CALCUTTA HIGH COURT

Commissioner of Income-Tax

Vs

Belliss and Morcom (I.) Ltd

(Sabyasachi Mukharji and S M Guha, JJ.)

18.02.1981

JUDGMENT

Sabyasachi Mukharji, J.

1. In this reference under Section 256(1) of the I. T. Act, 1961, the following question has been referred to this court :

> "Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that for the purposes of allowing a deduction under Section 80-I the words 'such profits' occurring in that section mean 'the profits and gains attributable to any priority industry' without deducting therefrom any loss arising in any other business activity under Section 70 or Section 71 of the Income-tax Act, 1961 ?"

2. This reference relates to the assessment for the assessment year 1971-72. The ITO dealt with the claim for deduction under Section 80-I of the I.T. Act, 1961. He observed in his order, inter alia, as follows :

"Deduction : Under Section 80-I Theassessee claimed relief Under Section 80-I amounting to Rs. 1,23,301 calculated @ 8% on a profit of Rs. 15,53,761 attributable to priority industry. But the gross total income was determined at Rs. 3,78,573 as above. It appears that the gross income calculated by the assessee (sic). This indicates that the priority income was offset by loss from non-priority business and the gross total income as computed above represents net priority income. Hence, relief Under Section 80-I is allowed @ 8% on Rs. 3,78,573.

Rs.

30,286 Total income :

3,48,287 Rounded off to 3,48,290

3. There was subsequently an appeal and then a further appeal to the Tribunal. One of the grounds raised by the revenue in the appeal before

the Tribunal against the order of the AAC allowing the assessee's contention related to the mode of computation of relief under Section 80-I of the I.T. Act, 1961. The Tribunal in its order on this aspect observed, inter alia, as follows :
"The second ground relates to the mode of computation of the relief Under Section 80-I of the Income-tax Act, 1961. The assessee claimed to have made a profit of Rs. 15,53,761 in its priority industry and suffered losses in its other business activities. After setting of the losses in the other activities against the profit of Rs. 15,53,761 in the priority industry, the ITO arrived at the figure of Rs. 3,78,573, which, according to him, was the assessee's gross total income and also the net income from the priority industry. He held that deduction at 8% under Section 80-I was allowable only on that net profit of Rs. 3,78,573 but not on the figure of Rs. 15,53,761."

4. Therefore, the basic facts are as follows : The assessee had made a profit of Rs. 15,53,761 on his priority industry and the assessee had also suffered losses in his other business activities. After setting off the losses in other business activities against the profit of Rs. 15,53,761 in the priority industry, the ITO arrived at the figure of Rs. 3,78,573 which, according to him, was the assessee's gross total income and also the net income from the priority industry. He held that the deduction at 8% under Section 80-I of the Act was allowable only on the net profit of Rs. 3,78,573 but not on the figure 15,53,761 as contended for by the assessee. Both the AAC as well as the Tribunal, relying on the decision of the Kerala High Court in the case of Indian Transformers Ltd. [1973] 86 ITR 192, as well as the decision of the Mysore High Court in the case of Balanoor Tea and Rubber Co. [1974] 93 ITR 115, held that the assessee was entitled to a deduction under Section 80-I with reference to profits amounting to Rs. 15,53,761 in the priority industry. It is out of this order of the Tribunal that the question indicated above has been referred to this court.

5. Therefore, we are concerned with the question whether the assessee is entitled to the relief on the sum of Rs. 15,53,761, which indisputably is the profit from priority industry, or whether it is only entitled to relief on the sum of Rs. 3,78,573, which was the figure arrived at by setting off the losses suffered in "other activities", viz., non-priority activities of the assessee, against the profits of the priority industry.

6. In order to resolve this question, it would be material to refer, in our opinion, primarily to the wording of Section 80-I, as it stood at the relevant time. This group of sections, which deals with

the deductions to be made in computing the total income, is contained in Chap. VI-A of the I.T. Act, 1961. The different provisions of this section have undergone several changes from time to time. It may, however, be mentioned that the section contains a definition clause, viz., Section 80B, and in Sub-clause (5) of Section 80B for the purpose of that Chap. VI-A, gross total income has been defined to mean as follows :

" 'Gross total income' means the total income computed in accordance with the provisions of this Act, before making any deduction under this chapter or under Section 280-O ;and without applying the provisions of Section 64."

7. Incidentally, we may mention that Section 2(45) of the Act defines "total income" as the total income referred to in Section 5 computed in the manner laid down in the Act. The section with which we are presently concerned is Section 80-I, which at the relevant time was as follows :

"80-I. (1) In the case of a company to which this section applies, where the gross total income includes any profits and gains atributable to any priority industry, there shall be allowed, in accordance with and subject to the provisions of this section, 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 domestic company, save in a case where such company is a company which is referred to in Section 108 and has a gross total income of fifty thousand rupees or less.

(3) Where a company to which this section applies is entitled also to the deduction under Section 80H,. the deduction under Sub-section (1) of this section shall be allowed with reference to the amount of the profits and gains attributable to the priority industry or industries as reduced by the deduction under Section 80H in relation to such profits and gains."

8. We may incidentally mention that prior to Section 80-I this subject was dealt with in Section 80-E which was inserted by the Finance Act of 1966, with effect from 1st April, 1966. That section was deleted and the present Section 80-I was introduced with effect from 1st April, 1968. We may mention that this Section 80-I has also subsequently been deleted. It would also be material, in view of several contentions raised by learned advocates for both the parties, to refer to Section 80E, as it stood prior to the introduction of Section 80-I. The same section roads as follows:

"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."

9. We may also refer that Chap. VI-A deals with several sections, viz., Sections 80J and 80H, which deal with deductions in the case of new industrial undertakings employing displaced persons, etc., Section 80M which deals with deduction in respect of certain inter-corporate dividends, a section which was considered by the Supreme Court in a decision to which we shall have occasion to refer, Section 80-O, etc., the most material portion for our purposes appears to be the legislative mandate to allow a deduction from "such profits and gains" of an amount equal to 8 per cent. thereof, meaning thereby, the profits and gains of any priority industry of a company to which Section 80-I applied. Therefore, the Legislature enjoins, in our opinion, clearly to give certain companies, which are priority industries, from the profits and gains of such priority industry, certain relief. This intention of the Legislature is manifest from the language used in the section. There is no dispute that the present assessee is a company to which Section 80-I applies. If such a company is also entitled to other deductions, then such deductions are enjoined to be deducted from the deductions allowed under Sub-section (1) of Section 80-I. This would be manifest from a reference to Sub-section (3) of Section 80-I read in conjunction with Sub-section (1) of Section 80-I. In our opinion, the expression "such profits" is descriptive of the profits of the priority industry which is entitled to relief. That seems to be the manifest intention of the Legislature. This question was, however, examined from different angles by different courts.

10. Learned advocate for the revenue urged that the expression "gross total income" includes "any profits and gains" attributable to any priority industry and pointed out to the fact that the gross total income of such priority industry which, according to him, would be entitled to relief,

should be computed in the manner contemplated by Sub-clause(5) of Section 80B of the Act, that is to say, the total income computed in accordance with the provisions of this Act before making any deduction under Chap. VI-A, and, without applying the provisions of Section 64, with which we are not concerned in this case.

11. It is true that the computation of the gross total income of a priority industry, naturally, should be done in accordance with the provisions of the Act, i.e., the profits and gains of the priority industry should be entitled to be set off against the profits and gains of such priority industries or against the losses or depreciation to carry forward the depreciation allowances of such priority industry. To that extent the position cannot be disputed and that is not disputed in the instant case. But what was contended before us was that the expression "such profits" from which deduction is eligible, and "deduction" are expressions which should be understood in the light of Sub-section (5) of. Section 80B of the Act, namely, the deduction, enjoined by the Act, from the profits and gains of an industry which had carry forward depreciation or other losses which should be taken into consideration in computing such profits.

12. Carried to the logical conclusion, it appears to us that this will lead to an absurd result which will defeat the purpose of the section. The purpose of the section seems to be, from the langugage used, to encourage development of priority industries. Take the case of an assessee who earns a profit of Rs. 1 lakh from a priority industry. He has other income from other activities which are not priority industries and if those sources are added up in computing his total income, it must be in conjunction with Sub-section (5) of Section 80B and thereby he earns a sum of Rs. 9 lakhs, and then the relief to which he would be entitled, would be Rs. 10 lakhs which seems to be a manifestly absurd result of the legislative intent. Similarly, the case of deduction if allowed in setting off the losses or other carried forward depreciation allowances of non-priority industry, then in some cases the entire profits or gains of the priority industry might be wiped out. In this case, there was a profit of Rs. 3,78,573, by setting off the losses of non-priority industry against the profit of Rs. 15,53,760, to the priority industry. But, logically, suppose a case where there will be no profit at all by setting off, then the entire purpose would be defeated if the expression "such profits" which is entitled to relief under Section 80-I was construed in the manner as contended for by the revenue. This position, therefore, appears to us to be quite manifest that the expression "such profits" to which relief as contemplated under the section is qualitative, viz., the profits of the priority industry only and descriptive of the same.

13. This view which we are taking appears to be in consonance with the view of the Division Bench of the Mysore High Court in the case of CIT v. Balanoor Tea and Rubber Co. [1974] 93 ITR 115. There, the assessee had derived an income of Rs. 1,18,214 from tea plantation industry which was a priority industry entitled to a deduction of 8% from such profits and gains under Section 80E of the I.T. Act, 1961, which we have set out hereinbefore, as it stood at the relevant

time. The assessee had claimed that in computing its taxable income, 8% should first be deducted from its income from tea leaving a balance of Rs. 1,08,757 and from the latter amount, its loss in plastic business amounting to Rs. 48,105 should be deducted, resulting in an income of Rs. 60,652. The ITO, on his interpretation of Section 80E, held that the loss from the plastic business of Rs. 48,105 should first be deducted from Rs. 1,18,214, the income from tea industry, leaving a balance of Rs. 70,109, and 8% of the latter amount should be deducted under Section 80E resulting in an income of Rs. 64,501. The Appellate Tribunal, however, upheld the assessee's contention. The Mysore High Court held that the Tribunal was correct in holding that for the purpose of allowing a deduction under Section 80E, as it stood at the relevant time, the words "such profits" occurring in that section meant "the profits and gains attributable to an activity as specified in the 5th Schedule of the Act", which included tea industry, before deducting any loss incurred in any other business activity. Reliance was placed before the Division Bench on behalf of the revenue on a circular of the CBDT. The Division Bench was of the view that the said circular dated 21st July, 1966, which the Division Bench of the Mysore High Court had set out in the said judgment, was not correct. Dealing with the construction of the section, the Division Bench observed, at p. 122 of the report, as follows :

"The first pre-requisite condition in order to entitle the assessee to the benfits of Section 80E is that the total income as computed in accordance with the provisions of the Act should include any profits and gains attributable to the business of a priority industry. The quantum of deduction is 8 per cent. of the profits and gains attributable to the business of a priority industry and that deduction has to be made in the process of computing the total income of the company.

If the contentions of Sri Rajasekhara Murthy were to be accepted, in the illustration given in paragraph 27 of the circular referred to above, it would be open to the assessing authority to deduct the whole of the loss from the profits and gains of the business from the specified priority industry and the assessee cannot insist that the loss should be set off in the first instance against its business profits other than the profits from specified priority industries."

14. We must, however, note in fairness to the learned advocate for the revenue that he did not seek any support from any circular issued by the CBDT. We are in respectful agreement with the aforesaid observations of the Division Bench. This view of the Division Bench, in our opinion, is supported by the ratio of the decision of the Supreme Court in the case of Cloth Traders (P.) Ltd. v. Addl. CIT [1919] 118 ITR 243. There, the Supreme Court was concerned with the deduction permissible under Section 80M of the Act; The Supreme Court noted that Section 99(1)(iv) of the I.T. Act, 1961, granted exemption from super-tax in respect of "any dividend from an Indian company" and these words could not mean anything else but the full amount of dividends, according to the Supreme Court, derived from an Indian company. The Supreme Court was further of the view that this did riot mean dividend from an Indian company minus any expenses

incurred in earning it or less any deduction allowable under the Act. The words "the following amounts which are included in the total income" in the opening part of Section 99(1), according to the Supreme Court, did not have any limitative effect. The Supreme Court observed that these were descriptive of items of income included in the total income and were not indicative of the quantum of the amounts included under different items in the computation of total income. The Supreme Court was of the view that the exemption from super-tax granted under Clause (iv) of Sub-section (1) of Section 99 would be applicable only if the particular item of income, namely, "dividend from an Indian company", was included in the total income. What was exempted was dividend from an Indian company, which would only mean the full amount of dividend received from the Indian company. The rebate on income under Section 85A which was to be calculated by applying the average rate of tax to the income by way of dividend from an Indian company, which could only mean the full amount of dividend received from an Indian company. The words " the income so included" did not refer, according to the Supreme Court, to the quantum of the income included but only to the category of income included, that is to say, "income by way of dividends from an Indian company". The Supreme Court was of the view, that the deduction permissible under Section 80M was to be calculated with reference to the full amount of dividends received from a domestic company and not with reference to the dividend income as computed in accordance with the provisions of the Act, that is to say, after making deductions provided under the Act. The words "where the gross total income of an assessee.....includes income by way of dividends from a domestic company" in Section 80M merely prescribed a condition for the applicability of the section, viz., that the gross total income must include this category of income described by the words "income by way of dividends from a domestic company". If the gross total income included in it this particular category of income, whatever might be the quantum of such income included, the condition, according to the Supreme Court, would be satisfied and the assessee would be eligible for deduction of the whole or 60 per cent. of "such income", as the case may be. The words "such income could not have any reference to the quantum of the income included but could refer only to the category of income included, viz., income by way of dividends from a domestic company. The possibility that the income by way of a dividend might exceed the quantum of such income inclusive of the gross total income was taken care of by Section 80M(2) which provided that the aggregate amount of deduction should not in any case exceed the gross total income. The obseivations of the Supreme Court in Cloth Traders (P.) Ltd. v. Addl. CIT are instructive and, in our opinion, decisive on this aspect though the Supreme Court was not dealing with either Section 80E or 80-I of the Act. This position is further strengthened by the introduction of Section 80AA and Section 80AB by the Finance (No. 2) Act of 1980. That was an appeal which the Supreme Court was deciding from the decision of the Gujarat High Court in the case of Addl. CIT v. Cloth Traders (P.) Ltd. [1974] 97 ITR 140. It appears thaton thequestion of construction of Clause (iv) of Sub-section (1) of Section 99, this

High Court as well as the High Courts at Bombay and Madras, had taken similar views while the Gujarat High Court in the decision under appeal took a contrary view. The Supreme Court referring to the Calcutta decision in the case of CIT v. Darbhanga Marketing Co. quoted from the observations of the Division Bench at p. 77 of the report with approval at p. 250 of [1979] 118 ITR 243. There, the Supreme Court observed, inter alia, as follows :

"The expression 'which are included in his total income' in Subsection (1) of Section 99 and 'incomes forming part of total income' in the heading are descriptive of the items included in the computation of the total income and not indicative of the quantum of the amounts included under the different items in the computation of total income. Such a construction of these expressions would be in harmony with the obvious meaning of the expression ' dividend received '."

15. In this connection reference may be made to the observations of the Supreme Court at p. 257 of the report where the Supreme Court analysed the scheme of. the different sections by which deductions were allowable under Chap. VI-A. It will be instructive to refer to the observations of the Supreme Court at pp. 258-259 of the report where the Supreme Court, inter alia, had observed as follows :

"The whole of such income, that is, income by way of dividends from a domestic company or 60 per cent. of such income, as the case may be, would be deductible from the gross total income for arriving at the total income of the assessee. The words 'where the gross total income of an assessee...includes any income by way of dividends from a domestic company ' are intended only to provide that a particular category of income, namely, income by way of dividends from a domestic company, should form a component part of the gross total income. These words merely prescribe a condition for the applicability of the section, namely, that the gross total income must include the category of income described by the words 'income by way of dividends from a domestic company'. If the gross total income includes this particular category of income, whatever be the quantum of such income included, the condition would be satisfied and the assessee would be eligible for deduction of the whole or 60 per cent. of 'such income'. Now, if the words 'where the gross total income of an assessee...includes any income by way of dividends from a domestic company' in the opening part of the section refer only to the inclusion of the category of the income denoted by the words 'income by way of dividends from a domestic company' and not to the quantum of the income so included, the words 'such income' cannot have reference to the quantum of the income included, but they must be held referable only to the category of the income included, that is, income by way of dividends from a domestic company. The words 'such income' as a matter of plain grammar must be substituted by the words ' income by way of dividends from a domestic company ' in order to arrive at a proper construction of the section and if that is done, it would be obvious that the deduction is to be in respect of the whole or 60 per cent of the 'income by way of dividends from a domestic company

which can only mean the full amount of dividends received from a domestic company. The deduction permissible under the section is, therefore, to be calculated with reference to the full amount of dividends received from a domestic company and not with reference to the dividend income as computed in accordance with the provisions of the Act, that is, after making deductions provided under the Act." -

16. We are also adopting this ratio of the said decision and we are of the view that the expression "where the gross total income includes any profits and gains attributable to any priority industry is descriptive of the types of income or profits which will be entitled to relief, and also, the expression "such profits" must relate to the quality of the profits or descriptive of the profits, that is to say, profits of the priority industry.

17. Other High Courts had also occasions to consider this contention. This question was canvassed before the Kerala High Court in the decision in the case of Indian Transformers Ltd. v. CIT . There, the Division Bench of the Kerala High Court observed that Section 80E, as it stood on the relevant date, was a special provision and permitted deduction from profits and gains attributable to specific activities like 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. The deduction under Section 80E, according to the Kerala High Court, was a special benefit given to the company which satisfied the condition laid down and the deduction of 8 per cent. admissible under the section was only from profits and gains and attributable to the specific activities which were referred to in the section. The Kerala High Court was of the view that the benefits should not be diminished by any other benefits conferred by the Act, such as, the right to have the previous, losses set off. The two served different purposes and the benefit of both must be available without the one impinging on the other. The wording of Section 80E, now Section 80-I, which talked of total income, was also an indication that the deduction must be made before the losses pertaining to the previous year were set off under Section 72 of the Act. We are also in respectful agreement with the conclusion arrived at by the Division Bench of the Kerala High Court. A different view, however, was expressed by the Gujarat High Court in two other decisions which we must presently note. The Gujarat High Court was of the view in the case of CIT v. Cambay Electric Supply Industrial Co. Ltd, [1976] 104 ITR 744 that Section 80E(1) contemplated the working out of the total income of the assessee as computed in accordance with the other provisions of the Act. It was contended by the revenue that when working out the total income as computed in accordance with the other provisions of the Act, one should deduct the depreciation allowance and the development rebate as contemplated under Section 32 and Section 33 of the Act. It was contended for the assessee that the expression "total income" in Section 80E(1) was used in the commercial sense and neither a carried forward depreciation nor a development rebate had anything to do with the

commercial profits and gains attributable to the profits of the business under Section 80E(1). The Gujarat High Court was of the view that the deduction of 8 per cent. contemplated by that section was to be worked out not on the total income but on that portion of the profits and gains which were attributable to the specified industries. The Gujarat High Court was also of the viey that it was not every profit and gain attributable to the specified industry which became the basis of deduction of 8 percent, because the use of the words "such" with reference to the "profits and gains" appearing in the section, indicated that the "profits and gains" were those which were referred to in the first part of the section which referred to those profits and gains which were included in the total income as computed in accordance with the provisions other than Section 80E. If it was to be held that the words "total income" were used in the commercial sense then the words in the section "as computed in accordance with the other provisions in the section of the Act", according to the Gujarat High Court, would become redundant, and without any effect, and the Gujarat High Court was of the view that the construction which ignored the words used by the Legislature or which rendered these words purposeless or redundant was not permissible. The Gujarat High Court was further of the view that the purpose of Section 80E would be defeated if double allowance were given for one thing, viz., depreciation, carried forward loss, and also the relief, under the Act. The Gujarat High Court was of the view that the Legislature had provided three important stages under Section 80E, viz., (1) to find out without reference to the provision of Section 80E what was 1he total income of the assesee concerned, if the same was computed in accordance with the other provisions of the Act, (2) having done that, find out whether any of the components of the total income thus arrived at represented the profits and gains of the business attributable to the industry specified in Section 80E, and (3) if there was any component of the type referred to in Clause (2) above, deduct 8 per cent. thereof from such profits and gains and then compute the total income which becomes exigible to tax. So far as the Gujarat High Court has expressed the view, that the construction which ignored the words used by the Legislature and which rendered the words purposeless should be avoided, we are in respectful agreement. But, in our opinion, the key to the problem lies in the expression "such profits" because it is "such profits" which is exigible to relief in the computation of the gross total income in accordance with the provisions of the Act, and it does not, as such, limit the application of the relief in any manner. It is true that normally double relief should not be contemplated. But, in this section, we have the indication in Sub-section (3) of Section 80-I where the Legislature intended not to give any double deduction ; in certain cases the Legislature has expressly said so. But while the Legislature expressed categorically to give the relief to priority industry, in our opinion, it would be an improper way to read the Legislature's intention in such a manner as would be curtailing the effect of the same, that is to say, by working out such profits by setting off a carried forward depreciation or losses from non-priority industry. This view of the Gujarat High Court was also reiterated in a subsequent decision which dealt which

Section 80-I, viz., in the decision in the case of CIT v. Amul Transmission Line Hardware P. Ltd. [1976] 104 ITR 771 (Guj). The Gujarat High Court was of the view that Section 80-I was the same as Section 80E in all material respects and followed the ratio of the previous decision and was of the view that for the purpose of working out 8 per cent. deduction in respect of the profits and gains from priority industry contemplated by Section 80E of the I.T. Act, 1961, it should be made after setting off the unabsorbed loss, the depreciation and development rebate carried forward from the earlier years.

18. For the reasons we have mentioned hereinbefore, we are, however, unable to accept this view with great respect to the Gujarat High Court. We may also point out that the Division Bench of the Madras High Court had also occasion to express a view different from that of the Gujarat High Court in the case of CIT v. L. M. Van Moppes Diamond Tools (India) Ltd.

[1977] 107 ITR 386, where the Division Bench of the Madras High Court was of the view that the language of Section 80E of the I.T. Act, 1961, made it clear that so long as the total income as computed in accordance with the other provisions of the Act included any profits and gains attributable to the priority industries, the assessee would be entitled to a rebate of 8 per cent. on the said profits and gains attributable to such priority industries. The Madras High Court was further of the view that neither the residuary income nor the total income had any bearing on the question and so long as the total income as computed under the provisions of the Act included profits and gains attributable to the priority industries, the assessee would be entitled to the rebate of 8 per cent. on the said profits and gains of the priority industries. The language of ihe section itself showed that there was no scope for a setting off of the earlier years' losses or losses arising out of other business activities of the assessee against the profits and gains attributable to the priority industries before the provisions of that section were applied. Now, in this case, one significant factor has to be kept in mind that set-off was being made against the profits of the priority industry against the losses of the priority industry. In" that context, the Madras High Court made the aforesaid observations. The facts of the instant reference before us are entirely different. Here, what the revenue is attempting to do is to set-off the profits of the priority industry against the losses from non-priority industry in order to minimise the quantum of relief to which the assessee is entitled under Section 80-I. This distinction has to be kept in view in considering the subsequent decision of the Supreme Court because the Madras High Court had made certain observations about the setting off of losses and referred to the provisions of Sections 70, 71 and 72 of the Act which did not meet with the approval of the subsequent decision of the Supreme Court, which we shall presently note.

19. The Supreme Court in the case of Cambay Electric Supply Industrial Co. Ltd. v. CIT , was deciding an appeal from the first Gujarat decision, which we have referred to hereinbefore. We must observe that the said decision, i. e., Gujarat decision, was concerned with setting off of the

profits of a priority industry against the losses or depreciation of a priority industry. The Gujarat High Court in the first decision was not concerned, as we are in the present case, viz., the question of setting off of the profits of priority industries against the losses of non-priority industries. Similarly, the Mysore High Court in the case of CIT v. Balanoor Tea & Rubber Co. [1974] 93 ITR 115, which we have referred to hereinbefore, was also not concerned with the same position. This distinction has to be kept in view, because though reference was made before the Supreme Court to the Mysore decision referred to hereinbefore.

the Supreme Court observed that the decision had nothing to do with the facts before the Supreme Court, because in that case the question was whether the loss incurred by an assesses in a non-priority industry could be set off against the profits and gains made by the assessee in the priority business while computing deduction of 8 per cent. under Section 80E and the High Court upheld the Tribunal's view that for the purpose of allowing deduction under Section 80E, the words "such profits" occurring in that section meant the profits and gains attributable to an activity 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 industry. The Supreme Court noted that the decision was rendered in the language of Section 80-I. The same are the facts before us in the present reference, though the language used in Section 80-I is similar language. So far as the decision of the Kerala High Court, which we have referred to hereinbefore and so far as the decision of the Madras High Court, which we have referred to hereinbefore, the Supreme Court observed that the said decision was open to grave doubts. We must reiterate again that the said two decisions, that is to say, the decision of the Kerala High Court and that of the Madras High Court referred to hereinbefore, were decisions dealing with the question of setting off of- all the profits of priority industry against the losses of priority industry and thereby arriving at the profit of such priority industry. That is not the situation here. The Supreme Court generally observed that in computing the total income of the assessee carrying on the business of an industry specified under Section 80E, as it stood at the relevant time, of the I.T. Act, 1961, for the purpose of the special deduction permissible thereunder, the balancing charge arising as a result of the sale of old machinery and buildings and worked out in accordance withs. 41(2), irrespective of its real character, had to be taken into account and included as income of the business. In other words, the balancing charge would have to be taken into account before computing the deduction of 8 per cent. under Section 80E. From the facts it appears that the said balancing charge of the machinery sold was priority industry. The legal fiction, according to the Supreme Court, under Section 41(2) and the grant of special deduction under Section 80E in the case of specified industries were so closely connected with each other that taking into account the balancing charge (i.e., the deemed profits) before computing the 8 per cent. deduction under Section 80E(1), would amount to extending the legal fiction within the limits of the purpose for which the fiction had been created. The Supreme Court was of the view that the Legislature had

deliberately used the expression "attributable to", having a wider import than the expression "derived from", thereby intending to cover receipts from sources other than the actual conduct of the business of the specified industry. The Supreme Court emphasised that the important words in Section 80E(1) were those that appeared in parenthesis, viz., "as computed in accordance with the other provisions of the Act", and, since it was income from business, the same, in view of Section 29, had to be computed in accordance with Sections 30 to 43A, which would include Section 41(2) (providing for the balancing charge). Therefore, the Supreme Court was not directly concerned with the quantum of profit which is descriptive of the expression "such profits".

20. Learned advocate for the revenue made an argument that in the decision of the Supreme Court in the case of Cloth Traders (P.) Ltd. v. Addl. CIT , no reference had been made to the decision of the Supreme Court in the case of Cambay Electric Supply Industrial Co. Ltd. v. CIT . The reasons, first, it may be, that the question involved was different. Furthermore, it must be reiterated that the decision in the case of Cloth Traders (P.) Ltd. [1979] 118 ITR 243 was a decision rendered by three learned judges, while the decision in the case of Cambay Electric Supply Industrial Co. Ltd. [1978] 113 ITR 84 of the Supreme Court was a decision rendered by two learned judges.

21. Our attention was also drawn to another decision of the Supreme Court in the case of CIT v. Patiala. Flour Mills Co. Ltd. . Our attention was also drawn to the decision of the Supreme Court in the case of CIT v. S. S. Sivan Pillai . Though the aforesaid decisions dealt with different sections the ratio of the said decisions are in consonance with the views we are taking in this case. It appears, however, that the attention of the Supreme Court was not drawn to the last two mentioned cases.

22. In the view we have taken for the reasons mentioned hereinbefore, we are of the opinion that the Tribunal was right in its conclusion and the question must be answered in the affirmative and in favour of the assessee.

23. In the facts and circumstances of the case, parties will pay and bear their own costs.

Sudhindra Mohan Guha, J.

24. I agree.