

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****TAX APPEAL NO. 1043 of 2006****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE M.R. SHAH****and****HONOURABLE MR.JUSTICE R.P.DHOLARIA**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
- 2 To be referred to the Reporter or not ?
- 3 Whether their Lordships wish to see the fair copy of the judgment ?
- 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
- 5 Whether it is to be circulated to the civil judge ?

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**COMMISSIONER OF INCOME TAX****Versus****M/S. MILMET LABORATORY PVT.LTD**

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**Appearance:****MRS MAUNA M BHATT, ADVOCATE for the Appellant****MR SN SOPARKAR, SENIOR ADVOCATE for the Respondent****MRS SWATI SOPARKAR, ADVOCATE for the Respondent**

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**CORAM: HONOURABLE MR.JUSTICE M.R. SHAH**  
**and**

**HONOURABLE MR.JUSTICE R.P.DHOLARIA****Date : 30/11/2013****ORAL JUDGMENT****(PER : HONOURABLE MR.JUSTICE M.R. SHAH)**

[1] Feeling aggrieved and dissatisfied with the judgment and order dated 17.02.2006 passed by the learned Income Tax Appellate Tribunal (hereinafter referred to as "the ITAT") in ITA No.1438/Ahd/2001 for A.Y. 1997-98, by which the learned ITAT has partly allowed the said appeal preferred by the assessee, the revenue has preferred the present appeal to consider the following substantial questions of law.

*[A] Whether the Appellate Tribunal is right in law and on facts in confirming the order passed by the CIT(A) directing to exclude sales tax and excise duty from the total turnover for the purpose of computing deduction under Section 80HHC?*

*[B] Whether the Appellate Tribunal has substantially erred in law and on facts in directing the Assessing Officer not to exclude 90% of other income amounting to Rs.1,54,033/- on the principle of netting ?*

[2] Heard Manish Bhatt, learned counsel appearing on behalf of the appellant – revenue and Mr.S. N. Soparkar, learned senior advocate appearing on behalf of the respondent – assessee.

[3] At the outset, it is required to be noted that so far as the question No(A) i.e. whether the Appellate Tribunal is right in law and

on facts in confirming the order passed by the CIT(A) directing to exclude sales tax and excise duty from the total turnover for the purpose of computing deduction under Section 80HHC is concerned, the same is squarely covered by the decision of the Hon'ble Supreme Court in the case of **Commissioner of Income Tax Vs. Lakshmi Machine Works**, reported in **[2007] 290 ITR 667 (SC)** by which it is held by the Hon'ble Supreme Court that excise duty and sales tax also cannot form part of the "total turnover" under section 80HHC(3) of the I.T. Act. It is required to be noted that the issues / questions raised in the present appeal are for the period prior to insertion of section 80HHC(3) of the Income Tax Act. Applying the ratio laid down by the Hon'ble Supreme Court in the case of **Commissioner of Income Tax Vs. Lakshmi Machine Works** (supra), the question No.(A) is held against the revenue.

[4] Now so far as question No.(B) i.e. whether the Appellate Tribunal has substantially erred in law and on facts in directing the Assessing Officer not to exclude 90% of other income amounting to Rs.1,54,033/- on the principle of netting is concerned, it is required to be noted that as such, the learned ITAT has relied upon the decision of the Special Bench of ITAT in the case of **Lalsons Enterprises Vs. DCIT (Delhi) (SB)**, reported in **89 ITD 25**. It is reported that the said decision has been approved by the Hon'ble Supreme Court in the case of **ACG Associated Capsules Pvt. Ltd. Vs. Commissioner of Income Tax**, reported in **[2012] 343 ITR 89 SC**. In the said

decision, the Hon'ble Supreme Court has held that 90% of not the gross interest but only the net interest, which has been included in the profits of the business of the assessee as computed under the heads "Profits and gains of business or profession" is to be deducted under clause (1) of Explanation (baa) to Section 80 HHC for determining the profits of business. Under the circumstances, as such, it cannot be said that the learned ITAT has committed any error in relying upon the decision of the Special Bench of ITAT in the case of **Lalsons Enterprises Vs. DCIT (Delhi) (SB)** (supra). Applying the ratio laid down by the Hon'ble Supreme Court in the case of **ACG Associated Capsules Pvt. Ltd. Vs. Commissioner of Income Tax** (supra) to the facts of the present case, the question No.(B) is answered against the revenue.

[5] In view of the above, the present appeal deserves to be dismissed and accordingly is dismissed.

**(M.R.SHAH, J.)**

**(R.P.DHOLARIA, J.)**

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