SUPREME COURT OF INDIA

Cambay Electric Supply Industrial Co. Ltd.

Vs

Commissioner of Income- Tax, Gujarat-II

Civil Appeals Nos. 785 and 783 of 1977

(V. D. Tulzapurkar and Y. V. Chandrachud JJ.)

11.04.1978

JUDGMENT

TULZAPURKAR.J–

These two appeals by special leave, one by the Commissioner of Income-tax, Gujarat, and the other by the assessee, against the Judgment of the Gujarat High Court in Income-tax Reference No. 115 of 1974 (Commissioner of Income-tax v.Cambay Electric Supply Industrial Co. Ltd. [1976] 104 ITR 744) raise two interesting question regarding the mode in which, and the fund from which, deduction of 8% contemplated by section 80E(1) of the Income-tax Act, 1961 (as it stood at the relevant time) should be computed.

The short facts giving rise to the question may be stated : The assessee - Cambay Electricity Supply and Industrial Co. Ltd. - carries on the business of generation and distribution of electricity at Cambay and, as such, is covered by the provisions of section 80E(1) and is entitled to claim the deduction contemplated by the said provision. The assessment in question relates to the assessment year 1967-68, the accounting year for which is the financial year ending March 31, 1967. During the accounting period which ended on March 31, 1967, the assessee-company earned an income of Rs. 46,319 from its said business. It appears that during this period it had sold some of its old machinery and buildings resulting in balancing charges contemplated by section 41(2) which the Income-tax Officer worked out at Rs. 7,55,807. It further appears that there was unabsorbed depreciation of Rs. 1,42,955 and unabsorbed development rebate of Rs. 1,11,658 aggregating to Rs. 2,54,613 of the earlier years which were required to be set-off against the profits of that period. The Income- tax Officer, while completing the assessment, determined the deduction admissible to the assessee under section 80E(1) of the Act in the following manner:
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Rs. Income from business as computed in the assessment order ... 46,319

Add : Profit under section 41(2) in respect ofsale of machinery and buildings ... 7,55,807

Total ... 8,02,126

Less: 8% deduction under section 80E(1)on Rs. 8,02,126 ... 64,170

-------- ... 7,37,956Less : Unabsorbed depreciation and development rebate :Depreciation Rs. 1,42,955Development rebate Rs. 1,11,658 ... 2,54,613 ---------- --------- Net income chargeable to tax ... 4,83,343

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It will appear clear from the above computation that the Income-tax Officer treated the item of Rs. 7,55,807 as profits attributable to the business of generation and distribution of electricity and allowed deduction at 8% thereon under section 80E(1). It would also be clear that the Income-tax Officer computed the relief/deduction admissible to the assessee under section 80E(1) at 8% on the amount of Rs. 8,02,126, that is to say, on the income before adjusting or setting of the unabsorbed depreciation and development rebate carried forward from the earlier year. When the aforesaid assessment order came to his knowledge, the Additional Commissioner of Income-tax called for and examined the record and proceedings in exercise of his powers under section 263 of the Act and after giving an opportunity to the assessee-company to show cause, took the view that the manner of computing the deduction admissible to the assessee under section 80E(1) was erroneous and prejudicial to the interests of the revenue, in that the deduction of 8% on the item of profit of Rs. 7,55,807 arising under section 41(2) had been wrongly allowed and that for the purpose of calculating the deduction of 8% the items in respect of the unabsorbed depreciation and development rebate should not have been excluded, and that if proper calculations as suggested by him were made, the assessee was not entitled to any deduction. He, therefore, set aside the order of the Income-tax Officer and directed that fresh assessment be made in accordance with law. Feeling aggrieved by the order passed by the Additional Commissioner of Income-tax, the assessee preferred an appeal to the Income-tax Tribunal. In the appeal as regards the item of Rs. 7,55,807, being profits arising from the sale of old machinery and buildings under section 41(2) of the Act, the Tribunal took the view that the said item of profits could not be treated in isolation or divorced from the profits and gains of the business of generation and distribution of electricity done by the assessee-company and that the said item will have to be regarded as profits "attributable to" though not "derived from" the business of generation and distribution of electricity and, as such, the said item was eligible to the deduction of 8% under section 80E(1) of the Act. On the question whether the unabsorbed depreciation and development rebate would be deductible in computing the profits under section 80E of the Act, the Tribunal, following the decision of the Mysore High court in the case of Commissioner of Income-tax v. Balanoor Tea and Rubber Co. [1974] 93 ITR 115, held that these two items could not be deducted in computing the deduction admissible under section 80E of the Act. The Tribunal accordingly allowed the appeal, set aside the order of the Additional Commissioner and restored that of the Income- tax Officer.

At the instance of the Commissioner of Income-tax, the Tribunal referred the following two question to the Gujarat High Court for its opinion :

"(1) Whether the Tribunal was correct in holding that the profits under section 41(2) of the Income-tax Act, 1961, arising from the sale of machinery and building, amounting to Rs. 7,55,807 should be taken into account while computing the deduction of 8 per cent. under section 80E(1) of the Act ?

(2) Whether unabsorbed depreciation and development rebate amounting to Rs. 2,54,613 is not deductible in computing profits under section 80E(1) of the Act ?"

The High Court, by its The Judgment of the Court was delivered bygment dated December 11, 1975, and December 24, 1975, Industrial Co. Ltd. [1976] 104 ITR 744 (Guj)], disposed of the

reference by answering the first question in favour of the assessee and the second question in favour of the revenue. In other words, the High Court upheld the view of the Tribunal on the first question while on the second question it took the view that the unabsorbed depreciation and development rebate were deductible before arriving at the figure that would be eligible to the deduction of 8% under section 80E(1) and, therefore, after deducting the aggregate amount of Rs. 2,54,613 from Rs. 8,02,126, the balance of Rs. 5,47,513 was eligible to the deduction of 8% under the said provision. Civil Appeal No. 783(NT) of 1977 has been preferred by the revenue in so far as the answer to the first question has gone against it, while Civil Appeal No. 785(NT) of 1977 has been preferred by the assessee inasmuch as the second question has been answered in favour of the revenue.

As regards the question raised in C.A.No. 783(NT) of 1977, the learned Solicitor-General appearing for the revenue has contended that the item of Rs. 7,55,807 represents the balancing charges arising out of the sale of old machinery and buildings worked out under section 41(2) of the Act and the same cannot be treated as any profits or gains "attributable to" the business of generation and distribution of electricity carried on by the assessee and as such the said item should not be taken into account while computing the deduction of 8% under section 80E(1) of the Act. He emphasized that under that section a deduction of 8% is permissible from "such profits and gains" meaning "profits and gains attributable to the business of generation and distribution of electricity" carried on by an assessee. He contented that a balancing charge contemplated under section 41(2) is really in the nature of a return of capital and not a return of revenue and it is only by reason of the fiction created by section 41(2) that the same is deemed to be a revenue receipt and has been made chargeable to income-tax as income of the business but it is well-settled that a legal fiction is to be limited to the purpose for which it is created and should not be extended beyond its legitimate field. He urged that the very fact that a deeming provision has been made under section 41(2) shows that it is not a revenue receipt but a capital receipt in the hands of an assessee. In support of his contention he placed reliance upon a decision of this court in Commissioner of Income-tax v. Bipinchandra Maganlal & Co. Ltd. [1961] 41 ITR 290 (SC), where the real nature of the balancing charge arising under the corresponding provision of the 1922 Act has been explained by this court as being a capital return or a capital receipt. He, therefore, contended that the item of Rs. 7,55,807 which is not really any profit or gain earned in the conduct of the business of generation and distribution of electricity cannot be taken into account while computing the deduction of 8% under section 80E(1) of the Act.

On the other hand, Mr. S.T. Desai, appearing for the assessee, contended that both the Tribunal as well as the High Court were right in coming to the conclusion that the said item of Rs. 7,55,807 was, on proper construction of section 80E(1), required to be taken into account before computing the permissible deduction of 8% contemplated by the provision. He pointed out that section 80E in the first place requires the computation of the total income of the assessee carrying on specified industry "in accordance with the other provisions of this Act"; secondly, such total income so competed should include "profits and gains attributable to the business of" the specified industry (here generation and distribution of electricity); and, thirdly, it is from such profits attributable to the business of the specified industry that the deduction of 8% should be made. He laid considerable emphasis on the aspect that the legislature has used the expression "attributable to the business of instead of "derived from the business of" and according to him the former being an expression of wider import would include an item like the balancing charge which may not be directly derived from the conduct of the business of the specified industry (here generation and distribution of electricity). He also urged that in its subsequent decision in the case of Commissioner of Income-tax v. Express Newspapers Ltd. [1964] 53 ITR 250 (SC), this court has explained that the balancing

charge contemplated under section 41(2) in substance partakes the character of "escaped profits" of the business carried on by an assessee and as such the item of Rs. 7,55,807 could be treated as profits attributable to the business of generation and distribution of electricity by the assessee. He also contended that even if the matter were to be looked at from the angle of the legal fiction created by section 41(2) of the Act, the said fiction could be extended so as to take into account the said item of Rs. 7,55,807 before computing the 8% deduction, for such extension, of the fiction would be within and for the purpose for which the same has been created.

In our view the answer to the question raised before us really turns upon the proper construction of the provision contained in section 80E(1) of the Act rather than on what is the real nature or character of a balancing charge arising under section 41(2) of the Act and it would, therefore, be proper to set out the provisions of section 80E as it stood at the relevant time :

"80E. Deduction in respect of profits and gains from specified industries in the case of certain companies. - (1) In the case of a company to which this section applies, where the total income (as computed in accordance with the other provisions of this Act) includes any profits and gains attributable to the business of generation or distribution of electricity or any other form of power or of construction, manufacture or production of any one or more of the articles or things specified in the list in the Fifth Schedule, there shall be allowed a deduction from such profits and gains of an amount equal to eight per cent. thereof, in computing the total income of the company.

(2) This section applies to –

(a) an Indian company; or

(b) any other company which has made the prescribed arrangements for the declaration and payment of dividends (including dividends on preference shares) within India,

but does not apply to any Indian company referred to in clause (a), or to any other company referred to in clause (b), if such Indian or other company is a company referred to in section 108 and its total income as computed before applying the provisions of sub-section (1) does not exceed twenty-five thousand rupees."

It was not disputed before us that the aforesaid provision contained in section 80E(1) has been enacted for the purpose of providing for certain special deduction to be made in computing the total income in the case of specified industries, over and above the other general deductions contemplated by the Act. It was further not disputed before us that the assessee being an Indian company engaged in the business of generation and distribution of electricity is a company to which the section applies and is entitled to claim the deduction of 8% contemplated by that provision and the only question is how and in what manner the said deduction should be computed. On reading sub- section (1) it will become clear that three important steps are required to be taken before the special deduction permissible thereunder is allowed and the net total income eligible to tax is determined. First, compute the total income of the concerned assessee in accordance with the other provisions of the Act, i.e., in accordance with all the provisions except section 80E; secondly, ascertain what part of the total income so computed represents the profits and gains attributable to the business of the specified industry (here generation and distribution of electricity); and, thirdly, if there be profits and gains so attributable, deduct 8% thereof from such profits and gains and then arrive at the net total income eligible to tax. As regards the first step mentioned above, the important words in sub-

section (1) are those that appear in parenthesis, namely, "as computed in accordance with the other provisions of this Act" and these words clearly contain a mandate that the total income of the concerned assessee must be computed in accordance with the other provisions of the Act without reference to section 80E and since in the instant case it is income from business the same as per section 29 will have to be computed in accordance with sections 30 to 43A which would include section 41(2). It is also clear that under the second step the profits and gains attributable to the business of the specified industry (here generation and distribution of electricity) forms a component of the total income spoken of in the first step. Reading these two steps together, therefore, it is obvious that in computing the total income of the concerned assessee the balancing charge arising as a result of the sale of old machinery and buildings and worked out as per section 41(2), irrespective of its real character, will have to be taken into account and included as income of the business. In other words, the balancing charge as worked out under section 41(2) will have to be taken into account before computing the deduction of 8% under the third step. On proper construction of sub-section (1) and having regard to the legislative mandate contained in the three steps that are required to be taken in the manner indicated above we are clearly of the view that the item of Rs. 7,55,807 will have to be taken into account before computing the 8% deduction contemplated by the said provisions.

The learned Solicitor-General has argued to the contrary by laying considerable emphasis on two aspects, first, the real nature of the balancing charge under section 41(2), which according to him is a return of capital and not a return of revenue and, secondly, under the second and third steps the 8% deduction is to be made from "profits and gains attributable to the business of" the specified industry (here generation and distribution of electricity). As regards the first aspect, on the question of real nature or true character of a balancing charge, two apparently divergent views would appear to have been taken by this court in two decisions. In the case of Bipinchandra Maganlal & Co. Ltd. [1961] 41 ITR 290 (SC), the question that arose for determination was whether a balancing charge which was brought to tax on the basis of deemed income and was, therefore, included in the assessable income of an assessee under the second proviso to clause (vii) of sub-section (2) of section 10 of the 1922 Act (equivalent to section 41(2) of the 1961 Act), could be taken into account while considering "smallness of profit" for purposes of deciding whether the case attracted the applicability of section 23A of the Act and this court took the view that the balancing charge was not real income but was made taxable income for the purpose of computation of the assessable income by legal fiction but on that account it did not become commercial profit and was not liable to be taken into account in assessing whether in view of the smallness of profits a larger dividend would be unreasonable; in that context this court observed that what in truth was a capital return was by a fiction regarded for the purposes of the Act as income and was made chargeable to income- tax but because of that its character was not altered and it was not converted into the assessee's business profits and that smallness of profit in section 23A had to be adjudged in the light of commercial principles and not in the light of total receipts, actual or fictional. In the subsequent decision in Express Newspapers case [1964] 53 ITR 250 (SC) this court has regarded a balancing charge as being the "escaped profits" of the business for which the assessee is made liable to tax. At page 254 of the report, the court explained the nature of the balancing charge way of illustration thus : "assume that the original cost a machinery or plant is Rs. 100 and depreciation allowed is Rs. 25; the written down value is Rs. 75. If the machinery is sold for Rs. 100, it is obvious that depreciation of Rs. 25 was wrongly allowed. If it had not been allowed, that amount would have swelled the profits to that extent. When it is found that it was wrongly allowed, that profit is brought to charge. The second proviso, therefore, in substance, brings to charge an escaped profit or gain of the business carried on by the assessee". These apparently divergent views have given rise to two

rival contentions urged before us by counsel on the other side. It is unnecessary in this case to go into the question whether the divergence is real or merely apparent, for, as we have said above, the answer to the question raised before us does not depend upon the real nature or true character of the balancing charge but upon proper construction of the sub-section (1) which contains the legislative mandate with regard to the manner in which three steps indicated therein are required to be taken for computing the deduction of 8% contemplated by that provision. It is true that by a legal fiction created under section 41(2) a balancing charge arising from sale of old machinery or building is treated as deemed income and the same is brought to tax; in other words, the legal fiction enables the revenue to take back what it had given by way of depreciation allowance in the preceding years since what was given in the preceding years was in excess of that which ought to have been given. This shows that the fiction has been created for the purpose of computation of the assessable income of the assessee under the head "Business income". It was rightly pointed out by the learned Solicitor General that legal fiction s are created only for a definite purpose and they should be limited to the purpose for which they are created and should not be extended beyond their legitimate field. But, as indicated earlier, the fiction under section 41(2) is created for the purpose of computation of assessable income of the assessee under the head "Business income" and under section 80E(1), in order to compute and allow the permissible special deduction, computation of total income in accordance with the other provisions of the Act is required to be done and after allowing such deduction, computation of total income in accordance with the other provisions of the Act is required to be done and after allowing such deduction the net assessable income chargeable to tax is to be determined; in other words, the legal fiction under section 41(2) and the grant of special deduction in case of specified industries are so closely connected with each other that taking into account the balancing charge (i.e., deemed profits) before computing the 8% deduction under section 80E(1) would amount to extending the legal fiction within the limits of the purpose for which the said fiction had been created.

As regards the aspect emerging from the expression "attribute to" occurring in the phrase "profits and gains attributable to the business of" the specified industry (here generation and distribution of electricity) on which the learned Solicitor-General relied, it will be pertinent to observe that the legislature has deliberately used the expression "attributable to" and not the expression "derived from". It cannot be disputed that the expression "derived from". Had the expression "derived from" been used, it could have with some force been contended that a balancing charge arising from the sale of old machinery and buildings cannot be regarded as profits and gains derived from the conduct of the business of generation and distribution of electricity. In this connection, it may be pointed out that whenever the legislature wanted to give a restricted meaning in the manner suggested by the learned Solicitor-General, it has used the expression "derived for", as, for instance, in section 80J. In our view, since the expression of wider import, namely, "attributable to", has been used, the legislature intended to cover receipts from sources other than the actual conduct of the business of generation and distribution of electricity.

For the aforesaid reasons and particularly on the true construction of the provision itself, we are of the view that both the Tribunal and the High Court were right in taking the view that the item of Rs. 7,55,807 was required to be taken into account while computing the deduction of the 8% contemplated by section 80E(1) of the Act. The revenue's appeal, therefore fails and is dismissed.

Turning to the appeal of the assessee, being Civil Appeal No. 785(NT) of 1977, the question is whether unabsorbed depreciation and development rebate are deductible or not in computing profits under section 80E(1) of the Act. Here again the answer to the question must depend upon the

construction of sub-section (1) of section 80E and the construction which we placed on the said provision while disposing of the revenue's appeal will furnish the correct answer to the question posed. As indicated earlier, sub-section (1) contemplates three steps being taken for computing the special deduction permissible thereunder and arriving at the net income exigible to tax and the first two steps read together contain the legislative mandate as to how the total income - of which the profits and gains attributable to the business of the specified industry forms a part of the concerned assessee is to be computed and according to the parenthetical clause, which contains the key words, the same is to be computed in accordance with the provisions of Act except section 80E and since in this case it is income from business the same will have to be computed in accordance with section 30 to 43A which would include section 32(2) (which provides for carry forward depreciation) and section 33(2) (which provides for carry forward of development rebate for eight years). In other words, in computing the total income of the concerned assessee, items of unabsorbed depreciation and unabsorbed development rebate will have to be deducted before arriving at the figure that will become exigible to the deduction of 8% contemplated by section 80E(1). On this construction, therefore, the High Court, in our view was right in deducting unabsorbed depreciation and development rebate aggregating to Rs. 2,54,613 from Rs. 8,02,126 and holding the balance of Rs. 5,47,513 being exigible to the 8% deduction.

The assessee attempted to challenge the aforesaid view by raising a couple of contentions. In the first place before the High Court it was strenuously urged, though not seriously before us, that the expression "total income" appearing in section 80E(1) has been used in its commercial sense and since neither the unabsorbed depreciation nor the unabsorbed development rebate has anything to do with commercial profits attributable to the business, the said two items would not be deductible before arriving at the figure that would be exigible to the 8% deduction. It is not possible to accept this contention for more than one reason. First, in sub-section (1) of section 80E, the expression "total income" is followed by the words : as computed in accordance with the other provisions of this Act" in parenthesis and the mandate of theses words clearly negatives the argument that the expression "total income" has been used in the sense of commercial profits. Secondly, the expression "total income" has been defined in section 2(45) of the Act as meaning "the total amount of income referred to in section 5, computed in the manner laid down in this Act" and when this definition has been furnished by the Act itself the expression as suggesting the contrary, be construed in accordance with such definition. Since the words in the parenthesis occurring in sub- section (1) lay down the manner in which the total income of the concerned assessee is to be computed there would be no scope for excluding items like unabsorbed depreciation and unabsorbed development rebate while computing the total income spoken of by sub- section (1) means commercial profits.

Counsel for the assessee next relied upon two decisions, one of the Kerala High Court in the case of Indian Transformers Ltd. v. Commissioner of Income-tax [1972] 86 ITR 192 and the other of the Madras High Court in the case of Commissioner of Income-tax v. L. M. Van Moppes Diamond tools (India) Ltd. [1977] 107 ITR 386, in both of which a view has been taken that the deduction under section 80E(1) has to be worked out before setting off the losses brought forward from the earlier years and the further argument based on this view is that if carried forward losses are not to be deducted then carried forward depreciation and carried forward development rebate-since all the three stand on the same footing-should not be deductible while working out the deduction under section 80E of the Act and in that behalf reliance was placed on a later decision of the Madras High Court in Commissioner of Income-tax v. Lucas-T. V. S. Ltd. (No. 2) [1977] 110 ITR 346. It may be stated that the first two decisions did not deal with the question of unabsorbed depreciation or unabsorbed rebate but merely dealt with the question of carried forward losses in the context of

section 80E(1), while the third decision dealt with all the three things, carried forward loss, carried forward depreciation and carried forward development rebate in the context of section 80E(1) and it was held that the deduction under section 80E(1) will have to be worked out before setting off or adjusting each of the three things. In that case, the Madras High Court held that as regards carried forward loss the point was covered by its earlier decision in L .M. Van Moppes' case [1977] 107 ITR 386 (Mad), that unabsorbed development rebate stood on the same footing as unabsorbed losses and as regards unabsorbed depreciation it took the view that since section 32(2) itself postponed the adjustment of unabsorbed depreciation to a stage subsequent to the set-off of business losses under section 72(2) and set-off the losses in speculation business under section 73(3), the unabsorbed depreciation cannot be adjusted or deducted because it for the purpose of section 80E the previous years losses could not be set off it will be a fortiori that the unabsorbed depreciation could not be adjusted inasmuch as from the very sequence the adjustment of unabsorbed depreciation could come only after the adjustment of the unabsorbed losses of the previous years. It will thus appear clear that in the last mentioned case unabsorbed development rebate was held to be non-deductible for the same reasons for which unabsorbed loss could not be deducted under the earlier decision and the unabsorbed depreciation was held to be non-deductible on the basis of a priori reasoning. The question that arises for consideration, therefore, is whether the view taken in regard to non-deductibility of carried forward losses while computing the total income for the purpose of granting the 8% deduction under section 80E in the first two decisions is correct. It is true that in the instant case the question of deductibility or otherwise of carried forward losses of earlier years in the context of section 80E has not directly arisen before us but since counsel for the assessee has raised a contention about non- deductibility of unabsorbed depreciation and unabsorbed development rebate on the basis of the view taken by the Kerala High Court in Indian Transformers' case [1972] 86 ITR 192 and the Madras High Court in L.M. Van Moppes case [1977] 107 ITR 386, in regard to non- deductibility of unabsorbed losses of earlier years, we are constrained to express our opinion on the validity of the view taken in those two cases. In our opinion the view taken in Indian Transformers' case and L. M. Van Moppes' case in regard to the non- deductibility of unabsorbed losses of the earlier years in the context of computing the deduction under section 80E of the Act is open to grave doubts. In the first place, such a view runs counter to the legislative mandate contained in the three steps required to be taken under sub-section (1) of section 80E as discussed earlier. Secondly, the main reasoning given by the Kerala High Court for taking such a view in Indian Transformers case - the Madras High Court in L. M. Van Moppes' case has merely followed the Kerala decision- does not bear scrutiny. After pointing out that Chapter IV of the 1961 Act deals with the computation of income falling under the various heads mentioned in section 14 of the Act that Chapter VI in which section 72 occurs deals with the aggregation of income and set-off or carry forward of loss and that section 80E deals with deduction to be made in computing total income, the Kerala High Court has proceeded to observe thus - See [1971] 86 ITR 192, 194 :

"Computation as such is used only in the heading in Chapter IV. Section 66 also provides that in computing the total income of an assessee there shall be included all income on which no income-tax is payable under Chapter VII, etc. What is provided in section 66 is also relating to computation. Similarly, the same words are used in section 67. But, there are no such words in section 72. Section 72 speaks of the net result of the computation under the head 'Profits and gains of business or profession'. We consider that the set-off permitted under section 72 is from an amount arrived at after applying the provisions of Chapter IV along with other section s of the Act such as sections 66 and 67, etc., dealing with computation of income and after permitting the deductions under section 80E."

The court has further observed that in its opinion the deduction under section 80E is a special benefit given to a company which satisfies the conditions under section 80E and the deduction permissible thereunder is only from profits and gains attributable to the specified activities and this benefit should not be diminished by the other benefits conferred by the Act, such as the right to have the previous losses set off, that the two serve different purposes and the benefint of not must be available to an assessee, without purposes and the benefit of both must be available to an assessee, without the one impinging on the other. It will thus appear that the Kerala High Court has regarded section 72 appearing in Chapter VI as a provision un- connected with the computation of the total income of an assessee and a provision which comes into operation at a stage subsequent to the computation of the total income arising from business done in accordance with section 30 to 43A occurring in Chapter IV of the Act and, therefore, the unabsorbed losses cannot be set off before calculating the deduction under section 80E. It is not possible to accept the view that section 72 has no bearing on, or is unconnected with, the computation of the total income of an assessee under the head "Profits and gains of business or profession". Actually, section 72(1) provides that where the net result of computation under the head "Profits and gains of business or profession" is a loss and such loss cannot be or is not wholly set off against the income under any head of income in accordance with the provisions of section 71, so much of the loss as has not been so set off, subject to the other provisions of the Chapter, shall be carried forward to the following assessment year and shall be set of off against the profits and gains, if any, of any business or profession for that assessment year. Therefore, section 72(1) has a direct impact upon the computation under the head "Profits and gains of business or profession". In other words, the correct figure of total income, which is otherwise taxable under other provisions of the Act, cannot be arrived at without working out the net result of computation under the head "Profits and gains of business or profession". Further, the question whether special benefit under section 80E as well as the normal or usual benefit of carry forward of losses of previous years should both be available to an assessee, without one impinging on the other must depend upon the intention of the legislature and such intention has to be gathered from the language employed. In this view of the matter it is extremely doubtful whether in spite of the legislative mandate contained in the three steps provided for by sub-section (1) of section 80E, the carried forward losses would not be deductible before working out the 8% deduction contemplated by section 80E and, therefore, the contention that by parity of reasoning or on a priori reasoning unabsorbed development rebate and unabsorbed depreciation should be held to be non-deductible before working out the 8% deduction under section 80E(1) cannot be accepted. As observed earlier, on a proper construction of the provision contained in sub-section (1) of section 80E, items like unabsorbed depreciation and unabsorbed development rebate will have to be deducted in arriving at the figure which would be exigible to deduction of 8% under section 80E(1).

Reference was also made by counsel for the assessee to the decision of the Mysore High Court in the case of Commissioner of Income-tax v. Balanoor Tea and Rubber Co. Ltd. [1974] 93 ITR 115. In our view that decision has nothing whatever to do with the question posed before us. In that case the question was whether the loss incurred by an assessee in non-priority business could be set off against the profits and gains made by the assessee in the priority business while computing the 8% deduction under section 80E and the High Court upheld the Tribunal's view that, for the purpose of allowing a deduction under section 80E, the words "such profits" occurring in that section mean "the profits and gains attributable to an activity as specified in the 5th Schedule of the Act" and, therefore, the deduction was required to be worked out without reference to the loss incurred in non-priority business. The decision was rendered on the language of section 80E(1) but it cannot avail the assessee on the point raised in the appeal.

In the result, the assessee's appeal also fails and the same is dismissed.

In the circumstances, there will be no order as to costs in both the appeals.

Appeals dismissed.

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