

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

INCOME TAX REFERENCE NO.487 OF 1997

Dhimant Hiralal Thakar

.. Applicant

vs

The Commissioner of Income Tax B.C.II

.. Respondent

Mr.Nitesh Joshi with Mr.Bharat Damodar i/b Kanga & Co., Advocates
for Applicant.

Mr.Suresh Kumar Advocate for Respondent

...
CORAM:

**M.S.SANKLECHA AND
G.S.KULKARNI, JJ**

**JUDGMENT RESERVED ON:
JUDGMENT PRONOUNCED ON:**

**21st SEPTEMBER, 2015
28th OCTOBER, 2015**

JUDGMENT (Per G.S.Kulkarni, J):-

1. By this reference under section 256 (1) of the Income Tax Act, 1961 (the Act), the Income Tax Appellate Tribunal (Tribunal) has referred the following question of law for answer the opinion of this Court :

“ Whether on the facts and in the circumstances of the case, the tribunal was right in law in holding that the expenditure of Rs.43,600/- on medical treatment of eyes for improving the vision has an element of personal expenditure, and accordingly

the expenditure incurred by the appellant on foreign tour for pre-operation investigation relating to his eyes cannot be allowed as business expenditure u/s 37 (1) ”.

In nutshell the facts are :-

2. The applicant-assessee is a Solicitor by profession. During the assessment year 1986-87, the applicant incurred an expenditure of Rs.43,600/- on a foreign tour in connection with a pre-operation investigation of his eyes while determining his total income. This claim was disallowed by the Assessing Officer in the assessment order dated 31st March, 1987 passed under section 143 (3) of the Act on the ground it was personal expenditure. Therefore, it did not arise in the course of the profession nor was it incidental to the profession.

3. The applicant being aggrieved by the Assessment Order dated 31st March, 1987 preferred an appeal before the Commissioner of Income Tax (Appeals) (CIT(A)). By order dated 12th October, 1988 the CIT(A) upheld the order of the Assessing Officer disallowing the said expenditure on the ground that if the logic of the applicant is stretched, it would mean that even expenditure incurred on food to preserve oneself should also be treated as allowable under Section 37(1) of the Act as being incurred for business or profession.

4. The applicant being aggrieved by the order dated 12th October, 1988 passed by the CIT (A) approached the Tribunal. By an order dated 13th September 1994 the Tribunal concurred with the findings of the Assessing Officer and the C.I.T.(Appeals) disallowing the expenditure incurred for investigation of the eyes. The Tribunal inter alia relied upon the decision of the Supreme Court in case of **State of Madras vs. C.J.Coelho (53 ITR 186)** to hold that the correct connotation of the words “*personal expenses*” would mean only expenses on the person of the assessee or to satisfy his personal needs such as clothes, food etc or for the purposes not related to business. On the above basis, it observed that eyes are an important organ for an effective living of every human being and in case of any defect in the eyes the medical treatment thereof is very much necessary for the effective living of a human being. This irrespective of the business, profession or vocation carried on by the person. In the alternative, the Tribunal held that if the expenditure is attributable to both personal and professional as contended by the applicant, yet it cannot be allowed as a deduction. This is so as the expenditure has an element other than business or profession, therefore, it cannot be said to have been incurred wholly and exclusively for the purpose of profession. Therefore, the expenditure of medical treatment on eyes was disallowed under Section 37 of the Act.

5. The applicant thereafter moved a reference application under Section 256 (1) of the Act to the Tribunal seeking a reference of the above question of law. On a reference accordingly, made by the Tribunal, the above question of law has fell for our opinion.

6. Mr.Joshi learned Counsel for the applicant would submit that for the subject assessment year, the assessee who is a Solicitor by profession had visited the U.S.A. for pre-operation investigation of his eyes and had incurred an expenditure of Rs.43,600/-. This expenditure was necessarily an expenditure relating to the assessee's profession. It is urged that but for this treatment the assessee would not have been able to continue with his profession and therefore the expenditure ought to have been allowed as a deduction. He submits that eyes have a direct nexus with the professional activity of the applicant and therefore, it is not a personal expenditure as held by Tribunal. It is submitted that medical treatment for eyes is so very important from the point of view of the profession of the assessee and as such has a direct relation to the profession of the assessee. If the medical treatment was not to be undertaken, then the assessee would not have been in a position to practice his profession. It is submitted that Section 37 of the Act is required to be interpreted so as to permit allowing of such medical expenditure as claimed by the assessee. In support of these submissions, Mr.Joshi has relied upon the decisions in the case of (1) "*Sakal Papers Pvt.Ltd* vs.

Commissioner of Income Tax Poona **114 ITR 256**, (2) **Mehboob Productions Private Ltd vs. Commissioner of Income Tax Bombay City-I (106 ITR 758)**, (3) **Commissioner of Income Tax vs Steel Ingots Pvt. Ltd. (220 ITR 552)** and (4) **Commissioner of Income Tax, Delhi vs Delhi Safe Deposit Co.Ltd, (133 ITR 756)**.

7. Mr.Joshi learned counsel for the applicant next submits that the expression 'wholly and exclusively' as used in Section 37 (1) of the Act does not mean necessarily and that it is for the assessee to decide whether the expenditure should be incurred in the course of business or profession. In support of this submission, Mr. Joshi places reliance on the decisions of the Supreme Court in the case of **Sasoon J.David & Co. Pvt. Ltd vs. Commissioner of Income Tax (Bombay) (118 ITR 281)** **Eastern Investments Ltd vs Commissioner of Income Tax West Bengal 20 ITR** and an unreported decision of this Court in **Commissioner of Income Tax v/s. NGL Network (I) Pvt. Ltd.** (Income Tax Appeal No.538 of 2012).

8. Per contra Mr. Suresh Kumar learned counsel for the revenue would submit that the contentions as raised on behalf of the applicant are wholly unfounded. Mr. Suresh Kumar would submit that the tax authorities and the Tribunal have rightly rejected the assessee's claim by disallowing the expenditure on the said foreign

tour undertaken by the applicant. Mr. Suresh Kumar would submit that the ratio of the decision of the Delhi High Court in the case of **Shanti Bhushan vs. Commissioner of Income Tax (2011) 336 ITR 26 (Delhi)** would be clearly applicable to the facts of the present case. It is submitted that eyes are not only useful for profession but also are essential otherwise than for professional purposes and is a human need. Mr.Suresh Kumar submits that it is not the case that the assessee cannot function as a Solicitor in the absence of eyes. The moment this test is applied and it becomes apparent that there is a element of personal use of the eyes then the assessee cannot claim expenditure for treatment of eyes under Section 37 of the Act. It is submitted that expenditure as claimed by the applicant goes completely beyond the ambit and scope of Section 37 of the Act. Mr.Suresh Kumar submits that this expenditure as claimed by the applicant has been rightly held as a personal expenditure.

9. To appreciate the contentions as raised on behalf of the parties, it would be useful to reproduce the relevant portion of Section 37 which arises for consideration and reads as under:

“General

37. “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.”

10. It is apparent that Section 37 of the Act is a residuary provision. From the wordings of Section 37(1) of the Act, it can be clearly gathered that in order to be eligible for deduction under this provision following conditions were required to be satisfied:

- (1) The expenditure must not be of the nature described in Sections 30 to 60;
- (2) The expenditure must have been laid down wholly and exclusively for the purpose of business / profession of the assessee;
- (3) The expenditure must not be capital in nature;
- (4) The expenditure must not be personal in nature

11. Keeping the above broad legal requirement, we shall now examine the rival submissions and the case laws relied upon by the respective parties. The primary submission of the Appellant is that the expenditure incurred on investigation and treatment of his eyes be allowed as a deduction under Section 37(1) of the Act. This on the ground that it is not a personal expenses but incurred wholly and exclusively for the purpose of his profession. It is submitted that in the absence of the investigation and treatment of the eyes, it would be impossible to carry on the profession of an Solicitor. Thus, the expense was for the purposes of the profession and must be allowed. The Tribunal did not accept the above submissions by inter alia holding that eyes are necessary for effective living as an human being. An identical issue arose before the Delhi High Court in Shanti Bhushan (supra). The only difference being the expenses claimed

therein was for the treatment of the heart and here it is for eyes. The Delhi High Court in Shanti Bhushan (supra), paragraph 22.2 observed as under:-

“22.2:- *As observed herein above, an impaired heard would handicap functionally of a human being irrespective of his position, status or vocation in life. Expenses incurred to repair an impaired heart would thus add perhaps to the longevity and efficiency of a human being per se. The improvement in the efficiency of the human being would be in every activity undertaken by a person. There is thus no direct or immediate nexus between the expenses incurred by the assessee on the coronary surgery and his efficiency in the professional filed per se. Therefore, to claim a deduction on account of expenses incurred by the assessee on his coronary surgery under Section 37(1) of the Income Tax Act would have to be rejected. There is, as a matter of fact, no evidence brought on record, which would suggest that the assessee could have continued in the same state without the medical procedure undertaken by him.”*

12 In the present case as well no evidence has been brought on record to establish that in the absence of investigation and treatment, the applicant would be handicapped in discharging his obligation as a Solicitor/ Advocate. While at this, we cannot resist but point out that in this Court itself, we have a couple of visually challenged Advocates who are very competent in discharging their duties. We may also make reference to the late Mr. Sadhan Gupta who passed away recently and though visually challenged was as such appointed as Additional Advocate General of West Bengal in

1978 and the Advocate General in 1986. Besides, we cannot but agree with the observation of the CIT(A) in his order dated 12th October, 1988 that if the submission of the applicant is taken to its logical conclusion, then every and all expense incurred on daily living and food would be allowable as expenditure under Section 37 of the Act. Thus, we find no substance in the contention that it is not a personal expenditure incurred by the Appellant.

13 It was also submitted by the Applicant that the expenses on account of investigation and treatment of eyes be allowed under Section 37(i) of the Act on the principle of commercial expediency. In support, reliance was placed upon the decision of this Court in **Mehboob Production (P) Ltd.** (supra), **Sakal Papers (P) Ltd.** (supra) and of **M. P. High Court in Steel Ingots (P) Ltd.** (supra). All the above decisions were rendered not in the context of expenses being personal in nature. In all the three cases, the assessee which was a body corporate had not incurred any personal expenses but had claimed deduction of expenses being amounts paid by it to others i.e. employees or relatives of the employees. It was in the above context that the Court held it was be allowed on commercial expediency. Thus, the question of considering the words '*not being in the nature of personal expenses of the assessee*' was not the issue for consideration. Therefore, none of the above three decisions have any application to the present facts.

14 Similarly the reliance upon the decision of the Apex Court in Delhi Safe Deposit Co. Ltd. (supra) is inappropriate. In this case also the Court was not concerned when the words “*Not being in the nature of personal expenses.*” It was concerned with an issue of expenditure being incurred for purposes of keeping the trade going. In this case as pointed out herein above this expenditure is for personal well being and the benefit if any as a professional is incidental.

15 The next limb of Mr. Joshi's submission is that the expression “*wholly and exclusively*” as used in section 37 (1) of the Act does not mean “*necessarily*” or “*solely*”. Therefore, it is for the assessee to decide whether the expenses should be incurred in the course of his business or profession or not. However, if the expenditure is incurred for the purposes of the business, incidental benefit to some other person would not take the expenditure outside the scope of Section 37(1) of the Act. In support, reliance was placed upon the decisions of the Supreme Court in case of **Sasoon J. David and Co. P. Ltd** (supra), **Eastern Investments Ltd** (supra) decision of this Court in **NGL Network (I) Ltd.** (supra) to submit that the words “wholly and exclusively” used in the Act does not mean necessarily or solely for its benefit. In all the above cases, expenditure was undisputedly incurred for the purposes of carrying on its business or profession. However, in all the above cases,

persons other than the assessee who incurred the expenditure also benefited. In the above context, it was held that where such expenditure is incurred for the purposes of the business and some third party gets incidental benefit, the expenditure under Section 37(1) of the Act cannot be disallowed. There can be no dispute with the above proposition. However, in this case, it is an expenditure which is personal in nature as held by us and the benefit of such expenditure in the profession or business is only consequential to the personal expenses. If at all the expenses in this case is personal and the incidental benefit, if any, is to carrying on of profession. Therefore, it is not an expenditure which can be said to be incurred wholly or exclusively for the purposes of business.

16. It was next submitted by Mr. Joshi that the impugned order of the Tribunal observes that the expenditure incurred for improving the vision of the eyes may have some nexus to the professional activity. In view of the above, it is submitted that some part of the expenditure has to be allowed as being incurred for professional or business purposes. The words used in Section 37(1) of the Act is wholly and exclusively for the purposes of business. In this case, the finding of fact is that it is incurred for the personal purposes. Be that as it may, the words used are "*wholly and exclusively for the purposes of business or profession*". In normal understanding the word "wholly" would mean entirely and the word

“*exclusively*” would mean solely. Thus, any element of expenditure not laid out entirely and solely for the purpose of profession would not be covered by Section 37(1) of the Act. One has to examine this from the perspective/ prism of the person who does makes the expenditure. In this case, the benefit, if any, of improvement in the eyes may/ would also enure to the applicant not only in the profession but also in all other walks of life. However, the test would really be whether in the absence of being in business or profession, would the applicant have incurred the expenditure to improve his eyes and the answer has to be 'yes' keeping in view the normal conduct of human affairs. This is because effective eye sight is a necessity for living a life of a complete human. Therefore, in this case the expenditure is personal and incidental benefit if any is to the profession carried out by the applicant. The Supreme Court in the case of “**CIT, Delhi vs. Delhi Safe Deposit Co.Ltd., (AIR 1982 SC 757)**” considering as to what would be the true test of the expenditure laid out wholly and exclusively for the purposes of trade or business held that it would be an expenditure incurred by the assessee as incidental to his trade for the purpose of keeping the trade going and of making it pay and not in any other capacity than of a trader. It could not be said that the expenditure incurred by the assessee was either gratuitous or one incurred outside the trading activities of the assessee and thus the assessee was entitled to claim deduction under section 37. Moreover the Supreme Court in

considering the various decisions of the English Courts in construing as to what would be “wholly and exclusively” for the purpose of business or profession observed thus:

“The true test of an expenditure laid out wholly and exclusively for the purposes of trade or business is that it is incurred by the assessee as incidental to his trade for the purpose of keeping the trade going and of making it pay and not in any other capacity than of a trader. In Comm. of Income Tax (Kerala vs Malyalam Plantation Ltd (1964) 7 SCR 693 (AIR 1964 SC 1722) Subba Rao, J (as he then was) summarised the legal position at p.705 (of SCR) at p.1728 of AIR) thus :

“The aforesaid discussion leads to the following result: The expression “for the purpose of the business” is wider in scope than the expression “for the purpose of earning profits” Its range is wide: It may take in not only the day to day running of a business but also the rationalization of its administration and modernization of its machinery it may include measure for the preservation of the business and for the protection of its assets and property from expropriation, coercive, process or assertion of hostile titles, it may also comprehend payment of statutory dues and taxes imposed as a pre-condition to commence or for carrying on of a business, it may comprehend many other acts incidental to the carrying on of a business. However wide the meaning of the expression may be, its limits are implicit in it. The purpose shall be for the purpose of the business that is to say, the expenditure incurred shall be for carrying on of the business and the assessee shall incur it in his capacity as a person carrying on the business.” (Emphasis supplied)

The above observation of the Supreme Court completely militates against the submissions as made on behalf of the Applicant.

17. It is thus clear that the requirement to claim a deduction under Section 37 which is a residuary provision is quite clear, which is that the expenditure must not be of the nature described in section 30 to 36; secondly the expenditure must not be capital in nature; thirdly the expenditure must have been laid down wholly and exclusively for the purpose of business/profession of the assessee; and fourthly the expenditure must not be personal in nature. Applying these requirements of the statutory provision and the settled position in law as noted by us in the above decisions, we have no hesitation to reach a conclusion that the applicant is not entitled to claim deduction in respect of the expenditure incurred by him on foreign tour undertaken by him in the assessment year in question for the purpose of pre-operative treatment of his eyes. It cannot be disputed that the expenditure of Rs.43,600/- on foreign tour claimed to be undertaken by the appellant is for the purpose of pre-operation investigation of his eyes. We are not persuaded to accept the submission on behalf of the applicant that eyes are required to be

exclusively used for the purpose of profession by the applicant. As observed above eyes are an important organ of the human body and is essential for the efficient survival of a human being. Eyes are thus essential not only for the purpose of business or profession but for purposes other than these which are so many. It is therefore clear that the said expenditure as claimed by the applicant is not in the nature of the expenditure wholly and exclusively incurred for the purposes of the profession of the applicant and thus this expenditure cannot be claimed by the applicant to be allowed as deduction in computing the income chargeable under the head profits and gains from business or profession in case of the applicant as per the provisions of Section 37 of the Act.

18. As a sequel to our above discussion, we do not agree with the contentions as raised on behalf of the applicant, we are in agreement with the submissions as made on behalf of the revenue and we answer the question as referred to us in the affirmative that is in favour of the revenue and against the assessee.

Reference Application is accordingly disposed of in the
above terms.

(G.S.Kulkarni, J)

(M.S.Sanklecha, J)

Bombay High Court

CERTIFICATE

Certified to be true and correct copy of the original signed Judgment/order.

Bombay High Court

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