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THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment reserved on: 10.05.2011
Judgment delivered on:31.05.2011

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ITR No. 230/1994

SHANTI BHUSHAN

..... APPELLANT

Vs

COMMISSIONER OF INCOME TAX

..... RESPONDENT

Advocates who appeared in this case:

For the Appellant: Mr. S.K.Pathak
For the Respondent: Ms. Rashmi Chopra

CORAM :-

**HON'BLE MR JUSTICE SANJAY KISHAN KAUL
HON'BLE MR JUSTICE RAJIV SHAKDHER**

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment ? | Yes |
| 2. | To be referred to Reporters or not ? | Yes |
| 3. | Whether the judgment should be reported in the Digest ? | Yes |

RAJIV SHAKDHER, J

1. This is a reference made to this court under Section 256(2) of the Income Tax Act, 1961 (hereinafter referred to as 'I.T. Act') against the judgment dated 19.05.1994 passed by the Income Tax Appellate Tribunal (hereinafter referred to as 'Tribunal'). Accordingly, a statement of case was drawn up and the following

question of law was referred, pursuant to order dated 08.09.1994 passed by this court :-

“whether, on all facts and circumstances of the case, the expenses incurred by the assessee on coronary by-pass operation should have been allowed as a allowable deduction either under Section 31 or Section 37 of the I. T. Act, 1961?”

2. As is apparent from the questions of law extracted hereinabove by us, the issue raised in the captioned reference is both ingenious and novel. The question raised is the product of experience, deftness and obvious artfulness of the petitioner who is a seasoned, experienced and an eminent Advocate of the country.

3. What is at the heart of the matter, as a matter of fact, is the heart itself. When one speaks of heart it brings forth imagery of myriad emotions. Emotions which encompass, often varied passions, of soulful love, abominable deceit, unremitting treachery and revenge. No two individuals deal with matters of heart similarly; often confounded, as to how to deal with it – which is why a famous lyricists expounds on this very peculiar quandary thus: *DIL-E-NADAN TUJHE HUA KYA HAI AKHIR ESS DARD KE DAWA KYA HAI.* (Here heart is personified. It is asked of it what ails it? What is the remedy for the malady).

3.1 But then here we are concerned with the nuts and bolts of what most would consider straight forward application of the

provisions of the IT Act. Therefore, before one gets into the legal nitty gritty, a brief mention of the facts would be useful :

4. In the year in issue i.e., assessment 1983-84, the assessee had filed a return declaring a total income of Rs 2,15,520/-. This return was filed on 25.06.1983. The assessee, however, revised his return on 04.09.1985. In the revised return, the assessee scaled down his income to Rs.2,14,050/-.

5. During the course of the assessment, the revenue noticed that the assessee had claimed as expense a sum of Rs. 1,74,000/- incurred evidently by him, on coronary surgery performed on him, in Houston in USA. He claimed waiver under Section 31 of the I.T. Act which, inter-alia permits deduction of expenditure incurred on current repairs of plant.

5.1 In other words, the assessee's stand was that the expenditure incurred by him on coronary surgery conducted on him, was akin to expenses incurred on current repairs of a plant. The assessee's stand thus is that a human heart is in the nature of a plant.

6. The Assessing Officer, however, was of the view that the expenditure in issue, was in the nature of a personal expense and hence, not allowable as deduction either under Section 31, or even, under Section 37 of the I.T. Act. He, therefore, referred the case to

Inspecting Assistant Commissioner (in short 'IAC') for directions under Section 144-A of the I.T. Act.

6.1 Before the IAC, the assessee was given an opportunity to present his case. The assessee put forth his submissions both orally as well as in writing.

6.2 In short, the assessee argued that the he suffered a heart attack in December, 1978, because of which he was advised against, undertaking strenuous physical activity, which included any hectic professional work requiring him to travel out of station. The assessee submitted that he agreed to undergo a bypass surgery on the advice of his doctors. It was thus argued that the repair of this vital organ i.e., the heart had directly impacted his professional competence. The assessee demonstrated this, by adverting to the rapid increase in his professional income in the period ensuing the surgery. Therefore, while in the assessment year 1982-83 his gross receipts were only to the tune of Rs 3.55 lakhs, after the bypass surgery, his gross receipts for the assessment years i.e., 1983-84, 1984-85 and 1985-86 increased to a figure of Rs. 5.1 lakhs, Rs 10.8 lakhs and Rs 12.15 lakhs respectively. According to the assessee such was the impact of this surgery that in the assessment year 1986-87, his gross professional receipts jumped substantially, to a figure of over Rs 20 lakhs.

7. The assessee submitted that the word 'plant' defined under Section 43(3) of the I.T. Act, was wide and varied. According to the assessee, the definition being inclusive, took within its fold, things like ships, vehicles, books, scientific apparatus and surgical equipments used for the purposes of business or profession.

7.1 Therefore, on a parity of reasoning, the assessee argued, that just like, for a professional musician, plant, would include musical instruments used by him in connection with his profession, and thus have a case to claim deduction in respect of expenses incurred on its repair or, even expenses incurred by a vocalist on repair of his vocal cords; a lawyer ought be allowed deduction of expenses incurred on repair of his heart under Section 31 of the I.T. Act. Similar examples were given of other situations such as a cricketer and a guitarist making use of their fingers and having to incur expenses in case they required repair.

7.2 Plethora of case law was also cited in this regard. Since almost identical case law has been cited before us, they are dealt with by us, in the later part of the judgment.

7.3 As indicated above, arguments in the alternative were also raised, to effect that: in case the expense incurred by the assessee was not allowable under Section 31, it surely fell within the domain of Section 37 of the IT Act.

7.4 Suffice it to say that the Assessing Officer rejected the claim made by the assessee under Section 31 as well as under Section 37(1) of the IT Act. The Assessing Officer was of the view that for the expenditure to be allowed as deduction under Section 37(1) of the IT Act it ought to fulfill three conditions: Firstly, the incurred expenditure could not be on capital account. Secondly, the expenditure should not be of a personal nature. And lastly, it should have been expended wholly and exclusively for the purposes of business or profession and was of a personal nature.

7.5 The Assessing Officer was of the view that expenditure did not fulfill the last two conditions, inasmuch as, it was not incurred wholly and exclusively for the purpose of business or profession and was of a personal nature.

7.6. According to the Assessing Officer it was the moral obligation of the assessee to keep himself physically and mentally fit, therefore, expenditure of such nature could only be categorized as personal in nature.

7.7 The assessee's reliance on the judgment of the Bombay High Court in the case of *Mehboob Production Pvt. Ltd. Vs. Commissioner of Income-Tax 106 ITR 78* was distinguished by the Assessing Officer, on the ground that in that particular case, the Director, who was the "driving force" in the company had travelled abroad. While

he was abroad he suffered a heart attack. Therefore, the expenses incurred in providing him medical facilities had been allowed as an expense. The Assessing Officer was of the view that assessee's case was not *pari materia* with the facts obtaining in Mehboob Production (*supra*). The assessee being neither his own employee nor had he gone abroad for professional activity. The assessee, in the instant case had travelled abroad specifically for treatment. Therefore, on these two grounds, the Assessing Officer came to the conclusion that the expense was not allowable under Section 37(1) of the IT Act.

7.8 Insofar as the assessee's claim under Section 31 was concerned, the Assessing Officer came to the following conclusion:-

(i) to claim deduction on account of expenses incurred on repair of plant under Section 31, it should be relatable to an asset of the business or that of the profession. Therefore, if expenses on repair of plant had been incurred it would necessarily have to be disclosed in the books, before expenses incurred on it, could be claimed as a deduction under Section 31 of the I.T. Act. The plant, which is undoubtedly an asset would necessarily have to be shown on the asset side of the balance sheet, and if it is so shown in the balance sheet it would have to carry an acquisition cost. The Assessing Officer was of the view that such was not the case where a human

body was involved. The Assessing Officer came to the conclusion based on the judgment in the case of *Norman Vs. Golder (Inspector of Taxes) (1945)13 ITR 21* that a human body was not a plant. In this regard the judgments in the case of *Yarmouth Vs. France 1887 Knives* and *Hinton Vs. Maden and Iyerland Ltd. 39 ITR 357, electrical fittings and other office applicances 71 ITR 587* etc. were distinguished.

7.9 The Assessing Officer thus, rejected the claim of the petitioner even under Section 31 of the IT Act.

8. Accordingly, expenses in issue were added to the assessee's income.

9. Aggrieved by the decision of the Assessing Officer, the matter was carried in appeal to the Commissioner of Income Tax (Appeals) [hereinafter referred to as 'CIT(A)']. The CIT(A) while affirming the view of the Assessing Officer looked at it from another point of view, which is that if, the assessee's argument was to accepted that his heart should be treated as plant in terms of Section 31 of the I.T. Act, because his heart was used for the purposes of his professional work, it could logically be construed that a retired lawyer or a person who is not actively engaged in earning any income is not interested in the efficacious functioning of his heart. The CIT(A) was of the opinion that regardless of the earning capacity. Since,

every individual was interested in the efficient working of his heart then, could it be said that a lawyer's heart was used, only, for the purpose of his profession. Based on this he sustained the Assessing Officer's opinion under Section 31 of the IT Act. Similarly, he also agreed with the Assessing Officer's the view taken by him as regards non-availability of deduction even under Section 37 of the IT Act.

10. Not being satisfied, the assessee carried the matter in appeal to the Tribunal. The Tribunal by virtue of the impugned judgment rejected the contention of allowability of expenses made by the assessee both under Section 31 and 37 of the IT Act. Insofar as Section 31 is concerned, the Tribunal relying upon the test as laid down by the Gujarat High Court in the case of *CIT Vs. Elecon Engineering Co. Ltd. (1974) 96 ITR 672 (Guj.)* came to the conclusion that for the expenses incurred on the repair of the plant to be allowed, the assessee would have to demonstrably show that the plant was used as a "*tool*" with which he carried out his business or professional activity. Applying the said test, the Tribunal came to the conclusion that the assessee could not have demonstrated that heart was used as a "*tool of his trade*" since the heart was even otherwise an organ, essential, for normal and healthy functioning of

a human body, and not necessarily for a professional, such as a lawyer.

10.1 The Tribunal, contrasted in this regard, the example cited by the assessee of a cricketer, guitarist and a vocalist. A cricketer or a guitarist may be able to claim, according to the Tribunal, expenses incurred on the repair of their fingers since they are used as a tool of their trade for furthering their professional activities. Similarly, a vocalist may be able to claim such like expenses incurred in repair of his vocal cord. This, however, was not the case of a lawyer claiming expenses incurred on repair of his heart.

10.2 The Tribunal applied the dicta laid down by the Court of Appeal in *Norman Vs. Golder (Inspector of Taxes)* that a tax payer's body could not be regarded as a plant. Like the authorities below, even the judgment in *Mehboob Productions* was distinguished on the ground that the expenses in that case were incurred by the company qua its Director. The expenses of the company, which was the assessee in that case, were allowed on the principles of commercial expediency; having been incurred wholly for the purpose of the business of the company. Insofar as the company was concerned, the expenses could not be regarded as personal in nature. The assessee, therefore, could not claim parity, as the facts in *Mehboob Productions* were distinguishable from those obtaining in

the instant case. Therefore, Tribunal came to the conclusion that not only were the expenses in issue, not expended wholly and exclusively for the purpose of assessee's business, but being personal in nature, were not allowable under Section 37(1) of the IT Act.

11. Before we proceed further, it may be important to note that the matter had come up for hearing on 19.04.2011 when an adjournment was sought. Since several adjournments had been granted in the case, parties were asked to file short synopsis in support of their respective stands. The matter was fixed for directions/clarifications on 10th May, 2011. On the said date, the learned counsel for the assessee relied upon the arguments put forth in the written submissions. A perusal of the submissions would show that once again the deduction has been claimed under Section 31, and in the alternative, under Section 37 of the I.T. Act, by treating the expenditure incurred as one, expended wholly and exclusively for the purposes of profession of the assessee. The assessee's contention, in short, runs as follows:-

11.1 Coronary surgery was not a life saving operation but was undertaken due to professional and commercial expediency in order to enable assessee to carry out his profession efficiently. It was stressed that the medical procedure had enabled the assessee to

travel extensively all over the country in connection with his professional duty of putting in appearances in various High Courts of the country. In support of his contention, as already noticed, a reference was made to the fact that his gross receipts had increased from Rs 3.55 lakhs in the assessment year 1982-83 to 106.87 lakhs in 1992-93. It may be noted that figures of assessment year 1992-93 could not have been on the record of the assessing officer since the order of the Assessing Officer was passed on 12.03.1986. Nevertheless, the point made is that there has been a substantial increase in the assessee's income, post the surgery conducted on him. In support of the submissions made, reliance has been placed once again on the following judgments:-

(1950) 18 ITR 460 Bombay, TATA Sons Ltd. Vs. CIT at pages 467/468, (1981) 131 ITR 223 Madras (at page 227) Waterfall Estates Ltd. Vs. CIT, (1977) 106 ITR 758 Bombay (at page 766/767) Mehboob Productions Pvt. Ltd. Vs. CIT, XIX QB 647 Yarmouth Vs. France at 652 and 658, (1974) 96 ITR 672 (Gujrat) CIT Vs. Elecon Engineering and (1987) 166 ITR 66 Scientific Engineering House Pvt. Ltd. Vs. CIT at page 95/97

11.2 Apart from the submissions made on behalf of assessee, that the expenditure incurred was not to undertake a life saving medical procedure, but to enhance professional efficacy of the assessee, it

was also contended once again before us, based on the judgment in the case of *Mehboob Productions* that if expenditure incurred by the company qua its Director (who was the driving force in the company and had travelled abroad for its work) was allowable as expenditure, there was no reason to deny a lawyer deduction on account of repair of his heart against his professional income.

11.3 The Tribunal having observed that a lawyer sharpens his professional skill not by using his heart, but using his brain, could it then be said that a lawyer would be allowed deductions for expenses incurred on brain surgery as against those incurred on medical procedure involving the human heart;

11.4 Lastly, Tribunal having accepted that the assessee had incidently benefitted by this medical procedure in undertaking his professional activities, the claim ought to be allowed as a deduction.

12. As against this, in rebuttal, learned counsel for the Revenue Ms.Rashmi Chopra relied largely upon the reasoning and the findings of the authorities below. Based on which Ms.Chopra pleaded for the rejection of the claim made on behalf of the counsel for the assessee.

13 Before we proceed further, let me advert to judgments cited by the assessee in support of his case.

13.1 The first, in the line of cases cited by the learned counsel for the assessee is the judgment in the case of Royal Calcutta Turf Club. The brief facts in this case were as follows :-

13.2. The Royal Calcutta Turf Club (in short, the club) was an association of persons whose business was to hold race meetings in Calcutta (now known as Kolkata) on a commercial basis. The Club did not own any horse and thus did not employ jockeys. The jockeys were employed by the owners and the trainers of horses which ran in the races organised by the club. Since the club was of the opinion that there was a possibility of the jockeys becoming unavailable due to injury, etc., and this could, not only seriously affect its business, but could also lead to closing down of the business; the club considered it appropriate to remedy this by establishing a training school of Indian boys as jockeys. The purpose being to make available a pool of trained jockeys for the purposes of races organised by it. Somehow, the training school did not prove successful and it had to be closed down within a period of three years. In the relevant accounting year ending on 31st March, 1949, the Club had spent certain sums of money on running this school, which was claimed by it, as deduction under section 10(2)(xv) of the provisions of the Income Tax Act then prevailing. The claim of the club was disallowed by the Income Tax Officer (in

short, ITO). In a further appeal, both the first appellate authority as well as the Tribunal confirmed the decision of the ITO. The club, however, succeeded before the High Court. The revenue came up in appeal to the Supreme Court.

13.3. The Supreme Court dismissed the revenue's appeal by holding that the amount was expended wholly and exclusively for the club's business as the supply of efficient and skilled jockeys was crucial for the business of the club. The money having been spent for preservation of the club business, the deduction had to be allowed. In this case the Supreme Court after noticing several precedents, broadly provided the contours of the kind of expenses which could be considered commercially expedient. One such expense being that which was incurred was for preventing extinction of business. The point to be noted is that, in this case, the expense was directly and immediately beneficial to the trade in which the club was engaged.

14. The second case cited by the petitioner is the judgment of the Bombay High Court in *Tata Sons (supra)*. In this case, the assessee, which was a limited company, held a managing agency of another company i.e., Tata Iron and Steel Company Ltd. (in short, TISCO). The terms of the managing agency were incorporated in the agreement dated 02.05.1948. By virtue of this agreement, the

assessee company was to be paid commission at different rates, which were to be computed based on the net profits of TISCO. In the assessment year in issue, the assessee company had paid half share of the bonus which the managed company paid to its officers. The question which arose was, whether it could claim deduction in respect of a portion of the said sum. From the record, the following facts emerged :-

14.1. The assessee company was entirely dependent in respect of its earning on the profits earned by the managing company, thus the assessee company was directly and vitally interested in the earnings of the managing company.

14.2 The Tribunal disallowed the deduction claimed by the assessee company. The reason being that the Tribunal was of the view that profits for the accounting year in issue, had already been earned and that bonuses had been paid subsequent to the earning of such profits and therefore, there was, according to the Tribunal, no connection between the two. The High Court, however, agreed with the assessee. In coming to the conclusion whether the expense was incurred wholly and exclusively for the purposes of the assessee's business it applied the following test :-

“if the expenditure helps or assists the assessee in making or increasing the profits, then undoubtedly that expenditure

would be expended wholly and exclusively for the purposes of business.”

14.3 The court agreed with the assessee that even voluntary payment, if necessitated on the grounds of commercial expediency, would be amenable for deduction, provided it was intended for the purpose of making or increasing the profits of the assessee company. The court in allowing the deduction held that the nexus between the managing company and the assessee company could not be seriously disputed. If the managing company intended to increase its profits, it would automatically tend to increase the income and profits of the assessee company. In that case, the court came to the conclusion “...the only motive by which the expenditure was actuated was a purely commercial and pecuniary one and that was to see that more profits were made by the managed company so that their own commission should thereby increased.”. This again was a case where the court came to the conclusion that there was a direct nexus in the sums expended and the motive of the assessee which was to enhance its profitability.

15. The third case cited by the petitioner is a judgment of the Madras High Court passed in the case of Waterfall Estates Ltd. In this case, the facts briefly were as follows :-

15.1 The assessee carried on business of running tea and coffee estates in addition to being in the business of coffee curing. For both these businesses, it had a common head office. Under the Central Income Tax Act, the business of tea was liable to be taxed to the extent of 40%, whereas income from coffee was wholly exempted. However, income from coffee curing works was wholly taxable. The finding of the Tribunal was that these businesses were separate. In the background of these facts, the issue which arose was whether the entire depreciation in respect of asset in the head office would be deductible from the taxable income and that in this regard there was no justification, as far as depreciation was concerned, to bifurcate and disallow any portion thereof.

15.2 The ITO allowed only a proportionate part of the depreciation. The Appellate Assistant Commissioner (in short, AAC) sustained the order of the ITO. The matter was carried in appeal to the Tribunal. The Tribunal came to the conclusion that the assessee had to maintain a head office, and that merely because the head office also supervised the coffee estates, the income from which was not taxable, a bifurcation could not be made between the user of the assets towards taxable sources of income and non-taxable sources of income. The Tribunal further observed that as the assets had been utilized for earning taxable income, there was no justification

for bifurcation and thus disallowing a portion of the depreciation as was done by the ITO. Consequently, the Tribunal reversed the view of the authorities below. The matter was carried to the High Court by way of a reference under section 256(1) of the then prevailing provisions of the I.T. Act. The Tribunal was thus concerned with reconciling the provisions of sub-sections (1) and (2) of section 38 of the Income Tax Act. The expression which finds mention in section 38(1) of the Act is : used for the purposes of business or profession. The Madras High Court in coming to the conclusion which it did, looked to the principles set forth by the courts in deciding cases under section 37 of the I.T. Act. The court held that so long as the expenditure was incurred for the purposes of business, and merely because some other person or some other activity was also benefitted by such an expenditure, it would not come in the way of the assessee being allowed a deduction. In that case, the court came to the conclusion that since the head office had been used for the purposes of the business whose income was being taxed, the assessee ought to be entitled to depreciation. The judgment noticed the principles, inter alia, set forth by the Supreme Court in Royal Calcutta Turf Club case. As noticed above, one cannot but agree with the principle, it is its applicability of the principle to the assessee's case which is in doubt.

16. The fourth case on which great stress has been laid by the petitioner is once again the judgment of the Bombay High Court in the case of Mehboob Productions (supra). The facts of the case were as follows :-

16.1 The assessee company was in the business of film production. Sometime in 1957, the assessee company produced a film titled 'Mother India'. Before the court, two questions arose for adjudication. The first question related to taxability of certain sums of money which the assessee company had received from its exhibitors and theatres, on the Government exempting the picture produced from entertainment duty. We are not concerned with the facts obtaining in respect of this question.

16.2 The second question which pertained to the claim of deduction of medical expenses incurred by the assessee company for treatment of its Managing Director, while in USA in connection with the assessee company's business, is the question we are concerned with. The facts of this case briefly are as follows :

16.3 One Mehboob Khan, Director of the assessee company, while on tour of USA suffered a serious heart attack. Mr. Mehboob Khan had to be hospitalized. In that connection, a sum of Rs.33,667/- was incurred on his illness. It is pertinent to note that Mr. Mehboob Khan had visited USA as '*Mother India*' was one such foreign film which

had been nominated for an award by the Academy of Arts and Sciences, Hollywood. On his return from the USA, the Board of Directors passed a resolution to the effect that the entire expenditure on the treatment of Mr. Mehboob Khan would be borne by the assessee company. The expenditure incurred was debited to the assessee company's account. The ITO rejected the assessee company's claim. The ITO was of the view that the expenditure incurred had directly benefitted Mr. Mehboob Khan, who had a substantial interest in the assessee company. The AAC confirmed the order of the ITO with regard to the claim for deduction of medical expenses.

16.4 In a further appeal, the Tribunal, however, in respect of medical expenses accepted the contention of the assessee company. The Tribunal came to the conclusion that since Mr. Mehboob Khan suffered a heart attack while he was in the USA for the purposes of the assessee company's work, therefore, expenses to the extent they were in excess of the expenses which would normally have been incurred in India ought to be allowed as deduction to the assessee company. On a rough and ready basis, 2/3rd expenses incurred in the USA were allowed as deduction. The matter was carried to the High Court in respect of the balance 1/3rd expenses (which were incurred for treatment of Mr. Mehboob Khan

in USA), which were disallowed. The High Court was of the view that the Tribunal having returned findings of fact: that Mr. Mehboob Khan had visited USA in connection with the business of the assessee as he was a “driving force” in the assessee company; that the expenses had been incurred on account of special contingency; and that, “*there was nothing unbusiness like or abnormal in the assessee company bearing the expenses of medical treatment of a person who meant so much to the company.*” – the revenue not having challenged the conclusion of the Tribunal that the decision of the Board of Directors, which was based on the principles of commercial expediency, was improper or perverse; the deduction with regard to the balance 1/3rd expenses had also to be allowed.

16.5 Importantly, in this case, the High Court was only concerned with, as noticed above, as to whether the balance 1/3rd amount incurred by the assessee company for treatment of Mr. Mehboob Khan had to be allowed as deduction. The revenue had not challenged the findings of the Tribunal. The assessee company’s reimbursement of the expenses had been allowed on a principle of commercial expediency as, Mr. Mehboob Khan was found to be a ‘driving force’ in running the affairs of the assessee company.

16.6 On the other hand, in the instant case, the assessee admits that his travel to the USA was for a specific purpose of undergoing a coronary surgery.

17. The fifth case cited before us is the judgment of the Queen's Bench Division in the case of Yarmouth Vs. France. This was a case where an action was brought under the Employers' Liability Act, 1880. The plaintiff brought the action under the said Act against his employer, the defendant in the action, on account of injury suffered by him while being in his employment. The defendant was a wharfinger and a warehouseman in London. The plaintiff was given a horse and a trolley for the purpose of delivering goods to the designated consignees. After the job was done, the plaintiff was required to return the trolley to the employer's premises and stable the horse thereafter. The plaintiff had been in the defendant service prior to the institution of the action for a period of four years. In one particular year, the defendant had bought a new horse. The horse was under the control and supervision of the defendant's stable foreman. The plaintiff found the horse to be a vicious animal who was a "kicker" and a "jibber" and hence dangerous and unfit to be driven. This fact was brought by the defendant to the notice of the stable foreman. The stable foreman persisted with the plaintiff to keep driving the trolley with the said

horse and, is stated to have said, that if he met with an accident, they would stand responsible for it. On one unfortunate day, the plaintiff while driving the horse, met with an accident, in as much as, the horse kicked the plaintiff, in which, he broke one of his legs. The question which arose for consideration was: as to whether the plaintiff was entitled to compensation under the Employers' Liability Act. The action was defended on the ground that: the plaintiff was not a workman; the horse was not a plant within the meaning of the Act; and lastly, the plaintiff was guilty of contributory negligence as he continued to drive the horse even after he became aware of the vicious character of the horse.

17.1 The Judge of the First Court found in favour of the plaintiff in respect of the first two objections i.e., he was a workman and horse was a plant within the meaning of the Act. With regard to the third objection, the Judge found in favour of the defendant.

17.2 The Appeal Court was thus called upon to decide as to whether the plaintiff having continued to drive the horse even after knowing the vicious character of the horse had assented to incur the risk which was an incident of his employment. While answering this question, the majority in the Appeal Court considered the effect of the provisions of the Employers Liability Act. In this connection, the following observations were made with regard to whether a horse

could be considered a plant within the meaning of section 1 sub-section(1) of the Employers' Liability Act. The observations being as follows :-

“...Then comes the question which is somewhat more difficult, - can a horse be considered 'plant' within s.1, sub-s. 1, of the Employers' Liability Act? It is suggested that nothing that is animate can be plant; that is, that living creatures can in no sense be considered plant. Why not? In many businesses horses and carts, wagons, or drays, seem to me to form the most material part of the plant : they are the materials or instruments which the employer must use for the purpose of carrying on his business and without which he could not carry it on at all. The principal part of the business of a wharfinger is conveying goods from the wharf to the houses or shops or warehouses of the consignees and for this purpose he must use horses and carts or wagons. They are all necessary for the carrying on of the business. It cannot for a moment be contended that the carts and wagons are not 'plant'. Can it be said that the horses, without which the carts and wagons would be useless, are not? If, then, this horse was part of the plant, it had a defect, that is, it had the constant habit, whether in a stable or harnessed to a trolley, of kicking

whatever was near it, whether a human being or a brick wall. In short, it was a vicious beast that could not be managed or controlled by the most careful driver. The plant, therefore, was defective.”

18. As would be noticed, the majority in coming to the conclusion that the horse was a plant, took into account the nature of the business. As noticed above, the nature of the business of the defendant was of a wharfinger which involved goods being carried from the wharf to the houses and the shops or, the warehouses of the consignees. For this purpose, the defendant had to use horses and carts, or wagons. These were necessary for carrying on the business. Since carts and wagons could not but be considered as plants, the court held that horses had to be held as plants as, carts and wagons would be useless without it. As is evident, the case did not involve the provisions of the Income Tax Act. The decision was rendered in the facts and circumstances obtaining in that case and in the background of the provisions of the Employers’ Liability Act.

19. The next judgment which is referred to by the petitioner is the judgment of the Gujarat High Court in the case of Elecon Engineering Company Ltd. (supra). This judgement required the court to determine whether drawings and patterns received by the assessee from a foreign company under a collaboration agreement

can be said to be plant on which depreciation could be claimed under section 32 of the IT Act. In determining as to whether drawings and patterns fell within the definition of a plant, the court examined section 43(3) of the IT Act. The court noted that the definition of a plant under section 43(3) of the IT Act was an inclusive definition. The Division Bench after examining a number of decisions observed that the word 'plant' is not necessarily confined to apparatus which is used for mechanical operations or is employed in mechanical or industrial businesses. It would according to the court not include stock-in-trade or even articles which are merely part of the premises in which business is carried on. According to the court, for an article to qualify as plant it must have a degree of durability, and that which is quickly consumed or worn out in the course of its operation, within a short span of time, cannot properly be called a plant. The test, which the court suggested could be applied was, the operation that the apparatus / article involved, performed in the performance of the assessee's business i.e., did it fulfil the function of a plant in assessee's trading activity. In other words, was it a tool of tax payers trade? The court thus held that the word 'plant' in its ordinary sense was a word of wide import and it had to be construed broadly having regard to the fact that articles like books and surgical instruments were expressly

included in the definition of plant under section 43(3) of the IT Act. Since the issue pertained to interpretation of section 32 of the IT Act, the court ultimately came to the conclusion that the word 'plant' in section 32 would include not only such articles which were capable of diminution in value year after year by reason of wear and tear in the course of their application for the business of assessee's profession but also those which diminished in value on account of other known factors such as obsolescence. The important aspect to be noted is that the court laid stress that plant would include such an article whether animate or inanimate which is used as a tool of the assessee's trade.

19.1 This matter was carried in appeal to the Supreme Court by the Revenue. The Supreme Court in *Commissioner of Income Tax Gujarat Vs. Elecon Engineering Co. Ltd. 1987 166 ITR page 66* dismissed the appeal of the revenue in limine by relying on its own judgment in the case of *Scientific Engineering House P Ltd. vs CIT (1986) 157 ITR 86*.

20. This brings me to the principles enunciated by the Supreme Court in the case of Scientific Engineering (supra). Briefly in this case, amongst others, one of the issues which the court was called upon to decide was whether technical know-how supplied by a foreign collaborator of the assessee company by way of what was

termed as '*documentation services*' could be construed as a capital asset of a depreciable nature.

20.1 The assessee company was in the business of manufacturing scientific instruments and apparatus. For the purposes of its business it entered into two separate collaboration agreements with a Hungarian company. The Hungarian company in consideration of a lump sum amount in respect each of the two agreements, agreed to supply to the assessee technical know-how required for manufacturing, such like, scientific instruments. The object of the agreement was to enable the assessee to manufacture the said instruments in India, under its own trade mark though under the licence of the Hungarian collaborator. It was for this purpose that the Hungarian collaborator supplied manufacturing drawings, processing documents, design charts, plans and other literature which was, as indicated above, termed as '*documentation services*'.

20.2 In the assessment year in issue, the assessee showed the aforementioned documentation received from the Hungarian collaborator as a "*library*" and claimed a depreciation on the same. The ITO disallowed the claim of the assessee for depreciation allowance on the ground that the lump sum price paid for the documents did not represent value of books but represented the price paid for acquiring technical know-how. Thus ITO was of the

view that even though the assessee had incurred expenses on capital account no tangible or depreciable asset have been brought into existence. Accordingly, he had disallowed, as indicated above, claim for depreciation allowance.

20.3 In an appeal preferred by the assessee the Appellant Assistant Commissioner agreed with the assessee that the documents purchased by the assessee constituted a book, on which depreciation was allowable as in the case of plant and machinery. Appropriate directions were issued by the AAC to the ITO.

20.4 The Tribunal, however, in a further appeal by the revenue came to the conclusion that the lump sum amounts paid by the assessee were not solely for purchase of documents. According to the Tribunal assessee had paid the said amount for acquiring other services of the foreign collaborator; the supply of documents being only incidental to those services. Therefore, the Tribunal came to the conclusion that the amounts paid did not represent the purchase price of the documents and hence deemed it unnecessary to determine as to whether documents fell within the meaning of the word 'books'. Consequently it did not find it necessary to adjudicate upon the issue, as to whether depreciation was available to the assessee. The Tribunal, however, held that since some of the services rendered by the foreign collaborator to the assessee were

on revenue account, therefore, the lump sum payment made by the assessee to the foreign collaborator was partly on capital account and, therefore, the remaining part which was expended on revenue account had to be allowed as deduction. Accordingly, the Tribunal confirmed the deduction claimed by the assessee before the ITO though not on the ground of it being a depreciation allowance, but on the ground that it was in the nature of revenue expenditure.

20.5 Aggrieved, both the revenue and the assessee preferred references before the High Court. The High Court took the view that even though the entire amount expended by the assessee represented an expenditure on the capital account, since no depreciable asset was brought into existence the assessee was not entitled to the relief claimed.

20.6 Aggrieved by the judgment of the High Court, the assessee carried the matter to the Supreme Court. The Supreme Court allowed the appeal of the assessee. What is important for our purpose is that the Supreme Court observed that definition of word 'plant' in Section 43(3) of the I.T. Act was wide. It would include broadly both animate and inanimate things. The court made the following apposite observations:

"In other words, plant would include any article or object fixed or movable, live or dead, used by businessman for carrying on his business and it is not necessarily confined

to an apparatus which is used for mechanical operations or processes or is employed in mechanical or industrial business. In order to qualify as plant, the article must have some degree of durability, as for instance, in Hinton v. Maden & Ireland Ltd., (1960) 39 I.T.R. 357 (HL), knives and lasts having an average life of three years used in manufacturing shoes were held to be plant. In C.I.T. v. [Taj Mahal Hotel](#) : [1971] 82 ITR 44(SC), the respondent, which ran a hotel, installed sanitary and pipeline fittings in one of its branches in respect whereof it claimed development rebate and the question was whether the sanitary and pipe-line fittings installed fell within the definition of plant given in Section 10(5) of the 1922 Act which was similar to the definition given in Section [43\(3\)](#) of the 1961 Act and this Court after approving the definition of plant given by Lindley L.J. in Yarmouth v. France as expounded in Jarrold v. John Good and sons limited 1962, 40 T.C. 681(CA), held that sanitary and pipe-line fittings fell within the definition of plant....

....In other words the test would be: Does the article fulfil the function of a plant in the assessee's trading activity? Is it a tool of his trade with which he carries on his business? If the answer is in the affirmative, it will be a plant.

14. If the aforesaid test is applied to the drawings, designs, charts, plans, processing data and other literature comprised in the 'documentation service' as specified in Clause 3 of the agreement it will be difficult to resist the conclusion that these documents as constituting

a book would fall within the definition of 'plant'. It cannot be disputed that these documents regarded collectively will have to be treated as a 'book', for, the dictionary meaning of that word is nothing but a "a number of sheets of paper, parchment, etc., with writing or printing on them, fastened 'together along one edge, usually between protective covers; literary or scientific work, anthology, etc., distinguished by length and form from a magazine, tract etc." (vide Webster's New World Dictionary). But part from its physical form, the question is whether these documents satisfy the functional test indicated above. Obviously, the purpose of rendering such documentation service by supplying these documents to the assessee was to enable it to undertake its trading activity of manufacturing theodolites and microscopes and there can be no doubt that these documents had a vital function to perform in the manufacture of these instruments; in fact it is with the aid of these complete and upto date sets of documents that the assessee was able to commence its manufacturing activity and these documents really formed the basis of the business of manufacturing the instruments in question. True, by themselves these documents did not perform any mechanical operations or processes but that cannot militate against their being a plant since they were in a sense the basic tools of the assessee's trade having a fairly enduring utility, though owing to technological advances they might or would in course of time become obsolete. We are, therefore, clearly of the view that the capital asset acquired by the

assessee, namely, the technical know-how in the shape of drawings, designs charts, plans, processing data and other literature falls within the definition of 'plant' and is, therefore, a depreciable asset." (emphasis is ours)

21. Having heard the learned counsels for the parties and having regard to the submissions made both on behalf of the assessee and the revenue, what emerges from the record is as follows :-

(i). The assessee had claimed a sum of Rs.1,74,000/- as deductible expenditure towards expenses incurred by him on getting a coronary by-pass surgery conducted on himself in Huston, USA.

(ii). The assessee's gross receipts over the years have increased from Rs.3.55 Lakhs returned in assessment year 1982-1983 to Rs.106 Lakhs in assessment year 1992-1993.

(iii). Based on these facts the assessee has made a claim for deduction under section 31 of the IT Act and in the alternative under section 37 of the IT Act.

21.1 In our view, deduction under section 31 of the IT Act would not be available for two reasons: firstly, if the heart of a human being, as in the case of the assessee, were to be considered a plant, it would necessarily mean that it is an asset which should have found a mention in the assessee's balance sheet of the previous year in issue, as also, in the earlier years. Apart from the fact that this is

admittedly not so, the difficulty that the assessee would face in showing the same in his books of accounts would be of arriving at the cost of acquisition of such an asset. Therefore, in our view before expenses on repair of plant are admitted as a deduction, the plant would necessarily have to be reflected as an asset in the books of accounts.

21.2 The second ground on which, we are persuaded by the counsel for the revenue not to accept the assessee's claim is that, even if one were to give the widest meaning to the word 'plant' in section 31 of the IT Act, it would still not fall within the definition of the word plant. The test of functionality laid down by the Gujarat High Court in Elecon Engineering Co. Ltd. (supra) which is affirmed by the Supreme Court in its judgement rendered in Scientific Engineering (Supra) is not fulfilled in this case. It cannot be said that the assessee who is a lawyer would have used his heart as a tool for his professional activity. The fact that a healthy and a functional human heart is necessary for a human being irrespective of his vocation or social strata is stating the obvious. But this would not necessarily lead to the conclusion that the heart is used by, a human being, as a tool of his trade or professional activity. General well being of the heart and its functionality cannot be equated with using the heart as a tool for engaging in trade or professional

activity. Atleast the facts in this case do not demonstrate the same. Hence, the petitioner's claim for allowing deduction of the expenses incurred by him on his coronary surgery under section 31 of the IT Act, is rejected.

22. This brings us to the alternate claim made by the assessee under section 37 of the IT Act. It is trite law that the claim for deduction under section 37 of the IT Act should satisfy three conditions: firstly, it should be an expense which is incurred wholly and exclusively for the purpose of the assessee's business or profession; secondly, it should not be an expense incurred to bring into existence a capital asset; and lastly, it should not be an expense of a personal nature.

22.1 In our view, the assessee's claim under section 37 of the IT Act does not fulfil the first condition which is that the expense in issue have been incurred wholly and exclusively for the purposes of the assessee's profession.

22.2 As observed hereinabove, an impaired heart would handicap functionality of a human being irrespective of his position, status or vocation in life. Expenses incurred to repair an impaired heart would thus add perhaps to the longevity and efficiency of a human being per se. The improvement in the efficiency of the human being would be in every activity undertaken by a person. There is

thus no direct or immediate nexus between the expenses incurred by the assessee on the coronary surgery and his efficiency in the professional field per se. Therefore, to claim a deduction on account of expenses incurred by the assessee on his coronary surgery under section 37(1) of the IT Act would have to be rejected. There is, as a matter of fact, no evidence brought on record, which would suggest that the assessee could have continued in the same state without the medical procedure undertaken by him. On this aspect, the best example which comes to mind, which perhaps, in a given case could be considered as an expense amenable under section 37 of the IT Act would be that of an actor undertaking plastic surgery to prevent age being reflected on screen. It could be argued in the case of an actor that he could have existed in the state he was without having gone under the knife of a plastic surgeon. Such are not the facts in the instant case.

22.3 In this regard, even the judgment of the Bombay High Court in Mehboob Productions (supra), which was cited before us, is distinguishable. As indicated above, only the assessee had come up before it with regard to the Tribunal's decision disallowing 1/3rd of the expenses reimbursed by the assessee company to its Director who had suddenly suffered a serious heart attack while running an errand for the assessee company in USA. Based on the findings

returned by the Tribunal, that the Director was the '*driving force*' of the company and that he had gone to USA in connection with nomination of the film produced by the assessee company for an award – the Division Bench of the Bombay High Court, concluded that there was no good reason to disallow the remaining expenses as the revenue had not challenged the findings on the ground of perversity.

23. In view of the foregoing reasons, we are of the opinion that the concurring judgments and orders of the authorities below ought not to be disturbed. It is ordered accordingly. The question of law is thus answered in the negative and against the assessee.

24. Resultantly, the reference stands disposed of; cost shall follow the result.

RAJIV SHAKDHER, J

SANJAY KISHAN KAUL, J

MAY 31, 2011

da/yg