

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX REFERENCE NO. 754 OF 1998

K. Kachradas Patel Specific Family Trust
24/26, Cama Building,
Dalal Street, Mumbai

.. Applicant

v/s.

The Commissioner of Income Tax,
Central, Gujarat

.. Respondent

Mr. Ashok Patil i/b Vipul Joshi and S.M. Lala for the applicant
None for the respondent

**CORAM : M.S. SANKLECHA &
S.C. GUPTE, J.J.**

RESERVED ON : 27/09/2016

PRONOUNCED On : 03/10/2016

JUDGEMENT - (Per M.S. Sanklecha, J.) :-

1. The service upon the respondent Revenue was completed on 1st January, 1999 and affidavit-of-service dated 27th August, 2015 is already on record.

2. By this Reference under Section 256(1) of the Income Tax Act, 1961, the Income Tax Appellate Tribunal (Tribunal) seeks our opinion in respect of Assessment Year 1984-85, 1985-86 and 1986-87 on the following substantial questions of law :-

(i) *Whether in the facts and circumstances of the case and in law, the Tribunal was justified in holding that the expenditure of Rs.13,97,962/- (Rs.16,25,038 for A.Y. 1985-86) on the free distribution of exercise note books was in the nature of advertisement, publicity and sales promotion within the meaning of sub-section (3A) read with sub-section (3B) of section 37 of the Act, particularly in view of the contention of the assessee, that free distribution of exercise note books was by way of discount and not by way of advertisement?*

(ii) *Whether in the facts and circumstances of the case and in law, the Tribunal was justified in invoking the provisions of Sec.37(3A) r.w.s. 37(3B) in respect of the expenditure of Rs.22,68,796/- (Rs.37,55,543/- for A.Y. 1985-86), on account of advertisement, particularly in view of the fact that the said expenditure was never claimed by way of deduction and the said expenditure incurred by the assessee for and on behalf of the Consignment Agent was subjected to disallowance under the provisions of Sec.37(3A) r.w.s. 37(3B) in the hands of the Consignment Agents?*

(iii) *Whether in the facts and circumstances of the case and in law, the Tribunal was justified in disallowing the deduction u/s 80I of the Act on the interest income of Rs.51,03,976/- on the ground that the said interest income did not form part of the business income and was, therefore, not eligible for deduction under Section 80-I of the Act?*

3. Regarding Question (i) :-

(a) Mr. Patil, learned Counsel for the applicant assessee very fairly states that the issue stands concluded against the applicant assessee by the decision of Andhra Pradesh High Court in ***Commissioner of Income Tax Vs. Ampro Food Products 215 ITR 904***. In the said decision, on identical facts, namely, distribution of note books, the Andhra Pradesh High Court held that the same was in the nature of sales promotion / advertisement.

(b) In the above view, he does not dispute the applicability of *Ampro Food Products* (supra) to the present facts. Consequently, question (i) as raised for our opinion is answered in the affirmative i.e. in favour of the respondent Revenue and against the applicant assessee.

4. Regarding question (ii) :-

(a) This issue arises for Assessment Years 1984-85 and 1985-86. The facts are identical except the amounts involved. For the present purposes, we take figures of A.Y. 1984-85, though our answer to the question would apply to both the Assessment Years.

(b) The applicant assessee had entered into an agreement with its distributors under which it was agreed that besides bearing expenditure

on transportation, octroi, loading / unloading charges, it would also be responsible for advertisement and sales promotion. The agreement also provided that the advertisement / sales promotion expenditure which is incurred would be recoverable from the distributors.

(c) For the assessment year 1984-85, the applicant assessee expended a sum of Rs.22.68 lakhs on advertisement / sales promotion. However, in terms of the agreement with the distributors, the applicant assessee collected an amount of Rs.27.93 lakhs from its distributors on account of sales promotion / advertisement expenses, leaving a surplus of Rs.5.34 lakhs. It is the appellant's case that this surplus alone has to be added to the income of the assessee as income from other sources. In the aforesaid facts, the applicant assessee had not claimed the amount of Rs.22.68 lakhs as its expenditure.

(d) As against this, the Revenue contended that in view of Sub-sections 3A and 3B of Section 37 of the Act, as in force at the relevant time, the entire amount of Rs.22.68 lakhs spent on account of advertisement has to be subjected to its rigour. The contention of the applicant assessee is that it has not claimed any expenditure, as a deduction for the reason that it was incurred by the Distributors was negatived.

(e) Before us, Mr. Patil, learned Counsel for the applicant urges that

in any case, the amount to be considered as expenditure is only the net amount after excluding the amount recovered from its distributors. This was in the alternative to his submission that as is evident from the question as framed, no expenditure under Section 37 of the Act has been claimed as a deduction and, therefore, sub-Sections 3A and 3B of Section 37 of the Act cannot be invoked. For both the submissions reliance is placed upon the decision of the Gujarat High Court in ***Commissioner of Income Tax Vs. Vadilal Industries Ltd. 217 CTR (GJ) 318.***

(f) We find that the Gujarat High Court in Vadilal Industries Ltd. (supra) has held that only the net amount of expenditure on advertisement / sales promotion i.e. gross expenditure less amount recovered by the applicant / assessee from its dealer can be considered for disallowance under Section 37(3A) of the Act. It also observed that where no claim for expenditure under Section 37 of the Act is made then no disallowance under sub-Section (3A) of Section 37 of the Act can be made.

(g) The relevant observations of the Gujarat High Court in Vadilal Industries Ltd (supra) are as under :-

“12. Therefore, the first thing is to determine what is the expenditure claimed by the assessee; is it the gross amount

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

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

claimed as a deduction. The Tribunal has recorded a finding that the assessee has claimed an expenditure of Rs.46,473 only; that would be the only amount which would come up for consideration as being allowable or otherwise under S.37(1) of the Act. The scheme of the Act itself envisages that only after amount is determined under S.37(1) of the Act as being allowable and the same falls within any of the specified categories of S.37(3B) of the Act, can be question of partial disallowance under S.37(3A) of the Act arise.

(emphasis supplied)

(h) There is some merit in the submission made by Mr. Patil. However, we are not considering the alternative submission as the question as framed for our opinion itself states that the expenditure was never claimed as a deduction i.e. under Section 37 of the Act. Therefore, the occasion to apply sub-Section (3A) of Section 37 of the Act to disallow only part thereof will not arise.

(i) We are in respectful agreement with underlined observations in Vadilal Industries Ltd. (supra). In fact, Section 37(1) of the Act is a general provision which provides for allowing any expenditure not being capital or personal in nature and expended wholly for the purpose of the business or profession as deduction in computing profits and gains of business. Section 37(3A) of the Act states that notwithstanding the deduction allowed under sub-Section (1) of

Section 37 of the Act, expenditure in respect of particular types / classes as mentioned in Section 37(3B) of the Act shall not be allowed in excess of specified percentage. It, therefore, follows that sub-section (3A) of Section 37 of the Act can only apply where deduction under Section 37(1) of the Act is claimed. The question as posed for our opinion itself records as a fact, that no expenditure was claimed by the applicant assessee in respect of the advertisement expenses sought to be disallowed under Section 37(3A) of the Act.

(j) Therefore, question no.(ii) as formulated for our opinion has to be answered in the negative i.e. in favour of the applicant assessee and against the respondent Revenue.

5. Regarding Question (iii) :-

At the very outset, Mr. Patil, learned Counsel appearing for the applicant assessee in support of the Reference, on instructions, states that he is not pressing question (iii) which relates to A.Y. 1986-87. In view of the above, question (iii) as raised for our consideration is being returned unanswered as not pressed.

6. The Reference is disposed of in the above terms. No order as to costs.

(S.C. GUPTE, J.)

(M.S. SANKLECHA, J.)