

(2001) 11 P&H CK 0129

High Court Of Punjab And Haryana At Chandigarh**Case No:** IT Ref. No. 48 of 1986 20 November, 2001

Commissioner of Income Tax

APPELLANT

Vs

INDO ASIAN SWITCHGEARS (P)
LTDRESPONDENT

Date of Decision: Nov. 20, 2001**Acts Referred:**

- Income Tax Act, 1961 - Section 256, 35B, 37

Citation: (2002) 173 CTR 102**Hon'ble Judges:** Jawahar Lal Gupta, J; Jawahar Lal Gupra, J; Ashutosh Mohunta, J**Bench:** Full Bench**Advocate:** R.P. Sawhney with Kishan Singh, B.S. Gupta with Sanjay Bansal, for the Appellant;

Judgement

Jawahar Lal Gupta, J.

The assessee filed its return for the assessment year 1980-81. It returned an income of Rs. 5,09,384. The assessing officer disallowed certain expenses and made the additions. The assessee appealed. It was partly allowed. The revenue and the assessee appealed to the Tribunal. The matter was decided vide order dated 12-4-1985. Both sides were still not satisfied. They approached the Tribunal with petitions u/s 256(1) of the Income Tax Act, 1961. The Tribunal has referred the following two questions in the petition filed by the revenue:

1. "Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in allowing weighted deduction on miscellaneous expenses of Rs. 25,70,195 which included salary and other establishment expenses."
2. "Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that the expenses on account of commission paid to the agents/marketing organisers amounting to Rs. 6,13,578 and Rs. 10,33,787 being

turnover discount paid to the distributors are not to be taken into account for purpose of disallowance u/s 37(3A) of the Income Tax Act ?"

Similarly, the Tribunal has also referred the following three questions on the petition filled by the assessee:

1. Whether on the facts and the circumstances of the case, Tribunal was right in law in holding that the claims of appellant- company are not entitled for weighted deduction u/s 35B in respect of the following expenses:

	Rs.	Rs.
(a) Handling charges for export consignments		51,580
(b) Export packing on export consignments:		
(i) Cardboard boxes	1,23,875	
(ii) Wooden cases	88,422	2,12,297
(c) Interest on export promotion		2.74,877
(d) bank charges for Bid Board and performance guarantee for export contracts		1,10,538
(e) Salary to Export Department exclusively engaged in the export promotion		45,053

2. Whether on the facts and in the circumstances of the case, Tribunal, was right in law in holding that only 20 per cent of the expenses out of Rs. 26,34,060 under the head "Miscellaneous expenses" can be considered for the purpose of weighted deduction u/s 35B?

3. Whether on the facts and in the circumstances of the case, Tribunal was right in holding that sum of Rs. 60,571 received by the appellant on transfer of assessee's right to import entitlements against export, is a revenue receipt.

2. Mr. B.S. Gupta, learned counsel for the assessee, has stated at the outset that he does not press question Nos. 2 and 3 as referred by the Tribunal. Resultantly, he accepts the order passed by the Tribunal. So far as question No. 1 as raised by the

revenue and the assessee respectively is concerned, the counsel for the parties are agreed that in view of the rule enunciated by their Lordships of the Supreme Court in [Commissioner of Income Tax, Delhi Vs. Stepwell Industries Ltd. and etc. etc.,](#) and [Commissioner of Income Tax \(CNTL\), Ludhiana Vs. Hero Cycles Pvt. Ltd., Ludhiana,](#), the order of the Tribunal has to be set aside and the case has to be remanded for a fresh decision.

3. In view of the two decisions of their Lordships as noticed above, the counsel

appear to be right. Accordingly, the Tribunal's order dated 12-4-1985, in so far as the claim for deductions u/s 35B of the Income Tax Act, 1961, is concerned is set aside. The case is remanded to the Tribunal for a fresh decision so as to enable the assessee to prove the nature of the expenditure and to show that it falls within one of the sub-clauses of section 35B1(b) of the Act. The Tribunal shall decide the matter after giving the assessee an opportunity of proving the nature of the expenditure.

4. This leaves us with question No. 2 as raised by the revenue. Mr. Sawhney contends that the trade discount as allowed by the Commissioner (Appeals) and the Tribunal is in fact inadmissible in view of the provisions of section 37(3A) of the Act. The argument is that trade discount is an expense for sales promotion. Thus, the assessee cannot claim any thing beyond what is permissible u/s 37(3A) of the Act. The claim made on behalf of the revenue has been controverted by Mr. B.S. Gupta, appearing for the assessee.

5. The short question is Did the assessee pay any thing for sales promotion so as to disentitle it to the claim as allowed by the Tribunal ?

Admittedly the provisions of section 37(3A) of the Act place an embargo on the expense incurred on the advertisement, publicity and sales promotion. This would mean that the expenses claimed by an assessee in connection with the advertisement, etc., have to be scrutinised and reduced in accordance with the slab prescribed in section 37(3A) of the Act. However, a discount allowed by an assessee to an agent is not an expense in connection with the publicity or advertisement, etc. It is an amount foregone by the assessee in favour of the dealer for effecting the actual sale. It is not like the fashion show conducted by a garment manufacturer, but a commission allowed to a dealer. Trade discount cannot be treated as a wasteful expenditure incurred by an assessee in connection with sales promotion. It is not a gift as given on a festival or a free sample as distributed by a pharmaceutical company to the doctors but an actual commission allowed or paid to a dealer. It does not fall within the mischief of section 37(3A) of the Act.

6. Mr. Sawhney contends that an amount of Rs. 10,33,787 has been paid by the assessee as a "turnover discount" to the distributor. He contends that the discount was given by the assessee to promote sales and, thus, it should fall within the provision of section 37(3A) of the Act.

7. The argument cannot be accepted. It is undoubtedly true that turnover discount may provide an incentive to the distributor to take steps to promote sales of a product in future also. However, so far as the assessee is concerned, it has actually given a discount to the distributor on the sales already made. Not for the sales to be made in future. It was not an expenditure for the purpose of advertisement, publicity or sales promotion. It was a reward for good performance. It might provide an incentive to the dealer in future. That is only incidental.

8. Reference has been made by the counsel to the decisions in [Commissioner of Income Tax Vs. Print System Products](#), [Commissioner of Income Tax Vs. Davangere Cotton Mills Ltd.](#), [Commissioner of Income Tax Vs. Mohd. Ishaque Gulam](#), [Commissioner of Income Tax Vs. Veneers and Laminations \(India\) Ltd.](#), CIT v. Popular Automobiles Ltd. (1995) 212 ITR 611, [Commissioner of Income Tax Vs. Bata India Ltd.](#), [Commissioner of Income Tax Vs. The Statesman Ltd.](#), [Commissioner of Income Tax Vs. Sulej Cotton Mills Ltd.](#), [Commissioner of Income Tax Vs. Hindusthan Motors Ltd.](#), and [Commissioner of Income Tax Vs. Santosh Agencies](#). However, it does not appear to be necessary to examine these cases in detail in view of the factual position as noticed above.

Thus, we hold that the claim made by the revenue cannot be sustained. The second question is accordingly answered against the revenue and in favour of the assessee.

In view of the above, so far as question No. 1 in I.T. Ref. No. 48 of 1986 is concerned, we hold that the order of the Tribunal, insofar as deductions u/s 35B of the Act are concerned, cannot be sustained. It is set aside. The case is remanded for fresh decision after affording the assessee an opportunity to establish its claim. Similarly, so far as question No. 1 as raised by the assessee in I.T. Ref. No. 48A of 1986 is concerned, the order of the Tribunal is set aside. The matter is remanded in the above terms.

So far as question No. 2 as raised by the department is concerned, it is answered against the revenue and in favour of the assessee. Question Nos. 2 and 3 as raised by the assessee have not been pressed. The order of the Tribunal in this behalf is affirmed. The case is now remanded to the Tribunal. There will be no order as to costs.

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