

# **BOMBAY HIGH COURT**

Tata Iron & Steel Co. Ltd

Vs

N.C. Upadhyaya

(J Nain and M J Rao, JJ.)

05.03.1973

## **JUDGMENT**

### **J. Nain, J.**

1. These two petitions have been filed by Tata Iron & Steel Co. Ltd., against the two Income-tax Officers, Companies Circle, Bombay, and against the Union of India. In the first petition it challenges three rectification notices under section 154 of the Income-tax Act, 1961 (hereinafter referred to as "the Income-tax Act"), for the assessment years 1965-66, 1966-67 and 1967-68 and the rectification orders made pursuant to those notices and notices of demand demanding Rs. 30,03,872 by way of additional taxes. In Petition No. 226 of 1973 the petitioner challenges the rectification notice dated March 12, 1973, in respect of the assessment year 1968-69.

2. The facts leading to these petitions are as follows :

For all the four years covered by the two petitions the petitioner had created some development rebate reserve and claimed development rebate under section 33 of the Income-tax Act. Apart from of the plant and machinery installed by the petitioner during these years, it had also installed some rolling mill rolls. It is admitted that during these four years the petitioner had not created the development rebate reserve after taking into consideration the rolling mill rolls installed by it and it had not claimed any rebate in respect of the same. The petitioner explains that the commission was due to the fact that it was not the practice of the income-tax authorities then to allow development rebate in respect of rolling mill rolls and that the income-tax authorities did not include these rolls in the expression "plant and machinery". It appears that some sugar mills contended that rolling mill rolls installed by them were as much plant and machinery as they other item of plant and machinery. The contention was considered by the Central Board of Direct Taxes, Government of India, who on November 16, 1968, issued a circular which is exhibit A to the petition and directed all Income-tax Officers to allow development rebate

on the cost of rolling mill rolls.

3. One of the conditions prescribed by section 34 of the Income-tax Act for allowance of development rebate is that an amount equal to 75% of the development rebate to the actually allowed should be debited to the profit and loss account of the relevant previous assessment year and credited to development rebate reserve account. There has been considerable controversy throughout the country as to the time at which such reserve should be created : whether it should necessarily be created during the year of installation of plant and machinery or whether it could be created when the company makes profits and development allowance is actually allowed or whether in cases of insufficiency or absence of creation of such reserve due to a bona fide mistake the income-tax authorities must give opportunity to the assessee to create a reserve or further reserve at a subsequent time.

4. In our judgment dated April 25, 1973, in Miscellaneous Petitions No. 184 of 1973 *Indian Oil Corporation v. S. Rajagopalan*, we have held that an assessee is not bound to create development rebate reserve during the year of installation of plant and machinery if there is no profit in that year and that it is sufficient if the reserve is created when there is profits and, therefore, development rebate is actually allowed. In the said case we did not decide the other points as to the time of creation of development reserve and left those questions for decision in appropriate proceedings as they did not arise in the matter then before us.

5. The petitioner has drawn our attention to a circular dated November 12, 1958, issued by the Central Board of Revenue regarding allowance of development rebate to tea companies which is exhibit B to the petition and which is admitted to be of general application. The said circular states that where there is no deliberate contravention of the conditions to creation of reserve fund equal to 75% of the development reserve allowance and the assessee has made his own bona fide computation, but the amount so provided is found by the Income-tax Officer at the time of the assessment to fall short of the development rebate actually allowable, the Income-tax Officers are instructed to condone genuine deficiencies subject to the shortfall being made good by the assessee through creation of an additional adequate reserve in the current year's books within the time allowed by the Income-tax Officer.

6. The petitioner states that after the circular, exhibit A, and on the basis of the circular, exhibit B, the petitioner claimed development rebate on the rolling mill rolls for the four years covered by these two petitions and for that purpose created additional development rebate reserves and made the necessary provision in the accounts of the respective assessment years. The petitioner filed revised returns and the Income-tax Officers granted it the additional development rebate for the four years. However, on February 7, 1972, the petitioner received a notice under section 154 of the Income-tax Act whereby the Income-tax Officer proposed to rectify the assessment for the

years 1966-66, 1966-67 and 1967-68 on the ground that the development rebate was wrongly allowed on the rolling mill rolls in view of the Supreme Court judgment in the case of *Indian Overseas Bank Ltd. v. Commissioner of Income-tax*. This notice is exhibit G to the petition. After the petitioner was heard, the income-tax authorities made an order dated February 28, 1972, purporting to rectify the assessment orders for these three years. The said notice and the rectification order are the subject-matter of Miscellaneous Petition No. 190 of 1972. In respect of the year 1968-69 the petitioner received a rectification notice dated March 12, 1973. The petition has been filed before the rectification order had been made. This rectification notice is the subject-matter of Miscellaneous Application No. 226 of 1973.

7. In Miscellaneous Petition No. 190 of 1972 there is an additional point. Belpahar Refractories Ltd., is a subsidiary of the petitioner. The petitioner had received from that company a deposit of Rs. 20,00,000 on December 21, 1962. Under the provisions of section 2(22)(e) of the Income-tax Act this deposit was treated as a loan and as such a dividend and was taxed in the assessment year 1964. For the assessment years 1965-66 the petitioner received from Belpahar Refractories Ltd., a dividend of Rs. 17,29,647. This dividend was adjusted against the loan of Rs. 20,00,000 and was, therefore, not treated as dividend in view of proviso (iii) to section 2(22)(e). It was not included by the petitioner in its total income for that year and was not taxed. In the original assessment for the year 1965-66 the Income-tax Officer granted the petitioner further tax relief on the said amount under the then existing section 85 of the Income-tax Act pertaining to now industrial undertakings. On the basis of section 85, out of the aforesaid dividend an amount of Rs. 14,12,954 was held exempt from tax in the hands of the petitioner. However, March 31, 1971, the petitioner received a rectification notice under section 154 of the income-tax Act for the assessment year 1965-66 stating that relief under section 85 had been wrongly given to the petitioner as the dividend was adjusted the loan and neither treated as dividend nor included in the total income of the petitioner. It was contended by the Income-tax Officer that if the dividend was not included in the total income, there could be no exemption under section 85. By another order dated February 28, 1972, this assessment was rectified and relief allowed on the amount of Rs. 14,12,954 was withdrawn and additional tax was levied. The petitioner is challenging this rectification notice and rectification order also in Miscellaneous Petition No. 190 of 1972.

8. On behalf of the respondents, Miss D. V. Bapat, Income-tax Officer, Companies Circle I(2), Bombay, has made two affidavits, one dated June 13, 1973, and the other dated June 14, 1973. The first affidavit is in reply to Miscellaneous Petition No. 190 of 1972 and seeks to support the rectification orders challenged in the petition. The second affidavit was made in the same petition under circumstances which we shall set out later in the judgment. No affidavit has been filed in Miscellaneous Application No. 226 of 1974.

9. Section 154 of the Income-tax Act relates to rectification of mistakes. It provides that with a view to rectifying any mistake apparent from the record, the Income-tax Officer may amend any order of assessment. Mr. Palkhivala on behalf of the petitioner contended that there was no error or mistake apparent from the record at all and there is, therefore, no occasion for amending the original assessment orders in these two petitions. He invited our attention to the case of *T. S. Balaram, Income-tax Officer v. Volkart Brothers*, wherein the Supreme Court held that a mistake apparent on the record must be an obvious and patent mistake and not something which could be established by a long drawn process of reasoning on points on which there may be conceivably two opinions. A decision on a debatable point of law is not a mistake apparent from the record. In fact this court had earlier taken a similar view in the case of *Arvind N. Mafatlal v. T. A. Balakrishnan, Deputy Controller of Estate Duty and Burmah-Shell Refineries Ltd. v. G. B. Chand, Income-tax Officer*. We shall follow the test laid down by the Supreme Court in the case of *Volkart Brothers* and by the Bombay High Court in the two cases aforesaid in deciding this matter. Mr. Palkhivala for the petitioner has informed us that there are appeals filed by the petitioner against the rectification orders and that the petitioner will withdraw any appeal that may be pending against the rectification order which is set aside by this judgment.

10. For rectifying an alleged mistake in the assessment orders pertaining to rolling mill rolls the grounds given by the income-tax authorities in the rectification orders is that, according to them, the Supreme Court has held in the case of *Indian Overseas Bank Ltd. v. Commissioner of Income-tax* that development rebate cannot be allowed to an assessee for a particular assessment year unless the assessee had created the necessary development rebate reserves before making up the profits and loss account of the relevant assessment year and that, in this case, as the petitioner had not created the necessary development rebate reserves in the relevant years before the original assessments were made, it was a mistake to have allowed development rebate on rolling mill rolls in subsequent years to the extent that there was shortfall in the reserve. According to the income-tax authorities, the Gujarat High Court has followed the decision of the Supreme Court in the case of *Surat Textile Mills Ltd. v. Commissioner of Income-tax*. The petitioner contends that the said decision of the Supreme Court has no relevance whatsoever to its case and does not operate to justify the rectification made. According to Mr. Palkhivala, the Supreme Court did not decide the issue in question and the Gujarat High Court has misconstrued the said decision.

11. The judgment of the Supreme Court in *Indian Overseas Bank Ltd. v. Commissioner of Income-tax* was rendered in an appeal against the judgment of a Division Bench of the Madras High Court consisting of Veeraswami J. (as he then was) and Natesan J. in the case of *Indian Overseas Bank Ltd. v. Commissioners of Income-tax*. In that case the assessee company had claimed development rebate and contended that it had set apart a sum of Rs. 6,00,000 during the

assessment year out of its net profits which not only satisfied the requirements of section 17 the Banking Companies Act, but also the requisites of the Indian Income-tax Act, 1922, with regard to the creation of development rebate reserves. The Madras High Court held that, as the assessee while setting apart the sum of Rs. 6,00,000 had not expressed the purpose for doing so, the conditions with regard to the creation of a development rebate could not be allowed. The High Court further held that even if it were assumed that the reserve was created under the Banking Companies Act, it could not be said to be available for any other purpose. The High Court observed that the provision for creation of a development rebate reserve was not a mere formality, but was intended to enable the revenue to trace the fund debited as part of the development rebate in the profit and loss account and credited to a reserve account. Unless this condition was complied with, development rebate could not be claimed. In our opinion, all that the Madras High Court decided was that a reserve created for the Banking Companies Act was not available as a development rebate reserve and that, as no development rebate reserve had been created in that case, the rebate could not be claimed. In the appeal from the above judgment the Supreme Court held in *Indian Overseas Bank Ltd. v. Commissioner of Income-tax* that creation of a reserve in compliance with section 17 of the Banking Companies Act was not sufficient compliance with the requirements of creation of development rebate reserve in the Income-tax Act. There are two observations in the Supreme Court judgment which have led to differences of opinion between various Indian High courts to which we shall refer presently. One observations is "the amount to be transferred to that reserve is debited before the profit and loss account is made up" and the other is that "it is also clear from the terms of the proviso that the transfer to the reserve fund should be made at the time of making up the profit and loss account". We must bear in mind that the Supreme Court was dealing with a case where it came to the conclusion that no development rebate reserve had been created. It was not dealing with the question of time when such development rebate reserve could be created. The observations in quotation marks reproduced hearing above appear to us to be no more than a mere discussion of the matter and not dicta, whether obiter or otherwise.

12. The Gujarat High Court had an occasion to consider the above judgment of the Supreme Court in the case of *Surat Textile Mills Ltd. v. Commissioner of Income-tax*. In that case the plant an machinery had been installed in 1960. Development rebate was claimed for the assessment year 1960-61 and an income of Rs. 2,57,029 was declared for that year. No development rebate was originally claimed in the return, but when the attention of the assessee was drawn to the fact that it was entitled to development rebate, it made the necessary entry creating development rebate reserve on July 23, 1961, i.e., after the end of the assessment year in which development rebate was claimed. The development rebate was actually allowed by the Income-tax Officer, but was later on disallowed by the department as a result of a notice under section 154 for rectification. The Gujarat High Court also disallowed the rebate. We must point

out that was a case in which no development rebate was created during the assessment year 1960-61, although there was a profits far exceeding the amount of the development rebate of Rs. 36,144. An entry allowed to have been made after the end of the assessment year was held not to have complied with the condition of creation of a development rebate reserve in the relevant year. The learned judges of the Gujarat High Court took the view that in the case of *Indian Overseas Bank Ltd.*, the Supreme Court had decided that "unless the reserve was created in the very same according year, development rebate should not be granted", agreeing with the view of the Madras High Court and overruling the decision of the Andhra Pradesh and the Rajasthan High Court. The Gujrat High Court held that in view of the aforesaid decision of the Supreme Court the benefit of the development rebate could not be granted to the assessee in the case before it because of the non-compliance with the requisite conditions as to creation of a development rebate reserve. The learned judges of the Gujarat High court also took the view that section 154 of the Income-tax Act was attracted as there was a mistake apparent on the record of the case. With regard to the judgment of the Gujarat High Court we must say with respect that, in our opinion, the Supreme Court nowhere lays down in *Indian Overseas Bank Ltd. v. Commissioner of Income-tax* the time at which the development rebate reserve must be created. We are unable to read in the judgment of the Supreme Court any observation to the effect that development rebate reserve must be created in the year of installation or fixation of the machinery irrespective of profits in that year or that the income-tax authorities could not permit the assessee to make up any deficiency in development rebate reserve which has occurred bona fide in subsequent years. In the case before the Supreme Court no development rebate reserve had been created at all at any time and, therefore, the claim for rebate was disallowed.

13. The Andhra Pradesh High Court has taken a view contrary to that of the Gujarat High Court in the case of *Veerabhadra Iron Foundry v. Commissioner of Income-tax*. In that case the assessee had not created a development rebate reserve before the close of the accounting year, but was allowed by the Income-tax Officer to make necessary entries before the assessment was complete. The Income-tax Officer disallowed the rebate and appeals to the Appellate Assistant Commissioner and the Tribunal failed. The High Court, however, took the view that as the entries had been allowed to be made before the assessment was finalised by the Income-tax Officer, the assessee was entitled to the benefit of the rebate.

14. In the case of *Commissioner of Income-tax v. Sardar Singh Sachdeva*, *The Punjab and Haryana High Court* held that it was not necessary that the entries about the development rebate should be made in the accounts on or before the last day of the accounting year or even before preparation of the profit and loss account, it held that it was open to the assessee to make the entry at any time before the assessment is completed. The entries become final only when the assessment is made. Till then they are in a fluid state and any defect or error in them could be

corrected. The income-tax authorities relied upon the decision of the Supreme Court in the case of *Indian Overseas Bank Ltd. v. Commissioner of Income-tax*. With regard to it the learned judges of the Punjab and Haryana High Court observed :

"This decision was delivered by their Lordships of the Supreme Court in an appeal from the judgment of the Madras High Court in *Indian Overseas Bank Ltd. Commissioner of Income-tax*. The question that fell for determination by their Lordships of the Supreme Court was whether a reserve under section 17 of the Banking Companies Act, 1949, was a reserve within the meaning of section 10(2)(vib), proviso (b), of the Income-tax Act, and their Lordships were of the opinion that such a reserve could not be treated as a reserve for development rebate under section 10(2)(vib), proviso (b) of the Act. The question with which we are concerned was not debated before their Lordships and all that their Lordships said was that the requirements of the proviso had to be complied with. So far as the present case is concerned, the requirements have been complied with. The only argument stressed before us is that the requirements should be complied with before the close of the accounting year or before making up of the profit and loss account. In our opinion it was open to the assessee to make these entries at any time before the assessment was completed. The entries only become final as an when they are accepted or rejected by the Income-tax Officer, i.e., when the assessment is made. Till then, they are in a fluid state and any error or defect in them could be corrected."

15. We respectfully agree with the learned judges of the Punjab and Haryana High Court as to the ambit of the decision of the Supreme Court in the case of *Indian Overseas Bank Ltd. v. Commissioner of Income-tax*.

16. In the case of the *Commissioner of Income-tax v. Modi Spinning & Weaving Mills Co. Ltd.*, a Division Bench of the Allahabad High Court held that a company can make the necessary entries for the purpose of complying with section 10 of the Income-tax Act, 1922, at any time before the return of income-tax is filed under the Act. Even if the entries are made thereafter during the pendency of the assessment proceedings, the Income-tax Officer may take them into consideration and allow the development rebate. The statute does not specify any period of time within which the relevant entries must be made. They could be made only after the year of account concluded when it is possible to know the extent of the profits available for the purpose of creating a reserve. The learned judges then proceeded to deal with the judgment of the Gujarat High Court in *Surat Textile Mills Ltd. v. Commissioner of Income-tax* as under :

"It is urged that the Supreme Court took the view that the entries must be made at the time when the profit and loss account is made up originally and that they cannot be made later. That is how, it is pointed out, those observations were construed by the Gujarat High

Court in *Surat Textile Mills v. Commissioner of Income-tax*.... As regards the observations of the Supreme Court in *Indian Overseas Bank Ltd.*, we are unable to infer from them that the profit and loss account originally prepared and passed by a company cannot be subsequently amended by it, and that the Income-tax Officer has no power to allow development rebates if the entries are made after the filing of the original return of income. The revenue relies upon *Surat Textile Mills Ltd.*, where the Gujarat High Court appears to have taken the view that compliance with the proviso (b) to section 10(2)(vib) cannot be effected after the profit and loss account has once been made up and that subsequent entries debiting the profit and loss account and crediting the development reserve can be of no avail. With great respect to the learned Judges who have delivered that judgment, we are unable to agree with the view taken by them..... But we have been unable to read those observation in the same light..."

17. Reviewing the above decisions we find that the Supreme Court has not decided in *Indian Overseas Bank Ltd. v. Commissioner of Income-tax* that the profit and loss account originally prepared and passed by a company cannot be subsequently amended by it and that the Income-tax Officer has no power to allow development rebate if the entries are made after the filling of the original return of income or even at a subsequent date in cases of bona fide mistake. We have expressed our own view about the judgment of the Gujarat High Court in *Surat Textile Mill Ltd. v. Commissioner of Income-tax* and the views of the Punjab and Haryana High Court and Allahabad High Court with regard to the construction of the Supreme Court judgment by the Gujarat High court. We have also set out the view of the Andhra Pradesh High Court. Mr. Palkhivala on behalf of the petitioner did not argue before us as to what was the correct position in law on a true interpretation of section 34 as to the proper time for creating a development rebate reserve. He said that, in view of his second argument on the point, to which we will come presently, it was not necessary for us to put any construction on section 34 as to the time of creation of reserve. Mr. Joshi on behalf of the respondents, however, contended that, in view of the Supreme Court judgment in *Indian Overseas Bank Ltd. v. Commissioner of Income-tax*, as interpreted by the Gujarat High Court in *Surat Textile Mills Ltd. v. Commissioner of Income-tax*, profit and loss account originally prepared and passed by a company cannot be subsequently amended by it and that the Income-tax Officer has no power to allow development rebate by the end of the assessment year in 1969 after requisite entries had been made by the petitioners in their account for preceding years creating a development rebate reserve respectively. In view of the fact that Mr. Palkhivala did not argue the point on merits, we do not propose to decide the point. We, however, take the view that the Supreme Court has not decide the point, and, with respect, we do not agree with construction placed by the Gujarat High Court on the judgment of the Supreme Court. The Andhra Pradesh, Punjab & Haryana and Allahabad High Courts have taken views different from the view taken by the Gujarat High Court. If after long drawn process

of reasoning on a point on which there obviously are two opinions, High Courts in India have taken different views, it is obvious that it is a debatable point of law. There can, therefore, be no mistake apparent from the record or which is an obvious or patent mistake. In our opinion, notice under section 154 and the rectification orders cannot be sustained as valid.

18. Mr. Palkhivala next argued that the question involved in this case is not regarding the interpretation of section 34 of the Income-tax Act, but the manner of execution of that provision. The most important point, according to him, in the present case is that it was under the express instructions of the Central Board of Direct Taxes and the Central Board of Revenue issued to all the Income-tax Officers to permit additional development rebate reserves to be created later on and to allow development rebate that the Income-tax Officer had allowed the development rebate to the petitioner on the said rolls. He contended that the instructions of the Central Board are binding on the Income-tax Officer and they are bound, in the execution of the Act, to carry out those instructions. The reference of Mr. Palkhivala is to the circular dated November 16, 1968, exhibit A to the petition, and date November 21, 1958 exhibit B to the petition. It is not contended by the respondents that the circular, exhibit A, is limited to sugar mills. It is admitted that it applies to rolling mill rolls by whom so ever installed. Similarly, it is admitted that the application of the circular dated November 21, 1958, is not confined to tea companies. It is admitted that it is a circular of general application.

19. At this stage we may refer to the affidavit of Miss D. V. Bapat, dated June 14, 1973. The arguments in this case began on June 13, 1973, and after Mr. Palkhivala had finished his arguments and Mr. Joshi had partly argued that this affidavit was tendered. We have refused to take it on the file on the ground that it was tendered at a late stage and the petitioner had no opportunity of dealing with it either by an affidavit in rejoinder or in the arguments. The affidavit not being on the file we need not actually deal with it. But we propose to deal with it none the less. The contention now taken is that in view of the judgments of the Supreme Court and the Gujarat High Court it was a mistake to have allowed development rebate on the rolls to the extent there was shortfall of development reserve, and that such mistakes can be rectified under section 154 of the Income-tax Act. The income-tax authorities also claim to have withdrawn the circular, exhibit B to the petition, on January 17, 1972. In our opinion, such withdrawal after the rebate has been allowed cannot affect the legal position in this matter. It was argued by Mr. Joshi that these circulars had no legal effect as they were in the nature of mere interpretation put by the Central Board of Revenue on the relevant Provisions of the Income-tax Act. We cannot accept this argument as in our opinion these circulars give administrative relief strictly beyond the terms of the relevant sections.

20. Mr. Joshi next argued that in this case there was no compliance with the circular of

November 21, 1958, exhibit B to the petition, as this was a case of non-creation of development rebate reserves and not of insufficiency in the said reserves. He pointed out that in the petition it is admitted that the petitioner had not originally created a development rebate reserve in relation to the rolling mill rolls. He contended that this was not a case of bona fide deficiency. We are afraid, we cannot accept this argument. It is not in dispute that in the relevant years the petitioner debited large amounts to profits and loss account and credited the same to development rebate reserve account. This was done in respect of "plant and machinery". The circular, exhibit A to the petition, accepts the position that rolling mill rolls are plant and machinery. There is no provision in law for separate development rebate reserve created itemwise. There is, therefore, no question of non-creation of reserve in respect of rolling mill rolls. It is clear that development rebate reserve was created and that it was not sufficient to cover the rolling mill rolls. This was obviously due to bona fide mistake because in the years prior to the assessment years the income-tax authorities had not been treating rolling mill rolls as plant and machinery for the purpose of development rebate and it was for the first time by circular, dated November 16, 1968, that the Income-tax Officers were instructed to allow development rebate in respect of such rolls. The mistake was not only bona fide, but arose from the previous stand taken by the income-tax authorities themselves. The case of the petitioner, in our opinion, falls squarely within the circular of November 21, 1958.

21. Mr. Palkhivala invited our attention to section 119 of the Income-tax Act which provides that the Board may from time to time issue such orders, instructions and directions to other (other than Appellate Assistant Commissioner in the exercise of his appellate functions) income-tax authorities as it may deem fit the proper administration to this Act, and such authorities and all other persons employed in the execution of the Act shall observe and follow such orders, instructions and directions of the Board. Mr. Palkhivala contended that the circulars, dated November 16, 1986, exhibit A to the petition, and November 21, 1958, exhibit B to the petition, were issued under section 119 of the Income-tax Act and were binding on the Income-tax Officers. Mr. Joshi for the respondents conceded that they were binding on the Income-tax Officers, but contended that they were not binding on the court and that the court must decide the matter on the interpretation of section 34 and irrespective of the circulars. We may say that this argument appeared to us to be quite plausible in the beginning until our attention was drawn to the judgment of the Supreme Court to which we shall refer presently. In the case of *Navnit Lal C. Javeri v. K. K. Sen* when the Income-tax Act was sought to be amended so as to define "dividend" to include loans and advances made by a company to its shareholder, the Minister in-charge of the legislation gave an assurance in Parliament that XGH outstanding loans and advances will not be subjected to tax if it is shown that they had been genuinely refunded to the respective companies before June 30, 1965. Pursuant to the said assurance a circular was issued by the Central Board of Revenue on May 10, 1965. Referring to the said circular the Supreme

Court observed :

"It is clear that a circular of the kind which was issued by the Board would be binding on all officers and persons employed in the execution the Act under section 5(8) of the Act."

22. In the said case the Supreme Court itself gave effect to the circular. Mr. Joshi contended that in that case the Supreme Court enforced the circular as it was issued pursuant to the assurance of a Minister given to Parliament. We are, however, of the view that it is only the circular which is binding on the Income-tax Officer and can be enforced by the courts and not an assurance given by a Minister in Parliament. It is the circular that gives legal validity to the assurance.

23. The above case was followed by the Supreme Court in the case of *Ellerman Lines Ltd. v. Commissioner of Income-tax* where effect was given to a circular issued by the Central Board of Revenue which clearly deviated from the provisions of the Income-tax Act as did the circular in *Navnitlal's* case. The Supreme Court gave effect to it. Mr. Joshi invited our attention to a judgment of the Allahabad High Court in the case of the *Bela Singh Daulat Singh v. commissioner of Income-tax*, where the said court observed that circulars were binding on the Income-tax Officers but not on the courts. In that case the court did not give effect to the circular because it had not been made a part of the case. We might mention that the judgment of the Supreme Court in *Navnit Lal C. Javeri v. K. K. Sen* was not cited before the Allahabad High court and was not considered by it.

24. In view of the two judgments of the Supreme Court referred to herein above we hold that the circulars dated November 16, 1968, exhibit A to the petition, and November 21, 1958, exhibit B to the petition, would be binding on the Income-tax Officers and must be given effect to by this court. While so holding we must, however, strike a note of caution that the binding nature of circulars issued by the Central Board of Revenue must be confined to tax laws and that also for the purpose of giving administrative relief to the taxpayer and not for the purpose of imposing a burden on him. In view of the above finding as to the binding nature of the circulars we hold that there is no mistake at all and, in any event, there is non apparent from the record and the income-tax authorities are not entitled to rectify the assessment in respect of the development rebate allowed by them to the petitioner.

25. There remains one more point which arises only in Miscellaneous Petition No. 190 of 1972. *Belpahar Refractories Ltd.*, is a subsidiary of the petitioner. The petitioner had received a deposit of Rs. 20,00,000 from this subsidiary company on December 21, 1962, which was treated by the Income-tax Officer as a loan and as "deemed dividend" under section 2(22)(e) for the assessment year 1963-64 and was taxed. For the assessment year 1965-66, *Belpahar Refractories Ltd.*, declared a dividend of Rs. 17,29,647 as payable to the petitioner. This was adjusted against the

deposit or loan of Rs. 20,00,000. This was treated by the authorities not to be "dividend" by virtue of proviso (iii) to section 2(22)(e). The petitioner did not include the amount in the total income in the return of income. In the original assessment the Income-tax Officer, however, granted to the petitioner relief under the then existing section 85 of the Act under which dividend attributable to the income from a new industrial undertaking was exempt from taxes. The Belpahar Refractories Ltd., was incorporated in 1959 and was a new industrial undertaking at that time. On the basis of section 85, out of the aforesaid dividend, a sum of Rs. 14,12,954 was held exempt from the taxes in the hands of the petitioner. On March 31, 1971, however, the petitioner received a notice under section 154 whereby the Income-tax Officer sought to rectify the assessment order for that year on the ground that relief under section 85 was wrongly given to the petitioner since the dividend adjusted in the deposit was not treated as dividend or included in the total income. Ultimately, by an order dated February 28, 1972, the rectification order was made.

26. Under section 2(22)(e) "dividend" includes any payment by a company of any sum by way of advance or loan to a shareholder, being a person who has a substantial interest in the company or any payment by any such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits. It is not in dispute that on December 21, 1962, Belpahar Refractories Ltd., possessed accumulated profits. The deposit of Rs. 20,00,000 made on December 21, 1962 by the said subsidiary company to its shareholder, the petitioner, was therefore, clearly a "dividend" within the meaning of section 2(22)(e). Accordingly, it was taxed as such. It is not the contention of Mr. Palkhivala in this petition that this deposit treated as a dividend attracted the provisions of section 85 which provides that income-tax shall not be payable by a shareholder in respect of so much of any dividend paid or deemed to be paid to him out of the profits and gains derived by a company from an industrial undertaking to which section 84 applies and is attributable to that part of the profits and gains on which income-tax is not payable by the company under section 84. Section 84 pertains to income of newly established industrial undertakings or trade. There is, therefore, no dispute about the fact that the amount of Rs. 20,00,000 was rightly taxed in the assessment year 1963-64.

27. The contention of Mr. Palkhivala is that the amount of Rs. 14,12,954 out of the said dividend of Rs. 17,29,647 was exempt from tax under the then section 85 of the Income-tax Act in the hands of the petitioner as it was a dividend from a newly established undertaking. Mr. Joshi has pointed out that section 2(22)(e), proviso (iii), states that "dividend" does not include any dividend paid by a company which is set off by the company against the whole or part of any sum previously paid by it and treated as a dividend within the meaning of section 2(22)(e) to the extent to which it is set off. Mr. Joshi contended that in view of the fact that the amount of Rs.

17,29,647 was set off against the deposit treated as a dividend under section 2(22)(e), the dividend of Rs. 17,29,647 was not a dividend at all by virtue of the proviso and hence not include in the total income. We find this argument incontrovertible. Mr. Palkhivala tried to argue that in fact this amount of Rs. 17,29,647 was by its own nature a dividend, but for the purpose of section 2(22)(e) it was not to be treated as a dividend as it was being set off. But it would be a dividend for the purpose of section 85, because, according to him, section 2(22)(e) as deeming provision and so was the proviso (iii) and the intention in enacting the proviso was merely to give tax relief under section 2(22)(e) and that this deeming must not be extended to section 85. We do not accept this argument because to accept it would be to hold that what is not a dividend for the purpose of section 2(22)(e) is a dividend for the purpose of section 85 in the same Act and we find no warrant for such a distinction.

28. Mr. Joshi further pointed out that section 85 was a part of Chapter VII, the heading of which was "Incomes forming part of total income on which no income-tax is payable". He pointed out that because the dividend of Rs. 17,29,647 was not treated as dividend, it was not included in there turn filed by the petitioner in the total income. It was, therefore, not taxed at all. Mr. Joshi pointed out that the petitioner was not content with the fact that this amount was not taxed at all, but it goes further and contends that by virtue of section 85 an amount equal to income-tax payable on the amount of Rs. 14,12,954 should be paid to the petitioner as relief under section 85. He admitted that this had been done by the Income-tax Officer in the original assessment, but this was obviously a mistake and was liable to be rectified.

29. In our view, the amount of Rs. 17,29,647 was not a dividend by virtue of proviso (iii) to section 2(22)(e) and as such it was not included in the total income under Chapter VII. In fact, no income-tax was paid on it. There is, therefore, no question of the petitioner getting relief under section 85 in respect of the said amount. This relief was granted to the petitioner in the original assessment obviously due to a mistake which the income-tax authorities are entitled to rectify. There will, therefore be no relief given to the petitioner in respect of the amount of Rs. 14,12,954.

30. In the result Miscellaneous Petition No. 190 of 1972, rectification notice dated February 14, 1972, part of exhibit G collectively, is set aside. The rectification orders dated February 28, 1973, in so far as they pertain to development rebate are also set aside, but not in so far as they pertain to the tax on Rs. 14,12,954. As both the parties have partly succeeded, there will be no order as to costs. The demand notice in respect of the assessment year 1965-66 to stand reduced in accordance with this judgment. The remaining demand notices are set aside.

31. In Miscellaneous Application No. 226 of 1974 the rule will be made absolute in terms of prayers (a) and (b) with costs.

