expenses under Section-37 (1)?

The assessee had claimed expenditure on account of donations under section 80G of the Act in its returns. It had submitted that donations were given to various organizations which were laid out or expanded exclusively for business purposes. These donations were mostly made for the purpose of promoting education and had special relevance since the assessee had units in townships or places where access to school was extremely limited. The general object of educational welfare being undoubtedly charitable, and linked with the well being of the assessee's employees, the expenditure was correctly allowed under section 37(1). The AO and the CIT had disallowed the claim originally made under section 80G. The reasoning of these two lower authorities was that the claim was unsupported by any documentary proof with regard to the permissibility of the deduction and such being the case, relief of larger deduction as business expenditure could not be granted.

14. The Tribunal accepted the assessee's argument and held that the payments were made for the purpose of efficient running of business as the establishment of assessee functions at various remote places and was for the purpose of securing local support. Furthermore, the Tribunal was persuaded to uphold the assessee's claim on the ground that the assessee's employees were also local residents and that such support by promoting welfare, was a business expenditure. The learned counsel for the assessee supported the decision of the Tribunal and also placed reliance upon the judgment in CIT v. Madras Refineries Ltd., 2004 (266) ITR 170.

15. There can be no two opinions that any expenditure which is laid out exclusively for business purpose and to facilitate profits, and which does not otherwise become permissible under specific sections, can qualify for deduction. In this case, however, the assessee claimed a limited deduction under Section 80G. It was unable to satisfy the AO with documentary evidence that the organizations or Trusts or Societies it donated the amounts to, had the requisite approval. The necessary certificates to claim deductions under Section 80G were not forthcoming, neither during the assessment nor in the appellate proceedings.

Before the Tribunal, the assessee appears to have argued that what it claimed as a limited permissible deduction by virtue of Section 80G, and which was not granted on account of lack of evidence, could be enlarged as business expenditure in entirety under Section 37(1). This Court is unpersuaded by the logic and reasoning of the Tribunal. There is absolutely no documentary evidence to show that the amounts involved (which are quite substantial) could be deemed necessary or expedient to promote the assessee's business. While the philanthropic activity such as donation are laudable and, in principle, cannot be faulted; however, parting with of large amounts to "gain local support," per se cannot constitute deductible business expenditure. For the assessee to have successfully made a claim in terms of section 37 (1), it was not enough for it to assert the general charitable public welfare benefits that potentially would accrue as a consequence of such donations. It had to show the particulars of the organizations which were beneficiaries of such donations and also the corresponding expedience in making out such donations. The danger in promoting such expenditure as having been "laid out" exclusively for business purposes is that it can well degenerate into an exercise of unregulated activity for which the Revenue would perforce defer to the assessee's decision on the basis of no discernable principle. Parliament having chosen one method of dealing with donations i.e. as in the case of section 80G, the adoption of another route as business expenditure would not be permissible.

16. For the above reasons, the Revenue's appeals have to succeed on this point. The amounts claimed as business expenditure for the relevant assessment years have to be added back and brought to tax.

6. Counsel for the respondent drew over attention to the observations made by the Tribunal which reads as under:-

“7. After considering the submissions, orders of the authorities below, we find that assessee deserves to succeed in its ground raised. It is noticed that before creating SPARSH, the assessee was doing all these expenditure itself. Just for betterment of administrative services, the assessee created the Trust through whom these expenses are incurred. The Profit & Loss account of the Trust is maintained, copy of which is placed in the compilation and it is seen that whatever the amount has been given by assessee or reimbursed by assessee that has been spent by the Trust on the animals to get better quality and quantity of milk. The assessee had contributed @ Rs. 0.05 paise per liter of milk procured to its Trust for the purpose of incurring expenditure for better quality of milk. An agenda note was prepared which clearly states that the purpose of contribution is for medical and health facility of the animals of the milk producers at the District Level. The contribution made by assessee to trust is thus directly linked with the procurement of better quality, hygienic and more quantity of the milk. It is in the interest of the assessee that the milk animals at the village level from where it procures the milk are healthy & for this purpose, SPARSH trust incurred expenditure in providing vaternity care, regular treatment, emergency care, preventive care, breed improvement through A.I. uninterrupted supply of nutritional supplements etc. Therefore, in our considered view, contribution made by assessee to this trust is an expenditure incurred wholly and exclusively for the purpose of business which is allowable under section 37(1). From the Income and Expenditure account of the Trust, it can be noted that it has incurred an expenditure of Rs. 80,35,447/- in pursuance of its objective and after considering the receipts, there is a deficit of Rs. 23,48,303/- to the trust in the year under consideration. Such deficit is met out of the contribution made by the assessee to the trust. It is further seen that before creating this Trust, the assessee was incurring all these expenses itself and all theses expenses were allowed by the department while completing assessment under section 143(3). Therefore, this is not a case that assessee has made any donation to any Trust and, therefore, the same cannot be allowed as business expenditure. The ld. CIT (A) has disallowed the claim of the assessee by observing that since assessee has made donation under section 80G and, therefore, deduction under section 80G is allowable whereas the facts are otherwise. The assessee has not made any donation but has contributed to the trust for a specific purpose i.e. to incur the expenditure to get better milk from milk animal. Various case laws relied upon by assessee are in support of the case of the assessee. We are not going into detail in respect to those cases as they have already been mentioned in the written submissions which are reproduced herein above. In view of these facts and circumstances, we hold that the expenditure/contribution made by assessee is allowable as business expenditure. Accordingly, the addition made and confirmed by the lower authorities is deleted.

12. After considering the orders of the AO and ld. CIT (A) and written submissions, we find that the assessee deserves to succeed in this ground also. It is seen that expenditure claimed under the head Vikas Yojna Fund is not any contribution but actual expenditure incurred for registering the members and the societies at the village level for which certain incentive/subsidy is given to ensure the regular procurement of milk from these persons/societies. It is further seen that for the purpose of over-all development of the dairy in the State assessee has received grant for revival of the societies from the Apex Society i.e. Rajasthan Co-operative Dairy Federation Limited at Rs. 22,91,920/- which has been offered for taxation by the assessee. The expenditure of Rs. 3 lacs or odd has been incurred for the same purpose i.e. for registering the members and the societies at village level so that regular supply of milk from these persons/societies can be maintained. In view of these facts and circumstances, we are of the view that the AO and ld. CIT (A) were not justified in not allowing the claim of the assessee. On one hand assessee is taxing the grant received by assessee and on the other hand the expenditure incurred for the same purpose is not allowed, which is not justified. In view of the above facts and circumstances, we delete this addition also.

7. He relied on the following decisions:-

M/s. Sri Venkata Satyanarayana Rice Mill Contractors Co. vs. Commissioner of Income Tax, Andhra Pradesh, II (25.10.1996 - SC) (1997) 223 ITR 0101

5. The principles for determining whether such a payment can be regarded as being allowable as business expense are, in our opinion, well

settled. As long ago as in the case of Atherton v. British Insulated and Helsby Cables Ltd., 10 TC 155 191 (HL) it was observed that "A sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of trade." The aforesaid observation was quoted with approval by this Court in Eastern Investments Ltd. v. Commissioner of Income Tax, West Bengal [1951]20ITR1(SC) . Again in the case of The Commissioner of Income-tax, Bombay v. Chandulal Keshavlal and Co. Petlad [1960]38ITR601(SC) , a similar question arose for consideration. The assessee who was managing agent was entitled to commission. It, however, relinquished part of the commission which was receivable from the managing company, inter alia, for the reason that the financial condition of the managing company was unsatisfactory. The question arose whether the amount relinquished was deductable as an expenditure or not. While upholding the claim for reduction this Court observed at page 50 that "Thus in cases like the present one in order to justify deduction the sum must by given up for reasons of commercial expediency; it may be voluntary, but so long as it is incurred for the assessee's benefit the deduction would be claimable ." What, therefore, is to be seen is not whether it was compulsory for the assessee to make the payment or not but the correct test is that of commercial expediency. As long as the payment which is made is for the purposes of the business, and the payment made is not by way of penalty for infraction of any law, the same would be allowable as a deduction.

6 . This Court in the case of Commissioner of Income-tax, Gujarat v. S.C. Kothari, [1971]82ITR794(SC) , was considering a case where the assessee had suffered loss in an illegal transaction and the question arose whether the same could be set off under Section 24 of the Income-tax Act, 1922 against the profits and gains of speculative transaction. While allowing the set off it was observed that if a business is illegal, neither

the profits earned nor the losses incurred would be enforceable in law but that does not take the profits out of the taxing statute. Similarly the taint of illegality of the business cannot detract from the losses being taken into account for computation of the amounts which can be subjected to tax under Section 10(1) of the 1922 Act. The tax collector, it was observed, cannot be heard to say that he will bring the gross receipts to tax without deducting losses and the legitimate expenses of the business.

Again in the case of Commissioner of Income-tax v. Piara Singh [1980]124ITR40(SC) , a question arose with regard to the loss sustained by an assessee in the carrying on of an illegal business. The respondent therein carried on smuggling activities and was apprehended by the Indian police while crossing the border into Pakistan and Rs. 65,000/- in currency notes were recovered from him. This money was being taken to Pakistan for the purposes of purchasing gold which was to be smuggled into India. This amount was confiscated. Thereupon the income-tax authorities came to the conclusion that the assessee, who was carrying on the business of smuggling, was liable to income tax and he was accordingly assessed to tax. The assessee claimed deduction under Section 10 of the 1922 Act of the loss of Rs. 65,000/- which had been confiscated by the customs authorities. While allowing this deduction it was held that the carriage of the currency notes across the border was an essential part of the smuggling operation and detection by the customs authorities and consequent confiscation was a necessary incident of the said business and constituted a normal feature of such an operation. The confiscation of the currency notes was a loss which sprang directly from the carrying on of the business and was allowable as a deduction under Section 10 of the 1922 Act.

Even though this Court has in the cases of Piara Singh and S.C. Kothari (supra) held that loss suffered while carrying on illegal business is allowable as a deduction, in the present case we find that the contribution which was made by the appellant could under no circumstances be regarded as illegal payments on payments which were opposed to public policy. This is not a case where the assessee was paying any bride to any person nor is this a case where money was being contributed to any private fund or for the benefit of any individual which could be regarded as a form of illegal gratification. By a voluntary scheme, with which the District Collector was associated, the district welfare fund had been established for the benefit of the general public. The payment to such a fund which was being used for public benefit cannot be regarded as being opposed to public policy. Requiring payment to be made for a just cause which would entitle a businessman to obtain a licence or permit cannot be regarded as being against the public policy.

10. From the aforesaid discussion it follows that any contribution made by an assessee to a public welfare fund which is directly connected or related with the carrying on of the assessee's business or which results in the benefit to the assessee's business has to be regarded as an allowable deduction under Section 37(1) of the Act. Such a donation, whether voluntary or at the instance of the authorities concerned, when made to a Chief Minister's Drought Relief Fund or a District Welfare Fund established by the District Collector or any other Fund for the benefit of the public and with a view to secure benefit to the assessee's business, cannot be regarded as payment opposed to public policy. It is not as if the payment in the present case had been made as an illegal gratification. There is no law which prohibits the making of such a donation. The mere fact that making of a donation for charitable or public cause or in public interest results in the government giving patronage or benefit can be no ground to deny the assessee a deduction of that amount under Section 37(1) of the Act when such payment had been made for the purpose of assessee's business.

Commissioner of Income Tax vs. Rajasthan Co-operative Dairy Federation Ltd. (25.08.2014 – RAJHC) (2014) 112 DTR 0131 (Raj.)

10. In our view, the ITAT as well as CIT(A) have arrived at a finding of fact that the genuineness of the expenses is not doubted by the appellant-revenue and thus, when genuineness of the expenses has not been doubted by the appellant-revenue, then it is a

finding of fact. We may further add that the respondent-assessee, as referred to herein above, is an apex body responsible for development of dairy activities in cooperative sector in the State of Rajasthan and the fundamental objectives of the respondent-assessee, as per its bye-laws, are as under:--

> "3.1 To carry out activities for promoting production, procurement, processing and marketing of the milk and milk products for economic development of the animal husbandry/farming community.
>
> 3.2 Development and expansion of such other applied activities as may be conducive for the promotion of the Dairy Industry, improvement and protection of such milch animals and economic betterment of those engaged in milk production.
>
> 3.2(7) advise, guide, assist and control the member milk unions in all respects of management, supervision and audit functions;
>
> 3.2(8)purchase or assist in purchasing raw material, processing material etc; or to collaborate with some one if need arises;
>
> 3.2(12) promote the organization of primary societies and assist members in organization of the primary societies;
>
> 3.2(13) plan development strategies and programme to increase the volume of production, procurement of federation and its member unions and for effective marketing of the same;
>
> 3.2(14) render technical, administrative, financial and other necessary assistance to the member unions and enter into collaboration agreement with some one if the need arises."

12. We have also gone through the judgment relied by the officer of Kerala High Court in Season Rubber Ltd. case (supra), however, the said judgment is totally distinguishable and not even remotely applicable to the facts of the instant case.

Commissioner of Income Tax vs. Kaira Dist. Co-op. Milk Producers Union Ltd. (11.07.2000 - GUJHC) : MANU/GJ/1076/2000

2. The relevant assessment years are 1976-77, 1977-78 and 1978-79. The assessee is a co-operative society engaged in the marketing of milk and milk products. It had claimed for deduction, the contribution to Gujarat Rajya Co-operative Education Fund. The Tribunal held that the assessee's said claim, which is covered by the above question No. 1 was allowable and confirmed the order of the Commissioner (Appeals). It is pointed out that this question stands answered by a decision of this court in Mehsana District Co-operative Milk Producers Union Ltd. v. CIT MANU/GJ/0299/1993, in which it was held that as the assessee had to contribute to the Education Fund, since, it declared a dividend of 3 per cent or more, the contribution made to the Education Fund was deductible. This decision was followed in the assessee's own case in CIT v. Kaira District Co-operative Milk Producers' Union Ltd. MANU/GJ/0181/1993, in which it was held by this court that the contribution to the Gujarat Co-operative Education Fund by the assessee was allowable as business expenditure. In view of the ratio of these decisions, question No. 1 stands concluded and is answered against the revenue and in favour of the assessee..

3. The assessee had claimed depreciation in respect of road and the Tribunal confirmed the decision of the Commissioner (Appeals) allowing such depreciation. It was pointed out by the learned counsel that even this question is covered by the decision of this court in assessee's own case, namely Kaira District Co-operative Milk Producers' Union Ltd. v. CIT MANU/GJ/0033/1985, in which it was held that the assessee was entitled to depreciation in respect of road under section 32 of the Act, as building. Again in assessee's own case in CIT v. Kaira District Co-operative Milk Producers' Union Ltd. MANU/GJ/0066/1991, it was held by this court that the written down value of the approach road has to be worked out by treating it as building. The Supreme Court in CIT v. Gwalior Rayon Silk Manufacturing Co. Ltd. MANU/SC/0337/1992, held that the roads laid within factory premises as links or providing approach to the buildings to carry on

the business activity of the assessee are "buildings" within the meaning of section 32 of the said Act. In this view of the matter, question No. 2 is answered in the affirmative against the revenue and in favour of the assessee.

MEHSANA DISTRICT CO-OPERATIVE MILK PRODUCERS UNION LTD. vs. COMMISSIONER OF Income Tax. (11.02.1993 – GUJHC), (1993) 203 ITR 0601

9. As regard question No. 1 pertaining to subsidy of Rs. 15,25,000 and consequent reduction from the written down value of the assessee for the purpose of computing depreciation on the milk drying plant, Mr. Shah for the assessee stated that he was not now questioning the finding of the Tribunal that the written down value could be reduced right from the assessment year 1967-68. He, however, submitted that the loan which was given to the assessee was for the whole project of setting up the milk drying plant. The loan was not confined to purchase of plant and machinery only. The items which were receivable under the resolution were for the purpose of indicating which plant and machinery was required to be imported with the help of foreign credit or by utilising foreign exchange. He submitted that out of the loan amount, the assessee had purchased land worth Rs. 1,11,416 and constructed buildings thereon worth Rs. 19,77,776 during the accounting years 1963-64 and 1964-65. According to him, these were parts of the project for which the Government had sanctioned the loan. He submitted that though all these relevant facts were disclosed before the Tribunal, they have not been properly considered and the Tribunal erroneously rejected its contention that it should be given an opportunity to correlate the loan with depreciable and non-depreciable assets purchased out of it. He stated that, unless this exercise is undertaken, no definite reply can be given to question No. 1. In our opinion, what the assessee contends before us has got substances in it. As indicated by the resolution of 1963, the loan was given for the purpose of setting up the milk drying plant at Mehsana. It would not mean that the loan was given for the purpose of purchasing plant and machinery only. The Tribunal has not at all

considered this aspect. The fact that the loan was sanctioned for the project of setting up a milk drying plant at Mehsana also becomes clear if we look at the resolution dated October 5, 1964, passed by the Government, wherein it is stated "owing to some reasons, the cost of the projects has risen to Rs. 141 lakhs". Again, in the resolution dated October 11, 1967, it is further stated that "25 per cent of the amount of loan sanctioned to the unions should be treated as subsidy for the projects". It is not in dispute between the parties that necessary material as regards the expenditure made by the assessee out of this amount was on record. The Tribunal, therefore, ought to have permitted the assessee to correlate the loan with the purchase of depreciable and non-depreciable assets. In this view of the matter, we decline to answer question No. 1 with the result that the matter will now go back to the Tribunal and the Tribunal will have to undertake that exercise with the help of the assessee as to whether depreciable and non-depreciable assets were purchased out of the said loan and to what extent and whether, as a result of conversion of part of the loan into subsidy, what should have been regarded as the written down value of the asset for the purpose of computing depreciation.

Mysore Kirloskar Ltd. vs. Commissioner of Income Tax (08.09.1986 – KARHC), (1987) 166 ITR 0836

15. Section 37(1) of the Act :

"Any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of the business or profession shall be allow in computing the income chargeable under the head 'Profits and gains of business or profession'".

16. To be an allowance within section 37(1), barring the exceptions mentioned therein, "the money paid out or away must be paid out wholly and exclusively for the purpose of the business". The assessee can claim the whole of it for deduction in computing the income chargeable under the head "Profits and gains of business or profession".

17. The basic requirements for invoking

sections 37(1) and 80G, are, therefore, quite different, but none the less, the two sections are not mutually exclusive. If the contribution by an assessee is in the form of donations of the category specified under section 80G, but if it could also be termed as an expenditure of the category falling under section 37(1), then the right of the assessee to claim the whole of it as allowance under section 37(1) cannot be denied. But such money must be "laid out or expended wholly and exclusively for the purpose of business". The word "wholly" refers to the quantum of expenditure and the word "exclusive" refers to the move, object or purpose of the expenditure.

There is yet one more thin to be remembered while applying section 37(1). The expenditure claimed therein need not be "necessarily" spent by the assessee. It might be incurred "voluntarily" and without any "necessity", but it must for promoting the business. In other words, if the expenditure has been incurred by the assessee voluntarily, even without necessity, but if it is for promoting the business, the deduction would be permissible under section 37(1) of the Act. In Season J. David and Co. P. Ltd. v. CIT [1979]118ITR261(SC) , the Supreme Court observed(at page 275 and 276) :

"It is relevant to refer at this stage to the legislative history of section 37 of the Income Tax Act, 1961, which corresponds to section 10(2)(xv) of the Act. An attempt was made in the Income Tax Bill of 1961 to lay down the 'necessity' of the expenditure as a condition for claiming deduction under section 37. Section 37(1) in the Bill read 'any expenditure... laid out or expended wholly, necessarily and exclusively for the purpose of the business or profession shall be allowed...." The introduction of the word 'necessarily' in the above section resulted in public protest. Consequently, when section 37 was finally enacted into law, the word 'necessarily' came to be dropped. The fact that somebody other than the assessee is also benefited by the expenditure should not come in the way of an expenditure being allowed by way of deduction under section 10(2)(xv) of the Act if it satisfied other wise the tests laid down by law".

18. Again, the words "for the purpose of business" used in section 37(1) should not be limited to the meaning of "earning profit alone". Business expediency or commercial expediency may require providing facilities like school, hospital, etc., for the employees of their children or for the children of the ex-employees. The employees of today may become the ex-employees tomorrow. Any expenditure laid out or expended for their benefit, if it satisfied the other requirements, must be allowed as deduction under section 37(1) of the Act. It may also be stated, as observed by the Supreme Court in the aforesaid case, that the fact that somebody other than the assessee is also benefited or incidentally takes advantage of the provision made, should not come in the way of the expenditure being allowed as a deduction under section 37(1) of the Act. But, nevertheless, it must be an "expenditure" allowable as deduction under the Act.

19. The question that, however, still remains is whether the donation claimed by the assessee for deduction can be said to be an "expenditure" as contemplated under section 37(1) of the Act. "Expenditure" primarily denoted the ideal of "Spending" or "paying out or away". It is something which is gone irretrievably, but should not be in respect of an unascertained liability of the future. It must be an actual liability in present, as opposed to a contingent liability of the future. Some of these principles have been explained by the Supreme Courtin Indian Molasses Co. (Private) Ltd. v. CIT [1959]37ITR66(SC) , wherein it has been observed (at pages 75 and 76) :

"The Income Tax law does not allow as expense all the deductions a prudent trader would make in computing his profits. The money may be expended or grounds of commercial expediency but not of necessity. The test of necessity is whether the intention was to earn trading receipts or to avoid future recurring payment of a revenue character. Expenditure in this sense is equal to disbursement which, to use a homely phrase, means something which comes out of the trader's pocket. Thus, in finding out what profits there be, the normal accountancy practice may be to allow as expense any sum in respect of liabilities which have accrued over the accounting period and to deduct such sums from profits. But the Income Tax law does not take every such allowance as legitimate for purposes of tax. A distinction is made between an actual liability in present and a liability in present and a liability de futuro which, for the time being, is only contingent. The Former is deductible but not the latter".

20. In the light of these principles, we may again revert to the reasons given by the Tribunal for rejecting the claim of the assessee. The first reason given by the Tribunal is that section 80G is a special provision and if it applies to the assessee's case, then section 37, which is a general provision, stands excluded. This reason appears to be to sound. We have stated that section 80G and section 37 are not mutually exclusive. If the sum claimed by way of deduction even if it a donation, could be considered as an expenditure falling under section 37, the assessee could claim it as an allowance in its entirety. The second reason given by the Tribunal is equally untenable. The establishment of the school was primarily to provide facilities for the education of the children of the employees and ex-employees of the assessee. Any expenditure incurred in connection therewith could be claimed as deduction. Merely because some children other than those of the employees and ex-employees are also admitted to the school, the expenditure incurred in connection with the activities of the school cannot be disallowed under section 37(1). Both the reasons given by the Tribunal, therefore, cannot be sustained. But we cannot answer the question without a finding recorded by the Tribunal as to whether the donation in question can be considered as an "expenditure" in the sense which we have explained.

Additional Commissioner of Income Tax vs. Rajasthan Spinning and Weaving Mills Ltd. (15.10.2003 – RAJHC), (2005) 274 ITR 0463

10. Undoubtedly, participation in any trade, association or fund set up for advancement of business, which is also carried on by the assessee, interest is primarily for advancing the assessee's own business and not for philanthropic purposes. Essentially the finding,

whether the expenses have been incurred wholly or exclusively for the purpose of assessee's business, is a finding of fact. The fact that by becoming member of such association or contributing to such fund, such other participant or contributor is also benefited does not mean that the assessee has not spent sum exclusively and wholly for his business. The concept or "wholly and exclusively" is not that nobody else is to be benefited by making like expenses, Question is why the assessee makes such contribution. If his contribution is motivated by his own interest and there is nexus between the expense incurred and his business interest he has spent the money for his own business exclusively and wholly. The fact that recipient of such contribution viz., the association or fund exist for benefit for other persons also is not relevant.

11. It is well-settled that expression "wholly and exclusively" does not denote "necessarily". The word "wholly" refers to quantum of expenditure. The word "exclusively" refers to motive, objective or purpose with which the particular expense has been incurred. Ordinarily, it is for the assessee to decide whether any expenditure should be incurred in the course of its or his business. Such expenses can be incurred voluntarily and without necessity. If it is incurred for promoting the business and to earn the profits, the assessee can claim the deduction. Reference in this connection may be made to Sasoon J. David & Co. (P) Ltd. v. CIT (supra) wherein the apex Court even considered the circumstance that as a matter of fact the word "necessarily" found place in the Income Tax Bill, 1961, but was dropped by legislature in favour of expression "wholly and exclusively".

15. Applying the aforesaid test to voluntary contribution to charitable fund or organisation it is also well-established that any contribution made by an assessee to a public welfare fund which is directly connected or related with the carrying on of the assessee's business or which results in benefit to the assessee's business has to be regarded as anallowable deduction under Section 37(1). Such a donation, whether voluntary or at the instance of the authorities concerned, when made to relief fund or a welfare fund or any other fund

for the benefit of the public and with a view to secure benefit to the assessee's business, cannot be regarded as payment opposed to public policy. It is not as if the payment in such circumstances had been made as an illegal gratification. There is no law which prohibits the making of such a donation. The mere fact that making of a donation for a charitable or public cause or in public interest results in the Government giving patronage or benefit can be no ground to deny the assessee a deduction of that amount under Section 37(1).

8. Taking into consideration that the Tribunal has observed that the expenses actually given in donation to the trust was to be with the requirement of trust for the benefit and betterment of quality of milk to meet the health of the animals, it was so held by the Tribunal which has been observed above in Para 7 and 12.

9. In that view of the matter, in our considered opinion, the Tribunal has rightly considered the argument raised by counsel for the appellant and decision cited by him were dealt with.

10. In view of above, the issue in answered in favour of assessee against the department."

5. In that view of the matter, no substantial questions of law arises.

6. For issues no.3 & 4, SLP No.016249/2014 (CIT Jaipur vs. M/s. State Bank of Bikaner and Jaipur Chairman) is pending and the said issues are subject to SLP.

7. The appeal stands dismissed.

(VIJAY KUMAR VYAS)J. (K.S.JHAVERI)J.

Brijesh 11.