

**(1998) 06 GUJ CK 0009**  
**In the Gujarat High Court**

**Case No :** Income-tax Reference No. 86 of 1984

Commissioner of Income Tax

APPELLANT

Vs

Deepak Nitrite Ltd.

RESPONDENT

**Date of Decision :** 23-06-1998

**Acts Referred:**

Income Tax Act, 1922 — Section 66, 66(1)

Income Tax Act, 1961 — Section 143, 256, 256(1), 256(2), 260

**Citation :** (2001) 247 ITR 362

**Hon'ble Judges :** C.K.Thakker, J;B.C. Patel, J

**Bench :** Division Bench

**Advocate :** B.P. Nayak and M.R. Bhatt, for the Appellant; J.P. Shah, for the Respondent

## **Judgement**

C.K. Thakker, J.—The following question is referred by the Tribunal for the opinion of this court :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in coming to the conclusion that the foreign tour expenditure amounting to Rs. 1,18,530 incurred by the assessee was allowable as revenue expenditure ?"

2. To appreciate the controversy raised and to answer the question referred to us, a few relevant facts may now be stated :

The assessee is a company doing the business of manufacturing sodium nitrite, sodium nitrate and nitric acid. For the assessment year 1978-79, the assessee filed its return of income on June 27, 1978, declaring loss of Rs. 19,25,910. A revised return was thereafter filed on June 22, 1979, declaring a loss to the extent of Rs. 19,88,350 claiming extra shift allowance for research and development equipment. Discount of Rs. 1,18,530 incurred on foreign travel was also claimed. It was the case of the assessee that the said expenses were incurred for a foreign tour of certain officials of the assessee, the details of which

were as under :

Sl. No. Rs. 1. Shri N.N. Tangri, Addl. Chief Engineer, FCI (trip to USA) 20,262 2. Shri O.P. Khungar, Chief Engineer. PCI (trip to USA) 20,262 3. Shri G.G. Gogate, Manager, Co-ordination of the company (trip to USA) 20,826 4. Shri C.K. Mehta, Managing Director of the company (trip to USA) 57,180

3. Admittedly, the visit was to the United States of America (USA) and the question was as to whether the expenses incurred for the said foreign tour were admissible as revenue expenditure. The Income Tax Officer was of the opinion that the expenditure could not be said to be revenue expenditure. In view of the provisions of Section 143, however, he referred the matter to the Commissioner. The Commissioner, vide his order dated November 19, 1981, held that the visit to the USA was for ascertaining the suitability of creating an opportunity to manufacture ammonia with a view to establish a new industrial undertaking. In his opinion, therefore, the expenditure was for establishing a new plant and, hence, it must be held to be capital expenditure and, accordingly, no deduction could be claimed by the assessee.

4. Being aggrieved by the said order, the assessee approached the Tribunal. It was argued before the Tribunal that the officials visited the USA not for ascertaining the feasibility of setting up a plant to manufacture ammonia. The Income Tax Officer proposed disallowance of the said expenditure on the ground that it was incurred for manufacturing a new product and for installation of a new plant and, hence, it was capital expenditure. It was contended that the expenditure could not be said to be capital expenditure inasmuch as the foreign visit was in the nature of a fact-finding mission.

5. It was submitted by the assessee that for manufacturing sodium nitrate, sodium nitrite and nitric acid, it required liquid ammonia which was the main raw material. The assessee was getting the said raw material from Gujarat State Fertilizers Company (GSFC). Disputes arose between the assessee and the GSFC regarding the price and product which were ultimately settled in arbitration proceedings but in view of the disputes between the parties, the agreement was not renewed after the contract period was over and the assessee could not get supply of ammonia from the GSFC. The assessee badly required the raw material for its product and uninterrupted supply of the said raw material was absolutely necessary. Facing difficulties in getting raw material from the GSFC, the assessee thought of various alternatives and one of the alternatives which was considered proper was to think of the feasibility or otherwise of setting up a new plant for manufacturing ammonia. In order to get a continuous supply of raw material by setting up a plant, it was necessary for the assessee to send some of its personnel abroad on a fact-finding mission. Thus, according to the assessee, the dominant purpose of the foreign tour was to secure the raw material for the manufacturing activity which the assessee was carrying on and to achieve that objective, foreign trips were undertaken. The expenditure, therefore, had no nexus with acquisition of a capital asset but was undertaken in order to explore

the feasibility to get supply of ammonia (raw material) continuously and uninterruptedly and also to explore the possibility of setting up of a separate plant.

6. The Tribunal, after considering the rival contentions of the parties and in the light of various decisions cited before it, held that the dominant purpose of the visit was to explore the feasibility of obtaining supply of liquid ammonia in view of the likelihood of termination of the contract by the GSFC and for that purpose, an exploratory tour was undertaken to organise the supply of ammonia which was the basic raw materials for its products. According to the Tribunal, therefore, it could not be said that the trips were undertaken for setting up of a new plant which would result in acquisition of capital and the expenses incurred by the assessee could not be said to be capital expenditure but business expenditure. The Tribunal concluded that the authorities had committed an error of law in holding that the expenditure was not deductible. The Tribunal, therefore, allowed the appeal filed by the assessee.

7. An application was made by the Revenue under Sub-section (1) of Section 256 of the Income Tax Act, 1961 ("the Act"), requesting the Tribunal to refer the question for the opinion of the High Court. The question proposed by the Revenue reads as under :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in coming to the conclusion that the foreign tour expenditure amounting to Rs. 1,18,530 incurred by the assessee for ascertaining the suitability of setting up a plant to manufacture ammonia was allowable as a revenue expenditure ?"

8. The Tribunal, it appears, was of the opinion that the broad question suggested by the assessee was proper. The said question reads as under :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in coming to the conclusion that the foreign tour expenditure amounting to Rs. 1,18,530 incurred by the assessee was allowable as revenue expenditure ?"

9. The Tribunal observed that the broad question proposed by the assessee fully covered the controversial issue and, accordingly, the said question was referred for the opinion of this court.

10. We have heard at considerable length Mr. B.B. Nayak, instructed by Mr. M.R. Bhatt, for the Revenue, and Mr. J.P. Shah for the assessee.

11. Mr. Nayak submitted that the Tribunal has committed an error of law in holding that the expenses in question for conducting a foreign tour by the officials of the assessee could be said to be revenue expenditure. The decision of the Tribunal is not in consonance with the provisions of the Act and various decisions of the Supreme Court as well as of this court. He argued that the Tribunal has based its conclusions on surmises and conjectures rather than on

evidence and findings. He fairly conceded that the Tribunal is the final fact-finding authority and a finding of fact arrived at by the Tribunal is final and conclusive and this court cannot reappraise the evidence and substitute its own finding for the finding recorded by the Tribunal. He, however, submitted that, in the instant case, the Tribunal has committed an error of law in recording certain findings without there being any material or evidence. He also stated that certain conclusions have been recorded by the Tribunal which were inconsistent with and contrary to the evidence on record and in ignorance of the admissions made before the authorities on behalf of the assessee. According to Mr. Nayak, therefore, the so-called findings said to have been arrived at by the Tribunal, cannot be said to be legal findings or findings in the eye of law which are binding on this court and the jurisdiction of this court is not excluded. According to counsel, in these circumstances, the order passed by the Tribunal cannot be said to be in accordance with law and the question referred to this court is required to be answered in the negative by holding that the Tribunal has committed an error of law in treating the expenditure as revenue expenditure.

12. Mr. Shah, on the other hand, supported the order passed by the Tribunal. According to him, u/s 256 of the Act, this court exercises advisory jurisdiction and it must proceed to decide the reference by answering the question referred to it either in the affirmative or in the negative, on the basis of the finding of fact recorded by the Tribunal. It has no jurisdiction to interfere with a finding of fact arrived at by the Tribunal nor can it reappraise the evidence with a view to interfere with such a finding. He further submitted that if it was the case of the Revenue that certain findings have been recorded by the Tribunal without any evidence or that they were contrary to the material on record, it was obligatory on the Department to make an application before the Tribunal or to approach this court by invoking Sub-section (2) of Section 256 complaining that certain findings of fact arrived at by the Tribunal were against the evidence on record and to get such question referred. In the absence of such application, it is not open to the Revenue to ask this court to reappraise the material on record and to disturb the finding of fact.

13. On the merits also, Mr. Shah submitted that the Tribunal was right in coming to the conclusion that the expenditure was incurred for business and it was admissible as revenue expenditure. He stated that the Tribunal has held that the foreign trips were exploratory in nature and if incidentally they included a plan for setting up of a new project, it could not be said that the expenditure was for acquisition of an asset. No capital was to be created. They were undertaken solely with an object to get uninterrupted supply of basic raw material (ammonia). Relying on various decisions, the Tribunal upheld the contention of the assessee and no ground to interfere with the same has been made out by the Revenue.

14. The first question which arises for our consideration is the ambit and scope of the powers of this court under Sections 256 and 260 of the Act. Section 256

provides for reference to a High Court. Under Sub-section (1), either the assessee or the Revenue may make an application to the Tribunal requesting the Tribunal to refer any question of law arising out of an order passed by the Tribunal to the High Court and if the Tribunal is satisfied that such question has arisen, it can draw up a statement and refer the case for the opinion of the High Court. Sub-section (2) enacts that when the Tribunal refuses to state the case on the ground that no question of law arises, an assessee or the Revenue, as the case may be, may approach the High Court and if the High Court is not satisfied with the correctness of the decision of the Tribunal, it may require the Tribunal to state the case and refer it for the opinion of the High Court. Section 260 declares that the High Court upon hearing of a case will decide the questions of law raised therein.

15. The argument of Mr. Shah, on behalf of the assessee, is that the Tribunal is the final fact-finding authority and while dealing with reference, this court would proceed to answer questions referred to it on the basis of those findings. In his submission, this court has no jurisdiction to enter into the correctness or otherwise of the findings of fact recorded by the Tribunal.

16. According to Mr. Nayak, though this court will proceed to decide the question referred to it on the basis of a finding of fact recorded by the Tribunal, there must be a finding of fact and such finding must have been recorded by the Tribunal on the basis of evidence which can be said to be legal evidence. A finding should not be without any material on record or it should not be based on extraneous or irrelevant considerations nor should it be perverse. According to him, in such circumstances, the so called finding cannot be said to be a finding in the eye of law and this court is not bound by such so-called finding. Our attention, in this connection, was invited by this counsel to various decisions of the Supreme Court as well as of this court. We may refer to only a few of them.

17. In Commissioner of Income Tax, West Bengal Vs. Calcutta Agency Ltd., , the Supreme Court considered the nature and scope of power and jurisdiction of the High Court u/s 66 of the Indian Income Tax Act, 1922. Section 66 of the 1922 Act also provided for reference to a High Court. It was observed that the jurisdiction of the High Court in matters of reference under the Act was of advisory nature. Under the Act, the decision of the Tribunal on fact was treated as final. It was, however, stated that even a finding of fact could be successfully assailed on the ground that there was no evidence for the conclusions on facts recorded by the Tribunal. The court observed that it was, therefore, the duty of the High Court to start by looking at the facts found by the Tribunal and answer the questions of law on that footing. The Departure from that rule would convert the High Court into a fact-finding authority which was not open under its advisory jurisdiction. At the same time, however, it was indicated that such a finding ought to have been arrived at on evidence and even a finding of fact can be assailed by contending that there was no evidence in respect of the finding said to have been arrived at by the Tribunal.

18. Reference may also be made in a leading decision of the Supreme Court in *SREE MEENAKSHI MILLS LIMITED Vs. COMMISSIONER OF Income Tax, MADRAS.*, . Referring to the decisions of the English courts as well as of various High Courts, the apex court observed that findings on questions of pure fact arrived at by the Tribunal cannot be disturbed by the High Court in reference. A caveat was however, added by observing that if it appears to the High Court that there was no evidence before the Tribunal upon which a reasonable man could come to the conclusion which the Tribunal has reached, the High Court could come to a conclusion entirely different from that of the Tribunal. The court laid down a principle much more explicitly by stating that such a finding could be reviewed on the ground that there was no evidence to support it or that the finding was perverse. Again, a finding ought to have been arrived at by assessing the cumulative effect of all the facts and circumstances and the facts and circumstances cannot be considered in isolation. The court observed that there may be questions of fact, questions of law and mixed questions of law and fact. So far as the questions of fact are concerned, the fact-finding authority would record conclusions on the basis of evidence on record. Neither those findings nor inferences of facts from the findings can be challenged. Questions of law, on the other hand, are open to challenge and the High Court can exercise jurisdiction by deciding those questions. In between the domains, occupied, respectively, by questions of fact and of law, there is a large area in which both these questions run into each other, forming so to say, enclaves within each other. The questions falling within that category are known as mixed questions of law and fact. Those questions involve first the ascertainment of facts on the evidence adduced and then a determination of the rights of the parties on an application of the appropriate principle of law to the facts ascertained.

19. After referring to several decisions on the point, the court observed that certain principles can be deduced from decided cases (page 50) :

"I. When the point for determination is a pure question of law such as construction of a statute or document of title, the decision of the Tribunal is open to reference to the court u/s 66(1).

II. When the point for determination is a mixed question of law and fact, while the finding of the Tribunal on the facts found is final, its decision as to the legal effect of those findings is a question of law which can be reviewed by the court.

III. A finding on a question of fact is open to attack u/s 66(1) as erroneous in law when there is no evidence to support it or if it is perverse.

IV. When the finding is one of fact, the fact that it is itself an inference from other basic facts will not alter its character as one of fact."

20. In *Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd.*, also, the Supreme Court after considering various decisions, summed up the position, thus (headnote) :

"(1) When a question is raised before the Tribunal and is dealt with by it, it is clearly one arising out of its order.

(2) When a question of law is raised before the Tribunal but the Tribunal fails to deal with it, it must be deemed to have been dealt with by it, and is, therefore, one arising out of its order.

(3) When a question is not raised before the Tribunal but the Tribunal deals with it, that will also be a question arising out of its order.

(4) When a question of law is neither raised before the Tribunal nor considered by it, it will not be a question arising out of its order notwithstanding that it may arise on the findings given by it."

21. Stating the position compendiously, it is only a question that has been raised before or decided by the Tribunal that could be held to arise out of its order.

22. One of the questions advanced in Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd., was whether a new question could be permitted to be raised at the stage of reference. The Supreme Court stated (page 612) :

"Now a question of law might be a simple one, having its impact at one point, or it may be a complex one, trenching over an area with approaches leading to different points therein. Such a question might involve more than one aspect, requiring to be tackled from different standpoints. All that Section 66(1) requires is that the question of law which is referred to the court for decision and which the court is to decide must be the question which was in issue before the Tribunal. Where the question itself was under issue, there is no further limitation imposed by the section that the reference should be limited to those aspects of the question which had been urged before the Tribunal. It will be an over-refinement of the position to hold that each aspect of a question is itself a distinct question for the purpose of Section 66(1) of the Act."

23. In that case, the Tribunal held that certain amounts were liable to be included in the income of the company on the basis of a provision which came into force subsequently. The provision was not in the statute on the day on which the liability to pay tax was crystallised. In reference before the High Court, it was contended by the assessee that the Tribunal erroneously assumed that the amending Act was in force and because of such misconception, the Tribunal decided the matter against the assessee. The court observed that the question on which the parties were at issue which was referred for the opinion of the High Court, was whether a particular sum was liable to be included in the taxable income of the assessee. According to the Supreme Court, the High Court had jurisdiction to entertain such question. It was argued before the Supreme Court that the effect of allowing the contention of the assessee would be to do away with limitations which the Legislature had advisedly imposed on the litigant to require reference u/s 66(1). A question cannot be allowed to be framed in

general terms so as to take within it the questions which were never raised.

24. In *I.C.I. (India) Private Ltd. Vs. The Commissioner of Income Tax, West Bengal*, , the Supreme Court reiterated the principles laid down in *SREE MEENAKSHI MILLS LIMITED Vs. COMMISSIONER OF Income Tax, MADRAS.*, .

25. In *Commissioner of Income Tax (Central), Calcutta Vs. Daulat Ram Rawatmull*, , the assessee-firm had opened an overdraft account with a limit of Rs. 10 lakhs against collateral security of two fixed deposit receipts of Rs. 5 lakhs each, one of which was in the name of A, son of one partner of the firm and the other in the name of B, son of another partner. The Tribunal held that the sum of Rs. 5 lakhs given to the firm was concealed income. In reference, the High Court came to the conclusion that the material Was not sufficient for the Tribunal to hold that the sum belonged to the firm.

26. Dealing with the jurisdiction of the High Court, the Supreme Court stated that a finding on a pure question of fact arrived at by the Tribunal cannot be disturbed by the High Court on a reference unless there is no evidence before the Tribunal upon which a reasonable man could come to the conclusion to which the Tribunal had come. If that is not the case the High Court cannot exercise jurisdiction even though the High Court would, on the evidence, have come to a conclusion entirely different from that of the Tribunal. A finding can be reviewed only on the ground that there is no evidence to support it or it is perverse. Again, when a court of fact acts on material partly relevant and partly irrelevant, it is not possible to say to what extent the mind of the court was affected by the irrelevant material used by it in arriving at the finding. Such a finding is vitiated because of the use of inadmissible material and a question of law, therefore, arises. The same principle applies where a court of fact bases its decision partly on conjectures, surmises and suspicions and partly on evidence and material on record.

27. The court quoted with approval the following observations of Viscount Simonds in *Edwards" (Inspector of Taxes) v. Bairstow* [1955] 28 ITR 579 :

"... it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying that the court should take that course if it appears that the Commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained . . ."

28. In the same volume, there is another decision of the Supreme Court in *The Commissioner of Income Tax, Bihar and Orissa, Patna Vs. S.P. Jain*, . In that case, purchase of certain shares was held by the Income Tax authorities to be benami and the amount paid for such purchase was held to be from undisclosed sources of the assessee. The Tribunal recorded a finding that the transaction was not benami. The said finding, however, was recorded without taking into account the relevant material and by relying on inadmissible evidence and basing its conclusions on conjectures and surmises. It was held that since the Tribunal

failed to take into consideration the relevant material on record and in arriving at a finding it had acted on inadmissible evidence and based its conclusions on conjectures and surmises, it was open to the High Court to ignore the findings of the Tribunal and to re-examine the issues arising out of the decision on the basis of the material on record.

29. The court summed up the principle thus (page 381) :

"In our view, the High Court and this court have always the jurisdiction to intervene if it appears that either the Tribunal has misunderstood the statutory language, because the proper construction of the statutory language is a matter of law, or it has arrived at a finding based on no evidence or where the finding is inconsistent with the evidence or contradictory of it, or it has acted on material partly relevant and partly irrelevant or where the Tribunal draws upon its own imagination, imports facts and circumstances not apparent from the record, or bases its conclusions on mere conjectures or surmises, or where no person judicially acting and properly instructed as to the relevant law could have come to the determination reached. In all such cases, the findings arrived at are vitiated."

30. In Commissioner of Income Tax, Calcutta Vs. Biju Patnaik, , the Supreme Court once again considered leading cases on the point and held that non-consideration of material facts would give jurisdiction to the High Court and the High Court can deal with the question sought to be agitated before the Tribunal. If a finding is not based on evidence, the High Court can interfere with it.

31. In Salem Co-operative Central Bank Limited Vs. Commissioner of Income Tax, , the Tribunal proceeded upon an assumption which was erroneous in law. In reference, the High Court held, after examination of the relevant provisions of the Act, that the order passed by the Tribunal could not be said to be in accordance with law. Disposing of the reference, the High Court observed (page 701) :

"This court cannot look on helplessly with reference to an error which is manifested in the contention of both sides before the Tribunal. This court has jurisdiction to correct an error in the order of the Tribunal, so long as the point arose out of its order, whoever be the author of the mistake or error in taking up a particular contention. Having regard to the nature of the issue that was before the Tribunal and having regard to what we have stated above, we think it proper to set aside the order of the Tribunal and direct the Tribunal to consider the case on all the points that require consideration of the question whether additional surcharge was attracted. The reference is returned unanswered."

32. The aggrieved assessee approached the Supreme Court. It was strenuously argued before the Supreme Court by the assessee that the High Court exceeded its jurisdiction u/s 256 in giving the above directions. The Supreme Court negated the contention of the assessee and observed that the High Court was right in issuing the directions. According to the Supreme Court, if the Tribunal

proceeded upon an assumption which was erroneous in law, it could not be said that the High Court was bound by the terms of the questions referred and could not correct the erroneous assumption of law. The court stated (page 701) :

"If such power is not conceded to the High Court, the result would be that the answer given by the High Court may equally be erroneous in law. Such a situation cannot certainly be countenanced. It would not be in the interest of law or justice."

33. In the opinion of the Supreme Court, it was not as if the High Court had asked for any further investigation and the High Court did not possess such powers, but the High Court could certainly ask the Tribunal to do what it was required to do in law.

34. Recently, in S.P. Jaiswal, etc. Vs. Commissioner of Income Tax, , there was a transaction of certain assets. As per book entries, it was in favour of the assessee's children. The Tribunal held that the transaction was not benami and the interest therein could not be said to be income of the assessee. The High Court, however, held that the transaction was not genuine. The assessee approached the Supreme Court against the decision of the High Court and contended that the High Court exceeded its jurisdiction in interfering with a conclusion of fact arrived at by the Tribunal and in holding that the transaction was not genuine though the Tribunal held it not to be benami. According to the assessee, thus the High Court exceeded its jurisdiction and committed an error of law.

35. Negating the contention and upholding the order of the High Court, the apex court observed that the transaction was nothing else but a paper device made to the reduce tax burden of the assessee and by no stretch of imagination, could it be said to be a loan transaction by the assessee in favour of his children. By holding the transaction as such, the High Court did not exceed its jurisdiction.

36. From the decisions referred to above, in our opinion, the legal position seems to be fairly well settled. But a pure finding of fact based on evidence cannot be made the subject-matter of reference to the High Court. Likewise, an inference of fact, drawn from findings of fact also remains a question of fact and cannot be challenged before the High Court. But a pure question of law, unrelated to the facts, can always be challenged and the High Court can examine such a question in the exercise of its jurisdiction u/s 256. On mixed questions of fact and law whereas the finding of the Tribunal on the facts found has to be treated as final, the legal effect of such finding is a question of law and can be reviewed by the High Court. Likewise, a finding on a question of fact is open to challenge if there is no evidence to support such finding or the finding is perverse or is such as could not have been arrived at by a "reasonable man" on the facts and in the circumstances of the case.

37. In the light of the above principles, if the case on hand is examined, in our considered opinion, the Tribunal could not have reached the finding which has

been arrived by it. In the order passed by the Commissioner (Appeals), it has been categorically stated that it was an "admitted fact" that the visit to the USA was for ascertaining the suitability of creating a plant to manufacture ammonia. The Commissioner, therefore, observed that it was clear that the proposed visit was to establish a new industrial undertaking. He was, therefore, of the view that the expenditure could not be said to be business expenditure and hence could not be allowed. In further appeal, the Tribunal, while narrating the facts in para. 5, also observed that the personnel named in the said para, visited the USA for ascertaining the suitability of setting up a plant to manufacture ammonia. The Tribunal noted that the Income Tax Officer proposed disallowance of the said expenditure on the ground that it was incurred for the purpose of a new product and for installation of a new plant and the said expenditure could not be revenue expenditure. The appellate authority agreed with the view taken by the Income Tax Officer and held that the foreign tour was undertaken with a view to implement installation of a separate plant. As a result of the on-the-spot study a separate company was incorporated from which it could be said that the trips were undertaken with the object to establish a new plant for the assessee's own use and captive consumption.

38. At the time of arguments before the Tribunal, however, counsel for the assessee submitted that facing the difficulty of obtaining continuous supply of raw material, i.e., ammonia, the assessee thought of various alternatives. One of the alternatives considered was of setting up a new plant for manufacture of ammonia. On behalf of the assessee, it was urged that ultimately it was decided not to set up such a plant but to float another company which could supply ammonia to the assessee and accordingly it was set up. Thus, the argument on behalf of the assessee was that the dominant purpose was to secure the raw material for manufacturing activity which the assessee was carrying on and to achieve that objective, foreign trips were undertaken. The expenditure had, therefore, no nexus with the acquisition of any capital asset but the tours were undertaken in order to explore a possibility to obtain raw material.

39. Apart from the fact that there was no evidence to the effect, it was clearly mentioned in the order of the Commissioner (Appeals) that it was admitted before him that the visit to the USA was for ascertaining the suitability of erecting a plant to manufacture ammonia. Thus, the evidence before the Tribunal was in the nature of an order passed by the Commissioner (Appeals), wherein the fact about the object of the foreign trips was made clear. The case put forward before the Tribunal that the foreign trips were to explore the possibility of obtaining supply of ammonia was never placed or pleaded before the authorities. There was no evidence to that effect as well. On the contrary, there was an admission on behalf of the assessee in the nature of the statement of Mr. Shah that the company decided to install its own plant and in pursuance of implementation of that scheme, the foreign tours were undertaken. The Tribunal without any evidence on record, and ignoring the admission of Mr. Shah on behalf of the assessee before the Commissioner (Appeals) held that since the

officials of the assessee-company undertook an exploratory tour to organise supply of ammonia which incidentally included a plant for setting up a new project by acquiring machinery, the expenditure could not be said to be capital expenditure.

40. In our opinion, the above finding cannot be said to be a finding of fact based on evidence or material on record but a mere argument of the assessee. If a finding of fact is not based on evidence on record or has been arrived at in disregard of evidence which was in the nature of the admission on behalf of the assessee, such a so-called finding cannot be said to be a finding in the eye of law which can be treated as final and binding on this court. Such a purported finding cannot close the doors of this court to the Revenue in raising a contention that the Tribunal has committed an error of law in recording a finding and that the order passed by the Tribunal was, therefore, vitiated.

41. In this connection, we may advert to Commissioner of Income Tax, West Bengal Vs. Calcutta Agency Ltd., referred to above. In that case, the assessee-company was the managing agent of a mill. Under an agreement, the assessee was entitled to a monthly allowance and a certain commission on all gross sales of goods manufactured by the mill. Certain hundis were drawn by one of the directors of the company acting as managing agent of the mill in the name of the mill-company and were negotiated to others. The bank claimed payment of those hundis. The mill-company, however, repudiated its liability. The bank thereafter instituted suits against the mills. The mill was advised to settle those suits and the assessee entered into an agreement with the mill under which the mill was entitled to deduct from the commission payable to the assessee under the managing agency agreement, a portion of the amount which the mill might have to pay under the decree. On the basis of that evidence, the Tribunal held that the payment was made for liquidation of decretal amount and, hence, it was a capital expenditure. When the matter reached the High Court, an argument was advanced on behalf of the assessee that the agreement was entered into with a view to avoid the possibility of an action against the assessee and consequent exposure and scandal and in order to maintain the managing agency, payment was made. The case was thus covered by a decision of the Court of Appeal in Mitchell v. B.W. Noble Ltd. [1927] 1 KB 719. The High Court, accepting the argument of the assessee, held that as the agreement was entered into with a view to avoid possibility of an action against the assessee and consequent exposure, it was covered by the principle laid down in Mitchell's case [1927] 1 KB 719 and the assessee was entitled to deduction. The Revenue approached the Supreme Court.

42. It was contended by the Revenue that the case of the assessee was of deduction. The burden, therefore, was on the assessee to prove necessary facts for such deduction. The High Court instead of basing its decision on evidence on record, accepted the argument put forward on behalf of the assessee and applying the principle laid down in Mitchell's case [1927] 1 KB 719, upheld the

contention by observing that the assessee was entitled to deduction. The decision was therefore contrary to law and liable to be set aside.

43. Upholding the said argument and setting aside the judgment of the High Court, the apex court observed (page 197) :

"Surprisingly, we find that the High Court, in its judgment, has taken the argument of Mr. Mitra as if they were facts and have based their conclusion solely on that argument. Nowhere in the statement of the case prepared by the Tribunal and filed in the High Court, the Tribunal had come to the conclusion that the payment was made by the assessee-company to avoid any danger of public exposure or to save itself from scandal or in order to maintain the managing agency of the appellant-company. The whole conclusion of the High Court is based on this unwarranted assumption of facts which are taken only from the argument of counsel for the present respondents before the High Court."

44. In our opinion, the principle laid down by the Supreme Court in *Commissioner of Income Tax, West Bengal Vs. Calcutta Agency Ltd.*, , applies with equal force to the case on hand. As already stated, the facts were very much before the authorities. In no uncertain terms, the Commissioner (Appeals) recorded a finding that it was admitted on behalf of the assessee that the company had decided to install its own plant which would produce adequate ammonia for the assessee's captive use and it was in pursuance of an implementation of the assessee's scheme for installation of a separate plant that the managing director and three other senior executives decided to visit the USA for making an on-the-spot study of the suitability of establishing such a plant in India. Thus, when the matter was before the Tribunal, the said finding was very much on record. Before the Tribunal, it was an argument on behalf of the assessee that the trips were exploratory in nature and that one of the alternatives was to set up a new plant and incidentally it was to be considered whether it was feasible. The said argument was unfortunately treated by the Tribunal as an assumption of fact and on that basis, the Tribunal held that since the foreign trips were not for acquisition of asset, the expenditure could not be said to be of capital nature and the assessee was entitled to deduction. As there was neither evidence nor material on record and the finding recorded by the Commissioner (Appeals) was to the contrary, in the nature of the admission of Mr. Shah, on behalf of the assessee, in our opinion, it cannot be contended that a finding of fact was recorded by the Tribunal which was final and binding on the court. The court is, therefore, not bound by the so-called finding and it has jurisdiction to go into the question as to whether such a finding could at all have been recorded in the light of the evidence and material on record. It is equally open to the Revenue to assail the said finding.

45. The question then remains whether the expenditure incurred by the assessee can be said to be revenue expenditure or capital expenditure. The question whether certain expenditure is revenue expenditure usually presents considerable difficulty.

46. In *Empire Jute Co. Ltd. Vs. Commissioner of Income Tax*, , the Supreme Court, dealing with the question, observed that a question whether a particular expenditure incurred by the assessee is of capital or revenue nature has always presented a difficult problem and continuously baffled the courts because it had not been possible, despite occasional judicial valour, to formulate a test for distinguishing between capital and revenue expenditure which would provide an infallible answer in all situations. There have been numerous decisions where this question has been debated but it is not possible to reconcile the reasons given in all of them, since each decision has turned upon some particular aspect which has been regarded as crucial and no general principle can be deduced from any decision and applied blindly to a different kind of case where the constellation of facts may be dissimilar and other factors may be present which may give a different hue to the case.

47. The court stated (page 7): "Whether it is capital expenditure or revenue expenditure would have to be determined having regard to the nature of the transaction and other relevant factors."

48. In *IRC v. British Salmson Aero Engines Ltd.* [1938] 22 TC 29 , Lord Greene M. R. said (page 43) :

"There have been since, many cases where this matter of capital or income has been debated. There have been many cases which fall upon the borderline : indeed, in many cases it is almost true to say that the spin of a coin would decide the matter almost as satisfactorily as an attempt to find reasons."

49. In *COMMISSIONER OF Income Tax, BOMBAY CITY Vs. CENTURY SPINNING WEAVING and MANUFACTURING COMPANY LIMITED.*, , the question was whether expenditure for registration of an old trade mark could be said to be revenue or capital expenditure. It was observed that expenditure could be attributed to revenue and it was exempt from payment of Income Tax.

50. The court then quoted with approval, the celebrated test by Lord Cave L. C. in *British Insulated and Helsby Cables Ltd. v. Atherton* [1925] 10 TC 155 ; [1926] AC 205, which is considered as the leading authority on the point (page 112 of 15 ITR) :

"... when an expenditure is made, not only once and for ail, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

51. Reference was also made to the observations of Lord Justice Romer in *Anglo-Persian Oil Co. Ltd. v. Dale* (1932] 1 KB 124 after referring to *Usher's Wiltshire Brewery Ltd. v. Bruce* [1915] AC 433 , wherein his Lordship stated (page 113 of 15 ITR) :

"In these circumstances, it is not surprising that the cases in which the court has

been called upon to say whether some particular deduction is or is not permissible should have been numerous and not always easy to reconcile with others in which the facts were not dissimilar. Nor is it surprising that learned judges should have applied tests which, however satisfactory for the purpose of solving the particular problem before them, should turn out to be inconclusive or insufficient when applied to the facts of another case."

52. In *K.T.M.T.M. Abdul Kayoom and Another Vs. Commissioner of Income Tax*, , the expenditure was incurred for acquiring an exclusive privilege as dealer in fish and conch shells. An annual amount was paid to the Government for collection of shells in a certain area. The question before the court was whether it was capital expenditure or revenue expenditure.

53. The Full Bench of the High Court of Madras held that the expenditure was not of capital nature *K.T.M.T.M. Abdul Kayoom and Another Vs. Commr. of Income Tax, Madras*, . The Supreme Court held that the amount paid by the assessee was an amount spent to obtain an enduring asset in the shape of an exclusive right to fish. The payment was not related to chanks, which it might or might not bring to the surface. It was not an amount spent in acquiring stock-in-trade but for acquiring an asset from which it may collect stock-in-trade. It was, therefore, expenditure of a capital nature.

54. Delivering the majority judgment, Hidayatullah J. (as he then was) stated (page 703 of 44 ITR) :

"What is attributable to capital and what to revenue has led to a long string of cases here and in the English courts ... It is not necessary for us to cover the same ground again. Further, none of the tests is either exhaustive or universal. Each case depends on its own facts, and a close similarity between one case and another is not enough, because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, its broad resemblance to another case is not at all decisive. What is decisive is the nature of the business, the nature, of the expenditure, the nature of the right acquired, and their relation inter se, and this is the only key to resolve the issue in the light of the general principles, which are followed in such cases."

55. In *Commissioner of Income Tax, Gujarat II Vs. Alembic Glass Industries Ltd.*, , the assessee was a company manufacturing glass at Baroda from 1947 which incurred expenditure for establishing a new glass manufacturing unit at Bangalore. The unit did not go for production during the two assessment years 1965-66 and 1966-67. The Income Tax Officer did not allow payment of interest for those two years on the borrowings. He also held that the Bangalore unit was not a branch of the assessee's factory and it was a new business. Since the new unit had not started production, the payment of interest could not be said to be revenue expenditure and, accordingly was not allowable.

56. The Tribunal, however, allowed the appeal of the assessee, holding that the expenditure was of revenue nature and ought to be allowed. When the matter reached this court, the court held that the Tribunal was right when it held that the expenditure was of revenue nature and, therefore, allowable. It observed that since the borrowing was made for business, the assessee was eligible to deduction but if it was for acquiring "an asset of enduring nature, no such benefit could be granted.

57. In *Alembic Chemical Works Co. Ltd. v. CIT* : [1989]177ITR377(SC) , the assessee was engaged in the manufacture of antibiotics. For acquisition of know-how to purchase high yield and sub-cultures of high yield penicillin, expenditure was incurred. There was no evidence to indicate that it was not part of the existing manufacture of penicillin. In the light of those facts, it was held by the Supreme Court that the expenditure was of revenue nature and was an allowable deduction.

58. Referring to various decisions, the court observed that in the infinite variety of situational diversities in which the concept of what is capital expenditure and what is revenue expenditure arises, it is impossible to formulate any general rule even in the generality of cases, sufficiently accurate and reasonably comprehensive, to draw any clear line of demarcation. The court stated that certain tests which were generally efficacious and serve as useful servants but bad masters could be formulated. All the material facts and tests can be relevant but they are not conclusive. The idea of a once for all payment and enduring benefit should not be treated as something akin to statutory conditions, nor are the notions of capital or revenue a judicial fetish. What is capital and what is revenue should remain flexible so as to respond to the changing economic realities of the business world. In the opinion of the court, the expression "asset or advantage of an enduring nature" was evolved to emphasise the element of a sufficient degree of durability appropriate to the context.

59. In *Asiatic Oxygen Ltd. Vs. Commissioner of Income Tax* , the expenditure related to preparation of a project report for the manufacture of raw materials for the assessee's product. It was held that the expenditure incurred for the feasibility report could be said to be revenue expenditure and was, therefore, deductible.

60. In *Commissioner of Income Tax Vs. Suhrid Geigy Ltd.* , this court was called upon to consider the deductibility or otherwise of the expenditure incurred by the assessee for acquiring know-how to produce raw material needed for the product manufactured by the assessee. Considering several cases, it was held that the purpose was to carry on business with more profitability and was not entering into a new adventure for operating in a new area of business. It was stated by the court that even applying the test of acquisition of assets, it could not have been said that by the agreement, the assessee acquired any capital asset. What was acquired under the agreement was the right to use technical know-how and the expenditure incurred for such knowledge could not be said to be capital

expenditure. The court also quoted the following observations of the Supreme Court in Alembic Chemical Works Co. Ltd.'s case : [1989]177ITR377(SC) wherein the test laid down by Lord Pearce in B.P. Australia Ltd. v. Commissioner of Taxation of the Commonwealth of Australia [1966] AC 224, had been reiterated (at page 158 of 220 ITR) :

"The solution to the problem is not to be found by any rigid test or description. It has to be derived from many aspects of the whole set of circumstances some of which may point in one direction, some in the other. One consideration may point so clearly that it dominates other and vaguer indications in the contrary direction. It is a commonsense appreciation of all the guiding features which must provide the ultimate answer."

61. If the expenditure is made for acquiring or bringing into existence an asset or advantage for the enduring benefit of the business, it is appropriately attributable to capital and is in the nature of capital expenditure. If, on the other hand, it is not made for bringing into existence any such asset or enduring advantage but for running the business or working it with a view to produce more profits, it is revenue expenditure. In other words, the aim or object of the expenditure would determine the character of the expenditure whether it is capital or revenue:

In Commissioner of Income Tax Vs. Graphite India Ltd., , the expenditure incurred for obtaining a feasibility report for manufacturing raw materials, which could not materialise was held to be revenue expenditure deductible under the Act.

In Commissioner of Income Tax Vs. Shri Digvijay Cement Company Ltd., , the assessee-company was manufacturing and selling cement. The expenditure was incurred for obtaining a feasibility report for setting up a shipyard at Sikka (Jamnagar). The report was not favourable and, hence, the shipyard could not be set up. The question was whether the expenditure incurred by the assessee could be said to be revenue expenditure or capital expenditure. After considering various decisions, this court held that the expenditure was capital in nature and was not deductible.

62. Quoting the observations of Hidayatullah J. (as he then was) in K.T.M.T.M. Abdul Kayoom and Another Vs. Commissioner of Income Tax, , this court stated that none of the tests distinguishing capital and revenue expenditure can be said to be exhaustive or of universal application and each case would depend on its own facts and close similarity between one case and another is not enough, because even a single significant factor may alter the entire aspect. In deciding such cases, one must avoid the temptation to match the colour of one case with another (page 261 of 159 ITR) :

"What is decisive is the nature of the business, the nature of the expenditure, the nature of the right acquired, and their relation inter se, and this is the only key to resolve the issue in the light of the general principles, which are followed in

such cases."

63. According to the court, the object of the expenditure was to obtain a feasibility report for setting up a shipyard with a view to enable the asset to develop. Considering the feasibility report in the light of certain suggestions made in the report, it was held that the expenditure was to acquire an asset. Reading various Clauses of the report submitted to the assessee by foreign company, the court came to the conclusion that the purpose of calling for the feasibility report was to enable the company to decide for the establishment and development of a shipyard. Negating the contention of the assessee that after the receipt of the feasibility report no shipyard was established at Sikka and, hence the expenditure could not be said to be capital expenditure, the court held that what was material was the purpose which prompted the assessee-company to call for such report and not whether a shipyard was in fact established. In the opinion of the court, the expenses had been incurred with a view to decide as to whether an advantage or asset of almost permanent nature could be brought into existence or not. Since the aim and object of the expenditure was to establish and develop a shipyard, even though it was not set up in the light of the feasibility report, the nature of the expenditure did not change. The court observed that it was the object alone that was material and it could not successfully be contended that the ship building yard was to facilitate the assessee's trading operation or was to enable the assessee to conduct and manage its business more efficiently or to earn more profits without touching capital assets. It was, therefore, held that the expenditure incurred by the assessee was capital expenditure. The question referred to the court at the instance of the Commissioner was, hence, answered in favour of the Revenue and against the assessee.

64. Almost in similar circumstances, the expenditure was held to be capital expenditure in *Ambica Mills Ltd., Ahmedabad Vs. Commissioner of Income Tax Gujarat, Ahmedabad*, . In that case also, expenditure was incurred in sending some officers to foreign countries to study new methods of manufacture with a view to install new machinery. According to the assessee, the expenditure was business expenditure whereas according to the Revenue, it was capital expenditure. The court noted that the-foreign tour was directed for two purposes, i.e., (i) in order to make an on-the-spot study on the development manufacturing, designing and processing and to make the report on their return on the work done by them as to the latest developments in the manufacturing, designing and processing of textiles seen by the representatives and (ii) to recommend as to whether the latest developments may be adopted and if yes to purchase new machinery which would bring an enduring benefit to the assessee-company. In fact after the report the assessee imported new improvements and modern machinery for being used for running its textile mills. The Tribunal concluded that the objective of the tour was to replace the old outdated and obsolete machinery and hence the expenditure was of capital nature. When the matter reached this court it was held that on the facts and in the circumstances

of the case, it was not possible to say that the tour was undertaken as study-tour merely to get acquaintance with new methods of production and new machinery and only for adding to the knowledge of the company's representatives and, therefore, the expenditure incurred could be termed as revenue expenditure. A tour which was undertaken for a preliminary survey of new methods for manufacturing, designing or processing and of new machinery with a view to purchase them, even if not immediately but at a later stage, would be for bringing into existence a capital asset. Since one of the purposes to bring into existence a capital asset was clearly established, the expenditure must be held to be capital expenditure.

65. Applying the above principles to the facts of the present case, we are clearly of the view that the Tribunal has committed an error of law in coming to the conclusion that the expenditure was of revenue nature. As stated above, it was not the case of the assessee that the foreign tours were exploratory in nature. In fact, the case of the assessee was to the contrary. It was specifically stated on behalf of the assessee, which is reflected in the order of the Commissioner (Appeals), that in view of the disputes between the assessee-company and the GSFC, it was not possible to get raw material (ammonia) from the GSFC after the contract period was over and it was absolutely necessary to make suitable arrangements for procurement of ammonia. The company, therefore, decided to install its own plant which would produce adequate ammonia for the assessee's own captive consumption. It was in pursuance of an implementation of the scheme for installation of a plant that the managing director and three other senior executives were sent to foreign country for making an on-the-spot-study of suitability of establishment of such plant in India. Such a plant was thereafter established also. It was no doubt stated by Mr. Shah, learned counsel for the assessee, that the said plant was not established by the assessee-company itself but it was established by a sister concern. Be that as it may, one thing is clear as admitted on behalf of the assessee, that the foreign tours were undertaken to see that a plant can be established in India for which expenditure was incurred. As held in *Alembic Chemical Works Co. Ltd.*'s case : [1989]177ITR377(SC) such expenditure can be said to be capital expenditure even if in pursuance of such tours a separate plant might not have been established or capital might not have been acquired. Since the purpose and object was to create a capital asset, expenses incurred can be said to be capital expenditure. The Commissioner (Appeals) was, therefore, right in holding that the assessee was not entitled to deduction of such expenditure.

66. For the foregoing reasons, in our opinion, the question referred to this court must be answered in the negative, i.e., in favour of the Revenue and against the assessee. The reference is, accordingly, disposed of. In the facts and circumstances of the case there is no order as to costs.