**BOMBAY HIGH COURT**

Indian Oil Corporation Ltd

Vs

S. Rajagopalan, Income-Tax

(J Nain and M J Rao, JJ.)

25.04.1973

**JUDGMENT**

**J. Nain, J.**

1. The petitioner company is a Government of India undertaking registered under the Companies Act, 1956 (1 of 1956). The respondent No. 1 is the Income-tax Officer, Companies Circle, Bombay, and the respondent No. 2 is the Income-tax Officer (Collection), Companies Circle, Bombay. The petition has been filed to for the issue of a writ, direction or order quashing and setting aside certain rectification notices issued by the respondents against the petitioner and for other reliefs. The question that arise for determination in this petition in this petition pertain to development rebate provided for in section 33 of the Income-tax Act, 1961 (hereinafter referred to as "the Income-tax Act"), the conditions for allowances such development rebate prescribed by section 34 and computation of capital employed in an industrial undertaking under section 80J of the said Act and rule 19A of the Income-tax Rules, 1962.

2. The fact leading to this petition may be briefly stated. Up to 31st March, 1964, the petitioner's business consisted mainly of distribution of petroleum products. During the accounting year ended 31st March, 1965, another company, viz., the Indian Refineries Ltd. was amalgamated with the petitioner-company by an order of the Government of India and the undertaking of that company stood transferred to the petitioner-company with effect from 1st April, 1964. Thereupon, the original name of the petitioner-company viz., "Indian Oil Company Ltd." was changed to "Indian Oil Corporation Ltd.". Under the said amalgamation order, the profits and losses from Indian Refineries Ltd. from 1st April, 1964, formed part of the profits and losses of the petitioner company and the petitioner company because entitled to the benefit of the development rebate allowable to that company.

3. The position of the petitioner with regard to development rebate for assessment years (hereinafter an assessment year is referred to as "A.Y.") is followed :

(1) For the A.Y. 1961-62 the petitioner's development rebate was determined at Rs. 25,819 and was allowed to be carried forward without creation of development rebate reserve as there were no profits.

(2) For A.Y. 1962-63 the development rebate was determined at Rs. 8,62,934 and was allowed to be carried forward without creation of development rebate reserve as the petitioner company made no profits.

(3) For A.Y. 1963-64 the development rebates was determined at Rs. 36,98,149. The petitioner company created and development rebate reserve of Rs. 43,44,000 out of the profits of the year and the entire development rebate for the is year and the proceeding two year actually allowed to it.

(4) For A.Y. 1964-65 the development rebate of the petitioner was determined at Rs. 33,15,335. The petitioner created a further development rebate reserve of Rs. 33,35,200 out of profit and the entire development rebate for this year was actually allowed to it.

(5) For A.Y. 1965-66 the development rebate of the petitioner including that of Indian Refineries Ltd. which had since been amalgamate with the petitioner company was determined at Rs. 4,82,68,525. This included the development rebate of Indian Refineries Ltd., for A.Y. 1962-63 to A.Y. 1964-65 for three years. The petitioner did not create any development reserve in respect of the development rebate determined by the respondents as there were no profits. It was allowed to carry forward the development rebate.

(6) For A.Y. 1966-67 the development rebate was determined at Rs. 14,29,80,361. There were no profits and no development rebate reserve was created and the development rebate was allowed to be carried forward.

(7) For A.Y. 1967-68 development rebates was determined at Rs. 8,01,13,245. There were no profits and no development rebates reserve was created. The development rebate was allowed to be carried forward. The development rebate accumulated by the petitioner for this and the proceeding 2 years in which were no profits amounted to Rs. 27,13,62,131.

(8) For A.Y. 1968-69 the development rebate was determined at Rs. 2,97,74,791. There were no profits. Therefore the development rebate was allowed to be carried forward. Actually on the expectation of a profit, the petitioner created a development rebate reserve of Rs. 3 crores which was however written back.

(9) For A.Y. 1969-70 the development rebate was determined at Rs. 5,39,78,223. For that year the petitioner had created development rebate reserve of Rs. 12 crores. There was sufficient profit

during this year. In computing the total income the Income-tax Officer allowed to the petitioner development rebate to the extent of Rs. 8,37,53,014 covering the development rebate determined for A.Y. 1968-69 and A.Y. 1969-70 only. Development rebates for A. Ys. 1965-66, 1966-67 and 1967-68 aggregating to Rs. 27,13,62,131 was not allowed by the Income-tax Officer on the ground that during these years the petitioners had not created any development rebate reserve. This was obviously due to a new stand taken by the Income-tax Officer that in order to claim development rebate, the development rebate reserve must be created during the year in which new machinery and plant was installed or put to use irrespective of whether there were or there were no assessed profits during that year.

(10) For A.Y. 1970-71 in the assessment order dated 24th January, 1973, the Income-tax Officer determined development rebate allowable to the petitioner for that year at Rs. 1,27,90,906. The petitioner created further development rebate reserve of over Rs. 14 crores. The development rebate reserve was actually allowed for that year and not for the years 1965-66, 1966-67 and 1967-68 for which years it aggregate to Rs. 27,13,62,131.

4. On 18th January, 1973 the respondent No. 1 served on the petitioner four rectification notices under section 154 of the Income-tax Act, all dated 11th January 1973, proposing to rectify the assessments for A.Ys. 1962-63, 1965-66, 1966-67 and 1967-68 during which years the petitioner was allowed to carry forward the unabsorbed development rebate and no development rebate reserve was created as there were no profits. On 31st January, 1973, the respondent No. 1 served on the petitioner two undated rectification notices under section 154 accompanied by the letter of 24th January, 1973, proposing to rectify the assessments for A. Ys. 1968-69 and 1969-70, on the ground the computation made under rule 19A(3) of the Income-tax Rules of the capital employed by the petitioner in each of its new industrial undertakings was incorrect. The petitioner complains that the last two notices have been served on it because respondent No. 1 now takes the view that in computing the capital employed in an industrial undertaking belonging to the petitioner (the petitioner owns 4 industrial undertakings), the assets of each undertaking are to be taken separately and from the assets of each undertaking the total liability of all the 4 undertaking of the petitioner is to be deducted is order to arrive at the capital employed in each industrial undertaking of the petitioner. The present petition has been filed challenging the validity of these six rectification notices.

5. We shall first deal with the rival contentions of the parties on the question of development rebate. The question before us is whether on a true interpretation of sections 33 and 34 of the Income-tax Act the petitioner had to create a development rebate reserve in respect of new machinery and plant in the year in which such machinery or plant was installed or put to use even though there were no profits during that year in order to be eligible for allowances of

development reserve during the year in order to eligible for allowance of development rebate in subsequent years out of profits or whether the petitioner would be eligible for allowance of development rebate if it created development reserve during the years in which there were assessed profits.

6. The development rebate was introduced for the first time in the Finance Act, 1955, in respect of machinery or plant installed after 31st March, 1954, apparently as an incentive for development of industries in the country. This allowance is in addition to the depreciation allowance and is granted to all assesses. Under the Indian Income-tax Act, 1922, section 10(2)(vib), which introduced in 1955 provided for development rebate. The Finance Act, 1958, granted this allowance subject to the condition of creating development rebates reserve. Under the Income-tax Act, 1961, the development rebates is granted be section 33 and conditions for allowing the development rebates are governed by section 34. The latter provisions provides that in respect of installation of any machinery or plant on or after 1st January, 1958, the development rebate shall be allowed only when an amount equal to 75% of the development rebate to be actually allowed debited to the profits and loss account of the relevant previous year and credited to a reserve account for the aforesaid purpose. The development rebates reserve account created in this way should not be utilised for a period of next 8 years following the relevant previous year either for distribution by way of dividends or profits or for remittance of profits aboard or for any other purpose which is not a business purpose of the undertaking. The provision with regard to development rebate in the Indian Income-tax Act, 1922, and the present Income-tax Act are substantially the same and in substantially the same language. The various decision of the courts referred to by us hereinafter are under the provisions of the Indian Income-tax Act, 1922.

7. The relevant provisions pertaining to development rebate in year sections 33 and 34 of the Income-tax Act, 1961, read as under :

> "33. Development rebate. - (1) (a) In respect of a new ship or new machinery or plant (other than office appliances or road transport vehicles) which is owned by the assessee and is wholly used for the purpose of the business carried on by him, there shall in accordance with and subject to the provision of this section and of section 34 be allowed a deduction in respect of the previous year in which the ship was acquired or the machinery or plant was installed or, it the ship, machinery or plant is first put to use in the immediately succeeding previous year, then, in respect of that previous year, a sum by way of development rebate as specified in clauses (b)...
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> (2) In the case of ship acquired or machinery or plant installed after the 31st day of December, 1957, whether the total income of the assessee assessable year relevant to the previous year in which the ship was acquired or the machinery or plant installed or the

immediately succeeding previous years, as the case may be, [the total income for this purpose being computed without making any allowance under sub-section (1) or sub-section (1A) of this section of sub-section (1) of section 33A or any deduction under Chapter VI-A or section 280-O] is nil or is less than the full amount of the development rebate calculated at the rate applicable thereto under sub-section (1) or sub-section (1A), as the case may be, -

(i) the sum to be allowed by way of development rebate for that assessment year under sub-section (1) or sub-section (1A) shall be only such amount as is sufficient to reduce the said total income to nil; and

(ii) the mount of the development rebate, to the extent to which it has not been allowed as aforesaid, shall be carried forward to the following assessment year, and the development rebate to be allowed for the following assessment year shall be such amount as is sufficient to reduce the total income of the assessee assessable for that assessment year, computed in the manner aforesaid, to nil, and the balance of the development rebate, if any, still outstanding shall be carried forward to the following assessment year, and so on, so however that no portion of the development rebate shall be carried forward for more than eight assessment year immediately succeeding the assessment year relevant to the previous year in which the ship was acquired or the machinery or plant installed or the immediately succeeding previous year, as the case may be....

34. Conditions for depredation allowance and development rebate. -

(1) The deductions referred to in sub-section (1) or sub-section (1A) of section 32 shall be allowed only if the prescribed particulars have been furnished; and the deduction referred to in section 33 shall be allowed only if the particulars prescribed for the purpose of clause (i) and clause (ii) of sub-section (1) of section 32 have been furnished by the assessee in respect of the ship or machinery or plant...

(3) (a) The deduction referred to in section 33 shall not be allowed unless an amount equal to seventy-five per cent. of the development rebate to be actually allowed is debited to the profit and loss account of the relevant previous year and credited to a reserve account to be utilised by the assessee during a period of eight years next following for the purpose of the business of the undertaking, other than -

(i) for distribution by way of dividends or profits; or

(ii) for remittance outside Indian as profits or for the creation of any asset outside India : .....

Explanation. - For the removal of doubts, it is hereinby declared that the deduction referred to in section 33 shall not be denied by reason only that the amount debited to the profits and loss amount of the relevant previous year and credited to the reserve account aforesaid exceeds the amount of the profit of such previous year (as arrived at without making the debit aforesaid) in accordance with the profit and loss account....."

8. On behalf of the petitioner Mr. Palkhivala pointed out that section 33(1)(a) of the Income-tax Act which provides for grant of development rebate says that such rebate "shall be allowed" in respect of the previous year in which the machinery or plant was installed or put to use. He contended that the expression "shall be allowed" indicates that development rebate is to be assessed and thereupon it becomes allowable. In sub-section (2) of section 33 which provides for the allowance of development rebate it is provided that the sum "to be allowed" by way of development rebate for an assessment year shall be only such amount as is sufficient to reduce the total assessable income to nil and the amount of development rebate to the extent to which is has not been allowed shall be carried forward to the following assessment years for 8 subsequent years. Mr. Palkhivala contended that sub section (2) clearly indicated that there was clear distinction made between the expression "to be allowed" which was equivalent to the word "allowable" and the expression "actually allowed" in section 34(3)(a) which means actually deducted out of profits under the provisions of section 32(2). He pointed out that in section 34(1) the expression "shall be allowed" has been used in respect of conditions which must be satisfied before the development rebate is actually allowed and that sub-section (3)(a) provides that the deduction referred to in section 33 "shall not be allowed" meaning thereby "shall not actually be allowed" unless an amount equal to 75% of the d development rebate "to be actually allowed" is debited to the profits and loss account of the relevant previous year and credited to a reserve account to be utilised by the assessee during a period of 8 years next following for the purpose of the business of the undertaking. We find considerable substance in the contention that section 33(1) provides merely for the assessment and determination of the development rebate to which an assessee is entitled or which is allowable to him. Sub-section (2) of that section also refers to allowable development rebate. Section 34 on the other hand provides for actually allowing the deduction of development rebate from assessable profits subject to the two conditions of prescribed particulars having been furnished and development rebate ever reserve having been created as conditions precedent to the actual allowance the development rebate. As to the first condition it does not appear from section 34(1) as to when the particulars should be furnished. It stands to reasons that they should be furnished before the completion of the assessment for the year in respect of which the claim for development rebate is made. It is, however, not necessary for us to decide this point and we do not propose to do so.

9. Mr. Palkhivala further argued section 34(3)(a) of the Income-tax Act provides that the

development rebate reserve shall be utilised by the assessee during a period of 8 years next following for the purpose of the business of the undertaking and that it shall be utilised for distribution by way of dividend or profits or for remittance outside India as profits or for the creation of any assets outside India. He contended that the utilisation by the assessee of the development rebates reserve for the purposes of the business of the undertaking contemplates the existence of an actual fund which can be utilised for the purpose of the business and which must not be utilised for the prohibited purposes. It does not contemplate an illusory debit entry in the profit and losses account and an illusory credit entry in the the development rebate reserve account. Such illusory credit entry is incapable of being utilised for business or for one of the prohibited purposes. Mr. Palkhivala contended that this supports the contention of the petitioners that the development rebate reserve can only be made out of the profits so as to create a real reserve account and negatives the contention of the respondents that the necessary debit and credit entries must be in the assessment year following the year of installation or use of plant or machinery in which the development rebate is determined under section 33. We find this argument also acceptable.

10. We are of the view that if in the assessment year relevant to the year of installation or use the total assessed income of the assessee is nil, the assessee cannot naturally be expected to have credited an actual and non illusory reserve equivalent to 75% of the development rebate to be allowed and that such reserve can only be made out of assessed profits. There can be no obligation on the part of the assessee to create a reserve as a condition merely for carrying over the development rebate without it being actually allowed to him by setting off the rebate gains the assessed profits. We are unable to accept the contention of the respondents that the assessee must create the reserve in the year of installation or use of the plant or machinery, irrespective of any profits, as a condition precedent to the actual allowance of development rebate in the subsequent years in which there are assessed profits. If this contention so accepted the assessee may have to resort to borrowing for creation of the reserve in order to be entitled to development rebate at some future date. In such event what he will be utilising for the purpose of his business under section 34(3)(a) will be the loan and not the amount of the development rebate. There will also be question of distributing an illusory fund by way of dividend or profits or for remitting it outside India as would be credited if a mere book entry were made.

11. Mr. Joshi on behalf of the respondents contended that the Explanation to section 34(3)(a) suggests the creation of reserve account exceeding the amount of the profits of the previous year. He contended that this support the contention of the respondents that the reserve must be created irrespective of profits in the year of installation or use. We, however, find the Explanation has been added as a precautionary provision for the removal of doubts. There can be cases where an assessee may credit to the reserve account an amount in excess of the assessed profits for the

year in which the development rebate is actually allowed to him. He may do this because his actual or expected book profits may be larger than the assessed profits which are arrived at after disallowing some items of expenditure which are not permissible in law. The Explanation provides that in such cases the assessee shall not be deprived of the development rebate because the development reserve created is in excess of the assessed profits. On the other hand it is possible to argue that as the section contemplates creation of development rebate reserve only out of the profits and the income-tax authorities may deprive an assessee of the rebate on the ground that the rebate created is in excess of the profits, the Explanation makes it clear that creation of serve in excess of profits shall not deprive an assessee of the actual allowance or rebate. We, however, find that the provision of section 34(3)(a) are quite clear and it is not necessary to resort to the interpretation of the Explanation suggested by the respondents or otherwise for interpreting the clear provision of section 34(3)(a).

12. It may be that in some cases the assesses may have on their own interpretation of section 34(3)(a) or on legal advice or as a result of the practice or insistence of Income-tax Officers debited 75% of the development rebate determined to be allowable to them in the year in which the plant or machinery was installed or put to use even if there were no assessable profits or insufficient assessed profits in that year. In our opinion, such assessee have credited such development rebate reserve without being obliged by law to do so. This has not happened in the case before us and it is not necessary for us to determinate the legal position of such assesses and we should not be understood to have done so. It is also not necessary for us to decide in this case whether the amount of development reserve created in the relevant previous year should be 75% of the commercial or book income or of the assessed income. This question does not fall to be determined in this matter.

13. The question before us arose directly before a Division Bench of the Madras High Court consisting of Veeraswami j. (as he then was) and Ramaprasada Rao J. in the case of Radhika Mills Ltd. v. Commissioner of Income-tax. The Madras High Court took the view that the allowance of development rebate was always in respect of the year of installing but the creation of the requisite reserve depends on and goes to reduce the available total income of that year or the following year. If there is no such total income or it is a loss, there can be no allowance of rebate but it is to be carried forward to the following year. No development rebate can actually be allowed unless two conditions are satisfied. One of the conditions is the creation of development rebate reserve. Regarding this condition, the Madras High Court took the view that it will not be sufficient compliance with the condition if no reserve is actually created to the extent required and mere book entries without actual reserve are made. Debiting in the profit and loss account and crediting in the reserve account is not theoretical but on the basis of actual reserve created. The basis of the actual reserve is the total profits as per the completed assessment and not book

profits. The entries as required by the condition are a sine qua non and are not an idle formality for it is only then that it will be possible to keep track of the development rebate reserve for enforcing the particular inhibitions against its user. Previous creation of reserve is not a condition for making the claim for rebate unlike actual allowance of it. Carrying forward of the development rebate is allowed only if the failure to create a reserve on the part of the assessee is on account of the fact that there is no income available in the assessee's hands in the relevant years out of which the requisite reserve or any part of it could actually be created.

14. The Madras High Court also took the view the before completion of the assessment when the claim for development rebate is determined by the officer, he will have to give a reasonable opportunity and time to the assessee to set apart the amount equal to 75% of the amount proposed to be allowed and then debit the same to profit and loss account and credit the same to the reserve account. In the case before us in the years in which there is a profit, a sufficient development rebate reserve has been created before the assessment is complete. We are therefore not called upon to decide whether the Income-tax Officer will have to give a reasonable opportunity and time to the assessee to create such reserve after the profits as well as the development rebate allowable are assessed. We leave this question to be determined by this courts as and when it arises.

15. The same question arose before a Division Bench of the Calcutta High Court in the case of West Laikdhi Coal Co. Ltd. v. Commissioner of Income-tax. The Calcutta High Court took the view that the whole object of granting development rebate would fail of if creation of the reserve account is insisted on in the year of installation of the new plant or machinery whether or not the assessee had funds to create such an account. The provision for development rebate does not intend to impose a burden on the assessee, but tries to give him relief or confers benefit on him to encourage him to build up his business. The Calcutta High Court further took the view that the development rebate has to be claimed in the year of installation or use of the machinery or plant. But the condition of creation of development rebate reserve is to be fulfilled in the year or years that the development rebate or portions thereof are actually allowed. A condition for the actual allowance of the development rebate is the creation of development rebate reserve in the year in which it is actually allowed. The assessee can utilise this reserve account only for the purpose specified in the statute. That statute envisages allowance of the development rebate in installments over a number of years depending on the assessable income of an assessee. The words "relevant previous year" refer not the year of the installation of the new machinery or plant, but to the year or years in which either the whole or a part of the development rebate is actually allowed. The assessee would create a reserve fund out of the development rebate to be actually allowed to him, in any particular year, and not by incurring loans to otherwise and utilise the reserve account for a period of 10 (now 8) years for the purpose of the business of the

assessee's undertaking only. The Calcutta High Court held that an assessee is not obliged to create a reserve fund in any year if he has no taxable income in that year for the purpose of carrying forward development rebate to the following years. It followed the judgment of the Madras High Court in Radhika Mills Ltd. v. Commissioner of Income-tax.

16. We agree with the judgments of the Madras and the Calcutta High Courts referred to by us hereinabove when they lay down an assessee is not obliged to create development rebate reserve if there was not taxable income in the relevant years for the purpose of enabling him to carry forward the development rebate to the following years. In our opinion the petitioner before us was not obliged to create a reserve in order to be eligible for allowance of development rebate if there was taxable income in the relevant years according to its assessment.

17. Several other judgments of various High Courts were cited before us. Both parities cited the case of Commissioner of Income-tax v. Veeraswami Nainar wherein a Division of Bench of the Madras High Court held that an assessee is not entitled to the allowance of development rebate if the necessary reserve in accordance with law has not been made. This was a case where no development rebate reserve was created at all. Therefore, this case is not relevant for our purpose. The Madras High Court further observed that it was not open to the Income-tax Tribunal to give direction to as assessee who had not made the necessary book entire by the time he produced his accounts before the Income-tax Officer that he should be allowed to rewrite them by the making the requisite entries. We are not concerned with this aspect of the matter also.

18. Another case cited before us was 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. Commissioner of Income-tax. In the* case the assessee-company claimed development rebate and contended that it had set apart a sum Rs. 6 lakhs during the assessment year out of its net profits which not only satisfied the requirements of section 17 of the Banking companies Act but also the requisites of the Indian Income-tax Act, 1922, with regard to the creation of development rebate reserve. The Madras High Court held that as the assessee when setting apart the sum Rs. 6 lakhs had not expressed the purpose for doing so, the conditions with regard to the creation of development reserve were not complied with and development rebate could not be allowed. The said High Court further held that even if it were assumed that 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 provisions for creation of development rebate reserve was not a mere formality, but was intended to enable the revenue to trace the fund debited as apart of the development rebate in the profit and loss account and credited to a reserved account. Unless this condition was complied with development rebate could not be claimed. In our

opinion, this case is an authority only for the proposition that a reserve created for the Banking Companies Act is not available as development rebate reserve and that as no development rebate reserve had been created in that case the rebate could not be claimed. This judgment followed the earlier judgment of the Madras High Court in Veeraswami Nainar's case referred to by us hereinabove. This judgment has also no bearing on the facts of the case before us. We must also point out that Veeraswami J. (as he then was) was a party to this judgment as well as to the subsequent judgment in the case of Radhika Mills Ltd. wherein the Madras High Court held that it will not be sufficient compliance with the condition of claiming the development rebate if no reserve is actually created to the extent required and mere book entries are made without actual reserve. The basis of the actual reserve created is the total profits as per the completed assessment. The entries are not an idle formality and an assessee is not obliged to create a development rebate if there is no profit available in the assessee's hands in the relevant year out of which requisite reserve or any pay part of it could actually be created.

19. The judgment of the Madras High Court in the case of Indian Overseas Bank Ltd. went in appeal to the Supreme Court and the judgment of the Supreme Court is reported in [1970] 77 I.T.R. 512. The Supreme Court held that creation of a reserve in compliance with section 17 of the Banking Companies Act was sufficient compliances with the requirement of creation of development rebate reserve in section 10(2)(vib) of the Indian Income-tax Act, 1922. There are two observation in the Supreme court judgment which have led to differences of opinions between various Indian High Courts to which we shall refer presently. One observation is : "The amount to be transferred to that reserve (development rebate reserve) is debited before the profit and loss account is made up "and" 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, however, bear in mind that the Supreme Court was dealing with a case where it came to the conclusion that no development rebate reserve bad been created.

20. The Gujarat High Court had an occasion to consider the above judgment of the Supreme Court in the case of Surat Texile Mills Ltd. v. Commissioner of Income-tax. In that case the plant and machinery had been installed in 1960. Development rebate was claimed for the assessment year 1960-61. 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, it made the necessary entry creating development rebate reserve on 23rd, July 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 disallowed by the department as a result of notice under section 154 for rectification . The Gujarat High Court also disallowed the rebate. We must point out that this was a case in which no development rebate reserve 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 claimed. 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 development reserve in the relevant year. This was not a case where no development rebate was created because there were no profits. The decision is therefore irrelevant for deciding the case before us. 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 accounting year, development rebate should not be granted, agreeing with the view of the Madras High Court and overruling the decisions of the Andhra Pradesh and Rajasthan High Courts. The Gujarat High Court the benefit of the development rebate cannot be granted to the assessee in the case before them because of the non-compliance with the requisite conditions as to creation of development rebate reserve. The learned judges 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 state that the Supreme Court nowhere lays down in *Indian Overseas Bank Ltd., v. Commissioner of Income-tax* that development rebate reserve must be credited irrespective of profits. The aspect of the matter, however, did not concern the Gujarat High Court because in the case before it although there was a profit no development rebate reserve was credit in the relevant year in which there were profits. We are unable to read in the judgment of the Supreme Court any observation to the effect that development rebate reserve must be created irrespective of profits. In the case before the Supreme Court no development rebate reserve had been created at all any time, and, therefore, the claim for rebate was disallowed. In the case before the Gujarat High Court, no development rebate reserve was created in spite of profits. The Gujarat case may have been rightly decided on the facts of the case before the Gujarat High Court. There is no warrant for reading in the judgment of the Supreme Court anything to the effect that development rebate reserve must be created irrespective of profits in order to be entitled to its actual allowance as suggested on behalf of the respondents. In the Gujarat case the development rebate reserve was created after the assessment year with the permission of the Income-tax Officer. It is unnecessary for us to decide whether the condition of creation of development rebate has been sufficiently complied with in such cases or not. That aspect of the matter does not arise before us.

21. Another judgment cited before us is the case of Veerabhadra Iron Foundry v. Commissioner of Income-tax decided by the Andhra Pradesh High Court. In this case also 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 completed. 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 entitled to the benefits of the rebate. We are not

concerned with this aspect of the matter in out case. We are however concerned with the observation of the Andhra Pradesh High Court that the necessity for creation of a reserve fund account arises only when the trade results in profit. This view supports the view we are taking in this case.

22. In the case *of Commissioner of Income-tax v. Sardar Singh Sachdeva the Punjab and Haryana Court* held that it was not necessary that entries about development rebate should be made in the accounts on or before the last day of the accounting year or even before the preparation of the profit and loss account. It is open to the assessee to make the entries 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. Our attention was also invited to the case of *Commissioner of Income-tax v. Modi Spinning and Weaving Mills Co.* Ltd.decided by the Allahabad High Court, wherein it was held that the company can make the necessary entries creating development rebate reserve at any time before the return of income of filed under the Income-tax Act. Even if the entries are made thereafter during the tendency of the assessment proceedings, the Income-tax Officer may take them into consideration and allow the development rebate. Once again, we are not concerned with this aspect of matter. The Gujarat and the Allahabad High Courts appear to have taken differing views on this point.

23. We now go over to another contention of the petitioner not connected with the creation of development rebate reserve. The petitioner contends that the respondent No. 1 denied to it relief of Rs. 5,48,36,671 under section 80J of the Income-tax Rules, 1962. Section 80J(1) reads as under :

> "80J. (1) Where the gross total income of an assessee includes any profits and gains derived from an industrial undertaking or a ship or the business of a hotel, to which this section applies, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains (reduced by the aggregate of the deduction, if any, admissible to the assessee under section 80H and section 80-I) of so much of the amount thereof as does not exceed the amount calculated at the rate of six per cent. per annum on the capital employed in the industrial undertaking or ship or business of the hotel, as the case may be, computed in the prescribed manner in respect of the previous year relevant to the assessment year (the amount calculated as aforesaid being hereinafter in this section, referred to as the relevant amount of capital employed during the previous year)."

24. Rule 19A reads as under :

"19A. Computation of capital employed in an industrial undertaking or a ship or the business of a hotel for the purpose of section 80J. - (1) For the purpose of section 80J, the capital employed in an industrial undertaking or the business of a hotel shall be computed in accordance with sub-rules (2) to (4), and the capital employed in a ship shall be computed in accordance with sub-rule (5).

(2) The aggregate of the amounts representing the values of the assets as on the first day of the computation period, of the undertaking, or of the business of the hotel to which the said section 80J applies shall first be ascertained in the following manner :-

(i) in the case of assets entitled to depreciation, their written down value;

(ii) in the case of the assets acquired by purchases and not entitled to depreciation, their actual cost to the assessee;

(iii) in the case of assets acquired otherwise than by purchase and not entitled to depreciation, the value of assets when they became assets of the business;

(iv) in the case of assets being debts due to the person carrying on the business the nominal amount of those debts;

(v) in the case of assets being cash in hand or bank, the amount thereof.....

(3) From the aggregate of the amounts as ascertained under sub-rule (2) shall be deducted the aggregate of the amounts, as on the first day of the computation period, of borrowed moneys and debts due by the assessee (including amounts due towards any liability in respect of tax), not being, -

(a) in the case of an assessee being a company the amount of its debentures, if any, and

(b) in the case of any assessee (including a company), any moneys borrowed from an approved source for the creation of capital assets in India, if the agreement under which such moneys are borrowed provides for the repayment thereof during a period of not less than seven years...."

25. The petitioner contends that under rule 19A(3) the capital of new industrial undertaking is to be computed by deducting from the aggregate assets of the undertaking "borrowed moneys and debts were due by the assessee" pertaining to the said undertaking. The petitioner states that is own 4 industrial undertakings. Its grievance is that in respect of each of the new industrial undertakings of the petitioner, the respondent No. 1 computed the aggregate of the assets employed in that industries undertaking and deducted therefrom not only the borrowing

pertaining to that industrial undertaking, but the petitioner's entire borrowings in respect of all its undertakings. The result is that the total borrowing in respect of its activities always exceeded the aggregate of the assets of each individual industrial undertaking and, therefore, the respondent No. 1 completely denied to the petitioner the relief in respect of every one of its various industrial undertakings. The petitioner contends that this has been done on a wrong interpretation of rule 19A.

26. Section 80J(1) provides that the assessee is to be allowed deduction of 6% per annum on the capital employed in the industrial undertaking from the gross total income of the assessee. Rule 19A provides for computation of capital employed in an industrial undertaking. Sub-rule (1) provides that for the purpose of section 80J the capital employed in an industrial undertaking shall be computed in accordance with sub-rules (2) to (4). Sub-rule (2) provides that the aggregate of the amounts representing the values of the assets as on the first day of the computation period of the undertaking shall first be ascertained. Sub-rule (3) provides that from the aggregate of the amount so ascertained under sub-rule (2) shall be deducted the aggregate of the amounts as on the first day of the computation period of borrowed moneys and debts due by the assessee. At first look sub-rules (2) and (3) appear to provide that from the aggregate value of the assets of each undertaking the aggregate of the liabilities of the assessee shall be deducted. The assessee in this case owns 4 industrial undertakings. The result of such interpretation would be that from the assets of each industrial undertaking the entire borrowings of the assessee in respect of all the industrial undertakings are to be deducted for arriving at the capital employed in an industrial undertaking. On the face of it this is an absurd proposition. If you want to arrive at the capital employed by an assessee in a particular industrial undertaking, you cannot arrive at it by deducting from the assets of that particular undertaking the liabilities not only of that industrial undertaking, but also of three other industrial undertakings. This is mathematically absurd. What you want to find is the capital employed in an industrial undertaking. This cannot be mathematically done by deducting from its assets the liabilities of other undertaking. One will, therefore, have to give a reasonable interpretation to sub-rule (3) by adding after the words "borrowed moneys and debts due by the assessee" the words "in respect of the industrial undertaking in which the capital employed is to be computed". We accordingly hold that on a true interpretation of rule 19A, in respect of each undertaking, the liabilities of the assessee in respect of that industrial undertaking only are to be deducted from the aggregate value of the assets of the same industrial undertaking. The controlling words in sub-rule (1), viz., "for the purpose of section 80J the capital employed in an industrial undertaking.....shall be computed..." must govern sub-rules (2) and (3).

27. Mr. Joshi invited our attention to the case of Commissioner of Income-tax v. Veeraswami Nainar wherein in quotation from the judgment of Rowlatt J. in Cape Brandy Syndicate v. Inland

Revenue Commissioners has been reproduced. It reads as under :

> ".....in taxing Act one has to look merely what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can look fairly at the language used."

28. Mr. Joshi contended that we cannot add any words to a taxing law to arrive at the correct conclusion even if it leads to absurd results. In our view all that Rowlatt J. held was that one has not to put any beneficent interpretation on the provisions of a taxing statute on the basis of a presumed intention of the legislature. He has not said that commonsense must not find a place in the interpretation of a taxing statute. Our attention has been invited to a judgment of the Privy Council in the case of Mohammed Ewaz v. Birj Lall where their Lordship took the view that if a construction would cause great difficulty and justice which it cannot be supposed the legislature contemplated and would be inconsistent with the language and tenor of the rest of the Act, the words should be read distributively, and be construed rule, 19A(3) in the manner indicated hereinabove.

29. The last point taken in this case by the petitioner is that the impugned rectification notices cannot be issued under section 154 of the Income-tax Act as there is no mistake apparent from the record but obviously a different legal interpretation is being put on section 34 purporting to be based on the judgment of the Gujarat High Court apart from the fact that the learned Judges of the Gujarat High Court read into the judgment of the Supreme Court in *Indian Overseas Bank Ltd. v. Commissioner of Income-tax* words which do not exist in it. It has been held by the Supreme Court in the case of *T.S. Balaram, Income-tax Officer v. Volkart Brothers* that a mistake apparent on the face of the record must be an obvious and parent mistake and not something which can be established by long drawn process of reasoning on points on which there may conceivably be two opinions. A decision on a debatable point of law is not a mistake apparent from the record. We, however, consider it unnecessary to decide this contention of the petitioner in view of the fact that we have decided this matter on merits.

30. In the result, the petition succeeds and the petitioner will be entitled to the following reliefs :Four rectification notices all dated January 11, 1973, for assessment years 1962-63, 1965-66, 1966-67 and 1967-68 (exhibit "N" collectively), two undated rectification notices for assessment years 1968-69 and 1969-70 (part of exhibit "P" collectively), and the undated notice of demand for Rs. 6,23,80,888 for assessment year 1970-71 (part of exhibit "J") are quashed.

31. The 1st respondent is directed to allow development rebate for the assessment years 1969-70 and 1970-71 in accordance with this judgment and to compute the capital employed in each of the relevant industrial undertaking under rule 19A also in accordance with this judgment.

32. The 1st respondent will be at liberty to issue fresh notice of demand, if any, in accordance with law and the above directions.

33. The respondents will pay to the petitioner the costs of this petition.