IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL NO. 151 of 2009

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE BHARGAV D. KARIA

and
HONOURABLE MR. JUSTICE PRANAV TRIVEDI

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Approved for Reporting	Yes	No
	✓	

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GSPL TRANSMISSION LTD.
Versus
PRINCIPAL COMMISSIONER INCOME TAX 1

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Appearance:
MR BS SOPARKAR FOR MRS SWATI SOPARKAR(870) for the Appellant(s) No. 1
MS MAITHILI D MEHTA(3206) for the Opponent(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE BHARGAV D. KARIA**
and
HONOURABLE MR. JUSTICE PRANAV TRIVEDI

Date : 20/08/2026

ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. Heard learned advocate Mr. B.S. Soparkar for the appellant and learned Senior Standing Counsel Ms. Maithili D. Mehta for the

respondent.

2. This Tax Appeal is filed by the appellant-assessee under section 260A of the Income Tax Act, 1961 (For short "the Act") against the common judgment and order dated 14.08.2008 passed by the Income Tax Appellate Tribunal, Ahmedabad (For short "the Tribunal") in ITA No.2220/Ahd/2008 for the Assessment Year 2005-2006.

3. The appeal is admitted vide order dated 02.03.2010 for consideration of the following substantial question of law:

> "Whether, in the facts and circumstances of the case, Income Tax Appellate Tribunal was justified in law in holding that fees of Rs.15,11,500/- paid to the Registrar of Companies in increasing the capital base of the assessee Company was not allowable under Section 35D(2)(c)(iv) of the Income Tax Act, 1961?"

4. The appellant assessee claimed sum of

Rs.15,11,500/- being 1/5th of the expenditure incurred as fees to Registrar of Companies (For short "ROC") under section 35D(2)(c)(iv) of the Act and other expenses for increase in share capital. However, the Assessing Officer disallowed such claim.

5. CIT(Appeals) considered that amount of Rs.15,11,500/- being 1/5th of the fees of Rs.75,57,500/- paid to ROC in the Financial Year 2003-2004 was claimed by the assessee and for the Assessment Year 2004-2005, claim of the assessee was accepted by the department and accordingly, deleted such addition.

6. The Tribunal however, reversed the findings of the CIT(Appeals) by observing as under:

> "13. We have heard both the parties. The impugned expenditure represents the fee paid to the Registrar of Companies for increasing the capital base of the assessee-company. The Assessing Officer disallowed the

claim of the assessee on the ground that it was in the nature of capital expenditure. He also rejected the claim of the assessee u/s 35D on the ground that it was not covered by the provisions of section 35D. At the time of hearing, the learned Counsel for the assessee placed strong reliance on section 35D (2) (iv) of the Income Tax Act for claiming the impugned expenditure. Perusal of section 35D (2) (iv) shows that it covers the expenditure incurred in connection with the issue, for public subscription, of shares in or debentures of the company, being underwriting commission, brokerage and charges for drafting, typing, printing and advertisement of the prospectus. The learned Counsel for the assessee could not establish that the fees paid to the Registrar of Companies for increasing the capital base was in the nature of underwriting commission or brokerage or charges for drafting, typing, printing and advertisement of the prospectus so as to fall u/s 35D (2) (iv). The fee paid to the Registrar of Companies for enhancing the capital base would clearly fall outside the scope of section 35B (2) (iv) of the Income tax Act. It cannot therefore, be considered for amortization under the aforesaid provisions. In this view of the matter, the order of the CIT(A) is reversed and that of the AO restored. Ground No.1 is allowed.”

7. Learned advocate Mr. B.S. Soparkar has placed on record the Annual Report for the Financial Year 2004-2005 to point out that the issued share capital was increased in the said year by issuing shares to the holding company of the assessee i.e. M/s. Gujarat State Petroleum Corporation Limited. It was also submitted that it is not in dispute that for the Assessment Year 2004-2005, claim of the assessee of the same amount being 1/5th expenditure of total expenditure of Rs.75,57,500/- incurred in 2003-2004 was allowed by the Revenue and therefore, the Tribunal has committed an error while interpreting the provisions of section 35D(2)(c)(iv) of the Act which stipulates that the expenditure incurred in connection with the issue, for public subscription, of shares in or debentures of the company, being underwriting commission, brokerage and charges for drafting etc. and holding that

same would not include fees paid to ROC.

8. In support of his submission, reliance was placed on the decision of Hon'ble Kerala High Court in case of **Nitta Gelatine India Ltd. v. Assistant Commissioner of Income-tax, Circle 1(1), Ernakulam** reported in (2016) 243 Taxman 245 (Kerala).

9. On the other hand, learned Senior Standing Counsel Ms. Maithili Mehta relied upon the impugned order of the Tribunal and contended that the fees paid to ROC for enhancing the capital would clearly fall outside the scope of section 35D(2)(c)(iv) of the Act.

10. Having heard the learned advocates for the respective parties and having considered the documents on record, in order to answer the question raised, it would be germane to refer to the provisions of section 35D(2)(c)

(iv) of the Act which reads as under:

> "**35D**. Amortisation of certain preliminary expenses
>
> xxx
>
> **(2)** The expenditure referred to in sub-section (1) shall be the expenditure specified in any one or more of the following clauses, namely :-
>
> xxx
>
> **(c)** where the assessee is a company, also expenditure-
>
> (i) by way of legal charges for drafting the Memorandum and Articles of Association of the company;
>
> (ii) on printing of the Memorandum and Articles of Association;
>
> (iii) by way of fees for registering the company under the provisions of the Companies Act, 1956 (1 of 1956);
>
> **(iv)** in connection with the issue, for public subscription, of shares in or debentures of the company, being underwriting commission, brokerage and charges for drafting, typing, printing and advertisement of the prospectus;"

11. On perusal of the above provision, it is clear that where the assessee is a company,

expenditure in connection with the issue itself is allowable expenditure and payment of fees to ROC is for the purpose of issue of share capital and therefore, the Tribunal has committed an error in interpretation of the provisions of section 35D(2)(c)(iv) of the Act by considering that the expenses for issue of share capital does not include the fees paid to ROC for issuance of the share capital.

12. It appears that the Tribunal has omitted the coma after the word “issue” and has read the provision as expenditure incurred in connection with the issue for public subscription. On close scrutiny of provisions of section 35D(2)(c)(iv) of the Act, it is clear that expenditure is to be incurred in connection with the issue of shares or expenditures in connection for public subscription of shares, in or debentures of

the company and thereafter the provision describes various types of expenditures in connection with the issue of shares or for public subscription of the shares. The provision is not an inclusive provision but the expenditures enumerated are of descriptive nature only. The Hon'ble Kerala High Court in case of **Nitta Gelatine India Ltd.**(supra), after considering the provision of section 35D(2)(c)(iv) of the Act has held as under:

> "7. From a reading of this provision, it can be seen that where the assessee is an Indian Company, the expenditure incurred by it in connection with the issue of its shares for public subscription, being underwriting commission, brokerage and charges for drafting, typing, printing and advertisement of prospectus, qualify for amortization as provided in the Section. Companies incorporated in India are permitted to issue shares to its existing shareholders and such issue of shares is governed by Section 81 of the Companies Act. This Section provides that such shares shall be offered to the persons who, at the date of the

offer, are holders of equity shares of the company, in proportion to the capital paid up on those shares at that date. It is also provided that after the expiry of the time specified for accepting the offer thus made by the company, if the offer is declined, the Board of Directors may dispose of the shares in such a manner as they think most beneficial to the company.

8. In compliance with Section 81 of the Companies Act, the assessee Company offered shares to its existing shareholders. Many shareholders accepted the offer and such of those shares which were declined to be accepted, were subscribed by the promoters of the Company themselves. It is because of the fact that the subscription of the shares thus issued by the Company was confined to its existing shareholders, the authorities have declined the benefit of amortization, stating that the subscribers of the shares were only a section of the public and not the public itself.

9. According to us, this interpretation adopted cannot be sustained. The term 'public' is not defined in the Income Tax Act. In such a situation and when the term is to be understood in the context of a rights issue under Section 81 of the Companies Act, to understand the scope of the term 'public' employed in Section 35D(2)(c)(iv) of

the Income Tax Act it is permissible to refer to the relevant provision of the Companies Act.

10. Section 67(1) of the Companies Act, reads thus:

> "67. Construction of references to offering shares or debentures to the public, etc.—(1) Any reference in this Act or in the articles of a company to offering shares or debentures to the public shall, subject to any provision to the contrary contained in this Act and subject also to the provisions of sub-sections (3) and (4), be construed as including a reference to offering them to any section of the public, whether selected as members or debenture- holders of the company concerned or as clients of the person issuing the prospectus or in any other manner."

11. A reading of this provision shows that any reference in the Companies Act or in the Articles of a Company offering shares to the public shall, subject to the provisions of the Companies Act, be construed as including a reference to offering the shares to any section of the public also. In other words, insofar as the Companies Act is concerned, the section of the public holding shares in a company would be treated as public, for the

purposes mentioned in Section 67. It is also clear from Section 67, that the purposes of the Section would include rights issue of shares under Section 81 of the Companies Act also. Therefore, when the scope and purport of Section 35D(2)(c)(iv) of the Income Tax Act is examined, this Court is entitled to refer to the provisions of Section 67 of the Companies Act and if so done, the inevitable conclusion is that the term for “public subscription” employed in Section 35D(2)(c)(iv) of the Income Tax Act would include subscription by a section of the public, i.e., the existing shareholders in a Company as well. Any interpretation to the contrary would lead to a situation where the benefit of amortization would be available to public issue of shares and the same benefit would be denied when shares are issued by Companies on rights basis.

12. This conclusion that we have reached is also supported by the interpretation given to the term “general public utility” in the Apex Court judgment in Commissioner of Income Tax, Madras v. Andhra Chamber of Commerce, Madras (AIR 1965 SC 1281) where it has been held that the term general public utility does not mean that the benefit should be available to the whole world, and the benefit can be continued to a section of the public as well. This principle has been laid down in paragraph 15 of the judgment, the

relevant part of which reads as follows:

> “The expression "object of general public utility" however is not restricted to objects beneficial to the whole mankind. An object beneficial to a section of the public is an object of general public utility. To serve a charitable purpose, it is not necessary that the object should be to benefit the whole of mankind or even all persons living in a particular country or Province. It is sufficient if the intention to benefit a section of the public as distinguished from specified individuals. Observations to the contrary made by Baumont, C. J., in Commissioner of Income tax Bombay v. Grain Merchants' Association of Bombay, 1938 (6) ITR 427 : AIR 1939 Bom 45 that "an object of general public utility means an object of public utility which is available to the general public as distinct from any section of the public" and that objects of an association "to benefit works of public utility confined to a section of the public, i.e. those interested in commerce" are not objects of general public utility, do not correctly interpret the expression "objects of general public utility". The section of the

> community sought to be benefited must undoubtedly be sufficiently defined and identifiable by some common quality of a public or impersonal nature : where there is no common quality uniting the potential beneficiaries into a class, it may not be regarded as valid."

13. In view of above decision as well as in facts of the case, it is not in dispute that the assessee company has paid fees to ROC in the year 2003-2004 for issuance of shares to its holding company. Therefore, we are of the opinion that the Tribunal has committed an error in holding that that the fees paid to ROC would not fall within the scope of provisions of section 35D(2)(c)(iv) of the Act.

14. We accordingly, set aside the order of the Tribunal and the Assessing Officer and restore the order passed by CIT(Appeals) by allowing the 1/5th expense of fees paid to ROC by the assessee company in the financial

year 2003-2004 of Rs.15,11,500/-. The question law is accordingly answered in favour of the assessee and against the revenue.

15. Appeal is accordingly allowed and disposed of.

(BHARGAV D. KARIA, J)

(PRANAV TRIVEDI,J)

RAGHUNATH R NAIR