BOMBEY HIGH COURT

Siemens India Ltd

Vs.

K. Subramanian

Misc. Petition No. 218 of 1975

(D.P. Madon, J.)

30.07.1982

JUDGMENT

D.P. Madon, Chairman

1. Siemens India Ltd, a public company incorporated under the Companies Act, 1956, and one of its shareholders have filed this Writ Petition under Article 226 of the Constitution of India against the income-tax Officer, Companies Circle IV(4), Bombay, and the Union of India to set aside an order of provisional assessment dated December 30, 1974 midi under Section 7 of the Companies (Profits) Surtax Act, 1964 (7 of 1964) (hereinafter for the sake of brevity referred to as "the Surtax Act"), and a notice of demand dated January 14, 1975 issued in pursuance of the assessment order. Under Section 4 of the Surtax Act, every company is liable to pay for every assessments year commencing on and from the first day of April 1964, surtax in respect of so much of its chargeable profits of the previous year or previous years, as the case may be, as exceed the statutory deduction, at the rate or rates specified in the Third Schedule to the Surtax Act. Under clause (8) of Section 2, the expression "chargeable profits" means the total income of an assessment computed under the Income-tax Act, 1961, for any previous year or years, as the case may be, and adjusted in accordance with the provisions of the First Schedule to the Surtax Act. Under clause (8) of the said Section 2, as it stood at the relevant time, the expression "statutory deduction" meant an amount equal to ten per cent of the capital of the company as computed in accordance with the provisions of the Second Schedule to the Surtax Act, or an amount of two hundred thousand rupees, whichever was greater. Under Section 5(1), every company whose chargeable profits assessable under the Surtax Act exceeded during the previous year the amount of statutory deduction, is bound to furnish a return of the chargeable profits of the company during the previous year in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed, before the 30th day of September of the assessment year. The expression "assessment year" is defined by clause (3) of Section 2 as meaning the period of twelve months commencing on the 1st day of April every

year. The previous year of the First Petitioner Company (hereinafter referred to as 'Siemens') is the period of twelve months ending on the 30th September in each calendar year. The controversy between the parties arises with respect to the provisional assessment made on Siemens for the assessment year 1974-75, in respect of which the previous year would be the year ending on September 30, 1973. Siemens submitted their return of chargeable profits for the said previous year on September 30, 1974. In the said return, Siemens showed their chargeable profits at Rs 1,53,41,602 and their capital at Rs 12,64,19,560 and the statutory deduction at Rs. 1,26,41,956. According to the said return, the excess of the chargeable profits at the applicable rate of 25 per cent would be Rs. 6,74,912. Section 7 of the Surtax Act confers upon the Income-tax Officer, the power to make a provisional assessment before proceeding to make a regular assessment under Section 6. As the controversy between the parties involves the determination of the nature and scope of a provisional assessment under Section 7, it will be convenient at this stage to reproduce the provisions of the said two sections. The said sections are as follows :

"6. Assessment.

(1) For the purposes of making an assessment under this Act, the Income-tax Officer may serve on any person who has furnished a return under sub-section (1) of Section 5 or upon whom a notice has been served under sub-section (2) of Section 5 (whether a return has been furnished or not), a notice requiring him on a date therein to be specified, to produce or cause to be produced such accounts or documents or evidence as the Income-tax Officer may require for the purposes of this Act and may, from time to time, serve further notices requiring the production of such further accounts or documents or other evidence as he may require.

(2) The Income-tax officer, after considering such accounts, documents or evidence, if any, as he has obtained under sub-section (1) and after taking into account any relevant material which he has gathered, shall, by an order in writing, assess the chargeable profits and the amount of the surtax payable on the basis of such assessment.

"7. Provisional assessment:

(1) The Income-tax Officer, before proceeding to make an assessment under Section 6 (in this section referred to as the regular assessment) may, at any time after the expiry of the period allowed under sub-section (1) or sub-section (2) of Section 5 for the furnishing of the return and whether the return has or has not been furnished, proceed to make in a summary manner, a provisional assessment of the chargeable profits and the amount of the surtax payable thereon.

(2) Before making such provisional assessment, the Income-tax Officer shall give notice in the prescribed form to the person on whom the provisional assessment is to be made of his intention to do so, and shall with the notice forward a statement of the amount of the proposed assessment, and the said person shall be entitled to deliver to the Income-tax Officer at any time within fourteen days of the service of the said notice, a statement of his objection, if any, to the amount of the proposed assessment.

(3) On expiry of the said fourteen days from the date of service of the notice referred to in sub-section (2), or earlier, if the assessee agrees to the proposed provisional assessment, the Income-tax Officer may, after taking into account the objections, if any, made under sub-section (2), make a provisional assessment, and shall furnish a copy of the order of the assessment to the assessee

Provided that assent to the amount of the provisional assessment, or failure to make objection to it, shall in no way prejudice the assessee in relation to the regular assessment,

(4) There shall be no right of appeal against a provisional assessment made under this section.

(5) After a regular assessment has been made, any amount paid or deemed to have been paid towards the provisional assessment made under this section shall be deemed to have been paid towards the regular assessment and where the amount paid or deemed to have been paid towards the provisional assessment exceeds the amount payable under the regular assessment, the excess shall be refunded to the assessee."

After Siemens had filed their return under the Surtax Act, the Income-tax Officer served Siemens with a notice dated December 20, 1974 under Section 7(2) of his intention to make a provisional assessment. According to thest atement attached to the said notice, the Income-tax Officer proposed to take the chargeable profits of Siemens at Rs 1,53,41,602 as per the figure of chargeable profits shown by Siemens in their said return. So far as however, the computation of capital was concerned, the Income-tax Officer proposed to take it at Rs 10,38,22,269 and the statutory deduction at Rs 1,03,82,226 as against the capital of Rs 12,64,19, 360 and the statutory deduction at Rs 1,26,41,986 computed by Siemens in their return, and the net chargeable profits, that is, the excess of the chargeable profits over statutory deduction, was worked out by the Income-tax Officer at Rs 49,59,376 as against Rs 26,99,646 as per the return filed by Siemens. By their letter dated December 27,1974, which was a Friday, Siemens submitted their objections to the proposed provisional assessment. By his order of provisional assessment dated December 30, 1974, the Income-tax Officer rejected the contentions raised by Siemnes in their said letter dated December 27, 1974 and made an order of provisional assessment in accordance with the order proposed by him in his said notice dated December 20, 1974. The said order of provisional assessment together with a notice of demand dated January 14,1975 were received by Siemens on January 20,1975. The present Petition was filed on February 24, 1975 seeking to set aside the said order of provisional assessment and the said notice of demand. The Petition was admitted and an interim stay of the provisional order of assessment and its recovery was granted by this Court, and the Respondents were restrained from taking any steps in pursuance of either the impugned order of provisional assessment or the said impugned notice. Nevertheless, Siemens paid a sum of Rs. 6, 74, 912 by way of surtax payable according to their return out of the sum of Rs. 12, 99, 844 demanded from them. The notice of the proposed provisional assessment dated December 20, 1974 and the statement annexed thereto do not show why the Income-tax Officer wanted to reduce the capital computation made by Siemens in their return; but it appears that by comparing the statement annexed to the said notice and the return filed by them, Siemens were

able to understand what was proposed to be done, and had filed their objections accordingly. In order to understand what was in fact done by the Income-tax Officer and to test e validity of his action, it is first necessary to see the provisions of the relevant Schedules to the Surtax Act. Under rule 5 of the Companies (Profits) Surtax Rules, 1964, a return of chargeable profits is to be in Form No l appended to the said Rules. Part I of the said Form is to contain a statement of chargeable profits of the previous year or years as computed in Part II of the return, the amount of statutory deduction as computed in Part III of the return, and the chargeable amount, that is the amount by which the chargeable profits computed in Part 11, exceeds the statutory deduction computed in Part III as rounded off to the nearest multiples of Rs 10. As mentioned earlier, the expression "chargeable profits" means the total income of an assessee computed under the Income-tax Act, 1961, for the previous year and adjusted in accordance with the provisions of the First Schedule to the Surtax Act. The First Schedule provides that, "In computing the chargeable profits of a previous year, the total income computed for that year under the Income-tax Act shall be adjusted as follows : Rule 1 than acts out the income, profits and gains and other sums specified in that rule which are to be excluded from such total income. Under rule 2, the balance of the total income arrived at after making the exclusions mentioned in rule I are to be reduced by certain amounts mentioned in the said rule. Under Rule 3, the net amount of income calculated in accordance with Rule 2 is to be increased in the manner specified in the said rule. The computation of chargeable profits made by Siemens in Part II of their return was accepted by the Income-tax Officer both in the notice of proposed provisional assessment issued by him as also in the impugned order of provisional assessment, the only controversy between the parties being with respect to computation of capital for the purpose of arriving at the statutory deduction. As we have seen earlier, the expression "statutory deduction" meant at the relevant time, an amount equal to ten per cent of the capital of the company as computed in accordance with the provisions of the Second Schedule to the Surtax Act, or an amount of two hundred thousand rupees, whichever was greater. Turning now to the Second Schedule, rules I and 4 of it are relevant for the present purpose. The material provisions of Rule I as it stood at the relevant time provided as follows:

> "1. Subject to the other provisions contained in this Schedule, the capital. of a company shall be the aggregate of the amounts as on the first day of the previous year relevant to the assessment year, of-
> (i) its paid-up share capital;
> (ii) its reserves, if any, created under the proviso (b) to clause (vib) of sub- section (2) of Section 10 of the Indian Income-tax Act, 1922(11 of 1922), or under sub-section (3) of Section 34 of the Income-tax Act, 1961(43 of 1961):
> (iii) its other reserves as reduced by the amounts credited to such reserves as have been allowed as a deduction in computing the income of the company for the purposes of the Indian Income-tax, 1922 (11 of 1922), or the Income-tax Act, 1961 (43 of 19,A);
> Explanation : For the removal of doubts, it is hereby declared that any amount standing to the credit of any account in the book., of a company as on the first day of the previous

year relevant to the assessment year which is of the nature of item (5) or item (6) or item (7) under the heading 'RESERVES AND SURPLUS' or of any item under the heading 'CURRENT LIABILITIES AND PROVISIONS' in the column relating to liabilities in the 'FORM OF BALANCE-SHEET' given in Part 1 of Schedule VI to the Companies Act, 1956 (1 of 1956), shall not be regarded as a. reserve for the purposes of computation of the capital of a company under the provisions of the Schedule."

Rule 4 is as follows :

"4. Where a part of the income, profits and gains of a company is not includible in its total income as computed under the Income-tax Act, its capital shall be the sum ascertained in accordance with rules 1, 2 and 3, diminished by an amount which bears to that sum in the same proportion as the amount of the aforesaid income, profits and gains bears to the total amount of its income, profits and gains."

As under the opening words of Rule 1, the capital of a company is to be computed as per the position prevailing on the first day of the previous year relevant to the assessment year, and as the relevant previous year of Siemens was year rended September 30, 1973, the capital computation of Siemens under the Second Schedule to the Surtax Act was to be made according to the position on October 1, 1972. The capital computation made by Siemens in their return was as follows:

	"Computation of Capital Base	Rs
1.	Paid up share capital	2,40,00,000
2.	Reserves and surplus :	
	Capital reserve	6,88,657
	Doubtful debts reserve	8,50,000
	General reserve	3,33,42,202
	Development rebate reserve	1,12,09,221
	Provision for doubtful debts	23,00,418
	Excess tax provision	25,09,565
	Debenture Redemption Reserve	5,00,000
		5,13,99,463"

The capital computation proposed by the Income-tax Officer as also made by him a his order of provisional assessment was as follows :

"Capital Computation	Gross Chargeable profits 1,53,41,602	
Paid up Capital	2,40,00,000	
Capital Reserve	6,88,057	
D R Reserve	1,12,09,221	
Deb. Redemption Reserve	5,00,000	
Gen Reserve	3,33,42,202	
Less Dividend	43,20,000	
	2,90,22,202	
Long Term Loan	3,17,71,719	
Debentures	2,00,00,000	
	11,71,91,199	
Proportionated decrease in Capital	7,39,758	
	11,64,51,441	
Less Under rule 4 in respect of Ch		

VIA deductions		
3472875 X 116451441 / 3201999	1,26,29,182 / 10,35,22,259	1,03,82,226 / 4959376
10% of Net Chargeable Profits		

On a comparison of these two statements, it will be obvious that what the Income- tax Officer preposed to do in his show cause notice and has done in his order of provisional assessment is to exclude five items from the computation of capital, namely, (a) doubtful debts reserve, (b) provision for doubtful debts, (c) excess provision for taxation, (d) deduction of a sum of Rs 43,20,000 from the balance of the general reserve, which sum had been recommended by the Board of Directors of Siemens to be paid as dividend, if approved by the shareholders at the Annual General Meeting of Siemens to be held on March 23, 1973, and which dividend had in fact been approved and paid during the following year; and (e) deduction of a sum of Rs. 1,26,29,182 being the amount of deduction to be made under Chapter V1-A of the Income-tax Act, 1961, in computing the total income to which according to Siemens, they were entitled under Rule 4 of the Second Schedule to the Surtax Act. The show cause notice does not set out any reasons why these amounts were not proposed to be taken into account by the Income-tax Officer in computing the capital base. From their return and the statement annexed to the show cause notice, Siemens could make out what was proposed to be done. In their said letter dated December 27, 1974 they, therefore, set out their objections thereto. These objections were not, and from the nature of things could not be, arguments against the grounds for what was proposed to be done, but merely the case of Siemens in support of their return. I will deal with the objections of Siemens later, In his order of provisional assessment, the Income-tax Officer set out his grounds for rejecting the claim of Siemens.

A show cause notice under Section 7(2) of the Surtax Act is to be in Form No 2 to the Companies (Profits) Surtax Rules, 1964 (hereinafter referred to as "the Surtax Rules"). The prescribed Form merely requires the Income-tax Officer to give a notice of his intention to make a provisional assessment as indicated in the statement of the amount of the proposed assessment attached and to call upon the assessee, if it has any objection to the amount of the proposed provisional assessment, to deliver to him a statement of its objections thereto within fourteen days of receipt of the notice. The prescribed Form does not, in express terms require any reasons to be stated where the assessee's return is not being accepted. Bearing particularly in mind the fact that there is no right of a personal hearing before a provisional assessment is made and thus no opportunity to the assessee to remove any misapprehension which an Income-tax Officer might have in his mind and of which, in the absence of the grounds being stated in the notice, the assessee would be ignorant, the principles of natural justice and the audi alteram partem rule

require that the grounds upon which the assessee's return or part of his return is not intended to be accepted should be communicated to the assessee. If the prescribed Form of Notice does not expressly require such grounds to be stated, it also does not expressly exclude this requirement. In the statement of the amount of the proposed assessment attached to the show cause notice, the grounds should be set out, otherwise in some cases, grave prejudice would be caused to an assessee. In fact, as would be set out; later, by reason of the omission to set out the grounds in the show cause notice in the present case, prejudice has been caused to Siemens by their not setting out certain relevant facts which they otherwise would certainly have. done had the grounds for disallowance in respect thereof had been communicated to them. This point is, however, not taken in the petition, and therefore, the order of provisional assessment cannot be invalidated on this ground.

At the hearing of this petition, several points were argued on behalf of the Petitioner. They may be summarized thus:

(1) The impugned order of provisional assessment has been made without any;.., application of mind, because objections were submitted by Siemens to the Income-tax Officer on December 27, 1974, which was a Friday, and the order of provisional assessment was made on December 30, 1974 which Was a Monday.

(2) The impugned order of provisional assessment is not a speaking order.

(3) An order of provisional assessment cannot be made unless and until the concerned assessee's total income under the Income-tax Act has been ascertained and assessed in as much as such ascertained total income is the starting point for arriving at the chargeable profits.

(4) In a provisional assessment under Section 7 of the Surtax Act, the Income-tax Officer is bound to make his assessment only on the basis of the return submitted by the assessee, and it is only in cases in which a return is not filed that the provisions of Section 7(2) apply.

(5) In the alternative, assuming for the sake of argument that a provisional assessment can even be made in a case where a return is filed, it is inherent in the nature of a provisional assessment that it should not decide complicated and debatable issues, either of fact or of law.

(6) If the power of the Income-tax Officer to make a provisional assessment extends also to adjudicating upon complicated and debatable issues of fact or law, it would render Section 7 of the Surtax Act void and unconstitutional under Article 14 and sub-clause (f) of clause (1) of Article 19 of the Constitution of India in as much as the said section would confer a discriminatory power upon the Income-tax Officer without there being any conditions or guidelines prescribed for the exercise by him of his discretion and without providing any remedy to the assessee in the event of an arbitrary and hostile exercise of power save and except to approach the High Court under Article 226 of the Constitution.

It will be convenient to consider the point of non-application of mind along with the second point of the impugned order not being a speaking order. The fact that the impugned order was made over a weekend cannot per se show that there was non-application of mind. Judicial and quasi-judicial authorities, as a rule, take papers home and work over them during, what for them is misnamed, free time and holidays. There might have been some substance in this contention, were the order, not a speaking order. It however, would not be correct to label the order in question in this case as a non-speaking order. It undoubtedly is a very brief order. The provisional assessment made by it is the very same assessment as was proposed in the show cause notice. But, however brief the impugned order may be, it refers to various objections raised by Siemens in their letter dated December 27, 1974 and deals with each of them, albeit tersely, but however tersely the objections have been dealt with and rejected. The order does show that the Income-tax Officer had taken into account the objections of Siemens and has given his reasons for rejecting it. Whether these reasons are correct and whether the Income-tax Officer was entitled to make the provisional assessment which he did, are, however, different matters and will be considered later in the course of this Judgment. It is equally not possible to accept the contention of Siemens that a provisional assessment under Section 7 of the Surtax Act cannot be made unless and until the assessment of the concerned assessee has been made under the Income-tax Act on the ground that the assessment of the assessess, total income under the Income-tax Act is the starting point for arriving at the chargeable profits. Even on first principles, the argument would appear to be fallacious. The very object of making a provisional assessment is the expeditious collection of tax. Assessment to income-tax may and does take time. Section 153 of the Income-tax Act prescribes the time limit for completion of assessments and reassessment, and a glance at that section would show the period which is given for making an assessment under the Income-tax Act. If, therefore, the Income-tax Officer were to wait for the assessment of income under the Income-tax Act, the expeditious collection of surtax would necessarily be postponed and the purpose for which the statute has provided for making a provisional assessment would thus be frustrated. Section 7 does not contain any such restriction on the power of the Income-tax Officer in making a provisional assessment. On the contrary, it confers upon him a power to do so at any time after the expiry of the period for the furnishing of the return. In this connection, Mr. Dastur, learned Counsel for the Petitioners, relied upon the opening words of the first Schedule to the Surtax Act, namely, "In computing the chargeable profits of a previous year, the total income computed for that year under the Income-tax Act shall be adjusted as follows." According to Mr. Dastur, these words show that the total income must first be computed for the relevant previous year under the Income-tax Act. Mr. Dastur also referred to the clause (6) of Section 2' of the Surtax Act which defines "chargeable profits" meaning that the total income of an assessee computed under the Income-tax Act, 1961 (XLIII of 1961), for any previous year or years, as the case may be, and adjusted in accordance with the provisions of the first Schedule :" Mr. Dastur also relied upon Section 4 of the Surtax Act to show that the charge of surtax is on chargeable profits which exceed the statutory deduction. These provisions do show that until the total income is in fact computed under the Income-tax Act, an assessment to surtax cannot be made, and that is why assessment under the Surtax Act are made by the Income-tax Officer after he had

made the assessment under the Income-tax Act. The question, however, is whether these provisions can - be called into play so far as a provisional assessment is concerned. The very expression "provisional assessment" shows that it is not a final or a regular assessment but one to be made before the regular assessment is made. As mentioned earlier, Section 7 (3) itself expressly, states that it can be made at any time after the period for furnishing of returns has expired, and this provision, therefore, excludes any requirement that the total income must first be computed under the Income-tax Act. It is also pertinent to bear in mind.that a return for chargeable profits is to be in Form No I to the Surtax Rules. Part II of the said Form No 1 is headed 'Computation of Chargeable Profits" and column I of Part II is headed "Total Income computed in accordance with the provisions of the Income- tax Act, 1961 ". If the arguments advanced on behalf of the petitioners were correct, it would mean that even a return of chargeable profits under Section 5 of the Surtax' Act cannot be made unless and until the total income is first assessed under the Income-tax Act. Such a construction would be contrary to the provisions of Section 5(1) which require a . return of the chargeable profits of the company during the previous year to be filed before the 30th day of September of the assessment year. The contention urged in this respect by learned Counsel for the Petitioners cannot, therefore, be, accepted both on first principles and on the relevant statutory provisions. The next point taken on behalf of the Petitioners is that a provisional assessment under Section 7 of the Surtax Act must only be made on the basis of the return where one has been filed and it is only in cases in which a return is not filed that a notice under Section 7(2) of the intention of the Income-tax Officer to make a provisional assessment is to be given. This contention equally does not appear to me to be correct. Under sub-section (1) of Section 7, the Income-tax Officer has the power to make a provisional assessment at any time after the expiry of the period for the furnishing of the return and "whether the return has or has not been furnished". Under sub-section (2) of Section 7, "before making such provisional assessment", the Income-tax Officer is required to give a notice of his intention to make the provisional assessment. The expression, "before making such provisional assessment" would mean before making a provisional assessment, whether the return has been furnished or not. The issuance of a notice under sub-section (2) of Section 7 before making a provisional assessment is a mandatory requirement and applies both to a case where a return has been filed as also to a case where a return has not been filed. Whether in a case where a return has been filed, the Income-tax Officer is bound to make a provisional assessment on the basis of such return, is a different question which I will now proceed to consider. On this part of the case, Mr. Dastur submitted that from its very nature, a provisional assessment can only be made on the basis of the return, and in any event, in the making of an order of provisional. assessment, an Income-tax Officer cannot decide any complicated or debatable question of fact or law. In support of this submission, Mr. Dastur emphasized certain salient features of a provisional assessment. These salient features are:

(1) The Income-tax Officer is required by Section 7(1) of the Surtax Act, to make a provisional assessment in a summary manner.

(2) Though the Income-tax Officer is required to issue a notice of his intention to make a provisional assessment, there is no obligation upon him to give a personal hearing, and

from the nature of things, a personal hearing is not possible, because under sub-section (3) of Section 7, a provisional assessment is to be made on the expiry of fourteen days from the date of service of the notice. Thus the only opportunity which the assessee has, is to submit his objections to the proposed assessment, and if the assessee does submit them, the Income-tax Officer is to take them into account.

(3) Under sub-section (4) of Section 7, there is no right of appeal against a provisional assessment.

(4) There is no time limit provided under the Surtax Act, as there is under the Income-tax Act, for making a regular assessment. The amount payable under a provisional assessment is to be paid within thirty five days from the date of service of the notice of demand, and as the provisions of Sections 220(2) and 221 of the Income-tax Act have been made applicable to the Surtax Act, an assessee committing default in payment of the amount of the provisional assessment becomes liable to pay interest as also becomes liable to imposition of penalty. The result is that, the amount of provisional surtax assessed would continue to be at the disposal of the Government until such time as the Income-tax Officer chooses to make a regular assessment.

(5) If as a result of a regular assessment, the amount paid under a provisional assessment is found to be in excess of the amount ascertained under a regular assessment, the excess amount is to be refunded to the assessee without any interest thereon.

(6) There is no provision for an assessee applying for a stay of the whole or part of the amount demanded under an order of provisional assessment may be wholly arbitrary and capricious.

In Mr. Dastur's submission, these features of a provisional assessment clearly show that it was never the intention of Parliament that an Income-tax Officer should be left free to make any provisional assessment he likes, however arbitrary it may be; but the intention was that the scope of a provisional assessment should be confined only to the return filed by the assessee, or to restrict him in making a provisional assessment from deciding by himself without an opportunity of a hearing being given to the assessee complicated questions of law and fact in any manner he liked, irrespective of even what the Court or the Income-tax Appellate Tribunal might have held in various cases, as according to Mr. Dastur, the Income-tax Officer has done in the present case.

There is no decided case on the scope of a provisional assessment under Section 7 of the Surtax Act, or at least none which the industry of learned Counsel have brought to my notice. In support of his submission, Mr. Dastur relied upon Section 141 of the Income tax Act, which was deleted from the statute-book by the Taxation Laws (Amendment) Act, 1970, with effect from April, 1 1971, and upon two decisions, one of this High Court and the other of the Supreme Court, on the interpretation of the said section. The material provisions of the said Section 141 were as follows:

"341. Provisional assessment;

(1) The Income-tax Officer may, at any time after the receipt of a return made under Section 139, proceed to make, in a summary manner, a provisional assessment of the tax

payable by the assessee, on the basis of his return and the accounts and documents, if any, accompanying it.

(5) After a regular assessment has been made, any amount paid or deemed to have been paid towards the provisional assessment made under sub-section (I) shall be deemed to have been paid towards the regular assessment; and where the amount paid or deemed to have been paid towards the provisional assessment exceeds the amount payable under the regular assessment, the excess shall be refunded to the assessee.

(6) Nothing done or suffered by reason or in consequence of any provisional assessment made under this section shall prejudice the determination, on the merits, of any issue which may arise in the course of the regular assessment,

(7) There shall be no right of appeal against a provisional assessment made under sub-section (1)."

In *Burmah Shell Refineries Lid v. S.B. Chand (Income-tax Officer) and another*[1], this High Court pointed out the distinctive features of a provisional assessment made under the Income-tax Act as opposed to a regular assessment. It laid emphasis on the fact that a provisional assessment was made ex parse and without an opportunity to the assessee of being heard, and that there was no right of appeal against an order of provisional assessment. It further emphasised that a provisional assessment was to be made on the basis of the return filed by the assessee. The High Court held that the correctness or otherwise of the return as to the factual position stated therein could not be gone into or inquired into at that stage and that it was on this basis that the assessment had to be made. According to the High Court, a provisional assessment had to he made on a factual position clearly admitted by the assessee, though in cases where the claim was clearly bad, without there being any controversy about it in view of the admitted position on facts, the Income-tax Officer could reject it; but where the position was not so clear and the determination of the claim would involve inquiry into questions of fact, it was not open to the Income-tax Officer to proceed to adjudicate upon that claim. The High Court further held. that similarly, an Income-tax Officer in making a provisional assessment had no jurisdiction to inquire into a mixed question of fact and law. In *Jaipur Udyog Ltd and another v. Commissioner of Income-tax. Delhi and Rajasthan, and another*[2], the Supreme Court held that Section 141 had been enacted with the object of expediting collection of tax on the basis of the return made by assessee. It further pointed out that in the making of a provisional assessment, the assessee had no right to be heard or to explain or elucidate and had no right of appeal against the computation of the levy of tax. The Supreme Court further stated (at p604)

[1](1966) 61 I.T.R. 493

[2](1969) 71 I.T.R. 799 S C

"In our judgment, if it be granted that the Income-tax Officer has jurisdiction to hold an enquiry into disputed matters, the expression 'provisional assessment' may lose all significance : the Income-tax Officer may, under a summary assessment without giving an opportunity to the assessee to explain his claim, negative it and the assessee has no redress under the Act (that is, the Income-tax Act, 1961) against any erroneous or arbitary action. The Court would not, unless compelled by the phraseology of the statute or by the

clear implication arising therefrom, be justified in accepting that view. The clearest implication of Section 141 (of the Income-tax Act, 1961, bars an enquiry at the stage of making a provisional assessment into disputed questions of law and fact : it is a matter of no moment that the dispute raised is complicated or is easy of solution."

A little later, the Supreme Court observed (at p 805) :

"If it be assumed that provisional assessment has to be made in accordance with and subject to the provisions of the Act (that is, the Income-tax Act, 1961), distinction between a provisional assessment and a regular assessment gets completely blurred. The scheme of Section 141 (of the Income-tax Act, 1961) is to call upon the assessee to pay tax provisionally at the appropriate rate on what he admits as his taxable income, subject to the benefit of the allowance under sub-section (2). The Section does not permit an enquiry to be made whether the total income returned by the assessee exceeds the amount admitted by him, nor whether the allowances or deductions claimed are admissible. If there be a discrepancy bet- ween the return made and the accounts and documents accompanying the return, the Income-tax Officer may ask the assessee to explain the discrepancy; but he must make a provisional assessment on the basis of the return initially made or clarified and the accounts and documents filed. He cannot make a provisional assessment by holding that certain claims made by the assessee are in law unjustified. If it transpires that the assessee has, without reasonable cause, concealed particulars of his income or has furnished inaccurate particulars of his income, it may be open to the Income-tax Officer to impose penalty upon him after the regular assessment is completed. But it is not open to him to determine whether there has been any concealment of particulars of income or to decide whether claims which have been made are unwarranted."

The language used in Section 141 of the Income-tax Act, however, differs from that used in Section 7 of the Surtax Act in two respects. Firstly, while Section 141 expressly provides that a provisional assessment is to be made on the basis of the assessee's return and the accounts and documents, if any, accompanying it, such a qualification is conspicuous by its absence in Section 7. Secondly, Section 141 does not require any notice to be given to an assessee of the Income-tax Officer's intention to make a provisional assessment and calling upon him to state his objections, if any, to the amount of the proposed assessment. The similarities between the two sections, how- ever, are that under both the sections, the provisional assessment is to be made in a summary manner and there is no enquiry or hearing and no right o}' appeal provided against the order of provisional assessment. On behalf of the Revenue, emphasis was placed on the two points of difference in the language of these sections which I have mentioned above, and it was argued that the very fact that Section 141 did not require a provisional assessment to be made on the basis of the return and the accounts and documents accompanying it showed that it was open to the Income-tax Officer not to accept the return as correct, but to reject certain claims made by the

assessee. It was further said that the provisional assessment under the Surtax Act could not be said to be wholly ex paste inasmuch as an opportunity was to be given to the assessee to state his objections to the proposed assessment' The question is, whether these two departures made in Section 7 from the language used in Section 141 confer a power upon' the Income- tax Officer to make a provisional assessment under Section 7 by rejecting, in whole or in part, the return filed by the assessee. Though the position under both these sections is not identical, in my opinion, the extreme argument advanced by the Department can- not be accepted by reason of the intricate distinction between a provisional assessment and a regular assessment which is being made, and in the other, it is a regular assessment. Even though the assessee may have an opportunity to state his objections in writing to the amount of the proposed assessment, he has no opportunity of adducing evidence or advancing arguments to clarify any doubt or difficulty which the Income-tax Officer might entertain with respect to accepting the assessee's claims. The object underlying both these kinds of assessment is different. In the case of a provisional assessment, the object is to accelerate and expedite the collection of tax without holding it up until a regular assessment is made. The object of a regular assessment is to determine the liability to tax of the assessee and to quantify that liability. It is for this reason that while a provisional assessment is to be made in a summary manner, for making a regular assessment, an opportunity of a hearing has to be given to the assessee as also an opportunity to produce his evidence. In my opinion, when the Supreme Court in the case of Jaipur Udyog Ltd., and another, observed that "If it be granted that the Income-tax Officer has jurisdiction to hold an enquiry into disputed matters, the expression 'provisional' assessment' may lose all significance", its observation was not confined merely to a provisional assessment made under Section 141 of the Income-tax Act; but was an observation made with respect to provisional assessments which are made in a summary manner and was made because of the very nature of a provisional assessment and the purpose for which it is made. It is also well settled that a summary procedure is not intended for determination of complicated questions either of law or fact. As an illustration of this, I may refer to the case of *Jayshree Shantaram Vankudre v. Rajkamal Kalarnandir Private Ltd and another*[3], in which the Court held that where complicated questions arise in a petition under Section 155 of the Companies Act, 1956, the summary remedy for rectification of the Register of Members provided for by the said section was not a proper one and ought not, to be allowed and the petitioner should be referred to a regular suit for obtaining the relief of rectification. The starting point for arriving at the chargeable profits of a company is the total income of the company and the form of return of chargeable profits is to contain the computation thereof. Now, were the argument of the Department correct, it would follow that the Income-tax Officer would have the power to determine, while making a provisional assessment, what is the total income of he assessee computed in accordance with the provisions of the Income-tax Act. He can reject items claimed as exemptions or deductions and arrive at his own determination of income and then proceed to deter- mine the chargeable profits. Such a construction would invest the Income-tax Officer with an arbitrary authority with respect to facts and the law applicable thereto. Mr. Joshi conceded, and in my opinion right that it was not open to the Income-tax Officer while making a provisional assessment to dispute the total income returned by the assessee. He,

[3] A I R 1960 Bom 136
however, submitted that it was open to the Income-tax Officer to dispute the computation of capital. He further conceded that in doing so, it was not open to the Income-tax Officer to go into disputed questions of fact. He, however, submitted that questions of law stood on a different footing and an Income-tax Officer while making a provisional assessment could form his own opinion about a disputed question of law. This distinction drawn between disputed questions of fact and disputed questions of law arising in the case of a provisional assessment is, to my mind, illogical. If disputed questions of fact cannot be gone into because they involve the leading of evidence, including production of documents, the opportunity of which is denied to the assessee, disputed questions of law equally involve a debate on the interpretation of the relevant statutory provisions as also with respect to decisions on the subject of the applicability and relevance of the points of difference or distinction between the cases decided and the case under consideration and cannot be decided in a provisional assessment. According to Mr. Joshi, so far as questions of law are concerned, the Income-tax Officer was only bound to follow the decision of the Supreme Court directly on the point, and so far as decisions of the High Courts were concerned, only of the High Court within whose jurisdiction he is, unless an appeal against that decision was pending in the Supreme Court, or o special leave application against the judgment in that decision was pending in the Supreme Court; but he was not bound by decisions of other High Courts. Mr. Joshi further submitted that the Income-tax Officer was equally not bound by the decisions of the Income-tax Appellate Tribunal, because these decisions do not lay down the law. The submission that an Income-tax Officer is not bound by the decision of a High Court within whose jurisdiction he is, if an appeal against that decision is pending in the Supreme Court, or a special leave application is pending in the Supreme Court against that judgment, cannot be accepted. Merely because an appeal has been filed or a special leave application is pending against it, does not denude a decision of its binding effect, and until set aside, that decision is binding on all upon whom it operates as a binding precedent, unless where the operation of that judgment has been stayed by the Supreme Court. Not to follow the decision of the High Court within whose jurisdiction the Income-tax Officer is, would be tantamount to committing contempt of that Court. In *East India Commercial Co Ltd., Calcutta, and another v. Collector of Customs, Calcutta*[4], the Supreme Court held that an administrative authority or Tribunal cannot ignore the law declared by the highest Court in the State. The Supreme Court pointed out that taking into consideration the provisions of Articles 215, 226 and 227 of the Constitution, it would be anomalous to suggest that a Tribunal over which the High Court had superintendence, can ignore the law declared by that Court and start proceedings in direct violation of it, the result being that if a Tribunal can do so, all the subordinate Courts can equally do so on the ground that there is no specific provision, just like there is in the case of the Supreme Court, making the law declared by the High Court binding on subordinate Courts. The Supreme Court further held that it is implicit in the power of supervision conferred on a superior Tribunal that all the Tribunals subject to its supervision should conform to the law laid down by it, for such obedience would be conducive to their smooth working, while otherwise there would be confusion in the administration of law, and respect for law would irretrievably suffer. Where a High Court of

another State has decided a point and the same point arises in the making of a provisional assessment, in my opinion, it is not open to the Income-tax Officer to ignore that decision, whatever may be the position in the making of a regular assessment, for in a provisional assessment, an assessee has no opportunity to satisfy the Income-tax Officer

[4] AIR 1962 SC 1893, 1905

about the correctness of that decision. With respect to decisions of the Tribunal, Mr Joshi relied upon what is stated in Salmond on Jurisprudence, Twelfth Edition, page 158.

According to Salmond, Courts of inferior jurisdiction do not create binding decisions even for Courts lower in rank, and as an illustration, it is mentioned that the Magistrates' Courts, are not bound by decisions of Courts of Quarter Sessions, even though an appeal lies from the former to the latter, and a Country Court Registrar is not forced to follow previous decisions of the Country Court Judge, even though an appeal lies from the Registrar to the Judge. According to Salmond, Courts of inferior jurisdiction are bound only by decisions of Courts of superior jurisdiction, as for example, the High Court, the Court of Appeal and House of Lords. I am here, however, not concerned with the question of the theory of precedents. The question is of the extent and nature of the powers of an Income-tax Officer while making a provisional assessment in a summary manner. If the Tribunal has decided a case in a particular way and the same point arises in a provisional assessment, it is implicit from the nature of a provisional assessment that the Income-tax Officer should not take a different view; because there is no opportunity to the assessee to convince the Income-tax Officer why he should not take a view different from that taken by the Tribunal and no remedy open to him to correct the view taken by the Income-tax Officer. Whether what has been stated in Salmond on Jurisprudence would apply to regular assessments is not a question with which I am concerned, but it is not open to the Income-tax Officer, while making a provisional assessment, to depart from the view taken by the Tribunal and strike out on a line of his own to the prejudice of the assessee. In *Stumps, Schuele & Somappa Pvt Ltd v. Second Income- tax Officer, Company Circle, Bangalore, and others*[5], the Karnataka High Court set aside the notice issued under Section 8 of the Surtax Act for reopening the assessment made. It was contended on behalf of the Department that the writ petition filed by the assessee was not maintainable as the assessee had an alternative remedy because they could file an appeal against any order passed in the reassessment proceedings. Overruling this preliminary objection, the Court held that the Commissioner of Income-tax had already in another case, taken a view against the petitioners' case which view had been set aside by the Tribunal in an appeal filed in that case and, therefore, the claim of the Department that there had been an under-assessment was patently contrary to the provisions of law and the preliminary objection to the maintainability of the petitions must be overruled. subordinate Courts can equally do so on the ground that there is no specific provision, just like there is in the case of the Supreme Court, making the law declared by the High Court binding on subordinate Courts. The Supreme Court further held that it is implicit in the power of supervision conferred on a superior Tribunal that all the Tribunals subject to its supervision should conform to the law laid down by it, for such obedience would be conducive to their smooth working, while otherwise there would be confusion in the administration of law, and respect for law would irretrievably suffer. Where a

High Court of another State has decided a point and the same point arises in the making of a provisional assessment, in my opinion, it is not open to the Income-tax Officer to ignore that decision, whatever may be the position in the making of a regular assessment, for in a provisional assessment, an assessee has no opportunity to satisfy the Income-tax Officer about the correctness of that decision. With respect to decisions of the Tribunal, Mr Joshi relied upon what is stated in Salmond on Jurisprudence, Twelfth Edition, page 158. According to Salmond, Courts of inferior jurisdiction do not create binding decisions even for Courts lower in rank, and as an illustration, it is mentioned that the Magistrates'

[5](1976) 102 ITR 320

Courts, are not bound by decisions of Courts of Quarter Sessions, even though an appeal lies from the former to the latter, and a Country Court Registrar is not forced to follow previous decisions of the Country Court Judge, even though an appeal lies from the Registrar to the Judge. According to Salmond, Courts of inferior jurisdiction are bound only by decisions of Courts of superior jurisdiction, as for example, the High Court, the Court of Appeal and House of Lords. I am here, however, not concerned with the question of the theory of precedents. The question is of the extent and nature of the powers of an Income-tax Officer while making a provisional assessment in a summary manner. If the Tribunal has decided a case in a particular way and the same point arises in a provisional assessment, it is implicit from the nature of a provisional assessment that the Income-tax Officer should not take a different view; because there is no opportunity to the assessee to convince the Income-tax Officer why he should not take a view different from that taken by the Tribunal and no remedy open to him to correct the view taken by the Income-tax Officer. Whether what has been stated in Salmond on Jurisprudence would apply to regular assessments is not a question with which I am concerned, but it is not open to the Income-tax Officer, while making a provisional assessment, to depart from the view taken by the Tribunal and strike out on a line of his own to the prejudice of the assessee. In *Stumps, Schuele & Somappa Pvt Ltd v. Second Income- fax Officer, Company Circle, Bangalore, and other*[6]*s,* the Karnataka High Court set aside the notice issued under Section 8 of the Surtax Act for reopening the assessment made. It was contended on behalf of the Department that the writ petition filed by the assessee was not maintainable as the assessee had an alternative remedy because they could file an appeal against any order passed in the reassessment proceedings. Overruling this preliminary objection, the Court held that the Commissioner of Income-tax had already in another case, taken a view against the petitioners' case which view had been set aside by the Tribunal in an appeal filed in that case and, therefore, the claim of the Department that there had been an under-assessment was patently contrary to the provisions of law and the preliminary objection to the maintainability of the petitions must be overruled. In defining the limits of the power of the Income-tax Officer to make a provisional assessment, it is paramount to bear in mind that the object of such an assessment is to accelerate the collection of revenue and not to keep it pending until a regular assessment is made. This, however, does not mean that the revenue which has to be collected there-by should be contrary to law or collected on a basis which cannot stand in a regular assessment. A provisional assessment must be made in accordance with law. It cannot be arbitrary, because that would confer upon the Income-tax

Officer, the power to collect tax contrary to the provisions of law. Such collection must also be made bearing in mind the intrinsic nature of a provisional assessment, namely, that it is made in a summary manner, that the assessee has no opportunity of being heard or of leading evidence or of satisfying the Income-tax Officer that the prima facie view he has taken is erronous, that the assessee has no right of appeal, no right to ask for stay pending the making of a regular assessment of the collection of any arbitrary excess tax assessed and that the assessee has no remedy whatever against a provisional assessment, save and except to approach the High Court under Article 226 of the Constitution. In my opinion, the departure made in Section 7 of the Surtax Act from the language used in Section 141 of the Income-tax Act, though it may not confine the Income-tax Officer only to the position as shown in the return, does not at the same time authorize him to reject that return, in whole or in part, or to refuse to accept the factual position shown therein or the legal position as then prevailing. So far as

[5](1976) 102 ITR 320

the legal position is concerned, the Income-tax Officer would be bound by a decision of the Supreme Court as also by a decision of the High Court of the State within whose jurisdiction he is, irrespective of the pendency of any appeal or special leave application against that judgment. He would equally be bound by a decision of another High Court on the point, because not to follow that decision would be to cause grave prejudice to the assessee. Where there is a conflict between different High Courts, he must follow the decision of the High Court within whose jurisdiction he is; but if the conflict is between decisions of other High Courts, he must take the view which is in favour of the assessee and not against him. Similarly, if the Income-tax Appellate Tribunal has decided a point in favour of the assessee, he cannot ignore that decision and take a contrary view, because that would equally prejudice the assessee. He can, however, reject claims which are clearly and indisputably untenable and about which a different view is not rationally possible. For instance, if an assessee seeks to include in the computation of the capital, a reserve brought into existence by increasing by revaluation or otherwise, a book asset such as plant or machinery, the Income-tax Officer would be justified in excluding this item, because the claim in respect thereof would be directly contrary to the provisions of Explanation 1 to Rule 2 of the Second Schedule to the Surtax Act. Bearing in mind the conclusions, I have reached with respect to the extent of the power of the Income-tax Officer in making a provisional assessment under Section 7 of the Surtax Act, I will now examine the impugned order of provisional assessment in the instant case. The first two items excluded by the Income-tax Officer from the computation of capital were doubtful debts, reserve and provision for doubtful debts. The ground given by the Income-tax Officer in the impugned order for excluding these two items is that these amounts were set aside to meet anticipated losses and, therefore, could not be classified as reserve. It is the case of Siemens that these amounts stood in their books for several years and were not meant to be utilized for writing off had or doubtful debts and that such debts were invariably debited to the profit and loss account and not to the reserve account and, therefore, these accounts were not maintained to meet any specific liability for bad or doubtful debts. This factual position is not disputed before me. In *Commissioner of Income-tax, Bombay City IV v. Jupiter General Insurance Co*[6]*,* that is, six and a half months before the impugned order of

provisional assessment was passed, on similar facts, a Division Bench of this Court had rejected an application made by the Department to direct the Tribunal to state a case where on the facts found by the Tribunal, it had held that the account was not in the nature of a specific reserve irrespective of the nomenclature of the said account. Further, as at the date of the impugned order for provisional assessment, the Income-tax Tribunal at Bombay had also in several matters taken a view upholding the contention of Siemens advanced before me. These cases are *Hindustan Lever Ltd v. The Income Tax Officer*[7], *Burroughs Welcome & Co (India) Private Ltd v. The Super Profits Tax Officer*[8], *Bombay v. Messrs Johnson and Johnson of India*[9], *The Income-tax Officer, Coin Cir V(2) Bombay v. Parke Davis*[10] *(India)* The first two of the above four were appeals under the Super Profits Tax Act, 1963, while the last two were cases under the Surtax Act. In view of the above decisions, it was not open to the Income-tax Officer to disallow the above two items and in doing so, he

[6](1975) 101 ITR 370, decided on June 26, 1974

[7] Sp C.A. No. 12 1967-68, Coin Cir II(3), Bom decided on January 17, 1970: Sp C.A. No. I (Bom) of 1973-74

[8] Coin Cir V(5), decided on May 20, 1974; S.T.A. No. 289 (Bom)170-71 The Income-tax Officer, Coin Cir 111

[9] Bom decided on December 12, 1972; and S.T.A. No. 163/Bom173-74

[10] decided on September 11, 1974

exceeded his jurisdiction. The only argument which was sought to be advanced in support of the action of the Income-tax Officer was that the facts upon which Siemens relied were not set out in their said letter of objections dated December 27, 1974. This argument is without any merit. As mentioned earlier, the show cause notice did not set out any reasons why certain items were not being taken into account. Had these reasons been set out, Siemens would have known the grounds upon which the Income-tax Officer proposed to proceed, and would have set out these facts. It may also be mentioned that along with their return, Siemens have filed their balance sheet for the year ended September 30, 1972, and the said balance sheet bears out the case of Siemens, The next argument which was advanced by Mr Joshi to support the action of the Income-tax Officer was that the Explanation to rule I of the Second Schedule to the Surtax Act is not to be found in the Super Profits Tax Act. According to 114r Joshi, the presence of this Explanation in rue I of the Second Schedule to the Surtax At makes a considerable difference. Further whether this Explanation made a difference or not was itself U11S t La debatable and complicated question of law which the Income-tax Officer in making the provisional assessment was not entitled to decide. Further in any event, on the date of the impugned order the Income-tax Appellate Tribunal at Bombay had taken a view favourable to Siemens in the two cases under Surtax Act itself which have been mentioned above. That the view taken by the Income-tax Officer was wrong in law is also shown by a recent judgment of a Division Bench of this High Court in *Parke Davis (India) Ltd. v. Commissioner of Income-tax, Bombay City*[11]-in which on similar facts, the Court decided in favour of the assessee in references made both under the Super Profits Tax Act and the Surtax Act. It is unnecessary to burden this judgment with other decisions to the same effect which were cited at the Bar and which have taken the same view. The next item which was excluded by the Income-tax Officer was excess provision for taxation. Under rule 2 of the First Schedule to the Surtax Act, the balance of the total income arrived at after making the exclusions mentioned in Rule 1 are to be reduced inter alia by the amount of income-

tax payable by the company in respect of its total income under the provisions of the Income-tax Act after making certain allowances and adjustments as mentioned in the said rule. Provision for taxation was made in the balance sheet of Siemens for the year ended September 30, 1972, and its working out was annexed to the return. The Income-tax Officer has excluded this item on the ground that in view of the Explanations to rule 1 of the Second Schedule to the Surtax Act, this was in the nature of a provision for a specified liability. As at the date of the impugned order or provisional assessment, the Madras High Court in four decisions, namely, *Commissioner of Income-tax, Madras v. Indian Steel Rolling Mills Ltd*[12], *Naganvnal Mills Ltd v. Commissioner of Income-tax. Madras*[13] *Sri Ganapathy Mills Co Ltd v. Commissioner of Income-tax, Madras*[14] and *United Nilgiri Tea Estates Co Ltd v. Commissioner of Income-tax, Madras*[15] had taken a view favourable to Siemens. These were all cases under the Super Profits Tax Act and not under the Surtax Act; but the question whether the Explanation to Rule I of the Second Schedule to the Surtax Act made any difference, was a matter of controversy and debate as pointed out earlier, and in view of the limitations which hedge around a provisional assessment by virtue of its very nature, the Income-tax Officer ought not to have taken the view which he did. It may be mentioned that recently, in several appeals, disposed of by the Supreme Court by a common judgment reported as *Vazir Sultan Tobacco Co Ltd and Others v.Commissioner of Income-tax, A.P and others*[16]

[11]1, (1981) 130 I.T.R. 613 13(1974) 94 ITR 387 [15](1974) 96 I.T.R. 734
12(I9 3) 92 ITR 76 14(1974) 94 ITR 429 [16](1961) 132 ITR 569, 573

in which one of the questions was whether provisions for taxations could be considered as "other reserves" within the meaning of rule I of the Second Schedule to the Super Profits Tax Act or Rule I of the Second Schedule to the Surtax Act, the Supreme Court has held that if a provision for a known or existing liability is made in excess of the amount that would be reasonably necessary for the purpose, the excess would have to be treated as a reserve and therefore, would be includible in the capital computation. The next item is with respect to provision for dividend. According to the note in the balance sheet, the Directors had recommended dividend at the rate of 18 per cent, free of tax, amounting to Rs. 43,20,000 which was to be paid out of the general reserve, if approved by the shareholders at the Annual General Meeting and for which no separate provision had been made. It is not disputed that as at the date of the impugned order of provisional assessment, the Income-tax Appellate Tribunal at Bombay had taken a view favourable to the assessees in several decisions, namely, *The Income-tax Officer, Coin Cir 1(8), Bombay v. Inarco Limited*[17], *The Income-tax Officer v. Jahnson & Johnson Ltd*[18]; *The Income-tax Officer, Com Cir 11(4), Bombay v. Colour Cheat Ltd*[19]; and *The Income-tax Officer, Coin Cir 111(8) Bombay, v. Atlas Copco (India) Ltd*[20].. The Income-tax Officer was, therefore, not entitled to take a view contrary to that taken by the Income-tax Appellate Tribunal at Bombay. It may, however, be mentioned that in *Vazir Sultan Tabacco Co Ltd and others v. Commissioner of Income-tax, A P and others*, referred to earlier, the Supreme Court has taken a view against the contention of Siemens and held that such an item would be a provision; but this decision of the Supreme Court came only on September 25, 1981, that is, about six years and nine months after the date of the impugned order of provisional assessment. The last item which remains to be considered is with respect to the sum of Rs 1,26,29,182, being the total amount of decision

deductions claimed under Chapter VI-A of the Income-tax Act in computing the total income. The Income-tax Officer has rejected the contention of Siemens with respect to this sum on the ground that the amount of such deductions did not form part of the total income, and therefore, Rule 4 of the Second Schedule to the Surtax Act applied. The said rule has been reproduced earlier. Under that rule, where a part of the income, profits and gains of a company is not includible in its capital is to be the sum ascertained in accordance with rules 1, 2 and 3 of the Second Schedule, diminished by an amount which bears to that sum, the same proportion as the amount of such income, profits and gains bear, to the total amount of its income, profits and gains. The question which arises for determination is whether deductions claimed under Chapter VI-A of Income-tax Act are not includible in the total income of Siemens. The expression "total income" is defined by clause (45) of section 2 of the Income-tax Act as meaning "the total amount of income referred to in Section 5, computed in the manner laid down" in the Income-tax Act. Under Section 4, income-tax is to be charged "in accordance with, and subject to the provisions of this Act (that is, the Income-tax Act) in respect of the total income of the previous year or previous years, as the case may be, of every person". Section 5(l) of the Income-tax Act provides as follows :

> 5. Scope of total income.
> (1) Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which-
> (a) is received or is deemed to be received in India in such year by or on behalf of such person; or
> (b) accrues or arises or is deemed to accrue or arise to him in India during such year; or
> (c) accrues or arises to him outside India during such year."

[17] S.T.A. No. 212 (Bom) of 1973-74
[18] Bom S.T.A. No. 239 (Bom),'70-71
[19] S.T.A. No. 137 (Bom) of 1972
[20] S.T.A. No. 24(Bom) of 1973-74

We are not concerned with the proviso to that sub-section. Section 10 is material for the present purpose. The marginal heading of that section is "Income not included in total income". The opening words of the section are "In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included. The different clauses of section 10 then set out the income which are not includible in the total income. None of these clauses refer to or provide for the deductions to be claimed under Chapter VI-A. Chapter VI-A provides for deductions to be made in computing the total income. The heading of Chapter VI-A is "DEDUCTION TO BE MADE IN COMPUTING TOTAL INCOME". Thus the deductions to be made under Chapter VI-A are different from the types of income which are not includible in the total income under section 10. While section 10 refers to the types of income which are not to be included in the gross total income, Chapter VI-A refers to the amounts which can be claimed as deductions and thus are to be deducted from the gross total income in order to arrive at the taxable income. Rule 5 of the Surtax Rules provides that the return of chargeable profits is to be in Form No I annexed to the said Rules. Part 11 of the Form of Return provides for computation of chargeable profits. In column 1 is to be set out the total

income computed in accordance with the provisions of the Income-tax Act sunder various heads of income. The material provisions of Note 2 to that Part is as follows :

> Note 2 (See item l of Part II)
> Against each of the entries (i) to (v), there should be shown the income as computed under the respective heads of income under the Income-tax Act, 1961, after taking into account all deductions permissible under that Act."
> In Part III is to be set out the computation of statutory deduction. Column 13(a) of that Part is as follows :
> "13. (a) Amount of income, profits or gains, if any, not includible in the total income as computed under the Income-tax Act, 1961
> (Please see Note 8)".
> Note 8 referred to in column 13(a) provides as follows
> "Note 8 See entry (a) of items 13 of Part III.
> Instances of income, profits and gains not includible in the total income as are computed under the Income-tax Act, 1961, agricultural income in India, and in the case of a non-resident company, its income accruing or arising outside India."

Agricultural income is one of the income which under clause (1) of Section 10 of the Income-tax Act is not to be included in computing the total income. Thus on a plain reading of the relevant statutory provisions, the conclusion of the Income-tax Officer that the amount of deductions under Chapter VI-A were not includible in the total income of Siemens was not correct. Further, as at the date of the impugned order of provisional assessment, the Income-tax Appellate Tribunal at Bombay had in three decisions taken a view which upheld the contention of Siemens. These decisions are *Inarco Limited, Bombay v. The Income-tax Officer, Com Cir 1, (8) Bombay*[21];

[21] S.T.A. No. 215(Bom) of 1973-74

The Income-tax Officer, Coin Cir 11(9) Bombay v. M/s ABC, Bombay[21]; and *M/s UBL, Bombay v. The Income-tax Officer*[22]*, Coin Cir 1V(8) Bombay*. In ignoring the above statutory provisions and the rulings of the Income-tax Appellate Tribunal at Bombay, the Income-tax Officer acted contrary to law. It may be mentioned that subsequently, the Karnataka High Court in *Stumpp, Schuele & Somappa Pvt Ltd v. Second Income-tax Officer, Company Circle, Bangalore and other*[23]*s*affirmed on appeal in *Second Income-tax Officer, Company Circle, Bangalore, and another v. Stumpp, Schuele and Somappa Private Ltd*[24]*,* and the Bombay High Court in *Commissioner of Income-tax, Bombay City III v. Century Spg and Mfg Co Ltd*[25] and *Commissioner of Surtax, Vidarbha and Alarathwada v. Ballarpur Industries Ltd*[26]. have held that the expression "not includible" in rule 4 of the Second Schedule to the Surtax Rules means "not capable of being included" and cannot refer to an amount which already forms part of the gross total income and which would be later on deducted for the purpose of determining the tax liability under Chapter VI-A or Chapter VII. I may also mention at this stage that in the regular assessment of Siemens, the Income-tax Officer took the same view which he did at the time of

making the provisional assessment. Siemens first went in appeal to the Appellate Assistant Commissioner who partly allowed the appeal. Thereafter, Siemen filed an appeal to the Income-tax Appellate Tribunal at Bombay. As a result of the order of the Tribunal, Siemens succeeded with respect to all the items which are the subject matter of this petition except one relating to the reduction of the general reserve by a sum of Rs. 43,20,000 being the amount of dividend declared and paid from such general reserve. At the instance of Siemens, the Tribunal has made a reference on this point to this High Court, being Income-tax Reference No 228 of 1981. At the instance of the Department also, a reference has been made in respect of the items of doubtful debts, reserve and provision for doubtful debts, that being Reference No 456 of 1981. The Department's Application to refer to this High Court, the question relating to the amount of deductions under Chapter VI-A of the Income-tax Act, was disallowed by the Tribunal. Against this order, the Department has filed an Application in this High Court, being Income-tax Reference Application No 26 of 1981, for a direction to the Tribunal to state the case on this point. The above two References and the Reference Application are all still pending. For the reasons set out above, it must be held that in making the impugned order of provisional assessment, the Income-tax Officer travelled beyond the ambit of a provisional assessment, acted in disregard of the law then prevailing and in the case of the item relating to deduction under Chapter V1-A of the Income-tax Act, also acted contrary to the provisions of law. The impugned order of provisional assessment was, therefore, in excess of the jurisdiction vested in the Income-tax Officer and must be set aside. Consequently, the notice issued in pursuance of the said provisional order must also be set aside. In the petition, the Petitioners have also challenged the constitutionality of Section 7 of the Surtax Act. That is, however, not an absolute challenge, but a challenge to be leveled only if it is held that the power of the Income-tax Officer to make a provisional assessment extends also to adjudicating upon complicated issues of fact or law. As I have already held that the Income-tax Officer has no such power while making a provisional assessment, this question does not fall for determination. In the result, this Petition must succeed, and I accordingly, make the rule issued therein absolute by quashing and setting aside the said order of provisional assessment dated December 30, 1974 and the said notice of demand dated January 14,

[21] S.T.A. No. 24 (Bom) of 1970-71 [23] (1976) 102 I.T.R. 320 [25](1978) 1 11 I.T.R. 6

[22] S.T.A. No. 97(Bom)/1973-74 [24](1977) 106 ITR 399, 407 [26](1979) 116 ITR 623

1975. The Respondents will pay to the petitioners, the costs of this Petition fixed at Rs 1,000.

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