Income Tax Appellate Tribunal - Ahmedabad
Income Tax Appellate Tribunal - Ahmedabad
Acit vs Goldmine Shares And Finance Pvt. ... on 30 April, 2008
Equivalent citations: 2008 113 ITD 209 Ahd, 2008 302 ITR 208 Ahd
Bench: R Garg, Vice, R Tolani, P Bansal, J Members
ORDER

R.P. Garg, Vice President

1. Because of the cleavage of opinion between the Benches of Tribunal viz., Mumbai and Kolkata the President, Income Tax Appellate Tribunal, has constituted this Special Bench for considering the following issue:

Whether in view of the provisions of Section 80I A(5) of the Income Tax Act, 1961, the profit from the eligible business for the purpose of deduction Under Section 80IA of the Act has to be computed after deduction of the notional brought forward losses and depreciation of eligible business even though they have been allowed set off against other income in earlier years.

2. The decision of the Tribunal, Bombay Benches, in the case of M. Pallonji & Co. Pvt. Ltd. v. JCIT 105 TTJ 136 (Bom.) is in favour of the assessee and it held that unabsorbed depreciation of eligible project could not be set off against profit of eligible business for the purposes of deduction Under Section 80IA which unabsorbed depreciation stood already adjusted against profits of assessee from other business. Whereas, another Bench of the Tribunal in ACIT v. Ashok Alco Chem Ltd. 96 ITD 160 (Mum.) is stated to have held against the assessee by observing that for the purpose of applying the provisions contained in Section 80IA of the Act, the profits or gains of the eligible business are to be computed as if the eligible business were the only business of the assessee right from the initial year, brought forward losses of the unit have to be set off against the profits and in the absence of profit from the eligible units after set off of brought forward losses of the said units, deduction Under Section 80IA could not be allowed. The Tribunal, Kolkata Benches, in the case of ITO v. Kanchan Oil Industries Ltd. 92 ITD 557 (Kol.) has concluded that in view of Sub-section (7) of Section 80IA, for computing deduction Under Section 80IA, brought forward losses and unabsorbed depreciation of ineligible business cannot be deducted from the income of eligible business and only the unabsorbed depreciation / brought forward losses of eligible business can be so deducted.

3. The brief facts of the case are that the assessee is mainly dealing in shares and securities. During F.Y. 1995-96, relevant to AY 1996-97, the assessee purchased Wind Mills and started producing electricity. The receipt of electric power generated through these mills is shown as credited in the P & L A/c at Rs. 95,388 and Rs. 6,40,296. The following is the income credited in the P & L A/c. of the assessee for Financial Years ending on 31/03/95, 31/03/96 & 31/03/97.

---------- Sr. Head of income F.Y. 1994-95 F.Y. 1995-96 F.Y. 1996-97 No

---

1. Net income from 25,43,055 96,57,818 2,00,083 sale/purchase of

shares/debentures

---

2. Dividend income 15,321 53,647 1,59,865
---

3. Electric power charges Nil 95,388 6,40,296 receivable

---

4. Income from bill - - 19,726 discounting

---

5. Interest on Bank FDR - - 2,268 ----------

4. Against these very low receipts from electric power charges in F.Y. 1995-96 when assessee purchased wind mills, it claimed depreciation of Rs. 1,04,44,150 which was set off against business income from all sources. In the return of income for A.Y. 1996-97 the assessee set off the depreciation against other income leaving thereby a balance unabsorbed depreciation at Rs. 9,89,675. A note No. 4 was attached stating: "The assessee is entitled to get deduction/benefit Under Section 80IA in respect of income derived by it from undertaking engaged in generation & distribution of power. During previous year income derived from said power generation unit has been set off against claim of depreciation Under Section 32(1) & hence amount deductible Under Section 80IA is NIL."

5. In the return of income for A.Y. 1997-98, the assessee has claimed deduction Under Section 80IA on power generation income of Rs. 6,40,296/- restricted to gross total income of Rs. 1,59,865 representing Dividend income (business income being Rs. 5,66,219 but set off against unabsorbed depreciation of Rs. 9,89,675, balance Rs. 4,23,456 still carried forward). In subsequent years the method was repeated.

6. Thus in all the Assessment years. 1997-98 to 2000-01 the assessee company claimed deduction Under Section 80IA on the basis of the profits earned in the respective year subject to the maximum of gross total income. On the other hand the A.O. reduced the claim of the assessee Under Section 80IA in view of the provisions of Section 80IA(7)/80IA(5) of the IT. Act holding that the deduction in these A.Y. 1997-98 and subsequent years would be allowable only on the income which is arrived after setting off of the carried forward losses on notional basis of the eligible business even though such losses of the eligible business were set off against other incomes' of the assessee in A.Y. 1996-97. The assessee challenged the order of the A.O. before the CIT(A) who primarily relied upon the judgment of High Court of Calcutta in the case of CIT v. Balmer Lawrie & Co. Ltd. 215 ITR 249 and decided the issue in favour of the assessee by observing as under:

10. From the various decisions discussed, the crystallized ratio appears to be:

(i) The profits and gains of an IU should have been included in the Total Income and that such profits must be computed in accordance to the provisions of the Act.

(ii) The percentage as prescribed is to be applied to such component of profits of IU included in total income.

(iii) The loss from other business cannot be set off from current profit of IU to determine "profit and gain of IU' for incentive section.

(iv) The loss of another priority industry also cannot be set off against the profit of the entitled priority industry.

(v) The carried forwarded unabsorbed depreciation, loss or development rebate of any other business or any other prior industry cannot be set off against the current profit of an IU for computing incentive.

(vi) Unabsorbed loss an unabsorbed depreciation of the concerned priority industry is required to be set off for the computation of "profit and gains of such IU" for working out deduction.

(vii) The loss, depreciation and development rebate of the IU, already set off against the other income in the earlier years cannot be artificially brought forward and set off against current year's profit of the IU to recompute deduction Under Section 80E, 15C, 84, 87J, 80HH etc.

(viii) The Section 80IA(7) does not have the legal fiction that "as of the losses, depreciation or development rebate in respect of the new industrial undertaking for the past assessment years were not set off against profit of other business.

10.1 Thus considering all the permutations, the action of the AO, hinges upon the interpretation and inference about legislative intent for introducing the clause "as if such eligible business were the only source of income".

It will denoted from various decisions that for computation of deductions based on profits and gains of the IU, various disputes arose. The Deptt. sought to set off losses of other business, loss of other priority industry, unabsorbed depreciation and loss of other business, unabsorbed depreciation and the loss of the concerned IU and loss and depreciation already set off against other income in earlier years to set off against IU's current profit, whereas the assessee took the view that the carried forward losses and depreciation of IU is to be set off against other business of the assessee and then against the profit of the IU. The fiction seems to have been introduced to set at rest these sort of controversies. The fiction also appears to have been created so that the profit of such IU could not be artificially increased or decreased like in the case of deduction Under Section 80J being based on proportion of turnover. It is significant to note that the Sub-section 80IA(7) has not used the fiction " or as if the past years' depreciation or development rebate had not been set off against other income of the assessee" as is mentioned by the Hon'ble Supreme Court in the case of Rajapalayam Mills. In place the section has used the fiction mentioned in the aforesaid judgment "if the new IU were the only business of the assessee". Looking into the controversies, if the legislature intended to permit set off such absorbed loss and depreciation, against the current profit of the IU, it could have very well used the first fiction mentioned above. It appears more logical that the legislation chose the other fiction to clarify the issue that the profit of an IU is to be determined as if, such business was only source. By this, the legislation meant to clarify that the profit of each unit is to be determined as per provisions of Act but did not mean to introduce the fiction that the unabsorbed depreciation or unabsorbed loss of the unit set off earlier is required to be set off from current profits.

10.2 In case the other view that the fiction meant to permit two modes of computation and to allow carry forward of such absorbed losses and depreciation is taken, it leads to numerous impractical situations and will go against the observations of the Hon'ble SC mentioned in para 9 and will also defeat the purpose of incentives to priority industry. The contradictions, if my opinion, will be with reference to following ratio laid down.

(i) The profit of IU shall be computed as per the provision of the Act in the same manner. It is done in determining total income chargeable to tax.

(ii) The new IU is not retrospectively quarantined or isolated from other income producing activities of the assessee.

(iii) There are no two modes of computation of the profits of the new IU, one for deduction under Section 803 and one for determining income chargeable to tax.

10.2.1 Further, in my opinion, in the legal fiction creased for limited purpose cannot be extended to further fiction of "carry forward of loss or depreciation of unit which has already been set off from other income in earlier year".

10.2.2 Section 80HH is with regard to industry which started manufacture after 31.12.1970. It has Sub-section 9 which is as under:

(9) In case where the assessee is entitled also to the deduction under Section 801 or Section 80J in relation to the profits and gains of an industrial undertaking or the business of a hotel to which this section applied, effect shall first be given to the provisions of this section.

In this section, phrase used is "deduction Under Section 80I of Section 803 in relation to profits and gains of an IU".

It shows that "profit and gain of an IU" for 80I, 803 and 80HH are not different but has to be the same. If legal fiction "as if only source of business" is interpreted to permit carried forward and set off of already absorbed loss and depreciation, the profit for 803 and 80HH would be different than for the purpose of Section 80IA. That is for Section 80HH and 803 absorbed loss and depreciation of earlier years would not be set off from current year's profit, whereas it will be artificially set off for Section 80I A. Logically this would not be the intention of the legislative.

10.2.3 As is mentioned by the AR, the Circular No. 657 intended to give benefit to energy sector. The Act allowed 100% depreciation and also exemption of 100% profit from tax for first five years. If the interpretation of the AO is accepted the very objective of incentive is defeated. As is revealed by the statistics of the income generation by wind farm, the appellant will require at least 15 years to absorb the depreciation which had already been set off against other income i.e. the owner of wind farm will never get the benefit of deduction.

10.2.4 Further the reason advanced by the learned AR quoted in para 6(iii)(b) is also very valid. The benefit proposed to be given puts appellant in disadvantageous position if the interpretation of the department is accepted.

10.3 Considering the objective of the incentive section, ratios laid down by the higher courts, harmonious construction of various similar incentive provision related to new IU and the strict interpretation of the fiction in 80IA(7), I am of the opinion that the fiction cannot be extended to permit the set off of already absorbed depreciation of the IU against other income in earlier years from the current profit However, the unabsorbed depreciation is required to be set off from the business profit of the IU to determine such profit'. The balance depreciation out of unabsorbed depreciation that could not be set off against the profit of the IU, will be set off against other income if any and the resultant balance remaining will be carried forward to subsequent years for set off with the profit of the IU.

7. Against this decision of the CIT(A) the Revenue is in appeal before the ITAT. The Ld. DR submitted that the provisions of Section 80IA(5) are identical to the provision of Section 80I(6) of the IT. Act., which was brought in the statute by the Finance Act, 1980 w.e.f. 1-4-1981. On introduction of 80I(6) by the Finance (No. 2) Act, 1980 the Board issued a Circular No. 281 dated 22/09/1980 on the subject and referred to para 19.4 of the "Explanatory notes of provisions relating to Direct Taxes".

8. He further stated that the deduction Under Section 80IA is allowed to an undertaking or an enterprise or an eligible business and not to an assessee; that Section 80IA(5) is a non-obstante clause and thus has overriding effect over all over provisions of the Act; and that if for the purpose of arguments an adverse view is taken i.e. if the loss of an eligible business in earlier year is set off against income of other type of activities and the deduction Under Section 80IA is to allowed only on the income of eligible business of the current year without considering the notional loss in earlier year, then this will be disadvantageous to those assessee who do not have any source of income other than the eligible business. Further, even if the assessee does not have real profits from other activities to set off against the loss of eligible business, then the assessee may buy bogus profits to set off the loss of eligible business so that in the subsequent year the assessee is entitled to

100% deduction Under Section 80IA. It may be mentioned that in this case the assessee has shown exceptionally higher profits of Rs. 96.57 lakhs from share activity in A.Y. 1996-97 as against normal share income of Rs. 25 lakhs shown in A.Y. 1995-96 & Rs. 2 lakhs in A.Y. 1997-98. Since the deduction Under Section 80IA is allowable only to an eligible business and not to an assessee, the earlier year loss of the eligible business, even though set off against other type of income in that year has to be set off against the subsequent year income of the eligible business. The following example illustrates the position:

'A' has only activity of eligible business

Yr No. 1^st year 2^nd year Profit/loss Loss of Rs. 1.5 crore Profit of Rs. 2 crores Deduction

Under Section 80IA - Nil- On Rs. 0.5 Cr.=(2-1.5 Cr.)

B' has Two activities - one of eligible business and other non eligible business activity

Yr No. 1^st year 2^nd year Eligible business +Non-eligible Eligible business + Non-eligible Loss of 1.5 cr + Profit. 1.50 cr Profit Rs. 2 Cr.+ Profit Rs. 1.50

Deduction

Under Section 80IA NIL- On Rs. 2 Cr.

9. He submitted that in the second year "A" would get deduction of Rs. 0.5 Cr. whereas, "B" gets deduction of Rs. 2 Cr. W would be at disadvantageous stage as compared to 'B' despite the fact that both "A" and "B" had similar eligible businesses earning similar profit/ losses in the first and second years and that 80IA deduction is allowable to the eligible business and not to the assessees- 'A' or 'B'.

10. It is further submitted that the words in Section 80IA(5) namely : "for the assessment year immediately succeeding the initial asstt. year or in subsequent asstt. year" would be construed as if the benefit Under Section 80IA is intended to be given only to an industrial undertakings or to an eligible business and not to an assessee as such. He placed reliance on the certain judgments of the High Courts and Tribunals, namely i) CIT v. Dewan Kraft System (P) Ltd. 210 CTR 124 Delhi; ii) Addl. CIT v. Ashok Alco Chem Ltd. 96 ITD 160 (Mum); iii) Prasad Productions (P) Ltd. v. DCIT. 98 ITD 212 (Chennai); and iv) Sri Ramakrishna Mills (CBE) Ltd. v. DCIT 7 SCT 356 (Chennai).

11. He also submitted that the CIT(A) has followed decision of Calcutta High Court as mentioned above which was rendered in connection with the deduction Under Section 80HH of the I.T. Act., which does not have any provisions like 801(6) or 80IA(5) of the I.T. Act. He therefore submitted that the reliance by the CIT(A) on the above mentioned decision is misplaced. According to him the view taken by the A.O. is correct law and is supported by the various judgments of the Tribunals and High Court as mentioned above.

12. The contention of the ld. Counsel of the assessee Mr. S N Soparkar on the other hand is that the fiction is for that year alone because the concept of initial year is dispensed with in the new provision and in that connection he referred to Section 80IA(1) of the old provision and 80(IA)(2)(iv)(b), Sub sections (5), (6), and (7). He relied upon the decision of Chennai Bench in the case of Mohan Breweries & Distilleries Ltd. 114 TTJ 532(Chennai) and submitted that the fiction of the only source is not sacrosanct as it was not applied to all the years of the undertaking but only for the years in which the deduction was claimed.

13. He further submitted that the object of this section, was not that Section 32(2), 70, 71 and 72 would not be applicable and consequently even if an adjustment had been, it has to be assumed not so adjusted or set off, but it is to clarify that the deduction is to be granted only with respect of the profits of the eligible business, if the assessee was carrying many activities and having many sources of income. The argument is that if the loss

incurred by the assessee were set off and adjusted against profits of the earlier year, there is no mandate in the section to presume that it should be notionally carry forward and set of against the profits of the eligible business of the subsequent year.

14. Had the intention was to presume that other business or source was not in existence, then in that case Section 80A(2) and 80B(5) would/should also be not applicable in restricting the deduction to the gross total income of the assessee which has been held to be applicable by Bombay High Court in the case of the Bombay High Court in the case of Synco Industries Limited V.AO: 254 ITR 608 (Bom) upheld recently by the Supreme Court vide judgment dated 8^th March, 2008. As these sections can be applicable only when there is other source(s) of income, there cannot be any reconciliation of this decision to restricting the deduction of the income from the industrial undertaking to the amount of income by the set off of losses under the heads "other heads of income".

15. We have heard the parties and considered the rival submissions of the respondent assessee. The deduction was originally provided under Sub-section (1) of Section 801 at 20% (25% in case of a company) of and from such profits and gains derived by an industrial undertaking or a ship or a hotel etc. as are included in the Gross Total Income of an assessee. It was on fulfillment of certain conditions. Notwithstanding anything contained in any other provision of this Act, a fiction was created by Sub-section (6) for determining quantum of deduction to be allowed by deeming that the profits and gains of an industrial undertaking or a ship or the business of a hotel or the business of repair to ocean going vessels or other powered craft as if such industrial undertaking or a ship or the business of a hotel or the business of repair to ocean going vessels or other powered craft were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made. The provision of Section 80I(6) are reproduced as under:

80I(6) "Notwithstanding anything contained in any other provision of this Act, the profits and gains of an industrial undertaking or a ship or the business of a hotel or the business of repair to ocean going vessels or other powered craft to which the provisions of Sub-section (1) apply shall, for the purposes of determining the quantum of deduction under Sub-section (1) for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, be computed as if such industrial undertaking or a ship or the business of a hotel or the business of repair to ocean going vessels or other powered craft were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made.

16. Notes on Clause explaining the scope of Sub-section (6), as appears in ITR 123 ITR 126 (Statute) reads as under:

Sub-section (6) provides that for the purpose of computing the deduction at the specified percentage for the assessment year immediately succeeding the initial assessment year and any subsequent assessment year, the profits and gains will be computed as if such business were the only source of income of the assessee in all the assessment years for which the deduction at the specified percentage under this section is available.

17. Memorandum explaining provisions dealing with Section 80I, as contained in Clause-30, appeared at Page No. 154 of Volume 123 of ITR clarifying the legislative intention reads as under;

30. The new "tax holiday" scheme differs from the existing scheme in the following respects, namely:

(i) The basis of computing the "tax holiday" profits is being changed from capital employed to a percentage of the taxable income derived from the new industrial unit, ship or approved hotel. In the case of companies, 25 percent of the profits derived from new industrial undertaking etc., will be exempted from tax for a period of seven years and in the case of other taxable entities 20 per cent. Of such profits will be exempted for a like

period. In the case of cooperative societies, however, the exemption will be allowed for a period of ten years instead of seven year.

(ii) The benefit of "tax holiday" under the new scheme would be admissible to all small-scale industrial undertakings even if they are engaged in the production of articles listed in the Eleventh Schedule to the Income-tax Act. In the case of other industrial undertakings, however, the deduction will be available, as at present, where the undertakings are engaged I the production of articles other than articles listed in the said Schedule.

(iii) In computing the quantum of "tax holiday" profits in all cases, taxable income derived from the new industrial units, etc., will be determined as if such unit were an independent unit owned by a taxpayer who does not have any other source of income. In the result, the losses, depreciation and investment allowance of earlier years in respect of the new industrial undertaking, ship or approved hotel will be taken into account in determining the quantum of deduction admissible under the new Section 80I even though they may have been set off against the profits of the taxpayer from other sources.

(emphasis given)

18. On introduction of 80I(6) by the Finance (No. 2) Act, 1980 the Board has also issued a Circular No. 281 dated 22/09/1980 on the subject incorporating the above "Explanatory notes of provisions relating to Direct Taxes" explaining in identical language the scope of Section 80I(6) in paragraph 19.4 thereof.

19. Section 80IA(1) was thereafter inserted by Finance (NO. 2) Act, 1991 w.e.f. 1-4-1991 similarly providing that where the gross total income of an assessee includes any profits and gains derived from any eligible business of an industrial etc. there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to a percentage mentioned in Sub-section (5) of the profits and gains derived from such business for a number of years specified in Sub-section (6).

20. Sub-section (7) of Section 80IA of the Act reads as under:

(7) Notwithstanding anything contained in any other provision of this Act, the profits and gains of an eligible business to which the provisions of Sub-section (1) apply shall, for the purposes of determining the quantum of deduction under Sub-section (5) for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made.

21. The provisions of Section 80IA were then divided in two parts by Finance Act, 1999 w.e.f. 1-4-2000- one, by the replaced 80IA and other, by the newly inserted Section 80IB. For material purposes and in order to resolve the controversy in these cases, we find the new provisions as almost identically worded to those of the aforesaid earlier provisions of Section 80I and 80IA. Section 80 IA(1) similarly provides that "Where the gross total income of an assessee includes any profits and gains derived by ah undertaking or an enterprise from any business referred to in Sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred per cent of the profits and gains derived from such business for ten consecutive assessment years. Under this section the deduction is to eligible business, as defined in Sub-section (4) thereof.

22. Sub-section (5) of Section 80IA of the newly replaced and inserted provisions of the Act reads as under:

(5) Notwithstanding anything contained in any other provision of this Act, the profits and gains of an eligible business to which the provisions of Sub-section (1) apply shall, for the purposes of determining the quantum of deduction under that sub-section for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made.

23. Apparently, this Sub-section (5) identically deems, for the purposes of determining the quantum of deduction, the eligible business as the only source of income of the assessee during the initial assessment year as well as subsequent years and has an overriding effect on all other provisions of the Act.

24. This Sub section 80IA(1), (5) and other like Sections 80IA(7)/80I(6) can be studied in five broad sub-heads:

I) first, the deduction Under Section 80IA(1) is of/from the profits and gains included in 'gross total income';

II) second, the computation of deduction is made under a non obstante Section 80IA(7)/80IA(5);

III) third, the profit and gains are computed on a fiction created to the effect that the eligible business is the only source of income;

IV) fourth, the fiction is created for the purposes of determining the quantum of deduction; and

V) fifth, the fiction is for all the years eligible for the.

25. As regards first sub-head it may be noticed that Section 80IA deduction is admissible in respect of profits and gains derived by eligible business which is included in the Gross Total Income. The Gross Total Income is defined in Sub-section (5) of Section 80B to mean the total income computed in accordance with the provisions of the Act before making any deductions under Chapter VI-A of the Act. It follows, therefore, as held by the Supreme Court in the case of Synco Industries Ltd. (supra), that deductions under Chapter VI-A can be given only if the Gross Total Income is positive and not negative. If the Gross Total Income of the assessee is determined as "nil" then there is no question of any deduction being allowed under Chapter VI-A in computing the total income. Assessing Officer has to take into account the provisions of Section 71 providing for set off of loss from one had against income from another and Section 72 providing for carry forward and set off of business losses. Section 32(2) makes provision for carry forward and set off of the unabsorbed depreciation of a particular year. The effect of the abovementioned provisions is that while computing the total income, the losses carried forward and deprecation have to be adjusted and thereafter the Assessing Officer has to work out the Gross Total Income of the assessee. Sub-section (2) of Section 80A specifically enacts that the aggregate of deductions under Chapter VI-A should not exceed the gross total income of the assessee. If the Gross Total Income is found to be a net Joss on account of the adjustment of loses of the earlier years or "nil", no deduction under this Chapter can be allowed. As noticed earlier Clause (5) of Section 80B defines the expression "gross total income" to mean the total income computed in accordance with the provisions of the act without making any deductions under chapter VI-A. The effect of Clause (5) of the Section 80B of the Act is that Gross Total Income will be arrived at after making the computation as follows:

i) making deductions under the appropriate computation provisions;

ii) including the incomes, if any, under Sections 60 to 64 in the total income of the individual;

iii) adjusting intra-head and/or inter-head losses; and

iv) setting off brought forward unabsorbed losses and unabsorbed depreciation, etc.

26. Decision of Kotagiri Industrial Co-op. Tea Factory Ltd., 224 ITR 604 (SC) was also noticed in the case of Synco Industries Ltd. (supra) wherein Supreme Court held that in view of express provision defining the expression "gross total income" in Clause (5) of Section 80B, for the purpose of Chapter VIA, Gross Total Income must be determined by setting off, against the income, the business losses of the earlier years as required by Section 72, before allowing deduction under Section 80P. The contention raised on behalf of the assessee that the deduction must first be allowed under Section 80-I and then only the Gross Total Income as computed under the provisions of the Act before allowing deductions under Chapter VIA should be worked out, cannot be accepted. It reiterated that Section 80A provides that the deductions shall be allowed out of the Gross Total Income whereas Sub-section (2) restricts the deductions of the Gross Total Income. It is, therefore, clear that Gross Total Income of the assessee has got to be computed in accordance with the Act after adjusting losses etc., and if the Gross Total Income so determined is positive then the question of allowing deductions under Chapter VI-A arises, but not otherwise.

27. Referring to provisions of Section 80-I(6), Court observed that while computing quantum of deduction, Assessing Officer no-doubt has to treating the profit derived from an industrial undertaking as the only source of income in order to arrive at the deductions under Chapter VI-A. However, non-obstante clause appearing in Section 80-1(6) of the Act, is applicable only to the quantum of deduction, whereas, the Gross Total Income under Section 80B(5) which is also referred to in Section 80-1(1) is required to be computed in the manner provided under the Act, which presupposes that the gross total income shall be arrived at after adjusting loss of other division against the profits derived from an industrial undertaking.

28. The second sub-head is emanating from the provisions Section 80IA(7)/80IA(5) which starts with non obstante clause reading as "Notwithstanding anything contained in any provisions of the Act". It means it overrides all the provisions of the Act. Profits and gains of a business are determined, as aforesaid, by allowing, all deduction including under Section 32 and set off under the provisions of Section 70, 71 and 72. it is on the balance the deduction is allowed 'under Chapter VIA. By this overriding provision these section, to the extent provided otherwise in Section 80IA(5) are not to be taken into consideration. Therefore whatever is stated in the other provision is to be ignored

29. The third sub-head provides that the profit and gains are computed on a fiction created to the effect that the eligible business is the only source of income. It is a deeming provision and a deeming provision is intended to enlarge/curtail the meaning of a particular word which includes or excludes matters which otherwise may or may not fall within the provision; it should therefore, be extended to the consequence and incidence which shall inevitably follow. The following off-quoted observations of Lord Asquith in East and Dwelling Co. Ltd. v. Finsburry Borough Council 1952 (AC) 109, may appropriately be referred to:

If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of these in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of the state of affairs.

30. Section 80IA(5) bids one to treat the eligible business as the only source of income of an undertaking as real, which is an imaginary state of affairs, one must surely as also real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flown from or accompanied It i.e., there was no other source of income of the assessee. The statute says that you must imagine a certain state of affairs (eligible business being the only source);, it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of the state of affairs, that there are other sources and that against those sources the unabsorbed depreciation or losses of eligible business were set off.

31. It is implicit from the tenor and phraseology implied in Section 80IA(5) that in substance, a legal fiction is created by which the eligible business has been treated as the only source of income. In construe this legal fiction it will be proper and necessary to assume all those facts on which alone the fiction can operate, so, necessarily, all the provisions in the Act in respect of a source of income will apply. As a consequence, the other sources of income of an assessee/undertaking would have to be assumed as not existing and consequently, any depreciation or loss cannot be set off against any other source which is assumed to have not been in existence and therefore, the depreciation or the loss of the illegible business which could not be set off against the loss of the illegible business itself has to be carried forward or set off of the profits of the very source of illegible business in the subsequent year.

32. The contention on behalf of the assessee that the object of this section, was not that Section 32(2), 70, 71 and 72 would not be applicable, in our opinion, has also no force. It amounts to permit your imagination to boggle when it comes to the inevitable corollaries of the deemed state of affairs and also reading something which is prohibited by the fiction as not there in the provisions. Because of the fiction, even if any set off of eligible business loss was made against other sources of income, it has to be assumed not so set off. The fiction is to clarify the position that the deduction is to be granted only with respect of the profits of the eligible business, if the assessee was carrying many activities and having many sources of income. "As if that were the only source of income" means if there was no other source of income. If that be so the depreciation and loss could not be absorbed and be set off against any other source or head of income. It is because by virtue of deeming fiction one has to assume that there is no other source of income and consequently it has to be carried forward and set of against the income of this very source only for which the deduction is being computed. The argument that if the loss incurred by the assessee were set off and adjusted against profits of the earlier year, there is no mandate in the section to presume that it should be notionally carry forward and set of against the profits of the eligible business of the subsequent year has the effect of ignoring the fiction created in the provision and therefore has no force hence, cannot be accepted.

33. The words "as if such eligible business were the only source of income of the assessee" compel us to assume that the assessee is not having any other source of income except that which is eligible to deduction under Section 80IA which in this case is the unit/undertaking, the unit of the mill generating electricity for the assessee. As per the wording of the Sub-section (5) of Section 80IA, for the purposes of computation of the deduction, it has to be assumed that the only source of income of the assessee is the eligible business. The income or loss of this business alone is to be considered as if that were the only source. This means neither the income of the undertaking nor the loss thereof can be set off or carried forward and set off or adjusted against any other source of income from loss. As a corollary the income or the loss of the other business or source cannot be considered or set off for determining the quantum of the deduction of the eligible business.

34. Neither the Income or loss of a business other than the eligible business of any year can be taken into consideration; nor the earlier years' losses of the eligible business can be ignored in computing the profit and gains to determine the quantum of the deduction under this section. Losses of the eligible business are to be set off only against the subsequent years' income of the eligible business, even though these were set off against other income of the assessee in that earlier year. It is evident from and so understood and clarified by, the Notes on Clause and the Memorandum Explaining the Provisions of the Finance Bill as adopted by the CBDT circular aforesaid. The proposition is also recognized by various judgments. Delhi High court in CIT v. Dewan Kraft System (P) Ltd. 210 CTR 124 (Del) held that in view of overriding provisions of Sub-section (7) of Section 80I. for the purpose of determining the quantum of deduction under Section 80-IA, the profits and gains of the eligible unit are to be computed as if such eligible business is the only source of income of the assessee and that Assessing Officer adjusting the profits of the eligible unit against the losses of other units of the assessee and restricting the deduction to the extent of business income was held not justified. The Tribunal, in Tolani Ltd. v. DCIT. 84 TTJ 881 (Mum) held that, as no profits were left after allowing deduction under Section 33AC, no deduction can be allowed under Section 80I as by virtue of Section 80I(6), as the profits of ship have to be computed as if the ship was the only source of income.

35. In a contrary situation the Mumbai Bench of the Tribunal in the case of Addl. CIT v. Ashok Alco Chem Ltd. 96 ITD 160 (Mum) similarly explained that for the purpose of applying the provisions contained in Section 80IA, the profits and gains of the eligible business are to be computed as if the eligible business were the only business of the assessee right from the initial year and the losses, depreciation or development rebate in respect of such eligible business for the past assessment years were not set off against the profits from other business; that there being no profit in respect of two units after set off of brought forward losses of these units, AO was therefore justified in denying deduction under Section 80IA, the Wordings of Section 80IA(7) are clear and unambiguous ; and that therefore, there is no scope for conferring the benefit upon the assessee by ignoring or misinterpreting the words of Section 80IA(7). To quote, the Bench held:

The legislature by introducing subs. (7) of Section 80-IA, has created a legal fiction that for the purpose of applying the provisions contained in that subsection, the profits or gains of the eligible business shall be computed as if the eligible business were the only business of the assessee right from the initial year and the losses, depreciation allowance or development rebate in respect of such eligible business for the past assessment years were not set off against the profits from other business. The language of Section 80-IA(7) is clear, according to which, taxable income of eligible business of the industrial undertaking is to be ascertained as if such undertaking were an independent unit owned by the assessee and the assessee had no other source of income. It is only consequential that the unabsorbed losses, unabsorbed depreciation, etc. relating to eligible business are to be taken into account in determining the quantum of deduction under Section 80-IA, even though these may have actually been set off against the profits of the assessee from other sources. In this view of the 'situation, the AO had rightly denied the deduction under Section 80-IA in respect of these units, there being a loss in respect of the said unit as computed within the meaning of Section 80-IA(7). The cases of CIT v. Patiala Flour Mills Co. (P) Ltd. (1978) 115 ITR 640 (SC) distinguished.

36. Similarly in Prasad Productions (P) Ltd. v. DCIT. 98 ITD 212 (Chennai) the Tribunal held that Section 80I(6) is a non obstante clause which creates a legal fiction providing that the profits and gains of the new industrial undertaking are to be computed as if the new industrial undertaking were the only business of the assessee from the date of its establishment, and the past years' depreciation and losses are to be set off against the income of the assessee from that undertaking for determining its profits and gains; that therefore, new industrial undertaking is retrospectively quarantined or isolated from other income-producing activity of the assessee for determining profits and gains for the purpose of deduction under Section 80I; and hence, order passed by the AO allowing deduction under Section 80-I without setting off unabsorbed losses of earlier years against the income of the succeeding years was erroneous as well as prejudicial to the interests of Revenue.

37. Again in Sri Ramakrishna Mills (CBE) Ltd. v. DCIT 7 SCT 356 (Chennai holding in any assessment year, if the industrial undertaking suffers loss (both business and/or depreciation loss) but the same has been absorbed by the other income of the assessee in the subsequent year or years during the tax holiday period, the said loss will have to be adjusted against the eligible profits and gains from industrial undertaking and tax holiday benefit under Section 80-1 is to be computed only on the balance.

38. The Tribunal, Kolkata Benches, in the case of ITO v. Kanchan Oil Industries Ltd. 92 ITD 557 (Kol.) discussed both the situations of losses of other business and of the business of eligible business and concluded that in view of Sub-section (7) of Section 80IA, for computing deduction Under Section 80IA, brought forward losses and unabsorbed depreciation of ineligible business cannot be deducted from the income of eligible business and only the unabsorbed depreciation / brought forward losses of eligible business can be so deducted. It held:

For the purpose of determining the quantum of deduction under subs. (5) of Section 80-IA, the eligible business is to be treated as the only source of income of the assessee during the relevant assessment year as provided under Sub-section (7) of Section 80-IA. A careful perusal of Section 80-IA(7) shows that Section 80-IA(7) enacts provisions of overriding nature...has been given an overriding effect over any other provisions of IT Act.... All other provisions of the Act would thus be applied subject to the provisions of Section

80-IA(7) for the purpose of determining quantum of deduction under Sub-section (5) of Section 80-IA. It is seen that Section 80-IA. provides a special mode for computation of the profits and gains derived from eligible industrial undertaking under Section 80-IA.... Consequently, all the deductions, allowances and losses relating to the eligible business are only to be taken into account in determining the amount of income of that nature which is derived or received by the assessee from eligible business and which is included in his gross total income and then in determining quantum of deduction available under Section 80-IA, even though the assessee may have other losses or allowances or deductions relating to some sources of income other than the eligible business. The language of Section 80-IA(7) itself showed that there was no scope for a setting off or adjustment of expenses, deductions, losses, earlier years losses or unabsorbed depreciation, etc. arising out of other business activities or related to the other sources of income of the assessee against profits and gains of eligible business to which Section 80-IA applies before the provisions of Section 80-IA were applied.... Consequently, the deductions, expenses and losses, etc., and the unabsorbed losses, unabsorbed depreciation, etc., relating to other non-eligible business or any other source of income cannot be taken into account in computing the "gross total income" for the purpose of computing the quantum of deduction admissible under Section 80-IA.

39. We concur and are in full agreement with these decisions and hold that, that is the correct interpretation of the Section 80IA(5) of the Act

40. The CIT(A) in our opinion erred in following the decision of Calcutta High Court in the case of Balmer Lawrie & Co. Ltd. (supra) which was rendered in connection with the deduction Under Section 80HH of the I.T. Act which had no provisions like 801(6) or pre amended Section 80IA(7) or post amended Section 80IA(5)of the I.T. Act. In the case before the Rajasthan High Court in CIT v. Mewar Oil & General Mills Ltd. (supra), nobody's pointed out the existence of Sub-section (6) to Section 80I nor was it noticed or discussed by the court though the Assessing Officer has sought to compute the income of the new undertaking for the purpose of computing deductions permissible under that section by setting off the loss carried forward from the assessment year 1983-84 by treating the new undertaking as the only source of income against which such losses carried forward could be set off. He relied on the decision in Cambay Electric Supply Industrial Co. Ltd. v. CIT held that the carried forward un-absorbed loss of the priority industry was first to be reduced from the total income and before computing the income of the assessee for the purpose of deductions and it was not by reliance on and by forgetting the existence of Sub-section (6) to Section 80I further it was a case of rectification invoked the Assessing aforesaid case, the Tribunal confirmed the order of the CIT(A) on the ground that the aforesaid issue could not be subject matter of rectification under Section 154 of the Act and the High court upheld the order of the tribunal.

41. The second aspect of the matter is that the fiction is created for all the years eligible for the deduction i.e. the initial year (the first year of the deduction) and all subsequent and succeeding years. It is not only for a particular year as evident from the language used in Section 80IA(5); it is "for initial assessment year and every subsequent assessment Year upto and including the assessment year for which the determination is to be made". We do not find any merit in the contention of Mr. Soparkar that the fiction is for that year alone or that the concept of initial year is dispensed with in the new provision in view of Section 80IA(1) of the old provision and 80(IA)(2)(iv)(b), Sub sections (5), (6), and. (7). Instead of defining the concept separately by Clause (b) to Sub-section (12) of the pre amended 80IA, the Sub-section (2) itself has contained the provisions of the explanation by providing the period of deduction and the year from which it is to starts. Even otherwise the plain meaning of the word 'initial year' means the year in which the manufacture or production or other activity begins. In the decision of Chennai Bench in Mohan breweries & Distillers Ltd. (supra) what is decided is that the deduction is allowed Under Section 80IA for 10 out of 15 years at the option of the assessee which means any ten years not necessarily the beginning 10 years. This case has no relevance in deciding the issue in this case of the assessee because the assessee itself had claimed deduction in the returns starting from the first years. It also does not through any light in construing the provision on the ground that the concept of initial year is dispensed with. It only could mean that the operation of the section starts from the year the deduction is first claimed and the immediately succeeding the initial assessment year or in

subsequent assessment year.

42. The fourth sub-head for our consideration is that the provision overrides all other provisions of the Act only for computing profit and gains of the eligible business for the determining the quantum of deduction under the section. This restricts the application of the fiction to a specified purpose and therefore it cannot be extended beyond the object for which the fiction is created. Once that purpose i.e., the determination of quantum of deduction is over, one has to fall back to the provisions of the Act for computing the total income as held by the Bombay High court in Synco Industries Limited V.AO: 254 ITR 608 (Bom) as upheld recently by the Supreme Court as reported in 299 ITR 444(SC). In this case the assessee was engaged in the business of oil and chemicals. It had a unit for oil division in Sirohi and a unit for chemical division in Jodhpur. For the assessment years 1990-91 and 1991-92 it had earned profits in both the units. But in the earlier years the assessee had suffered losses in the oil division. In relation to the deductions under Sections 80HH and 80-I of the Income-tax Act, 1961, it claimed that each unit should be treated separately and the losses suffered in the earlier years by the oil divisions were not adjustable against the profits of the chemical division. But since the gross total income was nil the Assessing Officer held that the assessee was not entitled to the benefit of deductions under chapter VI-A. The Appellate Tribunal and the High Court affirmed the view of the Assessing Officer. On appeal to the Supreme Court it is held affirming the decision of the High Court, that the High court was justified in holding that the loss from the oil division was required to be adjusted before determining the gross total income and as the gross total income was "nil" the assessee was not entitled to claim deductions under chapter VI-A which includes Sections 80HH and 80I. the court held that the effect of Clause (5) of Section 80B of the Income-tax Act, 1961, is that "gross total income" will be arrived at after making the computation as follows: (i) making deductions under the appropriate computation provisions; (ii) including the incomes, if any, under Sections 60 to 64 in the total income of the individual; (iii) adjusting intra-head and/or inter-head losses; and (iv) setting off brought forward unabsorbed losses and unabsorbed depreciation etc. Only if the gross total income so determined is positive the question of allowing the deductions under Chapter VI-A would arise, not otherwise. It is observed that the words "includes any profits" in Section 80-1(1) are important and indicate that the gross total income of an assessee shall include profits from a priority undertaking. While computing the quantum of deduction under Section 80-I(6) of the Assessing Officer, no doubt, has to treat the profits derived from an industrial undertaking as the only source of income in order to arrive at the deduction under Chapter VI-A. However, the non obstante clause in Section 80-I(6) is applicable only to the quantum of deduction, whereas, the gross total income under Section 80IB(5) which is also referred to in Section 80-I(1) is required to be computed in the manner provided under the Act which presupposes that the gross total income shall be arrived at after adjusting the losses of the other division against the profits derived from an industrial undertaking. To say that under Section 80-I(6) the profits derived from one industrial undertaking cannot be set off against the loss suffered from another and that the profit is required to be computed as if the profits making industrial undertaking was the only source of income would almost render the provisions of Section 80A(2) of the Act nugatory. Sections 40A(2) and 80B(5) are declaratory and apply to all the sections falling in Chapter VI-A. They impose a ceiling on the total amount of deduction and therefore the non obstante clause in Section 80-I(6) cannot restrict the operation of Sections 80A(2) and 80B(5) which operate in different spheres. The gross total income of the assessee has first got to be determined after adjusting losses etc., and if the gross total income of the assessee is "nil" the assessee would not be entitled to deduction under Chapter VI-A of the Act.

43. A specific contention was raised in this case as to the non obstante provisions of Section 80I(6) as was applicable in that case to contend that the fiction overrides all other provisions of the Act and the court held:

13. The contention that under Section 80I(6) the profits derived from one industrial undertaking cannot be set off against loss suffered from another and the profit is required to be was the only source of income, has no merit. Section 80I(1) lays down that where the gross total income of the assessee includes any profits derived from the priority undertaking/ unit/division, then in computing the total income of the assessee, a deduction from such profits of an amount equal to 20 per cent, has to be made. Section 80-I(1) lays down the broad parameters indicating circumstances under which an assessee would be entitled to claim deduction. On the

other hand, Section 80-I(6) deals with determination of the quantum of deduction. Section 80-I(6) lays down the manner in which the quantum of deduction has to be worked out. After such computation of the quantum of deduction, one has to go back to Section 80-1(1) which categorically states that where the gross total income includes any profits and gains derived from an industrial undertaking to which Section 80-I applies then there shall be a deduction from such profits and gains of an amount equal to 20 percent. The words "includes any profits" used by the Legislature in Section 80-I(1) are very important which indicate that the gross total income of an assessee shall include profits from a priority undertaking. While computing the quantum of deduction under Section 80-I(6), the Assessing Officer, no doubt, has to treat the profits derived from an industrial undertaking as the only source of income in order to arrive at the deductions under Chapter VI-A. However, this Court finds that the non obstante clause appearing in Section 80-I(6) of the Act, is applicable only to the quantum of deduction, whereas, the gross total income under Section 80B(5) which is also referred to in Section 80-1(1) is required to be computed in the manner provided under the Act which presupposes that the gross total income shall be arrived at after adjusting the losses of the other division against the profits derived from an industrial undertaking If the interpretation as suggested by the appellant is accepted it would almost render the provisions of Section 80A(2) of the Act nugatory and, therefore, the interpretation canvassed on behalf of the appellant cannot be accepted. It is true that under Section 80-I(6) for the purpose of calculating the deduction, the loss sustained in one of the units, cannot be taken into account because Sub-section (6) contemplates that only the profits shall be taken into account as if it was the only source of income. However, Section 80A(2) and Section 80B(5) are declaratory in nature. They apply to all the sections falling in Chapter VI-A. They impose a ceiling on the total amount of deduction and, therefore, the non-obstante clause in section -80-I(6) cannot-restrict the operation of Sections 80A(2) and 80B(5) which operate in different spheres. As observed earlier, Section 80-I(6) deals with actual computation of deduction whereas Section 80-I(1) deals with the treatment to be given to such deductions in order to arrive at the total income of the assessee and, therefore, while interpreting Section 80-I(1), which also refers to gross total income one has to read the expression "gross total income" as defined in Section 80B(5). Therefore, this Court is of the opinion that the High Court was justified in holding that the loss from the oil division was required to be adjusted before determining the gross total income and as the gross total income was "nil" the assessee was not entitled to claim deduction under Chapter VI-A which includes Section 80-I also.

14. The proposition of law, emerging from the above discussion is that the gross total income of the assessee has first got to be determined after adjusting losses, etc., and if the gross total income of the assessee is "nil" the assessee would not be entitled to deductions under Chapter VI-A of the Act.

44. Therefore the submission that, had the intention was to presume that other business or source has not to be in existence, then in that case Section 80A(2) and 80B(5) also would/should be not applicable in restricting the deduction to the total income of the assessee is to be rejected. The contention that these sections can be applicable only when there is other source(s) of income, there cannot be any reconciliation to this decision of the restricting the deduction of the income from the industrial undertaking to the amount of income as receipts by the set off of losses under the heads "other heads of income". We do not subscribe to the view of the counsel that in that case the provisions of Sections 80A(2) and 80B(5) would and should not be applicable and therefore do not find any merit in this submission of the assessee as well.

45. The Bombay High initially and thereafter Supreme Court ultimately have answered this question by holding that assumption under Section 80IA(5) is only for the purposes of determination of quantum of deduction under Section 80IA and that once that computation is made, we have to come back to other provisions of the Act for allowing the deduction and computing the income of the assessee. We can better understand it by the example given in the High Court order. The deduction under this section was assumed in the Bombay case at Rs. 32 by taking the assumption that there was no other source of income. Then for allowing deduction the Court held that it is to be subjected to the provisions of Section 80A(2) and 80B(5) and allowed deduction only of that amount of Rs. 30 which is equivalent to the gross total income of the assessee. These sections, 80A(2) and 80B(5) are not the provisions for determining the quantum of deduction Under Section 80IA. They are for admissibility of the deduction under the Act after computation is made under the

respective sections. The Court made it clear and observed:

However, the non obstante clause is applicable only to the quantum of deduction whereas the gross total income under Section 80B(5), which is also referred to in Section 80-I(1), is required to be computed in the manner provided under the Act which presupposes that the gross total income shall be arrived at by adjusting the losses of the oil division against the profits of the chemical division.... It may also be mentioned that under Section 80-I(6), for the purposes of calculating the deduction, the loss of the oil division cannot be taken into account because Sub-section (6) contemplates that only the profits, shall be taken into account as if it was the only source of income. However, as held by us in the case of Nima Specific Family Trust's [2001] 248 ITR 29 (Bom), Section 80A(2) and Section 80B(5) are declaratory in nature. They will apply to all the sections falling in Chapter VI-A. They impose a ceiling on the total amount of deduction and, therefore, the non obstante clause in Section 80-I(6) cannot restrict Sections 80A(2) and 80B(5). They operate in different spheres. Section 80-I(6) deals with actual computation of deduction whereas Section 80-I(1) deals with the treatment to be given to such deductions in order to arrive at the total income of an assessee and, therefore, while interpreting Section 80-I(1), which refers to gross total income, one has to read the expression "gross total income" in Section 80-I(1) as defined in Section 80B(5).

46. Reliance on the decision of the Supreme court in the case of Canara Workshops (P.) Ltd. [1986] 161 ITR 320 was also made before the Bombay High Court and it held to not applicable to in such a situation. The court held that:

In our view the judgment of the Supreme Court, on the facts, does not apply to the present case. In that matter, the assessee was a public limited company engaged in the manufacture of automobile spares. During the assessment year 1966-67, the assessee commenced another activity, viz., manufacture of alloy steels. Both the activities fell within the Fifth Schedule to the Act. The assessee sustained a loss in the manufacture of alloy steel, whereas profits were earned from the manufacture of automobile spares. The assessee claimed relief under Section 80E, as it then stood. The Assessing Officer declined to grant the relief on the ground that the assessee had ignored the losses incurred in alloy steel industry. He held that the assessee would be entitled to deduction under Section 80E on the profits from the manufacture of automobile scares only after setting off the loss in alloy steel. He, accordingly, granted a limited relief to the assessee under Section 80E. Ultimately, the matter reached the Supreme Court. It was held by the apex court that the Legislature, under Section 80E, had clearly stipulated that while computing the deduction, the following conditions were required to be satisfied, viz., that it must be a company to which Section 80E applied ; that the total income, as computed in accordance with the Act, should include profits and gains attributable to the business or the industry mentioned in Section 80E without taking into account the provisions of Section 80E and lastly, from the profits and gains attributable to such business, a deduction has to be allowed of an amount equal to eight per cent, of the profits and effect must be given to that deduction when computing the total income of the company. The Supreme Court held further that the object of Section 80E was properly served only by confining the application of that section to the profits of a single industry. In our view, the controversy before this Court in the present case was not the controversy before the Supreme Court in the case of Canara Workshops (P.) Ltd. [1986] 161 ITR 320. Under Section 80-I(6), the profits of the chemical division are required to be treated as if they were the only source of income. That the losses from the oil division are required to be ignored. That, while calculating the quantum of deduction, the profits of the chemical division alone are to be taken. Up to this stage, there is no dispute. However, after calculating the deduction on the basis that the profits from the chemical division was the only source of income, one has to give effect to the computed deduction in order to arrive at the total income of the company and while giving effect, one has to consider the provisions of Section 80-I(1). read with Sections 80A(2) and 80B(5). In other words, in the example given by us in Nima Specific Family Trust's case [2001] 248 ITR 29 (Bom), even if the total amount of deduction under Sections 80HH and 80-I is Rs. 32, but the gross total income is Rs. 30, then to that extent, the amount of deduction shall stand reduced. That, while calculating the gross total income of the company, one has to adjust the losses from one priority unit against the profits of the other priority unit and if the resultant gross total income is "nil", then the assessee cannot claim deduction under Chapter VI-A. In the

circumstances, the judgment of the Supreme Court in Canara Workshops (P.) Ltd.'s case [1986] 161 ITR 320 has no application to the facts of the present case.

47. In the decision of the Tribunal, Bombay Benches, in the case of M. Pallonji & Co. Pvt. Ltd. v. JOT 105 TTJ 136 (Bom.) which is claimed to be in favour of the assessee it was held as under:

The lower authorities have erred in setting off of the unabsorbed depreciation of the earlier assessment year against the profit of the wind mill unit pertaining to the current assessment year and, thereby restricting the benefit of Section 80-I A to the assessee-company. As a matter of fact, it is to be seen that the assessee-company had income from various business sources including that of wind mill project. As the assessee was entitled for 100 per cent depreciation on wind mills, the same was claimed but the profit of the wind mill project by itself was not sufficient to absorb the entire depreciation claimed by the assessee. But the depreciation not so absorbed exclusively by the profit of the wind mill project was concurrently absorbed by the profits of the assessee from other business also. So while computing the income for the immediately preceding asst. yr. 1996-97, the 100 per cent depreciation claimed by the assessee-company on wind mills has been de facto absorbed and exhausted. Therefore, there remains nothing to be further carried forward to the impugned asst. yr. 1997-98. In such circumstances, the AO is not justified in again making a notional concept of unabsorbed depreciation pertaining to the wind mill project relating to the earlier assessment year and notionally bring the same to the account of the impugned assessment year and setting off against the profit of the wind mill project for the impugned assessment year. Such a notional adjustment is not called for and not contemplated in the claim of deduction provided in Section 80-IA. As the entire 100 per cent depreciation claimed by the assessee for the earlier asst. yr. 1996-97 has already been set off against the income from business for the said assessment year, there remains nothing to be brought forward Jo the account of the impugned asst yr. 1997-98, Therefore, the claim of the assessee has to be allowed by the assessing authority on the basis of the profit of the wind mill project for the impugned assessment year not fettered by any notional amount of unabsorbed depreciation pertaining to the preceding assessment year". The cases of Indian Transformers Ltd. v. CIT and CIT v. L.M. Van Moppes Diamond Tools India Ltd. were applied.

48. There is no discussion at all either in this case or the cases relied therein of kerala and Madras High Courts regarding the fiction as created in Section 80I(6)/80IA(5) and therefore these cases cannot lead us anywhere.

49. Similarly the Rajasthan High Court in the case of CIT v. Mewar Oil & General Mills Ltd. 271 ITR 311(Raj), though also held that losses which have been absorbed in earlier years income from other sources the same cannot be notionally carried forward and set of while computing the deduction of eligible business, but this case has not noticed the non obstante provisions of Section 80I(6)/80IA(5) and, therefore, there is no discussion on this point in that decision. It would similarly, therefore, be not of any help to us.

50. The brief facts of the Joyco India (P) Limited, the intervener before the Special Bench, are that during the assessment year 1999-2000, the intervener was carrying on business in three different units, namely,- i) Bubble Gum unit, ii) Plain Toffee unit and iii) Trading unit. It has profit in Bubble Gum Unit of Rs. 6,84,51,624 and in Plain Toffee Unit Rs. 61,07,791 but loss in Trading Unit Rs. 17,92,646; Gross Total Income being Rs. 7,27,66,770. Since the Bubble Gum and Plain Toffee units were eligible for full tax holiday under Section 80IA of the Act, the assessee claimed full deduction but restricting it equivalent to the gross total income amounting to Rs. 7,27,66,770. The claim of the intervener was that the losses of the Plain Toffee unit were set off against income of those very years', namely,-profits of Bubble Gum unit and its claim for deduction under Section 80-IA of the Act in respect of profits derived from the Bubble Gum unit as reduced by such losses in the assessment years 1997-98 and 1998-99. AO denied deduction under Section 80-IA of the Act for the Plain Toffee unit on the ground that losses of earlier years pertaining to the said unit should first be set off against profits and since after adjusting the losses of the Plain Toffee unit relating to the assessment years 1997-98 and 1998-99 there was no resultant profit, no deduction under Section 80-IA of the Act was admissible to the Plain Toffee unit.

51. The submission of the intervener is that the AO erred in denying deduction under Section 80-IA in respect of profits of the Plain Toffee unit by notionally adjusting the absorbed losses relating to the earlier assessment years by invoking the provisions of Sub-section (5) of that section.

a. First ground is that Section 80IA(5) provides that the eligible unit claiming deduction under Section 80-IA of the Act would be treated as a separate source of income and deduction has to be allowed only vis-a-vis profits derived from the eligible unit unaffected by the profits/losses of other units owned by the assessee. This ground on the contrary, in our opinion warrants the view we have taken, instead of holding that Assessing Officer erred in denying the deduction.

b. The second ground is that the Revenue, has grossly misconstrued the application of the aforesaid provisions of Sub-section (5) of Section 80-IA of the Act as it does not provide that the losses/ depreciation of the eligible unit relating to any earlier assessment year(s) which are already absorbed against profits of other units/ other incomes in the respective year(s) should once again be notionally brought forward and adjusted against the profits of the current assessment year for computing deduction allowable under Section 80-IA of the Act. We have already held above that when the assumption is that the assessee has that source as the only source of income, one has to assume there could not be any set off of any depreciation or loss of the eligible business against any other source which is deemed not in existence by the fiction created in Sub-section (5) of Section 80IA.

c. The third ground is that the effects of the deeming fiction enacted in the provisions of Section 80IA(5) of the Act pointed out by the ld. Counsel of the intervener, that it only seeks to set at rest long standing controversy, namely,-whether for computing deduction losses incurred in one eligible unit is required to be set-off against the profits of the other eligible undertaking or not; and that the aforesaid controversy came up for consideration before the apex Court in the case of CIT v. Canara Workshops Pvt. Ltd: 161 ITR 320(SC), wherein it is held that in computing the profits for the purpose of deduction under Section 80-E of the Act, the losses incurred by the assessee in a priority industry could not be set-off against the profits of another priority industry, referring with approval the decision of the Calcutta High Court in the case of CIT v. Bellis & Corcom (I) Ltd: 136 ITR 481 delivered in the context of Section 80-I of the Act wherein it was held that it is not permissible to compute the profits of the priority industry respecting which the relief is claimed by taking into account the depreciation losses from other industries; and that the provisions of Sub-section (5) of Section 80-IA merely give legislative sanction/ statutory recognition to the stand taken by the assessee and subsequently approved by the apex Court in the case of Canara Workshops (supra) to avoid any unnecessary controversy / debate on the issue, is half true. The other half, which is left out is that unabsorbed depreciation and losses of eligible unit are also not deemed to be set off against other income because of the assumption of one source only to overcome the situation and to give effect to the following observations by the Supreme Court in Patiala Floor mills (supra) pointing out the absence of fiction in the following words while rejecting the Revenue's similar claim for the period when such a fiction was not there in the statute: "Sub-section (1) of Section 80J does not create a legal fiction that for the purpose of applying the provision contained in that sub-section, the profit or gains of the new industrial undertaking shall be computed as if the new industrial undertaking were the only business of the assessee right from the date of its establishment or the losses, depreciation allowance or development rebate in respect of the new industrial undertaking for the past assessment years were not set off against the profit from other business." It is so observed in the decision of the Mumbai Bench of the Tribunal in the case of Ashok Alco Chemical Limited (supra) that in Sub-section (7) of Section 80-IA of the Act, the Legislature has created a legal fiction by observing "Section 80-IA was introduced in Income-tax Act with retrospective effect from 1-4-1990. Reading the language of Section 80-IA(7) with the underlined observations of Supreme Court, it will be clear that Legislature by introducing Sub-section (7) of Section 80-IA, has created a legal fiction that for the purpose of applying the provisions contained in that sub-section, the profits or gains of the eligible business shall be computed as if the eligible business were the only business of the assessee right from the initial year and the losses, depreciation allowance or development rebate in respect of such eligible business for the past assessment years were not set off against the profits from other business. Thus, the Legislature has covered the lacuna, as it was in

Section 80J by creating a legal fiction by introducing Sub-section (7) of Section 80-IA.

d. And the fourth ground is that though it true that the origin of the unabsorbed losses/ depreciation carried forward in the hands of the assessee to the year in which the deduction under Section 80-IA of the Act is to be allowed, must be traced and If the unabsorbed losses/depreciation relates to the eligible undertaking, such unabsorbed losses/depreciation must be set off against the profits of the eligible undertaking for computing such deduction. This has to be done, irrespective of the option available to the assessee under Sections 72/32 of the Act to adjust unabsorbed losses/ depreciation against profits of any other undertaking/ other incomes and not against the profit of the eligible undertaking. Again it is half true and the half is that even if the losses of the eligible business are set off against other sources income in earlier year, it is to carried forward and set of against profit of the year of claim because of the fiction that there was no other source existed in realty.

52. The set off of unabsorbed losses and depreciation are governed by Chapter VI and Section 32(2) of the Act. Once in accordance with the said provisions unabsorbed losses/ depreciation are set off against any income, under the provisions of the Act there was no provision for notionally carrying forward such absorbed losses. It was so held by the decision of the Supreme Court in Patiala Floor Mills (supra). But after insertion in 1.980 of the non obstante clause like Sub-section (6) in Section 80I and subsequently in Sub-section (5) in Section 80IA, it is to be assumed for the purposes of determination of quantum of tax holiday deduction that the eligible business was and is the only source throughout and therefore the question of intra heads or inter heads does not arise and consequently one has to assume the unabsorbed depreciation or loss were not set of and have to be notionally bringing forward for setting of the same against the profits of the eligible undertaking for computing deduction under Section 80-IA of the Act.

53. Referring to the case before the Rajasthan High Court in CIT v. Mewar Oil & General Mills Ltd. (supra), it is emphatically submitted by Mr. Vora that the aforesaid decision of the Rajasthan High Court, being the only High Court decision, directly on the point, it is well settled, is binding on the Bench, as has been held in CIT v. Akshay Kumar Jain 281 ITR 431(MP); SAE Head Office Monthly Paid Employees Welfare Trust: 271 ITR 159 (Del); CIT v. Sarabhai Sons Ltd. 143 ITR 473, 486 (Guj); and that the decision does not lose its binding force merely because Sub-section (6) of Section 80I has not been specifically reproduced/ incorporated in the judgment since: (a) Section 80I has been specifically referred and considered by the Court; and (b) arguments based on the language of Sub-section (6), similar to the one addressed before this Bench, were also very much raised and considered by the Court. Reference, in this regard, was made to Ballabhdas Mathuradas Lakhani AIR 1970 SC 1002, 1003 wherein their Lordships observed in the context of binding effect of decision of Supreme Court on the High Court that:

4. ...The decision 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. Following the aforesaid decision, the Supreme Court in Director of Settlements, AP v. M.R. Apparao observed:

7. ...The decision in a judgment of the Supreme Court cannot be assailed on the ground that certain Aspects were; not considered the relevant provisions were not brought to the notice of the Court (See and AIR 1973 SC 794)....

54. We do not find any merits in these submissions of Mr. Vora. Firstly, the Supreme court was dealing with the binding nature of the Supreme Court decision on the High Court, whereas we are dealing with the decision of a High court and that too of a High Court having no jurisdiction over the case arising from a different State, which though has a high persuasive value is not binding in other jurisdiction. Secondly, the decision of Rajasthan High court has not dealt with and was also not addressed to deal with the controversy by noticing the non obstante provisions of Section 80I(6)/80IA(5) aforesaid. Thirdly, in any case the issue before Rajasthan High Court was whether Assessing Officer could be said to be justified to invoke Section 154 to rectify the mistake which on a contentious matter is not permitted. Fourthly, a decision without noticing an existing provision of law governing the very issue in dispute cannot shut the doors of the tribunal in

considering and applying the provisions of law de hors the contrary decision of a High court. This is because a statutory provision supersedes the contrary decision of any court including that of a High court or even Supreme Court and has an ultimate force of law having greater force. Fifthly, in the first case it was not an actual non consideration of a provision but as the Supreme Court itself says in the underlined portion by the intervener itself 'because they thought that "relevant provisions were not brought to the notice of the Court"'.

55. It is true that in the case of Director of Settlement, AP v. M.R. Apparao (supra) the Supreme Court observed in para-7 of its judgment that decision in the judgment of the Supreme Court cannot be assailed on the ground that certain aspects are not considered or the relevant provisions of the Act is not brought to the notice of the Court, but these observations were based on the decision of the Supreme Court in AIR 1970 in the case of Ballabhdas Mathuradas Lakhani (supra) wherein the Supreme Court, as stated above, has made observation that High Court could not ignore the decision of the Supreme Court because, "they thought" that the relevant provisions were not brought to the notice of the Court. There was actually no ignorance. We, however, find in paragraph-12 of the judgment of the Supreme Court's observation in Apparao' case as under:

Mr. Rao then placed reliance on yet another decision of this Court in the case of A-One Granites v. State of U.P. and Ors. (2001) 2 SCC 537 to which one of us (Pattanaik, J.) was a party. In that particular case the applicability of Rule 72 of the U.P. Minor Minerals (Concession) Rules, 1963 was one of the bone of the contention before this Court, and when the earlier decision of the Court in Prem Nath Sharma v. State of U.P. , was

pressed into service. It was found that in Prem Nath Sharma's case the applicability of Rule 72 had never been canvassed and the only question that had been canvassed was the violation of the said Rules. It is in this context, it was held by this Court in Granite's case "as the question regarding applicability of Rule 72 of the Rues having not been even referred to, much less considered by Supreme Court in the earlier appeals, it cannot be said that the point is concluded by the same and no longer res Integra". This dictum will have no application to the case in hand on the question whether the judgment of this Court in Civil Appeal No. 398 of 1972 can be held to be a law declared under Article 141.

56. In view of the above, it gets crystalised that when a provision of a statute is not considered, it cannot be said that point is concluded by the Supreme Court decision and the same was no longer res integra. These decisions, therefore, are of no help in resolving the issue. The decision of Rajasthan High Court wherein provisions of Section 80I(6) were not specifically discussed nor brought to the notice of the High Court, cannot therefore be said to have concluded the issue, and consequently the same cannot be said to be a binding decision.

57. The contention of Mr. Vora that to read the legal fiction, namely, overriding Section 32(2), 70,71 and 72 is also covered by the provisions of Sub-section (5) of Section 80-IA of the Act would clearly tantamount to reading words into the section at the cost of doing violence to the language of the provision, is not based on the correct interpretation of the fiction created. The statement of doing violence would, in our opinion, on the contrary would be more appropriate in a vice versa situation i.e., by not assuming the legal effect of the fiction and holding that it does not override the provisions of Sections 32(2), 70, 71 and 72 would be tantamount to doing violence to the language used in the fiction created by the statute, which violence, we agree is not at all permissible in law.

58. There is also no force in the submission that a plain and simple interpretation of Sub-section (5) of Section 80-IA of the Act nowhere states that losses of the eligible undertaking shall be notionally carried forward to the subsequent year(s) and adjusted against the profits in subsequent year(s) despite the fact that losses in the earlier years had actually been set off against the profits of the other unit/ other income has no force and amounts to ignoring the true import of the fiction. When a fiction is created one has to assume that putative state of affairs as real. The deeming fiction in Section 80-IA(5) of the Act, as stated earlier, not only provides that profits of the eligible unit has to be considered on a stand alone basis and it does not required to be

adjusted against loss in other unit(s) but also that its own losses are to be assumed as not adjusted against other sources and are carried forward to set off against this source of income alone. Though we agree that the origin of the unabsorbed losses/ depreciation carried forward in the hands of the assessee to the year in which the deduction under Section 80-IA of the Act is to be allowed, must be traced and if the unabsorbed losses/depreciation relates to the eligible undertaking, such unabsorbed losses/depreciation must be set off against the profits of the eligible undertaking for computing such deduction, but such unabsorbed losses are to be found out on the hypothesis that the assessee had the eligible source as the only source of income and the absorbed losses against other sources were not absorbed in absence of any other source assumed to be not in existence because of the fiction.

59. We have no quarrel in the proposition of law stated by Mr. Vora that the CBDT Circular, No. 281 explaining the provisions of the Finance (No. 2) Act, 1980: is not binding on the Bench in view of UCO Bank v. CIT 237 ITR 889, 896 (SC); Keshavji Ravji and Co. v. CIT 183 ITR 117 (SC); J & K Synthetics Ltd. v. CBDT 83 ITR 335 (SC); Commissioner of Customs v. IOL 267 ITR 272 (SC), but it is just explaining the law as we have discussed above. In any case it is not a simple case of Circular but an Explanation by the Finance Minister in the Memorandum explaining the Budget proposal later incorporated in the Circular.

60. It is true as contended by Mr. Vora that the deeming fiction has to be strictly construed and cannot be extended beyond its legitimate field, but what is the legitimate field? When you are bidden to assume a state of affairs you cannot boggle your mind and assume the putative state of affairs as not real. Therefore though losses were set off against other sources income, they are to assumed as not set off in absence of existence of another source and for computing the profit and gains for the purposes of determination of the quantum of deduction one has to once again notionally bring back already set off losses, etc. and set off the same against the profits and gains in a year in the deduction is claimed. Section 80-IA(5) of the Act seeks to regard the eligible unit as a separate source of income so as to separately determine the carry forward and set off of losses in the hands of that unit. Such an interpretation is not in our opinion contrary to the scheme of the Act whereby the aggregate profits and losses of all units owned by the assessee are pooled together and taxed in the hands of the assessee, if we keep in mind that the object of the fiction is only for determining the quantum of deduction and nothing beyond and therefore one cannot decry an assumption of multiple assessments for the same assessee owning numerous eligible units, by treating each eligible unit as a separate assessee.

61. The mandate to carry forward of losses/ depreciation notionally has to be read into Sub-section (5) of Section 80IA of the Act by very nature of the language therein and the same would not amount to reading words in the provision or ignoring the settled law that no words could be added or subtracted on ground of legislative intendment or otherwise: V' VS Sugars v. Govt. of AP 114 STC 47 (SC) (Constitution Bench); Vikrant Tyres Limited v. First ITO 247 ITR 820 (SC); CIT v. Vadilal Lallubhai 86 ITR 2, 9 (SC); CIT v. TVS Lean Logistics Limited: 293 ITR 432 (Mad.)

62. Mr. Vora also referred to the following decisions wherein it has been similarly held in favour of the assessee; i) M. Pallonji & Co. (P) Ltd. [2006] 6 SOT 287 (Bom.); ii) Samkrg Pistons & Rings Limited: ITA No. 726 & 727/ Hyd/ 2002. From these decisions also we do not get any assistance as these have not appreciated the true import of the fiction created by the non obstante clause of Sub-section (6) of Section 80I or Sub-section (5) of Section 80IA aforesaid.

63. In our opinion the only harmonious construction of Section 80-IA(5), consistent with the object in allowing deduction only to profits and gains of the eligible business would be that:

a. the deduction under that section would be computed with reference to profits of the eligible unit, unaffected by losses suffered in other units;

b. in case of loss suffered by the eligible unit, such loss would not be set off against profits of other units / other business / other incomes in the initial year of assessment or subsequent years of eligible years of

assessments ;

c. where losses of the eligible unit remained to be adjusted against that very source they are to be carried forward to subsequent year(s), and set of in the succeeding year(s), and on the balance profit alone the deduction admissible would be computed;

d. where there are no losses of the eligible unit carried forward (in view of set off against profits of that very source), it is the mandate of law that the losses of earlier years, though already absorbed against other sources they are once again be notionally brought forward and set off against profits of the eligible unit to compute eligible deduction.

e. the deduction would be limited to gross total income;

64. Mr. Vora then advocated for liberal Construction by citing decision of the Supreme Court in the case of Bajaj Tempo Limited v. CIT 196 ITR 188 (SC); Keshavji Ravji & Co. 183 ITR 1 (SC); CIT v. Strawboard Manufacturing Co. Ltd. 177 ITR 431 (SC); CIT v. Gwalior Rayon Silk Manufacturing Co. Ltd. 196 ITR 149 (SC); CIT v. Rajesh Kumar Jalan 286 ITR 274 (SC); P.R. Prabhakar 284 ITR 548 (SC); and for adopting in favour of the assessee and against the Revenue where two interpretations are possible as held in the decisions: Manish Maheshwari 289 ITR 341 (SC); ACIT v. Thanthi Trust 247 ITR 785 (SC); CIT v. Orissa Cement Limited 254 ITR 24, 29 (Del.); Dr. Prannoy Roy v. CIT 254 ITR 755, 770 (Del.), but we find that when there is a clear provision of law one cannot resort to the liberal or favourable interpretation by the assumed doubt. It is a trite law that when the language of the text is clear and unambiguous it has to adopt the literal construction and one should not indulge in doing violence to the language and adopting the theories of 'liberal" or "favourable' construction of the statutory provision. That is the golden rule of interpretation recognized centuries over.

65. To Conclude we answer the question referred in the affirmative, in the favour of the Revenue and against the assessee, in the terms that in view of the specific provisions of Section 80IA(5) of the Income Tax Act, 1961, the profit from the eligible business for the purpose of determination of the quantum of deduction Under Section 80IA of the Act has to be computed after deduction of the notional brought forward losses and depreciation of eligible business even though they have been allowed set off against other income in earlier years.

In the result, the revenues appeals are allowed and the point canvassed by the respondent assessee and the intervener is rejected.

Pronounced in the open Court on 30-4-2008.