BOMBAY HIGH COURT

Tata Iron & Steel Co. Ltd

Vs

D.V. Bapat

(S.K. Desai and Dighe, JJ.)

26.02.1975

JUDGMENT

S.K. Desai, J.

1. The petitioner before us is the Tata Iron & Steel Co. Ltd. and the petitioner will hereinafter be referred to as "the company" for the sake of brevity. The 1st respondent is the Income-tax Officer, Companies Circle I(2), Bombay, concerned with the 'assessment of the company and will hereinafter be referred to as "the Income-tax Officer" for the sake of brevity. The 2nd respondent is the Union of India.

2. Before adverting to the respective contentions it will be necessary to set out briefly the facts which are not in dispute. The company has its registered office in Bombay and has in its employment about 56,000 employees. It is the agreed position that the company keeps its accounts on the mercantile system of accounting. The accounting year of the company is the financial year. Up to and including the assessment year 1971-72, the company had claimed and was granted deduction in respect of its liability for gratuity to its employees on the basis of actual payments made during each relevant accounting year. For the next assessment year, however, the company claimed a deduction of a sum of Rs. 1,28,09,135 on the footing that the said amount represented its gratuity liability on an actuarial valuation, and the contention of the company was accepted by the Income-tax Officer. It may be mentioned that this allowance was in accordance with a circular dated September 21, 1970, issued by the Central Board of Direct Taxes, Government of India, New Delhi; this circular will hereinafter be referred be referred to as the "first circular". We shall refer in detail to this first circular subsequently. We are concerned with the assessment year 1973-74. The company obtained an actuarial valuation of its gratuity liability for the accounting year ending March 31, 1973. According to the company, an amount of Rs. 2,77,52,991 was the amount ascertained as a result of the said actuarial valuation. We are really not concerned with the reason why the provision of the actuarial calculation increased from

slightly over one core to this large amount of over Rs. 2,70,00,000 within the short span. The company, however, claims that this was on account of the increased liability imposed by the Payment of Gratuity Act, 1972, which Act came into force on September 16, 1972.

3. In the course of the assessment proceedings the Income-tax Officer made certain inquiries regarding the claim of the company for deduction of the said amount. Before, however, the assessment could be completed, it appears, another circular dated September 26, 1974, was issued by the Central Board of Direct Taxes; this circular will hereinafter be referred to as the "second circular". By this second circular the first circular was withdrawn and directions were given to complete all pending all pending assessments in the light of the instructions given by the Board in the second circular. According to the company, after the second circular the Income-tax Officer addressed a latter dated December 6, 1974, to the company indicating that the company's claim for gratuity based on actuarial calculation was proposed to be disallowed. According to the company, in the course of discussions which took placed thereafter, the Income-tax Officer made it clear that the company's claim for the aforesaid gratuity liability would be disallowed in view of the Board's second circular.

4. The said two circulars may now be fully set out :

> "First Circular No. 47 (F.No. 9/100/69-IT(A-II), dated September 21, 1970. See A question has arisen whether the provision made by an assessee in its accounts on account of the estimated service gratuity payable to the employees can be allowed as a deduction, when no gratuity fund has been set up under Part C of the Fourth Schedule of the Income-tax Act, 1961.The Board have decided that following the decision of the Supreme Court in the case of Metal Box Co. of India Ltd the provision of gratuity on a scientific basis (in the form of an actuarial valuation carried out every year) can be considered to represent a real liability of the employer to the employees. The Supreme Court in the case of Garment Cleaning Works (Civil Appeal No. 621 of 1960, dated 3-4-1961), decided that the employer would be required to pay gratuity even to an employee who has dismissed on account of misconduct. The Board have, therefore, come to the conclusion that the liability so ascertained cannot be considered as a contingent liability. Such provision of gratuity may be treated as an admissible deduction under section 37(1) of the Income-tax Act, 1961."

"Second Circular No. 146 (F.No. 228/2-73-IT(A-II), dated September 26, 1974. See [1975] 101 ITR (St). 46.

Attention is invited to Board's Circular No. 47 (F. No. 9/100/69-IT (A-II), dated September 21, 1970, on the above subject. In this circular the Board has considered the question as to whether

provision made by an assessee in its accounts for estimated service gratuity payable to its employees could be allowed as a deduction even though no approved gratuity fund under the provisions of the Income-tax Act had been set up. At the relevant time when this circular was issued, the Supreme Court's decision in the case of *Metal Box Company of India Ltd. v. Their Workmen* was available and taking note of certain observations in this particular decision of the Supreme Court, it was felt that provision of gratuity on a scientific basis (in the form of actuarial valuation carried out every year) could be considered to represent a real liability of the employer to the employees. Accordingly, the Board decided that such provision would not be a contingent liability and may be treated as admissible deduction under section 37(1) of the Income-tax Act, 1961.

2. The decision of the Board has been re-examined in the light of the unreported judgment of the Supreme Court in the cases of *Bombay Dyeing and Manufacturing Co. Ltd. v. Commissioner of Wealth-tax Since* reported in In this judgment, their Lordships have confirmed their own views in Commissioner of Wealth-tax v. Standard Mills and have observed that the decision in Metal Box Company's case was rendered under a different Act and in a different context.

3. In view of the later pronouncement of the Supreme Court in the case of Bombay Dyeing and Manufacturing Co. Ltd and on the clear provisions of law contained in section 36(1)(v) under which any sum paid by an employer by way of contribution to wards an approved gratuity fund created by him for the exclusive benefit of its employees under an irrevocable trust alone was admissible. Any allowance of such liability towards an unapproved gratuity fund under section 37(1) of the Income-tax Act does not arises. In view of this, the earlier instructions of the board referred to above stand withdrawn with immediately effect.

4. All pending assessments may be completed in the light of the present instructions."

5. The principal contention of the company in the petition is that the proposed action of the Income-tax Officer in disallowing the company's claim for deduction of the actuarially evaluated gratuity liability is without jurisdiction, patently illegal and contrary to the clear provisions of the Income-tax Act, 1961, and also contrary to the law laid down by the Supreme Court and the High Courts. Accordingly, it is submitted that there is an error apparent on the face of the record which is required to be judicial corrected. The company has further submitted in paragraph 4 of the petition what the consequences of such disallowance would be to the petition what the consequences of such disallowance would be to the petitioner and thereafter urged in paragraph 5 of the petition that although an appeal against such erroneous disallowance to the Appellate Assistant Commissioner is provided under the Income-tax Act, 1961, such provision would not be term. Apart from the individual case of the company it is urged that the question affects innumerable assesses all over India and is a question of utmost public importance. It is submitted

that in view of the directions given in the second circular, which directions would be binding on or likely to be followed by the Income-tax Officers dealing with several assesses, the companies concerned would be required to prefer separate appeals in several separate assessments which will ultimately result in further second appeals to the Income-tax Appellate Tribunal and thereafter in references to the High Court. The company has also annexed to the petition a resolution passed by the Bombay Chamber of Commerce and Industry, which would seem to suggest that the question of law raised and agitated in the petition is not one concerning the individual case of the company only but is raised in a sort of representative action for and on behalf of all companies similarly situated all over India. Accordingly, the company has sought a writ or order in the nature of mandamus or other appropriate writ, direction or order under article 226 of the Constitution of India, directing the Income-tax Officer to allow the aforesaid gratuity liability as a deduction in computing the assessable income of the company.

6. A return has been filed by the Income-tax Officer in which the company's claim for deduction of an actuarially evaluated gratuity liability has been rebutted and the proposed action of disallowance is defended, it being urged that the same would not be without jurisdiction or illegal or contrary to the provisions of the Income-tax Act, 1961, or contrary to the law laid down by the Supreme Court or other High Courts. The Income-tax Officer has in the later part of the return dealt with several judgments of the Supreme Court and of the High Courts referred to by the company in its petition. But, in our opinion, it is unnecessary to set out at this stage the contentions either of the company or of the Income-tax Officer concerning these decisions as we will have occasion to refer to these several decisions in the course of our judgment. In paragraph 8 of the return the Income-tax Officer has denied that the disallowance of gratuity liability would be erroneous or that the appeal against such disallowance would not constitute an adequate remedy in any sense of the term. It has been further denied that the second circular is contrary to the law laid down by the Supreme Court of India. It has been submitted that this was not a fit case for issue of a high prerogative writ.

7. It is, however, important to note that in paragraph 5 of the petition the company has categorically stated at more than one place that the Income-tax Officer had made it clear that the would follow the second circular issued by the Central Board of Direct Taxes, and this specific allegation is n to clearly traversed by the Income-tax Officer. It has, therefore, become necessary to refer to this aspect of the matter in view of the contention of the learned counsel for the revenue which, was based on the nature of the reliefs sought by the company, which according to the learned counsel, should not be granted by the court in the form in which it was sought.

8. This contention as to the nature of relief may be briefly indicated though we propose to deal with it, if necessary, when the question of granting any relief would arise. It was submitted by

Mr. Joshi that unless the court were clearly of the opinion that the law regarding such allowance has been clearly laid down by the Supreme Court of India and that the provisions of the Income-tax Act, 1961, in this connection are clear and would admit no discussion or argument, the court should not grant a writ of mandamus in the form sought for by the company but merely quash the direction contained in the second circular to complete the pending assessments in the light of instructions given by the Central Board of Direct Taxes in that circular and leave it to the Income-tax Officer to finalise the assessments according to the provisions of the Income-tax Act and uninfluenced by any instructions or directions given by the Central Board of Direct Taxes. Mr. Joshi referred us in this connection to *Sirpur Paper Mills Ltd. v. Commissioner of Wealth-tax. That* was a case under the Wealth-tax Act. He also referred us to *Orient Paper Mills Ltd. v. Union of India*. Which was a case under the Central Excises and Salt Act, 1944. As indicated earlier, it is our view that it would be appropriate to consider this question after discussing the various decisions which were discussed at the Bar and the respective contentions based on such decisions.

9. As stated earlier, it is the admitted position that the accounts of the company are kept on the mercantile system of accounting. The nature of this system has been adverted to in several judgments including those of the Supreme Court. Briefly stated, it is a system which "brings into credit what is due, immediately it becomes legally due and before it is actually received, and it brings into debit expenditure, the amount for which a legal liability has been incurred before it is actually disbursed"; the quotation is from the decision of the Supreme Court *in Keshav Mills Ltd. v. Commissioner of Income-tax the* actual passage being subsequently cited in a number of Supreme Court decisions. Thus, the clear position as far as the company is concerned is that the claim for such allowance is not based on any amount actually disbursed but on the basis of incurring a legal liability as indicated in the passage from Keshav Mill's case above cited.

10. The profits and gains of a business are made chargeable under section 28 of the Income-tax Act, 1961, and section 29 thereof provides that the income referred to in section 28 should be computed in accordance with the privations contained in sections 30 to 43A of the said Act. Section 30 to 37 would seem to consist of a list of permissible allowances and deductions as enumerated therein. Section 40 (we are not concerned with sections 38 and 39) contains provisions for certain amounts which are expressly declared as ones not to be deducted in computing income chargeable under the head "profits and gains of business or profession". Section 40A refers to certain expenses or payments which are declared to be not deductible in certain circumstances. Now, the question which would seem to arise on a consideration of the scheme of the Act pertaining to these sections would be whether the list of allowances and deductions enumerated is exhaustive. It seems to be now well settled by several decisions of the Supreme Court that this list is not exhaustive in the sense that an item of loss or expenditure

incidental to business may be deducted in computing profits and gains even if it does not specifically find a place within any of these sections, provided it is an item which is allowable as a deduction on ordinary commercial principles.

11. Reference may be briefly made to some Supreme Court judgments in this connection. The first of these judgments is *Badridas Daga v. Commissioner of Income-tax. I*n that decision the Supreme Court was considering section 10(1) of the Indian Income-tax Act, 1922, and one does not find any material difference (so far as we are concerned) in the phraseology employed in that provision and that of section 28(1) of the Income-tax Act, 1961. The deductions and the allowances which are now contained in sections 30 to 37 of the Act of 1961, were, it may be stated, to be found in section 10(2) of the Act of 1922. With this background the observations in Badridas Daga's case may now be noted.

12. According to Venkatarama Aiyar J., who spoke for the Supreme Court, it was well-settled that :

> "Profits and gains which are liable to be taxed under section 10(1) are what are understood to be such according to ordinary commercial principles.'The word "profits"..... is to be understood, observed Lord Halsbury in Gresham Life Assurance Society v. Styles in its natural and proper sense-in a sense which no commercial man would misunderstand'."

13. It was further observed :

> "The result is that when a claim is made for a deduction for which there is no specific provision in section 10(2), whether it is admissible or not will depend on whether, having regard to accepted commercial practice and trading principles, it can be said to arise out of the carrying on of the business and to be incidental to it. If that is established, then the deduction must be allowed, provided of course there is no prohibition against it, express or implied, in the Act." (page 15 of the report).

14. It will be observed that we are not really concerned with the nature of the allowance that was claimed in Badridas Daga's case but only with the principle affirmed by the Supreme Court, which principle has been set out above in the court's own words. There are, however, a number of other judgments which seek to apply that principle to the type of claim which is to be considered by us, viz, the claim made by the company for being allowed the deduction of an amount determined on an actuarial valuation of its gratuity liability for the employees.

15. It may be clarified at this juncture that the claim of the company pertains to what may be indicated as the incremental increase in its liability towards the accrued gratuity liability which

arose in the year ended March 31, 1973. This would be indicated by a perusal of the actuarial valuation report, exhibit B to the petition. According to this report, the total accrued gratuity liability for the company as on Match 31, 1972, was in the amount of Rs. 11,37,80,345. Similarly, according to the actuary's report, the total accrued gratuity liability of the company as at March 31, 1973, was Rs. 14,15,33,336. Thus, by a simple process of subtraction the total accrual of gratuity liability for the year 1972-73 would be put at Rs. 2,77,52,991, which is the amount claimed by the company as a deduction.

16. Now, before discussing the cases which deal with such a claim, a brief reference may be made to the provisions of the Payment of Gratuity Act, 1972, since some of its provisions may have a bearing on our decision. Under section 4 of the said Act, gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years, on his superannuation, or on his retirement or resignation, or on his death or disablement due to accident or disease. Sub-clauses (a) and (b) of the said sub-section. If the services of an employee have been terminated for any act, willful omission or negligence, causing any damage or loss to, or destruction of, property belonging to the employer, the gratuity can be forfeited to the extent of the damage or loss so caused. Similarly, gratuity payable to an employee shall be wholly forfeited if the services of the employee have been terminated for riotous or disorderly conduct or any other act of violence on his part. Similarly, the gratuity amount payable to the employee may be totally forfeited if the employee's service have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by the employee in the course of his employment. Thus, it is to be seen that although under sub-section (1) gratuity is payable to all employees after they have rendered continuous service for not less than five years in the sense that death, retirement, resignation or superannuation constitute what may be called cumulatively a certainty in the sense that one of these has to happen, sub-section (6) provides for two or three contingencies in which such payment is liable to be wholly or partially forfeited. It is in the light of these provisions that the judgments pertaining to gratuity may now be considered and understood.

17. The first of the cases which deal with the question of a claim made by an assessee for provision for retirement benefits of gratuity is Southern Railway of Peru Ltd. v. Owen (Inspector of Taxes). Under the legislation of Peru, an English company operating a railway there was bound to pay its employees compensation on the termination of their services, the legislative provisions being deemed to be incorporated into all contracts of service. The right arose on dismissal or on termination of the employment by the employee by proper notice, or on such termination by the death of the employee or on the expire of the term of employment. There were, however, certain exceptions when such benefits were not payable. The company claimed to be entitled to charge against each year's receipts the cost of making provision for the retirement

payments which would ultimately be thrown on it, calculating what sum would be required to be paid to each employee if he retired without forfeiture at the close of the year and setting aside the aggregate of what was required in so far as the year had contributed to the aggregate. In the judgment it was held that the company was not entitled to make the deductions sought to be made. But this was on the footing that in calculating the amount which it claimed to deduct in each year the company had ignored the factor of discount. On the other hand, in principle it was accepted that the company was entitled retirement payments which would ultimately be payable as it had had benefit of the employee's services during that year, provided the present value of the future payments could be daily estimated. During the course of that judgment Lord McDermott (at page 747 of the report) observed as follows :

> "My Lords, as a general proposition it is, I think, right to say that in computing his taxable profits for a particular year, a trader, who is under a definite obligation to pay his employees for their services in that year in immediate payment and also a future payment in some subsequent year, may properly deduct, not only the immediate payment, but the present value of the future payment, provided such present value can be satisfactorily determined or fairly estimated. Apart from special circumstances, such a procedure, if practicable, is justified because it bring the true costs trading in the particular year into account for that year and thus promotes the ascertainment of the 'annual profits or gains arising or accruing from' the trade."

18. The learned Law Lord went on to observe (at page 748 of the report) :

> "The position, therefore, was that the appellant's liability to pay a lump sum could only be avoided by some breach of contract or grave misconduct on the part of the employee concerned. It may be correct to call such a liability contingent, but I must say the contingency seems to me too remote to justify a prudent trader or, for that matter, a competent accountant, in ignoring the liability until the day for payment has arrived. Whether, if this appeal related to but one employee and one lump sum, the degree of the contingency would, nevertheless, be such as to preclude a present allowance in respect of the future liability is a question which in my opinion, does not call for decision on the facts of this case."

19. Before the House of Lords it had been contended on behalf of the Crown, which contention appears to have found favour with the Court of Appeal, that this was a contingent liability and, therefore, the claim of the assessee was liable to be rejected. It was observed that the Court of Appeal had looked at this contingency argument from the point of view of an individual employee, and it was pointed out that such an approach was erroneous. It was observed again, by Lord McDermott (at page 748 of the report) :

"The question, as I see it, on this branch of the case, was not whether, in a given year, the appellant's liability to pay this employee or that was contingent; it was whether the appellant's liability to make some payment in respect of the lump sums accruing for the benefit of all its employees in that year was in any relevant sense contingent. If that is the right view, I think the Crown's contention on this point must fail. It is clear from the accounts that the appellant's employees during the material years were numerous and the chances of all, or even a substantial proportion or them, acting so as to forfeit their lump sum rights seems to me to be much too distant and improbable to merit significance."

20. Similar observations are to be found in the judgment of Lord Radcliffe; these are at page 754 of the report and occur in the following words :

"What the appellant claims the right to do is to charge against each year's receipts the cost of making provision for the retirement payments that will ultimately be thrown upon it by virtue of the fact that it has had the benefit of its employees' services during that year, As a corollary it will not make any charge to cover the actual payments made in the year in respect of retirement benefits. Only by such a method, it is said, can it bring against the receipts of the year the true cost of the services that it has used to earn those receipts. Generally speaking, this must, I think, be true. For, whereas it is possible that any one of its many employees may forfeit his benefit and so never require a payment, the substantial facts of the situation are that when the company has paid every salary and wage that is due for current remuneration of the year it has not by any means wholly discharged itself of the pecuniary burden which falls upon it in respect of the year's employment."

21. Again, as regards the Crown's contention that such liability was contingent, the same was rejected by Lord Radcliffe also, the learned Law Lord observing :

"..... where you are dealing with a number of similar obligations that arise from trading, although it may be true to say each separate one that it may never mature, it is the sum of the obligations that matter to the trader, and experience may show that, while each remains uncertain, the aggregate can be fixed with some precision. "(at page 758).

22. Lord Radcliffe then went on to observe :

"But, whatever the legal analysis, I think that for liabilities as for debts their proper treatment in annual statements of profit depends not upon the legal form but upon the trader's answers to two separate questions. The first is : Have I adequately stated my profits for the year if I do not include some figure in respect of these obligations ? The second is : Do the circumstances of the case, which include the techniques of established

accounting practice make it possible to supply a figure reliable established accounting practice make it possible to supply a figure reliable enough for the purpose ?" (at page 758 of the report).

23. Theses observations have been set out in extenso because it is this case which has been subsequently referred to in Indian decisions and we were assured by the learned counsel for the company that the case still remains a leading case on the law in England. The decision in Southern Railway of Peru Ltd came to be referred to by the Supreme Court in *Indian Molasses Co. (Private) Ltd. v. Commissioner of Income-tax.* In that case the assessee-company had paid in 1948 a sum of pound 8,208 to certain trustees in implementation of an agreement to provide a pension for its managing director after his retirement. The provisions of the trust deed which are fully set out in the head-note of the report appear to be some-what complicated. It appears that by reason of these provisions the trustees took out a policy providing for an annuity of pound 563 if both H-the managing director- and Mrs. H. should die before that date and also an annuity of pound 645 if H should die before that date leaving Mrs. H surviving him. There was a special provision in the policy which entitled the trustees to surrender that annuity for the capital sum of pound 10,169 after giving notice, Clause III of the second schedule to the policy provided for the return of all premia paid to the insurance society should both H and Mrs. H die before September 20, 1955. The assessee-company claimed deduction of the initial sum and the yearly premia paid for the assessment years 1949-50, 1950-51, 1951-52 and 1952-1953, It was held that until September 20, 1955, the assessee-company had dominion through the trustees over the sums paid in two circumstances, viz, under the special provision (for surrender) and under clause III which provided for return of the premia paid in the event of the death of both Mr. and Mrs. H before September 20, 1955. Accordingly, there was a possibility of a resulting trust in favour of the assessee-company and the sums paid ought, therefore, to be treated as set apart to meet a contingency. The payment could not be regarded as a paying out or away of the sums irretrievably and could not amount to expenditure. Accordingly, the payments were held not to be allowable deductions under section 10(2)(xv) of the Indian Income-tax Act, 1922. It has to be borne in mind whilst considering this case that what was being claimed as a deduction under section 10(2)(xv) was on the footing of actual payment or expenditure of the same and not on the basis of a provision has been contended, and with considerable justification, by the learned counsel for the company that the observations made in the Indian Molasses Company's case in fact lend support to the submissions which he has been canvassing before us for our acceptance and that these observations are fully consistent with later decisions of the Supreme Court, particularly in the case of *Metal Box Company of India Ltd. v. Workmen* to which reference will be made later on.

24. In Indian Molasses Company's case Hidayatullah J. (as he then was), speaking for the

Supreme Court, observed as follows :

> "Side by side with these principles, there are others which are also fundamental. The income-tax law does not allow as expenses all the deductions a prudent trader would make in computing his profits. The money may be expended on grounds of commercial expediency but not if necessity. The test of necessity is whether the intention was to earn trading receipts or to avoid future recurring payments of a revenue character. Expenditure in this sense is equal to disbursement which, to use a homely phrase, means something which comes out of the trader's pocket. Thus, in finding out what profits there be, the normal accountancy practice may be to allow as expense any sum in respect of liabilities which have accrued over the accounting period and to deduct such sums from profits. But the income-tax laws do not take every such allowance as legitimate for purposes of tax. A distinction is made between an actual liability in present and a liability de futuro which, for the time being, is only contingent. The former is deductible but not the latter." (pages 75-76 of the report).

25. Thereafter, he referred to the case of Alexander Howard & Co. Ltd. v. Bentley and of Southern Railway of Peru Ltd. v. Owen and observed (at page 77) as under :

> "These two cases illustrate the propositions that the recurring liability of a pension which is compressed into a lump payment should itself be a legal obligation, and that, if contingent, the present value of the future payments should be fairly estimable. If the pension itself be not payable as an obligation, and if there be a possibility that no such payment may be necessary in the future, the whole of the amount cannot be deducted but only the present value of the future liability, if it can be estimated."

26. The basis or the footing on which the claim of the Indian Molasses Company was disallowed is to be found in the penultimate paragraph of the above judgment and was that, on the facts of the case, before the Supreme Court the payment was not merely contingent but the liability itself was also contingent. According to the Supreme Court, the expenditure which is deductible for income-tax purposes is one which is towards a liability actually existing at the time, but the putting aside of money which may become expenditure on the happening of an event is not expenditure. These observations bear out what we have earlier maintained and which would be a distinguishing feature, viz., that the retirement benefits undertaken to be provided by the Indian Molasses Co. were for one employee as contradistinguished from over deduction was on the footing of moneys already paid to the trustees and not on the basis of a provision made on the basis of an actuarial calculation as is proposed to be made by the company before us.

27. In the very same volume of Income Tax Reports, viz, 37 ITR, one finds a case which will

afford us some assistance although it is not specifically concerned or connected with a provision for gratuity or retirement benefit. The said case is Calcutta Co. Ltd. v. Commissioner of Income-tax. It is somewhat interesting to note that, although reported earlier in the very same volume, as a matter of fact it had been decided seven days after the Indian Molasses Company's case Hidayatullah J. (as he then was), who delivered the judgment in the latter case, was a party to the judgment in the Calcutta Company's case although the actual Judgment delivered by Bhagwati J., speaking for the Supreme Court.

28. Now, in Calcutta Company's case the assessee-company bought lands and sold them in plots for building purposes undertaking to develop the plots by laying out roads, providing a drainage system and installing lights, etc. When the plots were sold the purchaser paid only a portion of the purchase price and undertook to carry out the developments within six months; but, according to the Supreme Court, the period was not of the essence of the contract. In the relevant accounting year the assessee-company actually received in cash only a sum of Rs. 29,392 towards the sale price of the lands, but in accordance with the mercantile system of accounting adopted by it, it credit in its accounts a total sum of Rs. 43,692 representing the full sale price of the lands. At the same time it debited an estimated sum of Rs. 24,809 as expenditure for the developments it had undertaken to carry out, even thought no part of that amount was actually spent. The claim of the assessee-company to be allowed the entire sum was disallowed by the Income-tax Officer, the disallowance upheld by the Appellate Assistant Commissioner and the view of the Appellate Assistant Commissioner confirmed by the Income-tax Appellate Tribunal. The High Court, upon a reference made to it by the Appellate Tribunal answered the question again the assessee-company and in favour of the revenue. Being aggrieved by the decision of the High Court the assessee-company of being allowed the deduction claimed. It was observed by Bhagwati J. (at pages 6 and 7 of the report) as under :

> "Inasmuch as the liability which had thus accrued during the accounting year was to be discharged at a future date the amount to be expended in the discharge of that liability would have to be estimated in order that under the mercantile system of accounting the amount could be debited before it was actually disbursed.
>
> The difficulty in the estimation thereof again would not convert an accrued liability into a conditional one, because it is always open to the income-tax authorities concerned to arrive at a proper estimate thereof having regard to all the circumstances of the case."

29. In Calcutta Company's case the views earlier expressed by the Supreme Court in Badridas Daga's case were reiterated and the passage from the said case which we have set out earlier quoted with approval.

30. Southern Railway of Peru's case came up for consideration of the Supreme Court once again in *Standard Mills Co. Ltd. v. Commissioner of Wealth-tax t*he assessee-company appearing before the court claimed in the proceedings for assessment of wealth-tax that it was entitled to deduction, inter alia, of the amount of Rs. 25,02,675 on account of accrued liability for gratuity to workmen and staff as per the award of the industrial court and the Labour Appellate Tribunal. It is important ton note that in Standard Mills' case the Supreme Court was considering the application of the definition of "net wealth" in section 2(m) of the Wealth-tax Act, 1957, which requires that there should be debt owed by the assessee on the relevant valuation date. It was observed by the court that if there is no debt owed on the valuation date, it could obviously not be deducted in determining the net wealth which is liable to tax under Wealth-tax Act. The Supreme Court observed that the right to obtain gratuity under the awards arises only when there is determination of employment and not before and the liability did not exist in present but was contingent upon the determination of the employment (page 474 of the report). The case of Southern Railway of Peru and the observations there from were brought to the attention of the court. But, according to the Supreme Court, the house of Lords in that case was concerned with determining the deductibility of the present value of a liability which may arise in future in the computation of taxable profits for the relevant year under the Income-tax Act, and that the same considerations could not apply to a case under the Wealth-tax Act where the liability to pay wealth-tax is charged upon the net wealth of an assessee. It is pertinent to note that no fault was found with the reasoning of the House of Lords or with the view that before profits of a business could be fairly assessed in the sense of computed or calculated) such a deduction has to be made.

31. Southern Railway of Peru's case came to be considered by the Supreme Court once again in *Commissioner of Income-tax v. Gemini Cashew Sales Corporation* where the principle set out in extenso earlier in this judgment was approved by the Supreme Court, but the claim of the assessee in the appeal before it was rejected on a totally different footing as set out in the judgment of the court which was delivered by J. C. Shah J. (as he then was), speaking for the court. In the said case a firm consisting of two partners came to be dissolved by reason of the death of one of them on August 4, 1957. Thereafter, its business was taken over and continued by the surviving partner on his own account without any interruption in the services of the employees or alteration in the terms of their employment. In settling the accounts of the firm as on the date of death, i.e., August 4, 1957, a sum of Rs. 1,41,506 was taken into account as retrenchment compensation payable to the employees under section 25FF of the Industrial Disputes Act, 1947. The question was whether this sum constituted an allowable expenditure in computing the income of the firm for the assessment year 1958-59. The Supreme Court considered the liability to pay retrenchment compensation arising under section 25FF of the Industrial Disputes Act, 1947, and concluded that it would arise for the first time after the closure of the business and not before and that such liability arose not in the carrying on of the business

but on account of the transfer of the business. According to the Supreme Court, during the entire period that the business was continued there was no liability to pay retrenchment compensation. Further, according to the Supreme Court, the liability which arose on transfer of the business was not of a revenue nature and, therefore, it could not be deducted under section 10(1) and 10(2)(xv) was disallowed. The Supreme Court, however, had occasion to consider the Southern Railway of Peru's case and Appeal from the Judgment and Order dated on discussing the same and the observations from the judgments of Lord McDermott and Lord Radcliffe, to which we have adverted earlier, observed as under.

> "The question which arises in the present case is not about the miscibility of a provision made by a trader by the adoption of a reasonably satisfactory method estimating the present value of an obligation which may arise in future to pay a sum of money to his employees. The question that falls to be determined is whether the liability which arises on transfer of the business is to be regarded as a permissible our going in the account of the business which is transferred. Broadly stated, the present value on commercial valuation of money to become due in future, under a definite obligation, will be a permissible outgoing or deduction in computing the taxable profits of a trader, even if in certain condition s the obligation may cease to exist because of forfeiture of the right. Where, estimating its present value may arise, for to be a permissible outgoing or allowance, there must in the year of account be a present obligation capable of commercial valuation." (page 649 of the report).

32. It is clear, therefore, that even in this case the Supreme Court appears to have confirmed the principle enunciated by the House of Lords.

33. We now turn to *Metal Box Company of India Ltd. v. Their Workmen* which decision is expressly mentioned by the Central Board of Direct Taxes in the first circular and which decision, therefore, merits close scrutiny and attention. In that case the Supreme Court was primarily concerned with the calculation of bonus payable to the workmen of Metal Box Company under the Payment of Bonus Act, 1965; and, broadly speaking, under the provisions of the said Act the available surplus for any employer in respect of any accounting year has to be the gross profits for that year after deducting therefrom the sums referred to in section 6 of the said Act. Section 4 indicates the manner in which gross profits derived by an employer from an establishment are to be calculated. In the case of a banking company the gross profits are to be calculated in the manner specified in the First Schedule to the said Act, and in all other cases they are to be calculated in the manner specified in the Second Schedule to that Act. We are really not concerned with the detailed provisions in the Act or in the Schedules, and what has been mentioned above is only as a background for appreciating the rival contentions which came up

for decision before the Supreme Court in Metal Box Company's case. In the profit and loss account of the said company a sum of Rs. 18.38 lakhs, being the estimated liability under two gratuity schemes framed by the company, was deducted from the gross receipts. Under one of the schemes, which was first introduced in 1960, gratuity was payable on the termination of an employee's service either due to retirement, death or termination of service, the amount of gratuity payable being dependent on his wages at that time and the number of years of service put in by him. The company had worked out on an actuarial valuation its estimated liability and made provision for such liability not all at once but spread over a number of years. In 1964-65, the second gratuity scheme was introduced by the company which was available to its officers. In this case also the estimated liability under the scheme was worked out. But, instead of providing the whole of it during the year, the provision was spread over a number of years. In the year under consideration, i.e., 1964-65, the company had made provision against its liability under the two schemes for Rs. 18.38 lakhs, whereas the actual payment as gratuity to the workmen and officers who retired was Rs. 1,31,585 and Rs. 87,295, respectively. The Union contended that the company could deduct from the gross receipts only the sums actually paid during the year. The company, on the other hand, maintained that what it had done was legitimate and was warranted by the principles of accountancy and, therefore, the hole amount of Rs. 18.38 lakhs was deductible in arriving at its net profits. The question which the Supreme Court was called upon to consider was whether it was legitimate in such a scheme of gratuity to estimate the liability on an actuarial valuation and deduct such estimated liability in the profit and loss account while working out the net profits of the company. It was observed by Shelat J., speaking for the Supreme Court (at pages 62-63 of the report), as under :

> "In the case of an assessee maintaining his accounts on the mercantile system, a liability already accrued, though to be discharged at a future date, would be a proper deduction while working out the profits and gains of his business, regard being had to the accepted principles of commercial practice and accountancy. It is not as if such deduction is permissible only in case of amounts actually expended or paid. Just as receipts, though not actual receipts but accrued due are brought in for income-tax assessment, so also liabilities accrued due would be taken into account while working out the profits and gains of the business."

34. Reference was then made to Calcutta Company's case and Standard Mill's case, to which we have adverted earlier. It was observed that in Standard Mill's case the Supreme Court was concerned with the terms of section 2(m) of the Wealth-tax Act and that in view of the express phraseology employed, its liability to pay gratuity which did not exist in present would not constitute a debt and, therefore, could not be deducted while computing the net wealth. In connection with this aspect of the matter it was observed (at pages 64-65 of the report) as under

"These observation show that the court was of the view that though such a liability is a contingent liability and, therefore, not a 'debt' under section 2(m) of the Wealth-tax Act, it would be deductible under the Income-tax Act while computing the taxable profits. In the instant case, the question is not whether such estimated liability arising under the gratuity schemes amounts to a debt or not. The question that concerns us is whether, while working out the net profits, a trader can provide farmhouse gross receipts his liability to pay a certain sum for every additional year of service which he receives from his employees. This, in our view, he can do, if such liability is properly ascertainable and it is possible to arrive at a proper discounted present value. Even if the liability is a contingent liability, provided its discounted present value is ascertainable, it can be taken into account. Contingent liabilities decanted and valued as necessary can be taken into account as trading expenses if they are sufficiently certain to be capable of valuation and if profits cannot be properly estimated without taking them into account. Contingent rights, if capable of valuation, can similarly be taken into account as trading receipts where it is necessary to do so in order to do so order to ascertain the true profits : (see C. N. Beatti's Elements of the Law of Income and Capital Gains Taxation, 8th edition page 54)."

35. In Metal Box Company's case Shelat J. cited Southern Railway of Peru's case and noted with approval the principle enunciated by the House of Lords that the company was entitled to charge against each year's receipts the cost of making provision for the retirement payments which would ultimately be payable as the company had had the benefit of the employee's service during that year, provided the present value of the future payments could be fairly estimated. It may be mentioned that the passage from Southern Railway of Peru's case which we have quoted earlier, has been quoted in extenso in the judgment of Metal Box Company's case repelling the contention that such provision was merely for a contingent liability which may or may not come about; and this argument advanced on behalf of the workmen appears to be repelled as was the argument of the Crown by the House of Lords. It appears thereafter from the report (at page 67) that it was contended before the Supreme Court that such a claim on behalf of the Metal Box Company ought not be countenanced inasmuch as it was not in accordance with the companies Act, and further that such a provision was not permissible under the Income-tax Act, 1961. Both these aspects were considered by the Supreme Court and the contentions based on the provisions of the two enactments negatived. As far as the Income-tax Act, 1961, is concerned, it was observed (at page 67 of the report) :

> "But the contention was that though Schedule VI to the companies Act may permit a provision for contingent liabilities, the Income-tax Act, 1961 does not, for under section 36(v), the only deduction from profits and gains permissible is of a sum paid by an assessee as an employer by way of his contribution towards an approved gratuity fund created by him for the exclusive benefit of his employees under an irrevocable trust. This

argument is plainly incorrect because section 36 deals with expenditure deductible from out of the taxable income already assessed and not with deductions which are to be made while making the profit and loss account."

36. After this discussion the Supreme Court held that an estimated liability under gratuity schemes such as the ones being considered by the Supreme Court, even if it amounted to a contingent liability and not a debt under the Wealth-tax Act, if properly ascertainable and its present value fairly discounted, was deductible from the gross receipts while preparing the profit and loss account. It found no rule or direction in the Companies Act which prohibited such a practice. This branch of the argument advanced before the Supreme Court then was clearly negatived.

37. It was on the basis of the judgment in Metal Box Company's case that the Central Board of Direct Taxes came to issue its first circular, dated September 21, 1970. According to the Board, the provision of gratuity on a scientific basis (in the form of an actuarial valuation carried out every year) could be considered to represent a real liability of the employer to the employees. In this view of the matter the Board came to the conclusion that the liability so ascertained could not be properly regarded as a contingent liability, and that such provision of gratuity, therefore, may be treated as an admissible deduction under section 37(1) of the Income-tax Act, 1961.

38. The learned counsel for the respondents has submitted that the observation in Metal Box Company's case pertaining to the allow ability of such provision under the Income-tax Act can in no sense of the term be regarded as the ratio dicidendi and were no more than mere casual observations which were not binding on the High Courts or subordinate courts and would not constitute the law of the land within the meaning of article 141 of the Constitution of Indian the other hand, it was submitted by Mr. Palkhivala on behalf of the company that these were not casual observations and not even obiter dicta but part of the ratio of the case, fully consistent with the previous decisions of the court, and, accordingly, the law of the land, binding upon the courts and all officers including Income-tax Officers. Alternatively, it was submitted by Mr. Joshi on behalf of the revenue that in his view the observations of the Supreme Court were per income and, therefore, ought not to be followed by the High Courts and that, in any event, no writ of mandamus should issue on the basis of these observations if the court was satisfied that the same were per income. In connection with these two heads of argument it would become necessary to refer briefly to some authorities of our High Court and the other High Courts cited at the Bar. But before doing so, we think it would be proper to complete the recital of the Supreme Court cases by referring to *Bombay Dyeing and Manufacturing Co. Ltd. v. Commissioner of Wealth-tax* which has been mentioned in the fore front in the second circular of the Central Board of Direct Taxes, which circular has been impugned in this petition.

39. In the above-cited case the Supreme Court was concerned with computing the net wealth of the assessee-company which was the appellant before it. It appears that the assessee-company wanted the Supreme Court to reconsider the decision it had given in Standard Mill's case to which reference has been made earlier. According to the assessee-company, the decision in Standard Mill's case was required to be reconsidered by a larger Bench of the Supreme Court in view of the Supreme Court's decision in Metal Box Company's case. According to Hegde J., there was no conflict between the two decisions and there was no justification for referring the Bombay Dyeing case to a larger Bench for reconsideration of the decision in Standard Mill's case. Accordingly, the latter decision was applied and the appeal to the Supreme Court dismissed. There is only one line in the judgment of the Supreme Court (if that decision can be elevated to the status of a judgment) pertaining to Metal Box Company's case and that line reads : "Metal Box Company's case was rendered under the Bonus Act." That this is so is plain and obvious. But, in our opinion, it would be improper and impermissible to read anything more in this line than what it says. The Metal Box Company's case was obviously one where the Supreme Court was considering the claims and contentions of the respective parties before it arising under the Bonus Act. For that purpose, however, the court thought it necessary to refer to the provisions of and decisions under the Wealth-tax and the Income-tax Acts and the provisions of the Companies Act. In the Bombay Dyeing case it has not been stated that this discussion is obiter directly and it appears to us that merely by reason of this passage in the Bombay Dyeing case it would not be proper to consider that the Supreme Court has in any way regarded the observations in Metal Box Company's case pertaining to income-tax as obiter or casual and not binding.

40. The distinction between obiter dictum and "casual observations" of the Supreme Court is well illustrated by a decision of a Division Bench of this court in Mohandas Issardas v. A. N. Sattanathan. According to the Division Bench, it was as much necessary in the interests of judicial uniformity and judicial discipline that all the High Courts must accept as binding the obiter dicta of the Supreme Court in the same spirit as the High Courts accepted the obiter dicta of the privy Council. Am obiter dictum was defined as an expression of opinion on a point which is not necessary for the decision of a case. This definition draws a clear distinction between a point which is necessary for the determination of a case and a point which is not necessary for the determination of a case. It was, however, observed that in both cases the point must arise for the determination of the Tribunal. The question which was necessary for the determination of the case would be the ratio decidendi. The opinion of the Tribunal on the question which was not necessary to decide the case would be only an obiter dictum. However, according to the Division Bench, it would be incorrect to say that every opinion of the Supreme Court would be binding upon the High Court in India; the only opinion which would be binding would be an opinion expressed on a question that arose for the determination of the Supreme Court and even though

ultimately it might be found that the particular question was not necessary for the decision of the case, even so if an opinion was expressed by the Supreme Court on that question the opinion must be regarded as binding upon the High Courts. The relevant observations from the judgment of Chagla C.J. are to be found at pages 1160, 1161 and 1163 of the report.

41. It was similarly pointed out by Mr. Joshi that in Zoolfiqar Ali Currimbhoy Ebrahim v. Official Trustee of Maharashtra counsel for one of the parties had referred to certain observations made in. judgment of the Supreme Court and attempted to utilise those observations in support of his argument advanced before the Bombay High Court. It was conceded that the observations of the Supreme Court did lend support to the argument of counsel but the observations were regarded as not amounting to either ratio decidendi or obiter dicta of the Supreme Court and in the nature of mere casual observations, which were not binding (see observations made by Tarkunde J. at pages 333.334 of the report and at pages 369.370 by Kotval C.J.).

42. On the other hand, according to the learned counsel for the company, the observations in Metal Box Company's case above quoted regarding deductibility of gratuity liability on an actuarial valuation basis for the purposes of computing income-tax payable by the assessee-company were part of the ratio of the case. According to his submission, for the purposes of computation of bonus under the Payment of Bonus Act, the starting point was the computation of commercial profits. There was no definition of such concept to be found in the payment of Bonus Act and, therefore, the Supreme Court took recourse and it had to take recourse to the corresponding provisions under the Companies Act and under the Income-tax Act. The learned counsel for the company proceeded to analyst the judgment in Metal Box Company's case in the light of this approach and submitted that, in the view of the Supreme Court as expressed in the said The Judgment commercial profits, which concept was not defined in either the Payment of Bonus Act or in the Income-tax Act, had to be computed on ordinary principles of commercial accounting. The Supreme Court had before it for consideration a new enactment of Parliament for which there was no judicial authority and, therefore, the question of computing or calculating commercial profits and the deductibility of gratuity liability which was payable in future but on the present scientific estimation had to be decided on the basis of decision given in respect similar enactments (the similarity being restricted to the provisions under consideration, viz., the Income-tax Act, 1961). It is in the light of this approach that the Supreme Court referred to cases under the income-tax law to elucidate the concept of commercial profits and the proper approach to the claim of the company to make the deduction for the provision under contemplation. Again, according to the contention of the learned sensual for the company, it was open to the learned judges of the Supreme Court to decide this question on first principles, being guided by the express statutory provisions under the Payment of Bonus Act, or it was open to them to decide this question with the help of analogous provisions and principles underlying the decisions in

what they regarded as comparable enactment, viz., the Income-tax Act. It was submitted that in case the second approach was resorted to by the Supreme Court, it would not be proper for the High Court to hold that the observations made concerning the provisions in the Income-tax Act and the judicial decisions under that Act are casual observations or obiter. As far as this contention is concerned, it was submitted that where the Supreme Court has adopted an approach and after adopting that approach had indicated its views on an enactment which it expressly or by implication regards as comparable to the enactment under consideration, the views expressed by the Supreme Court on the latter enactment must be regarded as part of the ratio and cannot be regarded by the courts bound by Supreme Court decisions as obiter or casual observations which in the opinion of the subordinate courts were not necessary to be made which came up for consideration. According to this submission, the decision of the Supreme Court in Metal Box Company's case rested on the footing : (a) that the payment of Bonus Act and the Income-tax Act were in pari material as far as these two allied questions were concerned, and (b) that the legal position regarding such deduction under the Income-tax Act had to be determined in order to come to a conclusion as to the true position under the Payment of Bonus Act. If this is accepted-and in Mr. Palkhivala's submission, it was not open to us to question the approach of the Supreme Court or to say that some other approach was the proper or better one-it was impossible to argue that determination of the position under the Income-tax would amount to laying down obiter dicta, much less making a casual observation. According to the Supreme Court, the decision under the Income-tax was a necessary and essential step in coming to the conclusion regarding the question of deductibility of similar provision under the Payment of Bonus Act and that it would not be open for the High Court to say that any of the observations in such decision are obiter or casual because in the opinion of the High Court it would have adopted a different approach or would not have considered it necessary to decide some of the points in fact decided by the Supreme Court.

43. During the course of arguments it had appeared to us at one stage that perhaps it was unnecessary for the Supreme Court to have considered whether such a provision had been or could be deducted from the computation of gross profits of the business by reason of the provisions of section 36(1)(v) of the Income-tax Act, 1961. According to the Supreme Court, the argument advanced on behalf of the workmen that such a provision was not permitted by reason of section 36(1)(v) was not tenable inasmuch as section 36 deals with expenditure deducted from out of taxable income already computed and not with deductions which are to be made while making the profit and loss account. It was pointed out by Mr. Palkhivala whilst dealing with this aspect of the matter that one of the sums deductible from the gross profits of the employer under the provisions to be found in section 6 of the Payment of Bonus Act would be direct taxes which the employer is liable to pay for the accounting year in respect of his income, profits and gains during that year, and that it would be open to a court having regard to the statutory provision to

seek to reconcile its decision under the Payment of Bonus Act with the position as, according to it, would exist under the Income-tax Act so that the estimation or computation of gross profits would be the same for both purposes and would not be lower for the Payment of Bonus Act and higher for the Income-tax Act, inasmuch as this might result in hardship to the workmen concerned.

44. The question before us is not what we would have done had we been faced with the task of deciding the question which came up for decision before the Supreme Court in Metal Box Company's case. We might have decided the case on first principles, restricting our decision to the provisions of the Payment of Bonus Act, 1965. That, however, the Supreme Court does not seem to have done. On the other hand, the Supreme Court does seem to us to have followed the approach indicated by Mr. Palkhivala during the course of arguments, and having followed that approach it would not be open to us now to question that approach or to say that any observations made by that court whilst following that approach would be obiter or casual observations. Indeed, it appears to us that the Central Board of Direct Taxes itself did not consider this observations to be casual observations, and this view is fortified by the language of the first circular which has been fully set of at the beginning of this judgment.

45. In dealing with this aspect of the matter it also becomes necessary, in our opinion, to refer to three judgments of the High Courts, including that of the Bombay High Court, which have considered and sought to apply the observations of the Supreme Court in Metal Box Company's case. These decisions of the High Courts would also go a long way to reveal the unstable foundations underlying Mr. Joshi's theory that those observations were casual observations. These three cases, to which brief reference may now be made are : Madho Mahesh Sugar Mill (P) Ltd. v. Commissioner of Income-tax. Delhi Flour Mills Co. Ltd. v. Commissioner of Income-tax and India United Mills Ltd. v. Commissioner of Income-tax

46. In Madho Mahesh Sugar Mill's case the assessee-company was maintaining its accounts on the mercantile system. In 1961 the U.P. Government issued a notification with regard to the sugar industry imposing a liability on persons running sugar mills to provide gratuity to their workmen in accordance with the scale provided in the said notification. In pursuance of this notification the assessee-company set apart the sum of Rs. 1,37,811, representing the sum that the assessee-company would be required to pay to its workmen as gratuity and made an appropriate entry in its book of accounts, crediting the gratuity account and debiting the profit and loss account for the assessment year 1962-63. This sum was claimed by the assessee-company as business expenditure, but the claim was disallowed by the Income-tax Officer, the Appellate Assistant Commissioner and the Income-tax Appellate Tribunal. On a reference to the Allahabad High Court it was contended for the revenue that at best the assessee-company could claim only such

gratuity relevant to the previous year. The discounted value of the assessee-company's liability to pay gratuity based on an actuarial valuation was determined at the instance of the High Court at Rs. 1,05,200. Before the High Court the Calcutta Company's case. Indian Molasses Company's case. Standard Mills' case were referred to, and finally the Metal Box Company's case according to Mr. Joshi, makes only casual observations regarding the position under the Income-tax Act, was considered and applied. It was held that the Government order provided that the gratuity would be payable to an employee not only in respect of his future services but also for his past services. Thus, on order to ascertain the quantum of liability as on the date the order came into effect, the past services of the employees had also to be taken into account. In the circumstances every businessman would make provision every year for his liability under the notification. According to the Allahabad High Court, the liability for payment of gratuity ascertained on actuarial calculations, in which all contingencies are taken into consideration, is a liability in present and is capable of ascertainment, and, therefore, the sum of Rs. 1,05,200 was a permissible business expenditure in the assessment year concerned. According to the High Court, prior to the decision of the Supreme Court in Metal Box Company's case there appeared to be some doubt as to whether such a liability was capable of ascertainment and whether it could be called a liability in present.

47. After considering the observations of the Supreme Court, the Allahabad High Court opined that the doubt had been set at rest by the decision of the Supreme Court. This would be found at page 509 of the report. A passage from the Indian Molasses Company's case was brought to the attention of the Allahabad High Court and these observations were made by the High Court after considering the said case as well as subsequent observations of the Supreme Court in Metal Box Company's case. It may be pointed out that before the Allahabad High Court, counsel for the department had contended that payment of gratuity was provided for in clause (v) of sub-section (1) of section 36 of the Income-tax Act and that deduction for gratuity could be allowed only in accordance with that provision. The Allahabad High Court answered that contention in the followed words (at page 509 of the report) "In any case, the answer to that question is plain. The present case is not governed by section 36(1)(v), which permits deduction out of the gross profits of any contribution made by an employer towards gratuity fund created under a trust. In the present case the amount is deductible in the computation of the gross profit itself."

48. After making these observations the Allahabad High Court referred to the observations made to the same effect by the Supreme Court in Metal Box Company's case.

49. A similar question came up for consideration before the Delhi High Court in Delhi Flour Mill's case. Before the said High Court the Indian Molasses Company's case Southern Railway of Peru's case Metal Box Company's case and Madho Mahesh Sugar Mill's case were cited. Indian

Molasses Company's case was distinguished and the other three cases followed and the question was answered in favour of the assessee-company. In the case before the Delhi High Court gratuity was payable to the employees of the assess-company under a settlement of disputes between the employer and the employees. Pursuant to such agreement the assessee-company, which maintained its accounts on the mercantile system, transferred the sums of Rs. 55,712 and Rs. 12,001 to the Employees' Gratuity Fund for the accounting periods ending on 31st October, 1956, and October 31, 1957, and in its balance-sheets the assessee-company showed these amounts under the head "Current Liabilities and Provisions". The assessee-company also gave credit of the amount of gratuity payable under the agreement to the employees in the account of each of the employees. The Income-tax Officer had allowed deduction only of the actual amounts disbursed during those years and disallowed the balance. According to the Delhi High Court, the provision made by the assessee-company for payment of gratuity under its agreement with the employees dated February 14, 1956, was in the nature of revenue expenditure and the amounts were allowable as business expenditure under section 10(2)(xv) of the Indian Income-tax Act, 1922, for the two assessment year respectively. The gratuity payable to an employee represented a part of the emoluments payable to him for rendering service during each year. The right to receive gratuity accrued to the employee as soon as he completed a year of service, and, as a corollary, the liability to pay the gratuity to the employee arose to the assessee-company at the end of each year. The amount of liability was also ascertainable and there was no question in that case of the discounted present value of the liability not being ascertainable. No doubt the actual payment of the gratuity was deferred to a later date on the happening of a certain event, viz., death or voluntary retirement of the employee. But, according to the Delhi High Court, these were not uncertain events. Further, according to the Delhi High Court, even though the gratuity might not be payable to an employee in the event of his dismissal or retrenchment from service, it could not be said that the liability of the assessee-company for the payment of gratuity to its employees under the agreement did not accrue during the relevant years. As the Delhi High Court observes, distinguishing the Indian Molasses Company's case (which pertained to the provision for retirement benefits of a single employee) :

> "Under the agreement, every employee was entitled to receive gratuity for every year of service rendered by him to the assessee and this gratuity was payable to the employees on the happening of events which were certain. The possibility of the gratuity not being paid at all to the employees in the event of dismissal or retrenchment of the employees is certainly too remote to be taken into account."

50. It is interesting to not that as far as Metal Box Company's case was concerned, the Delhi High Court observed that the several observations made by the Supreme Court in that Case, though made in the context of the bonus payable by a company under the payment of Bonus Act

which required computation of profits earned by the company in a particular year, were is its view equally applicable to the question for consideration before the High Court, viz., whether the provision made by the assessee-company for the payment of gratuity under its agreement with the employees was in the nature of an accrued liability of the assessee, which liability was liable to be taken into account for computing the income of the assessee-company for the years under reference.

51. Even if the position had rested with the judgment of the Allahabad and Delhi High Courts, it is our opinion that this court would have, on the application of the principle of uniformity of construction, followed the law laid down in the above-quoted two decisions. As has been observed in a number of decision of this court, the latest of which is Commissioner of Income-tax v. Tata Sons Private Ltd. the established practice and policy is that one High Court must accept the view taken by another High Court in the interpretation of the section of a statute which is an all-India statute. It is, however, unnecessary to base our view of the position under the Indian Income-tax Act, 1922, merely on the view taken by the Allahabad and Delhi High Courts inasmuch as in India United Mills Ltd. v. Commissioner of Income-tax a similar view appears to have been taken by a Division Bench of this court also. In that case the facts were as follows : By an award given under the Bombay Industrial Relations Act, 1946, the Industrial Court had directed payment of gratuity to workmen of the assessee-company in accordance with the scale provided therein, the amount of gratuity being dependent on the wages at that time and the number of years of service put in by the workmen. In order to implement this award the assessee-company provided or set apart during the year 1951, an amount of Rs. 21,77,359 for a gratuity fund made up of Rs. 19,11,658 on account of initial contribution and Rs. 2,65,701 on account of annual contributions for the year 1951. It may be noted, however, that the assessee-company subsequently created a trust by executing a deed on February 20, 1952, to hold the funds contributed to the gratuity fund and made payments to the trustees of the fund of Rs. 20,00,000 on February 28, 1952, and Rs. 1,50,466 on March 4, 1952. Gratuity rules had been framed and in these rules there was a specific provision that certain categories of employees who has been dismissed for dishonesty or misconduct were not to be entitled to claim gratuity and any amounts contributed by the company on their account were to stand transferred to "Lapse and Forfeiture Suspense Account". The assessee-company claimed deduction of the amounts contributed to the gratuity fund while determining its profits for the assessment years 1952-53 and 1953-54. The Income-tax Officer allowed as a deduction only the amount that had been actually paid to the persons who had retired in that year. On second appeal, the Appellate Tribunal rejected the assessee-company's claim on the ground that the said expenditure was of a capital nature. The Tribunal further held that though the assessee-company was following the mercantile system of accounting, that method only permitted a deduction on account of liabilities which were actual and present during the current year and which could be ascertained with a fair degree of precision

and in the instant case the liability was not present and actual and that it was not possible to ascertain it with a fair degree of precision. According to the Tribunal, it was in the nature of a contingent liability and, therefore, the deduction claimed could not be allowed. On a reference to the High Court, after citing Madho Mahesh Sugar Mill's case and referring to the decision of the Supreme Court in Metal Box Company's case it was held the the liability for payment of such gratuity ascertained by actuarial calculations, in which all contingencies are taken into consideration, is a liability in present and capable of ascertainment and, therefore, the amount set apart was a permissible business expenditure in the assessment year concerned. Applying what was laid down in the above two decisions the High Court answered the question in favour of the assessee-company, observing that the setting apart of the two sums would have to be allowed as business expenditure provided it could be said that the amount claimed as a deduction had been arrived at by adopting a scientific method of determining the present value of the said Liability had been contended by the revenue before the High Court in India United Mill's case that in the case which was before the High Court for consideration the estimate of the liability had not been properly arrived at. According to the High Court, it was unnecessary to decide this particular issue in view of the creation of the trust inasmuch as the amount had been actually paid over by the assessee-company to the trustees and, therefore, this was a case of actual expenditure and not merely a provision on account of the liability. Mr. Joshi had urged before us that in India United Mill's case the facts disclosed an actual irretrievable parting of the amounts by the assessee-company, and he submitted that this was the basis why the question were answered in favour of the assessee-company. With respect to his sub-mission, it proceeds upon an erroneous appreciation of what that judgment discloses. This aspect of the matter assumed importance before the High Court only because of the limited contention raised by the revenue that the provision was not scientifically estimated. The High Court applied the observations of the Supreme Court in Metal Box Company's case and of the Allahabad High Court in Madho Mahesh Sugar Mill's case on the earlier aspect of the question viz., whether such liability was contingent or could be said to exist in present, and on this aspect of the question the fact that it had irretrievably parted with the amount was not of any relevance.

52. This decision (in India United Mill's case, in our opinion clearly establishes that the observations in Metal Box Company's case were not at all casual observations. Those observations have been held as ones which could be usefully referred to by our High Court and in fact have been followed and applied by the High Courts of Allahabad and Delhi. It is not necessary in our opinion, to consider whether the observations as to the position under the Income-tax Act made in Metal Box company' case would be the ratio or obiter dicta as in either case the observations are binding on the High Courts. These observations are according to us in line with the previous decisions of the Supreme Court under the Income-tax Act and merely elucidate the position which has been arrived at by the Supreme Court step by step from its

decisions in the various cases to which we have referred earlier. To that extent, perhaps, Mr. Palkhivala is right in his submission that these observations cannot be characterised as obiter dicta but must be properly regarded as the ratio of the case inasmuch as the Supreme Court seems to have followed the approach of considering the position under the Income-tax Act and applying the same position to the position under the Payment of Bonus Act. It is true that some other court may decide not to follow that approach and ascertain the position under the Bonus Act on first principles; but merely because that is a possible approach, it would not be proper to regard these observations of the Supreme Court as being in the nature of obiter.

53. There remains the alternative argument of Mr. Joshi that these observations are and must be properly regarded as being made as per income. This submission proceeded upon the following footing : According to Mr. Joshi, section 36(1)(v) of the Income-tax Act, 1961, read with section 40(a) thereof and the Rules framed under the Income-tax Act provide a complete code for such allowance and provision made for gratuity liability. He conceded that there was no express bar to such provision as was intended to be made by the company before us. But, according to his submission, there was an implied bar by reason of these provisions read together with the Rules, which bar had not been properly considered by the Supreme Court in Metal Box Company's case and that to that extent the decision was per income and not binding on the High Courts.

54. The provisions of section 36(1)(v) and section 40(a)(iv), on which reliance was placed, may be set out :

> "36. (1) The deductions provided for in the following clauses shall be allowed in respect of the matters dealt with therein, in computing the income referred to in section 28 -.....
>
> (v) any sum paid by the assessee as an employer by way of contribution towards an approved gratuity fund created by him for the exclusive benefit of his employees under an irrevocable trust."
>
> "40. Notwithstanding anything to the contrary in sections 30 to 39, the following amounts shall not be deducted in computing the income chargeable under the head 'Profits and gains of business or profession', -
>
> (a) in the case of any assessee -.....
>
> (iv) any payment to a provident or other fund established for the benefit of the employees of the assessee, unless the assessee had made effective arrangements to secure that tax shall be deducted at source from any payments made from the fund which are chargeable to tax under the head 'Salaries'....."

55. The approved gratuity rules are to be found in Part XIV of the Income-tax Rules, 1962, and provides as to how a trust is to created, in what its moneys are to be invested, who may be its directors; the rules also fix the limit for the annual and initial contributions. Mr. Joshi placed great reliance on rule 106 under which the employer is not to keep to have any interest in the fund moneys. Now, the argument of Mr. Joshi that the decision in Metal Box Company's case was per income inasmuch as it did not properly consider and apply this implied bar of the allowance of such provision, was met by Mr. Palkhivala on a number of alternative footings. In the first place, it was submitted that it was not open to the High Courts to take up a position that the decision of the Supreme Court or the observations made therein were per income and not to follow the decision and the observation. In this connection we were referred to *Ballabhdas Mathuradas Lakhani v. Municipal Committee, Malkapur* where it was observed that a decision of the Supreme Court was binding on the High Court and the High Court could not ignore it because they thought that "relevant provisions were not brought to the notice of the court". Similar views are to be found in Chhotala Vaghjibhai v. Vivekanand Mills Co. Ltd. where it is observed that it is only in case of the decision of the concurrent court that the doctrine of obiter per income, or distinguished on facts, could be applied; and that the same position would not extend to a decision of the superior court (viz., the Supreme Court) which was completely binding on the High Court. Mr. Palkhivala also referred us to similar observations in Sailendra Nath Neogy v. Purnendu Sen and Commissioner of Income-tax v. Roshanlal Kuthiala.

56. Alternatively, it was submitted that the doctrine of a decision being distinguished and not followed on the footing that it is per income has to be invoked in the rarest of cased and only when it is clear to the court that there is a manifest slip or an erroneous observation which is inconsistent with a specific statutory provision or a binding authority. In connection with this aspect of the matter we were referred to a discussion in Morelle Ltd. v. Wakeling The Court of Appeal was called upon to hold that its earlier decision in Morelle Ltd. v. Waterworth was per incuriam. This submission was not acceptable and it was observed that a decision should be held to have been given per income only where it was given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court, so that in such cases some part of the decision or some step in the reasoning on which it was based was on that account demonstrably wrong. The Court of Appeal went on to observe that a decision was not to be treated as having been given per incuriam simply because of a deficiency of parties, or because it might be made to appear that on an earlier occasion the court had not had the benefit of the best argument.

57. It was finally urged that the decision of the Supreme Court could not be said to be per incuriam inasmuch as the provisions contained in section 36(1)(v) of the Income-tax Act, 1961, had been brought to the attention of that court when it delivered its judgment in Metal Box

Company's case that, further, the view that it took of the applicable provisions under the Income-tax Act was fully consistent with and in consonance with its earlier observations in the four cases, to which we have adverted earlier in the course of our judgment, and that, in any event, there was no basis in Mr. Joshi's contention that there was any bar by necessary implication by reason of the provisions contained in sections 36(1)(v) and 40(a)(iv) read together with the Rules contained in Part XIV of the Income-tax Rules, 1962.

58. In connection with the last mentioned argument Mr. Palkhivala took us through the various permissible deductions provided for under sub-section (1) of section 36 and demonstrated how it was not possible to argue that those only were the permissible deductions in respect of the heads thereunder mentioned and that the other deductions or allowances under those heads were barred by necessary implication. According to his submission, these were provisions for allowing certain provision made or expenses incurred irrespective of whether they would otherwise be properly regarded as expenses incurred by the assessee in the course of its business or amounts which had to be deducted before arriving at or estimating the income or profits of the assessee. For instance, there was a special provision made in respect of any special reserve created by a finance corporation indicated for providing long-term finances for industrial or agricultural development under section 36(1)(viii). This could not be deemed to be a complete self-contained code for such reserves or even as far as reserves of financial corporations were concerned, but a specific and a special provision for such deductions. The same may be said about the special provisions to be found in section 36(1)(vi), which permits of certain deductions in respect of animals used for the purpose of business or profession otherwise than as stock-in-trade, which deduction would otherwise not be regarded, perhaps, as a permissible deduction. But the argument may be best illustrated by referring to section 36(1)(i) which permits deduction of the amount of any premium paid in respect of insurance against risk of damage or destruction of stock or stores used for the purposes of the business or profession. Apart from such insurance, insurance against loss of profit and standing charter is a common type of insurance taken by various assesses. Can it possibly be contended that the only deduction permissible in respect of insurance premia is that contemplated by section 36(1)(i) and no other insurance premium is allowable as a deduction although it might be properly regarded as pertaining to the business activity of the assessee ? It is important in this connection to appreciate that under sections 40 and 40A of the Income-tax Act, 1961, are to be found specific express prohibitions against allowing certain types of deductions. Bearing in mind that where the legislature wanted to prohibit certain claims it did so expressly under these sections, it appears to us that the contention that such bar should be necessarily implied is not one that deserves to be easily accepted. Bearing all these considerations in mind the contention of Mr. Joshi that there is a bar by necessary implication by the provisions of section 36 is one which does not deserve to be accepted. As the Supreme Court has observed in Metal Box Company's case there appear to be two steps in the

process of considering the tax liability for assesses similar to the company, the first step being to estimate the income which will permit deduction being made of the nature claimed by the company, and, thereafter, to consider whether any further deductions are available under section 36(1) and similar provisions. Accordingly, as the Supreme Court tersely put it, "section 36 deals with expenditure deductible from out of the taxable income already assessed" (i.e., calculated or arrived at) "and not with deductions which are to be made while making the profit and loss account", i.e., after the income is assessed but before considering the tax payable on such income. These observations, though tersely made and even assuming, as was contended, that the Supreme Court in that case might not have had the benefit of an elaborate argument such as the one which was made before us, appear to us to represent the true legal position under the Income-tax Act, 1961. This is also in accordance with the view taken by the Allahabad and Delhi High Courts in their decisions referred to above. If that be so, then on neither of the three alternative footings the argument of Mr. Joshi that the decision was per incuriam can be accepted. It does not appear to be per incuriam in the sense of the decision of the Court of Appeal in Morelle's case It is extremely debatable whether a decision of the Supreme Court or the observations made in such a decision can be disregarded by a High Court on this footing. And finally, as has been shown, the decision and the view taken by the Supreme Court on the provisions contained in section 36(1)(v) appears to us to be the correct view, and Mr. Joshi's contentions based on the provisions of section 36(1) read with section 40(a) together with the rules in Part XIV of the Income-tax Rules, 1962, cannot be accepted. There appears to us to be no implied prohibition contained in the Income-tax Act against allowing such provision as a deduction before the figure of profits is calculated or arrived at.

59. Before considering the argument advanced on behalf of the revenue as to the relief which ought to be granted, if any was liable to be granted, it now becomes necessary to make a few observations concerning the second circular of the Central Board of Direct Taxes which is impugned in this petition. We have already indicated that the view taken by the Board as to what the Supreme Court had observed in the Bombay Dyeing's case is not borne out by a careful perusal of the observations made by that court in its judgment. These observations did not warrant the conclusion that the Supreme Court had in any way doubted or limited or restricted its observations in Metal Box Company's case Bearing in mind the discussion which is to be found in the earlier part of this judgment, dealing with the somewhat terse observations in Metal Box Company's case as far as section 36(1) is concerned, the observations made in paragraph 3 of the said circular also appear to be unwarranted and untenable. A proper review of the Supreme Court decisions to which we have adverted during the course of this judgment would seem to indicate that permissible deductions are not restricted to those indicated in section 30 to 37, that such a provision is not for a contingent liability in the sense of the liability similar to that of the assessee-company in Indian Molasses Company's case but must be properly regarded as, if

scientifically estimated, a provision for a present liability which is allowable in the case of an assessee which keeps its accounts on the mercantile system : it must be further held that there is no bar against such provision being allowable as a deduction by reason of section 36 or 37 which are mentioned in paragraph 3 of the second circular. It appears to us that the first circular issued by the Board had been issued on a proper consideration of the law laid down by the Supreme Court of India in Metal Box Company's case which law was in accord with its earlier decisions, and that the second circular which withdrew the first circular was clearly based on erroneous and untenable footings as we have indicated above. In this connection, it would be open to the Board to issue circulars granting relief and withdraw such circulars subsequently; but the difficulty in the instant case appears to be caused by the fact that the withdrawal of the first circular which is mentioned in the second circular is on a certain footing, which appears to us to be untenable and based on an incorrect view of the provisions of the Income-tax Act and the Supreme Court decisions.

60. It is in the light of these considerations that we have now to consider what relief is to be granted to the company, i.e., the petitioner, and what writ should issue. Before, however, dealing with the two authorities which were cited by Mr. Joshi in this connection and which we have mentioned earlier in this judgment, we may make it clear that we are not expressing any opinion as to the correctness of the calculations made by the actuary in his report dated June 15, 1974, a copy whereof is annexed as exhibit B to the petition. We have only considered a principle of the provision and no part of our judgment should be taken as certifying the correctness of the calculation of the amount of Rs. 2,77,52,991 which is to be found as determined by the said actuary. We have only considered whether if the present value of such liability can be scientific and properly ascertained and if the company makes a provision for such amount, it would be entitled to claim deduction in respect of this amount at the stage of ascertainment or estimating or computing its taxable profits.

61. In Sirpur Paper Mill's case the Supreme Court was considering the orders, instructions and directions which should be given by the Central Board of Direct Taxes under section 13 of the Wealth-tax Act, 1957, and observed that the Board cannot give directions or instructions to judicial functions. The provisions contained in section 13 of the Wealth-tax Act then under consideration by the Supreme Court were similar to the provisions contained in section 119 of the Income-tax Act, 1961. Mr. Joshi referred us to the relief granted by the Supreme Court in the said case and pointed out that inasmuch as the Commissioner had merely followed the impermissible directives given by the Central Board of Direct Taxes, the order of the Commissioner was quashed and the matter was remanded back to the Commissioner with a direction that he had to dispose of the revision application according to law and uninfluenced by any instructions or directions by the Central Board of Revenue (as it was then called). It was

submitted by Mr. Joshi that in the instant case also the Income-tax Officer may be directed to dispose of the contention raised by the company in the matter of its claim for the deduction being allowed uninfluenced by the second circular which expressly directs the Income-tax Officer to complete the pending assessments in the light of the instructions contained in the said circular. We were also referred in this connection to the final order passed by the Supreme Court in *Orient Paper Mills Ltd. v. Union of India* where the Collector had been called upon to determine whether "M.G. Poster Paper" was packing and wrapping paper, and instead of determining the question for himself proceeded to answer the same in accordance with the directions issued by the Central Board of Revenue. It was observed that the power to be exercised by the Collector was a quasi-judicial power and that power could not be controlled by the directions issued by the Central Board of Revenue. By the final order the Supreme Court allowed the appeal and set aside the orders of the Collector as well as of the Central Government and remitted the proceedings back to the Collector for deciding the question whether the M.G. Poster paper should be assessed as printing and writing paper or wrapping and packing paper. It was submitted that this was the paper course and this could be the only writ to be issued by this court and not the writ as sought for by the company.

62. Now, it is important to note that in Orient Paper Mill's case the Supreme Court had been invited to decide the case and answer the question on the basis of the material on record. But the court observed that, ordinarily, it would not do so, since questions of fact were involved. It further observed that there was no exceptional circumstance in the case requiring the Supreme Court to deviate from the ordinary rule. As far as we are concerned, firstly, we are not called upon to determine any question of fact but only a matter of principle and to give a writ in accordance with the proper view of the provisions contained i the Income-tax Act, 1961, and the law laid down by the Supreme Court of India and the High Courts. In the second place, would it not be proper to regard this as an unusual if not an exceptional case and somewhat in the nature of a representative or a test case in the light of what is stated in paragraph 5 of the petition ? Further, there would be considerable justification in the company's apprehensions that in view of the express directions given in the second circular, the Income-tax Officer might not be able to discharge his quasi-judicial functions impartial despite the views expressed by this court; and that in such a contingency which could not be regarded a too remote or beyond the limit of possibility, the company and similar assesses would be constrained to avail of their remedies under the Income-tax Act of going in appeal to the Appellate Assistant Commissioner, in the first place, and, thereafter, in second appeals to the Income-tax Appellate Tribunal, with further reference to the High Court which would result in multiplicity of judicial proceedings which are both time-consuming and expensive, which is a result necessary to be avoided, and which could be avoided only if a clear writ as sought for by the petitioner is granted and not merely by following the course which was followed by the Supreme Court in Sirpur Paper and Orient Paper

Mill's case attention was also drawn in this connection to the reply given by the Income-tax Officer to the specific allegations made in paragraph 5 of the petition. It appears to us that in this case there are exceptional circumstances which did not exist in either the Sirpur Paper Mill's case or in Orient Paper Mill's case and that it would not be proper, therefore, merely to quash the second circular issued by the Central Board of Direct Taxes, leaving it to the Income-tax Officer to complete the income-tax assessment of the company ignoring such circular. In the view that we have taken of the provisions of the Income-tax Act, 1961, and of the view of the Supreme Court and High Courts' judgments also, it appears to us that the writ as substantially sought for may issue.

63. In the view that we have taken, there will accordingly be a writ in terms of prayer (a) of the petition but omitting the word "aforesaid". We make it clear that in considering the claim of the company for the deduction being allowed, it will have to be seen whether the computation has been made on a scientific basis after providing for the discounting of all possible contingencies.

64. This has been a test case and, in our opinion, the parties should bear their own costs of the proceedings. Order accordingly.

65. Mr. Joshi applied for a certificate under article 133 of the Constitution of India.

66. Mr. Palkhivala opposes the application.

67. Under article 133(1) as amended, it is now provided that an appeal shall lie to the Supreme Court from any judgment, decree or final order in civil proceedings of a High Court if the High Court certifies : (A) that the case involves a substantial question of law of general importance, and (b) that in the opinion of the High Court the said question has to be decided by the Supreme Court.

68. We have already indicated how we were inclined to regard the question posed for our consideration in this petition, which was for an issue of a writ against the Income-tax Officer, as an exceptional case in the nature of a test case involving not merely the petitioner-company but a number of similar assesses, and we have decided in the view that we have taken to issue the writ sought for (substantially) by reason of these considerations. Now, the questions posed for our determination and dour decision have far-reaching importance at least in the sense of effect. These questions are important for limited companies from the point of view of the companies themselves, from the point of view of their shareholders and from the point of view of the revenue. These questions may have a bearing also on the rights of workers and other employees also.

69. It is true that as far as such question of provision for gratuity which may be payable in future

is concerned, we have found the judgments of the Supreme Court all consistent in the sense that such liability may be regarded as a certain liability existing in present, thought payable in future. But on the other question posed by Mr. Joshi before us, viz., that such provision could not be allowed as a deduction by reason of the express provisions of section 36(1)(v) and section 40 read together with the Rules, which, according to him, constituted a bar on such amount being allowed as a deduction, we did not find an equally clear decision of the Supreme Court; and as far as this aspect of the matter is concerned, it would seem to be a substantial question of law of general importance which is required to be decided by the Supreme Court.

70. Accordingly, we certify that this case involves a substantial question of law of general importance which is required to be decided by the Supreme Court as indicated above.