
(2002) 12 MAD CK 0119

In the Madras High Court

Case No : TC No. 98 of 1998 & Tax Case No. 98 of 1998 31 December 2002

Commissioner of Income Tax

APPELLANT

Vs

Dynavision Ltd.

RESPONDENT

Date of Decision : 31-12-2002

Acts Referred:

Income Tax Act, 1961 — Section 37(1), 40A(9)

Citation : (2003) 182 CTR 85 : (2004) 265 ITR 289

Hon'ble Judges : N.V. Balasubramanian, J;K. Raviraja Pandian, J

Bench : Division Bench

Advocate : T. Ravikumar, for the Appellant; V.D. Gopal, for the Respondent

Judgement

N.V. Balasubramanian, J.—The assessee is a public limited company carrying on the business of manufacture of television sets. In this reference, we are concerned with the asst. yr. 1985-86 with the relevant previous year ended on 31st Dec., 1984. The assessee claimed, in the course of assessment proceedings for the asst. yr. 1985-86, a deduction of the contribution made to Dynavision Dealers' Welfare Trust of a sum of Rs. 50 lakhs. The AO "found that the Dynavision Dealers' Welfare Trust was formed on 27th Nov., 1984, with the assessee-company as settlor, and a sum of Rs. 50 lakhs was paid by the assessee on 26th Dec., 1984. It was also noticed that all the dealers of the Dyanora T.V. sets were the beneficiaries of the trust. After noticing the objects of the trust, the AO rejected the claim of the assessee for deduction for the following reasons recorded in the assessment order:

"1. The accounts of the trust were not produced, So, it has not been possible to verify if any amount was spent during the year for the objects of the trust.

2. The assessee-company has not created the trust for the benefit of employees, but dealers who are third parties.

The assessee is not supposed to spend for third parties welfare. The company has no charitable object.

3. The company has not filed details of activities undertaken by the trust during the year.

4. The trust deed has no clause whereby the assessee-company can haul up the trust or take action against the trustees if the trustees do not carry out the objects of the trust.

5. The trust was created on 26th Dec., 1984, and within five days, i.e., by 31st Dec., 1984, the trust could not have undertaken any action.

6. Anyway, the amount has not been spent wholly and exclusively for business purposes. So, deduction u/s 37 is not allowed."

2. The assessee challenged the order of assessment before the CIT(A). The CIT(A), after noticing the objects of the trust, found that nearly a sum of Rs. 46 lakhs out of Rs. 50 lakhs was deposited with the sister concerns of the assessee and Rs. 11.29 lakhs, Rs. 14.68 lakhs and Rs. 16.54 lakhs were said to have spent by the assessee-company on dealers as well as for sales promotion for the years ended 31st Oct., 1985, 31st Oct., 1986 and 31st Oct., 1987. The CIT(A) also noticed that Rs. 1.11 lakhs, Rs. 39,866 and Rs. 5,473 were spent by the trust for dealers' conferences for the years ended on 31st Oct., 1985, 31st Oct., 1986 and 31st Oct., 1987. He, therefore, held that the assessee has not established that the expenses were incurred for the purpose of its business and upheld the order of the AO and dismissed the appeal.

3. The assessee carried the matter in further appeal before the Tribunal. The Tribunal held that no trust, by name, Dynavision Dealer's Welfare Trust had come into existence on 27th Nov., 1984, and the trust deed dt, 27th Nov., 1984, was not a valid document and it had not brought into existence a valid trust on that date. The findings of the Tribunal that no trust, by name, Dynavision Dealers' Welfare Trust had come into existence on 27th Nov., 1984, and the trust deed dt. 27th Nov., 1984, was not a valid document have become final as the assessee has not challenged the said findings. However, on the basis of the letter dt. 26th Dec., 1984, written by the assessee-company to the managing trustee of the Dynavision Dealers' Welfare Trust and taking note of the fact that a sum of Rs. 50 lakhs was transferred by the assessee-company in favour of the trust on 26th Dec., 1984, and the said sum was accepted by the trust through its trustee, the Tribunal held that all the ingredients for the creation of a trust under Sections 5 and 6 of the Indian Trusts Act were fulfilled. The Tribunal rejected the contention urged on behalf of the Department that since the trust deed dt. 27th Nov., 1984, was invalid, it could not be revived by means of letter dt. 26th Dec., 1984. The Tribunal held that the trust had come into existence on 26th Dec., 1984, in the name and style, Dynavision Dealer's Welfare Trust and legal obligations had been attached to the trust by the contribution of Rs. 50 lakhs paid by the assessee on 26th Dec., 1984. The Tribunal, in its elaborate order, considered the question of allowability of expenditure and rejected the contention that there was violation of Section 295(1)(b) of the Companies Act as a sum of

Rs. 50 lakhs was given by the trust as loans to its partnership firm in which the directors of the assessee-company were partners. The Tribunal held that there was no violation as the trustees had earned more interest than the prevailing interest rate offered by the financial institutions and the assessee had invested the money in non-hazardous assets. The Tribunal went into the question of allowability of Rs. 50 lakhs as business expenditure and held that the transaction was not a colourable and collusive transaction. The Tribunal also held that the transaction was a genuine transaction and there was nothing to show that a sum of Rs. 50 lakhs had found its way back into the hands of the assessee-company. The Tribunal, on the basis of the materials, found that the trustees had been carrying on the objects of the trust by investing the funds of the trust in safe investment and by earning substantial interest income with which they carried on the objects of the trust, The Tribunal held that there was no personal expenditure, nor capital expenditure in the payment of Rs. 50 lakhs by the assessee to the trust and it would constitute an expenditure as money had gone out of the hands of the assessee. The Tribunal held that the expenditure had been incurred for the welfare and benefit of the dealers and stockists and the expenditure had been made for the promotion of sale of the assessee-company by ensuring the welfare and loyalty of the stockists and dealers of the assessee-company. The Tribunal noticed the figures of sales turnover of the assessee and held that there was a direct nexus between the expenditure incurred by the assessee by making the contribution of Rs. 50 lakhs and its business as the company had shown upward trend in the realisation of gross profit. The Tribunal, therefore, held that the amount spent was allowable as business expenditure u/s 37(1) of the IT Act on the ground of commercial expediency. The Tribunal also rejected the contention that the expenditure incurred would fall within the mischief of Section 37(2A) or (3A) of the Act. The Tribunal also held that the expenditure incurred cannot be regarded as capital expenditure. The Tribunal ultimately held that the assessee was entitled to deduction of a sum of Rs. 50 lakhs as it represented the expenditure incurred by the assessee wholly and exclusively for the purpose of its business made out of commercial expediency which would be allowable u/s 37(1) of the Act. The Tribunal accordingly allowed the appeal preferred by the assessee.

4. The Revenue sought for a reference which was rejected by the Tribunal, and on the basis of the directions of this Court, the Tribunal has stated a case and referred the following questions of law for our consideration :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law and had valid material in holding that the sum of Rs. 50 lakhs paid by the assessee to Dynavision Dealers" Welfare Trust on 26th Dec., 1984 is allowable as a business expenditure, laid out wholly and exclusively for its business u/s 37(1) of the IT Act, 1961 ?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that with the transfer of Rs. 50 lakhs by the assessee-company

to the Dynavision Dealers" Welfare Trust a valid trust came into existence on 26th Nov., 1984, and that in this regard no written trust deed is necessary, in the context of the Tribunal holding that the Dynavision Dealers" Welfare Trust was ab initio void and non est, in law, when it is created on 27th Nov., 1984, with no corpus fund and no recognised instrument of trust deed ?"

5. Now we take up the second question first. The submission of the learned counsel for the Revenue is that after holding that no trust by name, Dynavision Dealers" Welfare Trust had come into existence on 27th Nov., 1984, and the trust deed dt. 27th Nov., 1984, was not a valid document, the Tribunal was not correct in holding that by the transfer of Rs. 50 lakhs, a trust was created by the assessee for the same objects which were set out in the deed of trust dt. 27th Nov., 1984, and the Tribunal committed an error in holding that the sum of Rs. 50 lakhs was accepted by the trustees of the Dynavision Dealers" Welfare Trust for the same objects which were set out in the invalid trust deed dt. 27th Nov., 1984.

6. We are unable to accept the submission of the learned counsel for the Revenue. Though the Tribunal held that no trust, by name, Dynavision Dealers" Welfare Trust had come into existence on 27th Nov., 1984, and the deed of trust dt. 27th Nov., 1984, was not a valid document, a reading of the letter dt. 26th Dec., 1984, clearly shows that a sum of Rs. 50 lakhs was transferred by the assessee to the managing trustee of the Dynavision Dealers" Welfare Trust and the amount was accepted on the terms of the trust deed dt. 27th Nov., 1984. In the letter it is stated that the terms of the deed should govern the trust. It is stated that the managing trustee accepted the money with the conditions contained in the letter dt. 26th Dec., 1984. Though the trust deed dt. 27th Nov., 1984, has failed as there were certain serious omissions in the deed, the letter dt. 26th Dec., 1984, clearly imposes a legal obligation on the trustees of the Dynavision Dealers" Welfare Trust to hold the money transferred for the objects set out in the deed dt. 27th Nov., 1984. We are of the opinion that when the trustees have accepted the money for the objects set out in the deed of trust dt. 27th Nov., 1984, a legal obligation has been created in fulfilling the objects set out in the deed of trust dt. 27th Nov., 1984. The mere fact that the trust deed dt. 27th Nov., 1984, has failed is immaterial when all the conditions for the creation of a valid trust have been fulfilled as there is a settlor-settles relationship and the sum has been transferred to the trust and the trustees have accepted the same on the terms set out in the deed of trust dt. 27th Nov., 1984.

7. The submission of the learned counsel for the Revenue that since the earlier trust deed dt. 27th Nov., 1984, has not come into force, there is no trust at all is not acceptable as it is well settled that even an oral trust is permissible in the case of creation of a trust. In *Fazlhussein v. Mahomedally* AIR 1943 Bom 366 a Division Bench of the Bombay High Court has held that where the original trust deed is void, the conduct of the trustees in subsequently admitting that he is holding the property on specific trust would establish a valid trust on those

terms. In *M/s. Radhasoami Satsang Saomi Bagh, Agra Vs. Commissioner of Income Tax*, the Supreme Court, after noticing the decision of the Privy Council in the case of *All India Spinners' Association v. CIT* (1944) 12 ITR 482 held that where a property was given to the Satguru which was intended for the common purpose of furthering the purpose of the institution, the property was subject to a legal liability of being used for the religious and charitable purposes of the Satsang, The Supreme Court in *Commissioner of Income Tax, West Bengal Vs. Tollygunge Club Ltd.*, has held that a trust may be created by any language sufficient to show the intention and no technical words are necessary and it may even be created by the use of the words which are primarily the words of condition. The Supreme Court further held that the requisites which must be satisfied are that there should be purposes independent of the donee to which the subject-matter of the gift is required to be applied and an obligation on the donee to satisfy those purposes. We are therefore, of the opinion that a formal deed is not necessary to create a trust and to create a legal obligation to be attached to the property transferred to the trustees.

8. We are of the view that the observations made by the Supreme Court in *Radhasoami Satsang v. CIT* (supra) and the Privy Council in *All India Spinners' Association v. CIT* (supra) would squarely apply to the facts of the case and there is no difficulty at all in holding that a valid trust or a legal obligation in the nature of a trust has been created by the letter dt. 26th Dec., 1984. Further, all the conditions for the creation of trust have also been complied with as the settlor has transferred the money and the trustees have accepted the money with the obligation to spend the same for the purposes mentioned in the deed of trust dt. 27th Nov., 1984. The trustees thereafter would be holding the money to spend the same for the purposes mentioned in the deed of trust dt. 27th Nov., 1984. We find that the Tribunal was correct in holding that a valid trust has come into existence and all conditions prescribed in the Indian Trusts Act have been fulfilled. The Tribunal also found on the basis of the terms of the deed that the objects of the trust are not vague. In this view of the matter, we hold that a valid trust has come into existence. It is true that a valid trust has come into existence, and the question whether the amount transferred is allowable would depend upon different criteria, which we will discuss later.

9. The question was framed as if the Tribunal has held that the *Dynavision Dealers' Welfare Trust* was ab initio void and non est in the eye of law when it was created on 27th Nov., 1984, with no corpus fund and there was no recognised instrument of trust deed. However, we find that the Tribunal has not recorded such a finding, but the Tribunal has held that the trust deed dt. 27th Nov., 1984, was not a valid document and it had not brought into a valid trust which is far different from saying that the trust was void ab initio and non est in the eye of law. Accordingly, we reframe the second question of law as under:

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that by the transfer of a sum of Rs. 50 lakhs by the assessee to

the Dynavision Dealers" Welfare Trust, a valid trust has come into existence with the objects set out in the trust deed dt. 27th Nov., 1984 ?"

We answer the question as reframed by us in the affirmative, in favour of the assessee and against the Revenue.

10. Now we take up the first question. The submission of the learned counsel for the Revenue on the question of allowability is that there was no liability on the part of the assessee when it created the trust and since the assessee had transferred the money without any liability, it would not constitute an expenditure incurred by the assessee. Learned counsel for the Revenue referred to Section 37 of the IT Act and also the decisions of the Supreme Court in *Indian Molasses Co. (Private) Ltd. Vs. Commissioner of Income Tax, West Bengal*, and *Shree Sajjan Mills Ltd. Vs. Commissioner of Income Tax, M.P., Bhopal* and *Another*, and the decision of the Karnataka High Court in *Mysore Lamp Works Ltd. Vs. Commissioner of Income Tax*, . Learned counsel also placed reliance on the decision of the Gujarat High Court in *Commissioner of Income Tax, Gujarat-I Vs. Shree Digvijay Cement Co. Ltd.*, . In *Indian Molasses Co. (supra)* the Supreme Court has held that the expenditure which is deductible for Income Tax purposes is one which is towards a liability actually existing at the time, but the putting aside of money, which may become expenditure on the happening of an event, is not expenditure and the IT Act makes a distinction between an actual liability in praesenti, and a liability de future, which is only contingent, and the former is deductible, but not the latter. The same view was reiterated by the Supreme Court in *Shree Sajjan Mills Ltd.* 's case (supra) wherein the Supreme Court has held that a contingent liability would not constitute an expenditure and cannot be a subject-matter of deduction, even under the mercantile system of accounting and the expenditure which is deductible for Income Tax purposes is towards a liability actually existing at the time, but setting apart money which might become expenditure on the happening of an event is not expenditure. The Karnataka High Court in *Mysore Lamp Works Ltd. v. CIT (supra)* also held that for the purpose of deductibility of expenditure u/s 37(1) of the IT Act, the basic requirement is that the amount sought to be excluded should be an expenditure and the expenditure which is deductible for Income Tax purposes is one which is towards a liability actually existing at the time, but the putting aside of money which may become expenditure on the happening of an event is not expenditure. All these decisions support the case of the Revenue in the sense that the money was paid by the assessee to the trustees without any liability on its part and hence, it is not a payment made by the assessee towards an accrued or existing liability of the company, but the trust was created to meet some future expenditure allegedly for the welfare of the dealers of the assessee and, therefore, it would not qualify for deduction u/s 37(1) of the IT Act.

11. Learned counsel for the assessee also, in his fairness, submitted that for the purpose of deduction, there must be an existing liability and the case of the assessee would be defeated on the short point that there was no existing liability

when the assessee transferred the money to the trust and hence, it would not be regarded as an expenditure, but however, the case of the assessee is not that there was an existing liability, but the payment has been made by the assessee voluntarily for commercial expediency. We propose to consider this topic later. Before that, we consider some of the submissions made by the learned counsel for the Revenue before we consider the main questions.

12. Learned counsel for the Revenue submitted that the payment is not a genuine payment as the money transferred to the trust has found its way to the assessee as the trustees have granted loans to the partnership-firm in which the directors of the company are partners, and therefore, there was no expenditure incurred by the assessee-company. We are unable to accept the said submission as the Tribunal, on the basis of the annual report of the assessee-company and also taking note of the fact that the directors of the assessee are the partners of the firm, has recorded a finding of fact that the transaction was not a colourable or collusive transaction. We are of the view that the said finding of the Tribunal is a pure finding of fact and the said finding has been rendered after taking into consideration the constitution of the Board of Directors of the assessee-company and the members of the Board of the trust.

13. The second submission of the learned counsel for the Revenue is that the assessee-company has violated the provisions of Section 295(1)(b) of the Companies Act. We are unable to accept the submission as it was found by the Tribunal that there were reasons for the grant of loans in favour of the partnership-firm by the trustees. It was also found by the Tribunal that there was no violation of Section 295(1)(b) of the Companies Act. It was found that the trustees have earned more interest than the prevailing rate of interest offered by the financial institutions. Further Section 295(1)(b) of the Companies Act is not attracted as it deals with the case of a loan by a company to a firm in which the director of the company is a partner, In the present case, the loans were not given by the assessee-company, but by the trustees of the trust and, therefore, the provisions of Section 295(1)(b) of the Companies Act not attracted,

14. Another submission made by the learned counsel for the Revenue is that the assessee-company, during the assessment year in question, had incurred expenditure towards advertisement of a sum of Rs. 54,70,606 and other expenses of substantial sums towards entertainment expenditure and, therefore, the contribution of a sum of Rs. 50 lakhs for the same purpose would not constitute a business expenditure of the assessee. We are unable to accept the submission as it is for the assessee to devise its own way of running its business, and if a particular expenditure is allowable, the fact that the assessee had spent substantial amounts is not a ground to hold that the amount is not deductible, unless there are statutory provisions to the contrary. Further, it is not for the Revenue to dictate terms to the assessee as to how the assessee should run its business and manage its affairs.

15. The next submission of the learned counsel for the Revenue is that the trust

deed was a void document and the amount was contributed not as a trader, but as an owner. He referred to the objects of the trust and submitted that the beneficiaries are uncertain and the objects of the trust are also vague in nature. Learned counsel also referred to Clauses 19 and 20 of the deed of trust and submitted that under Clauses 19 and 20 of the deed, the trust shall stand determined on the expiry of the last lineal descendants of past or present stockists or dealers of the assessee-company and the assessee-company has reserved a right to modify or alter the deed of trust. He, therefore, submitted that since the power to modify the deed of trust is vested with the assessee, the deed of trust has to fail and the money contributed by the assessee to the trust is not an expenditure.

16. We are unable to accept the submission of the learned counsel for the Revenue, As far as the beneficiaries of the trust are concerned, the reading of the deed of trust shows that the trust was created for the benefit of dealers and stockists of the assessee-company. The expression, "dealer and stockist" has also been defined in the deed of trust to mean a person/firm/company/concern dealing in any of the company's products which for the time being are television receiver sets. Therefore, it cannot be stated that the beneficiaries are uncertain. We have also gone through the objects of the trust and we find that the objects are wide and it cannot be stated that the objects are vague. As far as the determination of the trust is concerned, the deed of trust provides that the deed shall continue till the expiry of last lineal descendants of past or present stockists or dealers of the assessee. It cannot, therefore, be stated that the duration of the trust is not specified as it is stated that after the expiry of the last lineal descendants, it is open to the trustees to transfer the trust fund to public charitable trust, As far as Clause 20 of the deed is concerned, though the assessee-company has reserved its power to modify or alter the terms of the deed, that is not a power to revoke the trust deed itself and what is vested with the assessee is the power to modify or alter the deed of trust in consonance with the provisions of the IT Act, as it stands amended from time to time. In other words, the settlor is not vested with the power to revoke the trust deed, but the settlor is empowered to alter the terms of the trust deed so that the trust would be in consonance with the provisions of the IT Act lest the trust may lose exemption because of some offending clauses in the deed of trust, if the Income Tax law is amended subsequently. Therefore, we are unable to accept the submission of the learned counsel for the Revenue that the deed of trust is vague and the beneficiaries are unknown and the objects of the trust are uncertain. Though we hold that the deed of trust is not vague, as observed earlier, the question of allowability of the money would depend upon different tests which we deal later.

17. We have already held that there was no existing or prior liability when the assessee-company had transferred the sum of Rs. 50 lakhs in favour of the trust. The submission of Mr. V.D. Gopal, learned counsel for the assessee is that the sum was spent by the assessee voluntarily and for commercial expediency and

for the purpose of business of the assessee and, therefore, the amount is deductible as business expenditure. His main submission is that the purpose behind the creation of the trust was to improve the profitability of the assessee-company by keeping the welfare of the dealers and stockists in mind and in pursuance of the said motive and object, the assessee had created the trust and the amount was also paid to the trustees. Learned counsel submitted that there is evidence on record which establishes the nexus between the assessee's business and the expenditure incurred on account of commercial expediency. Learned counsel submitted that on the basis of material on record it is clear that the trustees have incurred expenditure under various heads resulting in the welfare of the dealers and the Tribunal has found that the amount was spent for the welfare of the dealers and stockists. Learned counsel submitted that the expenditure is not a capital expenditure and the expenditure was incurred for the purpose of business of the assessee. According to him, no liability is necessary if the commercial expediency is established and what is applicable to the Employees' Welfare Trust is also applicable to the Dealers Welfare Trust as there is no difference between these two kinds of trusts either qualitatively or quantitatively and the assessee, while creating the trust, has taken into account the welfare of the dealers in mind. According to him, marketing the products produced by the assessee is vital and unless the dealer's welfare is taken into account and provided for, it will not be possible for the assessee to sell the commodities produced by it. Learned counsel also submitted that the dealers deal with several commodities belonging to different manufacturers and hence, it is essential that the interest of the dealers is taken care of so that the dealers would take care of the sale of products of the assessee in the market and, therefore, the object behind the expenditure is purely commercial in nature and it is allowable as a business expenditure. Learned counsel further submitted that it is impermissible to look into the objects of the trust and according to him, the welfare of the dealers was taken care of by creating the trust and handing over the money to the trustees and it is not necessary to examine the objects of the trust while considering the allowability of the amount as business expenditure. According to him, it is not open to the Revenue to go into the objects of the trust and contend that the money was spent for the personal benefits of the dealers or for advertisements for the dealers. According to the learned counsel, the assessee is a company carrying on business through a large net work of dealers and stockists and when the trust was created for the benefits of the dealers and stockists of the assessee-company, the loyalty of the dealers and stockists would be maintained and to ensure the loyalty of the dealers and stockists the assessee provided certain welfare measures for the benefits of the dealers and stockists. Learned counsel submitted that there is a strict competition in the market and for the easy passing of the products manufactured by the assessee in the market it is essential to have goodwill of the dealers and the goodwill of the dealers is secured by the assessee by creating the trust and by declaring that the dealers welfare is taken care of by the trustees. Learned counsel submitted that the

amount transferred by the assessee to the trust is purely a business expenditure incurred voluntarily and on account of commercial expediency and therefore, it is allowable as business expenditure. Learned counsel, in support of his submissions, relied upon the following decisions :

1. The Commissioner of Income Tax, Bombay Vs. Chandulal Keshavlal and Co., Petlad, ;
2. M/s. Sri Venkata Satyanarayana Rice Mill Contractors Co. Vs. Commissioner of Income Tax, Andhra Pradesh, II, ;
3. Commissioner of Income Tax, Kerala Vs. Malayalam Plantation Ltd., ;
4. Addl. CIT v. Symonds Distributors (P) Ltd. (1977) 108 ITR 140;
5. CIT v. Shree Digvijay Cement Co. Ltd. (supra); and
6. Commissioner of Income Tax Vs. Kirloskar Oil Engines Ltd., .

18. On the other hand, learned counsel for the Revenue submitted that there is absolutely no commercial expediency in making the payment to the trust and its connection to the business of the assessee is too remote and therefore, it does not qualify for deduction as revenue expenditure. Learned counsel referred to the decisions of the Supreme Court in Aluminium Corporation of India Ltd. Vs. Commissioner of Income Tax, West Bengal, and Commissioner of Income Tax, Punjab, Haryana, J. and K., H.P. and Union Territory of Chandigarh Vs. Panipat Woollen and General Mills Co. Ltd., and submitted that there were only three dealers and others were sub-dealers to the main dealers and they had no direct contact with the assessee-company and there was no direct nexus between the expenditure incurred and the business of the assessee. His submission was that the trust was created to meet the dealers' expenditure. He submitted that the objects of the trust clearly show that the trust is discretionary in nature and it is open to the trustees to meet the advertisement expenditure of the dealers and since there is no nexus between the expenditure and the business of the assessee, the amount is not allowable as business expenditure.

19. We have carefully considered the submissions of learned counsel for the assessee and learned counsel for the Revenue. Both the counsel relied upon the decision in *Atherton v. British Insulated and Heisby Cables Ltd.* 10 Tax Cases 155 wherein the House of Lords observed as under:

"A sum of money expended, not of necessity and with a view to a direct and immediate benefit to the trade, but voluntarily and on the grounds of commercial expediency, and in order indirectly to facilitate the carrying on of the business, may yet be expended wholly and exclusively for the purposes of the trade."

The above observation has also been quoted with approval by the Supreme Court in *Eastern Investments Ltd. Vs. Commissioner of Income Tax, West Bengal*, . The Supreme Court again in *CIT v. Chandulal Keshavlal & Co*, (supra) referred to the observation made in *Atherton's* case, cited supra and held that in order to justify

deduction, the sum must be given up for reasons of commercial expediency, it might not be voluntary, but so long as it was incurred for the assessee's benefit the deduction is allowable. The Supreme Court again in *Sri Venkata Satyanarayana Rice Mill Contractors Co. v. CIT* (supra) has quoted the observation of Viscount Cave, L.C. in *Atherton's* case with approval.

20. In deciding the question, it is also relevant to note some of other decisions cited by learned counsel for both the parties. The Supreme Court in *Aluminium Corporation of India Ltd. v. CIT* (supra) has laid down the law as under :

"It is true that u/s 10(2)(xv), it is for the ITO to decide whether any remuneration paid by an assessee to his selling agents was wholly or exclusively expended for the purpose of his business. It is also true that by the mere fact that the assessee establishes the existence of an agreement between him and his agents and the fact of actual payment, the discretion of the ITO to consider whether the expenditure was made exclusively for the purpose of the business is not taken away. See the decision of this Court in *Swadeshi Cotton Mills Co. Ltd. Vs. Commissioner of Income Tax, Uttar Pradesh (No. 1)*, The expenditure incurred must be for commercial expediency. But, as observed by this Court in *Commissioner of Income Tax, Bombay Vs. Walchand and Co. Private Ltd.*, in applying the test of commercial expediency for determining whether an expenditure was wholly and exclusively laid out for the purpose of the business, reasonableness of the expenditure has to be adjudged from the point of view of the businessman and not of the Revenue. In *J.K. woolen Manufacturers Vs. Commissioner of Income Tax, U.P.*, after applying the rule laid down in *Walchand & Co.'s* case (supra) applying the test of commercial expediency for determining whether an expenditure was wholly and exclusively laid out for the purpose of the business, reasonableness of the expenditure has to be adjudged from the point of view of the businessman and not of the IT Department....."

21. The Supreme Court again in *CIT v. Panipat Woollen & General Mills Ltd.* (supra) has held that it is not open to the Court to go behind the commercial expediency which had to be determined from the point of view of a businessman and the Supreme Court has laid down the law as under:

"Great stress was laid by counsel for the assessee-company on the fact that this Court could not go behind the commercial expediency which, had to be determined from the point of view of a businessman. Even so whatever be the commercial considerations, it is difficult to hold that the commercial expediency dictated the assessee-company to allow itself to be completely overshadowed by its selling agents so as to pay them not only for the services rendered but also allow them to share profits, control the manufacture of the goods and the programme thereof and also to share the losses. The test of commercial expediency cannot be reduced in the shape of a ritualistic formula, nor can it be put in a water-tight compartment so as to be confined in a strait jacket. The test merely means that the Court will place itself in the position of a businessman and find out whether the expenses incurred could be said to have been laid out for

the purpose of the business or the transaction was merely a subterfuge for the purpose of sharing or dividing the profits ascertained in a particular manner. It seems to us that in the ultimate analysis the matter would depend on the intention of the parties as spelt out from the terms of the agreement or the surrounding circumstances, the nature or character of the trade or venture, the purpose for which the expenses are incurred and the object which is sought to be achieved for incurring those expenses. If the expenses incurred amount to a profit of an enduring nature they may be treated as capital expenditure, whereas if the expenses merely serve to promote or increase the commercial activity they may amount to an expenditure which is incurred for the purpose of the business."

22. Learned counsel for the assessee referred to certain decisions where the test of commercial expediency is explained. One such decision is the decision of the Allahabad High Court in *Addl. CIT v. Symonds Distributors (P) Ltd.* (supra) where the assessee-company, which was a sole agent of the manufacturing company, was voluntarily, making payments to the manufacturer with a view to help the manufacturer when it was in financial difficulties, and the Allahabad High Court held that the expenditure would be allowable even when it was incurred indirectly to facilitate the carrying on of the business or to preserve the existing source of income with a view to safeguarding the business as also of increasing profits in future.

23. Learned counsel for the assessee also referred to certain cases where expenditure was incurred by the assessee-company directly for the welfare of the dealer and one such case is the decision of the Gujarat High Court in *CIT v. Shree Digvijay Cement Co. Ltd.* (supra) where the assessee was obliged to become a member of an organisation formed at the behest of the Government and the Gujarat High Court held that the contribution to the organisation would be allowable as business expenditure.

24. Learned counsel for the assessee also referred to the decision of the Bombay High Court in *CIT v. Kirloskar Oil Engines Ltd.* (supra) where the assessee incurred an expenditure in connection with the seminar arranged for the foreign and local distributors of the assessee with a view to boosting its sales in the foreign market and the Bombay High Court held that the seminar arranged was in connection with the assessee's business and the expenditure incurred would be allowable as business expenditure.

25. On the other hand, learned counsel for the Revenue referred to the decision of this Court in *Commissioner of Income Tax (Investigation) Vs. Jeevandas Laljee and Sons.*, where this Court held that the expenditure incurred by the assessee in offering gifts on the occasion of the marriage of a family member of the director of the company with whom the assessee had business dealings would not qualify for deduction as a business expenditure. This Court held that the expenditure was made not on commercial expediency. Learned counsel for the Revenue also referred to the decision of this Court in *Commissioner of Income Tax Vs. Tiam House Service Ltd.*, where this Court was dealing with a case of

allowability of medical expenditure incurred on the part-time adviser of the assessee-company and this Court held that the expenditure was not an expenditure on commercial expediency and was not incurred wholly and exclusively for the purpose of business of the assessee-company.

26. We make it clear that these decisions are all cases where the assessee had incurred direct expenditure for the benefits of a particular dealer or a relative of a director and though these cases help in laying down the tests as to when the expenditure would be allowable on commercial expediency, the issue that arises in the present case is far different from the issues that arose in the cases referred to by the counsel for both the parties. Here, it is a case, where the assessee has created a trust for the benefit of its dealers and stockists. Though learned counsel for the Revenue has referred to the order of the Tribunal in para. 82 wherein it was observed that there was only three distributors for the assessee-company as wholesale dealers who, in turn, appointed dealers in various parts of Tamil Nadu, Andhra Pradesh, Karnataka, Kerala and other States, however, the Tribunal went into the list of dealers and also appointment letters and the expenditure incurred by the assessee company and the expenditure incurred by the trust and came to the conclusion that the expenditure was incurred by the trust under various heads in carrying out its objects. Hence, we are unable to accept the submission of the learned counsel for the Revenue that there were only three stockists and others were sub-dealers and they were not beneficiaries under the trust. However, the question whether the amount transferred by the assessee to the trust is allowable or not would depend upon the question whether the assessee-company had satisfied the test laid down by Lord Viscount Gave, L.C. in *Atherton's case* (supra) which has been quoted with approval by the Supreme Court in several decisions referred to earlier,

27. Before considering the question, we make it clear that we are unable to accept the submission of Mr. V.D. Gopal, learned counsel for the assessee that it is not open to the Court to look into the terms of the trust deed as the assessee had incurred expenditure by transferring money to the trust and when the trust was created for the welfare of the distributors, it is not permissible to go into the objects of the trust. We are of the view that the assessee has created the trust and transferred the money and claimed the same as business expenditure. In considering the question whether the amount is allowable as business expenditure or not, the objects of the trust are relevant. It is not possible to overlook or ignore the objects of the trust and determine the question only on the basis of the transfer of money by the assessee to the trust without examining the purposes or objects for which the trust was created. We find on examining various" objects of the trust, the objects of the trust are very wide and some of the objects are to render financial help to the dealers in the case of financial difficulties at interest-free or at concessional rate of interest, to arrange holiday trips and tours for the recreation of dealers, to take up publicity campaigns for promoting the sales of dealers to present gifts in cash or in kind at marriages,

birthday functions, etc. of dealers and their dependent family members, to benefit dealers and stockists on account of indigence, ill-health or other necessitous circumstances, to take up any work which will help the dealers or stockists to achieve common goals like, promotion of sales, making their products more competitive, reduce their overheads, make them more useful for the company, etc. it is also very relevant to note here that the trust is a discretionary trust and it is provided in the trust deed that all or any of the objects would be executed by the trustees at their unfettered discretion. The effect of the clause is that it is open to the trustees to apply the funds of the trust for any of the objects of the trust. The discretionary power of the trustees is unfettered and it is not controlled by any of the clauses of the trust. In other words, it is open to the trustees to spend money for any of the objects of the trust and the trustees are vested with the power to deposit the money with any person, firm, company or corporation or in any movable property. In view of the discretionary power conferred on the trustees to spend or not to spend the funds of the trust for the welfare of the dealers or stockists, we are of the opinion that there is no nexus at all between the business of the assessee-company and the expenditure incurred by the transfer of money to the trust. As we have observed earlier, the trustees have unfettered discretion to spend or not to spend the money for any of the objects of the trust. It is open to the trustees to invest the funds of the trust in any company, firm, or corporation. Therefore, the benefit that may be derived by the beneficiaries are ephemeral and in this sense, there is no nexus either direct or indirect between the expenditure incurred by the assessee-company and the business of the assessee.

28. Insofar as the decisions relied upon by the learned counsel for the assessee are concerned, all these cases would reveal that actually the expenditure was incurred voluntarily and the question arose whether the expenditure incurred was allowable or not. On the other hand, on the facts of the case, the assessee-company has no control over the trustees in the matter of incurring expenditure for the benefit of the dealers. As we have stated, it is at the discretion of the trustees to spend the funds of the trust for the benefit of the beneficiaries. We hold that there is no connection between the expenditure incurred and the business of the assessee-company. It is also relevant to note that there is no scheme or safeguard for the disbursement of the funds of the trust for the benefit of the dealers and the investment of the money is also left to the complete discretion of the trustees. We are therefore, of the opinion that by incurring expenditure through voluntarily, the object of commercial expediency for which the trust was created is not achieved by the creation of the discretionary trust.

29. It is also relevant to note here that it is not a case where the money was transferred by the assessee to the trustees of the trust in recognition of an existing liability, nor is it a case where the trust has been created with a condition that the beneficiaries have a right to claim the amount. As far as Atherton's case (*supra*) is concerned, a pension scheme was framed by the

assessee-company to meet the claims of the members of the staff on their retirement. In the circumstances, it was held that the contribution was made for a laudable object and also prudent one in the interests of the company. In view of the unfettered discretion of the trustees, it cannot be stated that there is a direct and immediate benefit to the beneficiaries by the payment of huge sum of money to the trustees.

30. Learned counsel referred to the findings of the Tribunal and submitted that the trustees had actually expended the money for the benefits of the dealers. We are of the view that in considering the question whether the amount is allowable as business expenditure or not, we have to see the objects of the trust and the powers of the trustees and it is immaterial how the trustees had acted in a year or two. Therefore, the fact that the trustees had spent the money for the seminar and conferences would not establish that the money has been expended by the assessee for the purpose of its business.

31. In this connection, it is also relevant to notice the decision of the Supreme Court in COMMISSIONER OF INCOME TAX Vs. AMALGAMATION PVT. LTD., where the holding company incurred certain expenditure by payment of remuneration in excess of the oiling to the director of the subsidiary company. The Supreme Court held that when there was no direct and immediate connection between the expenditure incurred and the business of the assessee-company, it cannot be stated to be an expenditure, incurred for the carrying on the business of the assessee-company. Therefore, unless there is a direct or indirect nexus between the expenditure and the business of the assessee-company, the assessee is not entitled to claim the expenditure as an allowable one. Further, the business of the dealers is not solely confined to the assessee's products as there is no tie-up agreement between the assessee and the dealers that the dealers should sell exclusively the assessee's products.

32. We are of the opinion, unless the objects for which the trust was created are accomplished, it will be business expenditure and since the trustees are given unfettered discretion in the matter of application of funds to incur or not to incur expenditure for the objects of the trust, the benefit of the expenditure will be ephemeral and, therefore, there is no connection or nexus either direct or indirect between the expenditure incurred and the business of the assessee-company and the test of commercial expediency fails on the facts of the case.

33. It is no doubt true that the beneficiaries under the discretionary trust have a right to be considered for the benefit from the trustees and the trustees must exercise their discretion properly and not arbitrarily, but however, the trustees here have an unfettered discretion to spend the funds of the trust for any of the objects of the trust and also to invest the money. In the state of affairs, we are of the view that the connection between the business of the assessee and the expenditure is too remote. We are of the view that if the assessee had spent the money for any one of the dealers or for all the dealers and the sub-dealers of the assessee-company, necessarily an enquiry has to be made whether the money

was expended by the assessee for the benefit of the dealers or whether the money was expended for the advertisement or entertainment expenditure, allowability of which is subject to the provisions of the IT Act or whether it is a capital expenditure. We are of the view that if the benefit flows directly, from the assessee to the dealers or sub-dealers of the assessee, the matter would stand on a different footing subject to the allowability of the expenditure provided in the IT Act. However, we are of the view that where the assessee sought to spend the money through the medium of trust vesting the trustees with uncontrolled discretion without retaining any control over the exercise of the power of discretion by the trustees, the benefit that may flow to the dealers by the transfer of money cannot be said to have any connection or nexus either direct or indirect with the business carried on by the assessee. As observed earlier, the element of discretion vested with the trustees clearly shows that the benefit that may be derived by the dealers or sub-dealers is remote.

34. Mr. V.D. Gopal, learned counsel for the assessee relied upon the decision of the Calcutta High Court in *Commissioner of Income Tax Vs. Machine Tools (India) Ltd.*, where the Calcutta High Court held that the trust was created to keep the employees loyal and also to make them satisfactory and hence, it had a close nexus and intimate connection with the business of the company on the ground of commercial expediency, and submitted that the same analogy would apply to the facts of the case as the trust was created and the expenditure was incurred for the welfare of the distributors on commercial expediency. The Calcutta High Court was dealing with a case where the trust created was not a discretionary trust and it was created for the benefit of the employees and the employees had a right and interest in the trust and they also had a right to demand the trustees to fulfil the obligations of the trust. However, in the present case, the benefits that may flow on the beneficiaries are at the discretion of the trustees. Hence, the decision of the Calcutta High Court is not applicable to the facts of the case.

35.. Learned counsel for the assessee referred to Sections 40A(9), (10) & (11) of the IT Act and submitted that Sections 40A(9), (10) and (11) were inserted when instances came to notice that certain employers had created irrevocable trusts for the welfare of the employees and the legislature has indicated that the amount transferred to the trust would not be allowable as deduction. Learned counsel, submitted that in the absence of any provision like, Sections 40A(9), (10) and (11) of the IT Act, the assessee is entitled to claim the deduction. We are unable to accept the submission of the learned counsel for the assessee. As we have observed earlier, Section 40A(9) of the IT Act was introduced only as an abundant caution and, therefore, the absence of a similar provision like 40A(9) in the matter of creation of trust in favour of dealers is not relevant when the money transferred to the trust may not reach the dealers for their welfare. Further, a reading of the statement of objects and reasons for the insertion of Section 40A(9) of the IT Act shows that the said provision was inserted to avoid litigation regarding allowability of claim or deduction in respect of contribution made to the trust. Therefore, it cannot be stated that in the absence of a similar

provision to Section 40A(9) of the IT Act for the creation of trust in favour of dealers, the amount is allowable as business expenditure.

36. The Tribunal, after analysing the evidence on record has recorded a finding that the expenditure was incurred by the trustees for the promotion of sale of assessee's products under various heads. We have already observed that what is relevant to see is the objects of the trust and the powers of the trustees in carrying out the objects of the trust and not the amount of expenditure incurred by the trustees. Though during some of the years, as found by the Tribunal, the trust had incurred certain expenditure for the dealers' conference and advertisements and also granted some incentives that would not be relevant as an unfettered power is conferred on the trustees to spend or not to spend the funds of the trust for any of the objects of the trust in favour of any one of the beneficiaries or to invest the same in bank which would clearly show that the connection between the expenditure and the commercial expediency for which the trust was created is too remote.

37. We are also of the view that considering the objects of the trust, it cannot be stated that the expenditure was incurred exclusively for the purpose of assessee's business. The objects of the trust contemplate that it is open to the trustees to arrange for holiday trips and tours for the recreation of dealers and their employees or their dependent family members and to present gifts in cash or in kind at the time of marriage and birthday functions of the dealers and their family members. We are of the view that the trustees are empowered to incur expenditure for the marriage and birthday functions of the members of the family of the dealers and that would not become a deductible expenditure in the hands of the assessee if the assessee had directly incurred the expenditure for the said purposes. Therefore, it cannot be stated that the expenditure incurred exclusively for the purpose of business of the assessee as it is open to the trustees to incur expenditure not only for the purpose of the assessee's business, but also for the personal or capital expenditure of the dealers. Since the trustees have been empowered to spend not only for the assessee's business, but also for the dealers' business as well as there is no business tie-up that such dealer should deal exclusively with the assessee's articles, it cannot be stated that by the creation of the trust the expenditure has been incurred wholly or exclusively for the purpose of the assessee's business and the amount is not allowable as it has dual objects.

38. Learned counsel for the Revenue also submitted that the expenditure incurred is a capital expenditure. Learned counsel for the assessee submitted that the expenditure is only revenue in nature and in support of his submission, he relied upon the decision on the Supreme Court in *Empire Jute Co. Ltd. Vs. Commissioner of Income Tax*, . We are of the view that the facts in *Atherton's* case (*supra*) are nearer. In *Atherton's* case, the company claimed deduction of a lump sum amount contributed irrevocably as the nucleus of the pension fund established by the trust deed for the benefit of its staff. The House of Lords held

that it was a capital expenditure. Lord Viscount Cave, L.C. holding that it was a capital expenditure, held as under:

"The payment of 31,784, which is the subject of dispute, was made, not merely as a gift or bonus to the older servants of the appellant company, but (as the deed shows) to "form a nucleus" of the pension fund which it was desired to create; and it is a fair inference from the terms of the deed and from the commissioner's findings that without this contribution the fund might not have come into existence at all. The object and effect of the payment of this large sum was to enable the company to establish the pension fund and to offer to all its existing and future employees a sure provision for their old age, and so to obtain for the company the substantial and lasting advantage of being in a position throughout its business life to secure and retain the services of a contented and efficient staff. I am satisfied in full consideration that the payment was in the nature of capital expenditure, and accordingly that the deduction of the amount from profits, although not expressly prohibited by the Act, was rightly held by the Court of Appeal not to be admissible."

Lord Atkinson who agreed with Lord Viscount Cave, L.C. held that when the asset has been created, the asset need not be a material asset "and Lord Atkinson held as under:

"If the word "asset", as used in this connection, be confined to something material and I do not think it well can be so confined then I am inclined to agree with Lord Justice Scrutton that, if the existence of this pension fund results in making the staff of the company more contented and less inclined to change their service and therefore, on the whole more efficient, these results when secured would amount to an "asset" of the company's business. The Master of the Rolls expresses the same idea at the end of his judgment, in the following words :. "It appears to me that when you consider what is the nature of this payment made, not for the purpose of meeting any actual liability, but only for the purpose of, in a very general way, improving the position of the staff, the right attribute to apply to it is that it was a payment made as and for the purpose of a capital outlay and cannot be deducted from the revenue as a payment made in the course of seeking profits and gains."

39. As far as the decision of the Supreme Court in *Empire Jute Co. Ltd. v. CIT* (supra) is concerned, the Supreme Court has, no doubt, held that if the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. On the facts of the case, if the case of the assessee is accepted, the assessee-company will have the goodwill of the dealers till the death of last lineal descendent of the past or present dealers of the assessee-company and such an expenditure incurred for the acquisition of an asset, a material asset, in our opinion, is capital in nature and the decision of the

Supreme Court in *Empire Jute Co. (supra)* is not of much help to the learned counsel for the assessee.

40. Learned counsel for the assessee also submitted that the Tribunal in its elaborate order has considered the matter in detail and arrived at the finding of fact and, therefore, this Court sitting in reference should not interfere with the said finding. Learned counsel relied upon the decision of the Supreme Court in *Hazarat Pirmahomed Shah Saheb Roza Committee Vs. Commissioner of Income Tax, Gujarat*, wherein the Supreme Court referred to *Commissioner of Income Tax, Madras Vs. M. Ganapathi Mudaliar*, and held that even if the question referred to the High Court regarding the existence of material to support a finding of fact arrived at by the Tribunal, the High Court should not act as an appellate Court and consider whether the finding was justified or not. There can be no quarrel over the proposition of law laid down by the Supreme Court, but the said proposition has no application as the Tribunal has not considered, while holding that the amount was allowable as business expenditure, the effect of the trust deed or the discretionary power vested with the trustees to spend the money and since the relevant criteria for considering the allowability were overlooked by the Tribunal, we hold that the finding arrived at by the Tribunal is not a finding of fact. Further, the Supreme Court in *Eastern Investments Ltd. v. CIT (supra)* has held that the question must be decided on the facts of each case and the final conclusion is one of law.

41. In *Swadeshi Cotton Mills Co. Ltd. Vs. Commissioner of Income Tax, Uttar Pradesh (No. 1)*, the Supreme Court has held that the question whether an amount claimed as expenditure was laid out or expended wholly and exclusively for the purpose of the assessee's business, profession or vocation has to be decided on the facts and in the light of the circumstances of each case, but the final conclusion on the admissibility of an allowance is one of law. Moreover, the question has been framed to challenge the order of the Tribunal, whether it had materials to come to the conclusion arrived at. Therefore, on the basis of the authoritative opinion of the Supreme Court, it cannot be stated that the finding of the Tribunal is one of fact. Further, we hold that the finding has been arrived at ignoring the relevant material on record. Consequently, we answer the first question of law in the negative, against the assessee and in favour of the Revenue.

42. In the result, we answer the questions of law as under:

First question

In the negative, against the assessee and in favour of the Revenue.

Second question

In the affirmative, against the Revenue and in favour of the assessee.

Since the Revenue succeeds on the substantial question of law referred to us, the Revenue is entitled to costs of Rs. 2,000.