Gujarat High Court
Anant Mills Ltd. vs Commissioner Of Income-Tax on 2 September, 1992
Equivalent citations: 1994 206 ITR 582 Guj
Author: S Shah
Bench: S Majmudar, S Shah
JUDGMENT S.D. Shah, J.

1. The Income-tax Tribunal was referred the following question of law for our opinion under section 256(1) of the Income-tax Act, 1961 :

Common questions for the assessment years 1971-72 and 1972-73 :

"(1) Whether the Tribunal was right in holding that the question whether the assessee carried on business activities in the assessment year 1968-69 had to be determined in the assessment order for that year only ?

(2) If the answer to the above question is in the negative, whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the assessee was not entitled to reagitate this point in a subsequent year ?

(3) If the answer to question No. 2 is in the negative, whether, on the facts and in the circumstances of the case, the Tribunal was right in concluding that the assessee discontinued the business in the accounting year relevant to the assessment year 1968-69 and not 1967-68 ?"

Question relevant only for the assessment year 1972-73 :

"(4) Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the unabsorbed depreciation could not be set-off against income under the head 'Other sources' derived during the accounting year relevant to the assessment year 1972-73 unless there was business income ?"

2. It appears that two appeals being Income-tax Appeals Nos. 197 and 198/(Ahd.) of 1974-75, were preferred before the Income-tax Tribunal by the Revenue against the order of the Appellate Assistant Commissioner for the assessment year 1971-72 and 1972-73. The said appeals were allowed by the Tribunal and thereupon the assessee had filed Reference Applications Nos. 465 and 466/(Ahd.) of 1976-77, and on such reference applications the statement of case along with the questions of law are drawn up. The Tribunal has thus, in fact, referred the aforesaid questions by two references for assessment years 1971-72 and 1972-73. However, the registry of this court has numbered the said references as one reference but, in view of the fact that there were two reference applications arising from the consolidated judgment and order in two appeals before the Tribunal, two references should have been registered, and we, accordingly, direct the registry of this court to renumber the reference as Income-tax References Nos. 163 of 1977 and 163A of 1977.

3. In order to answer the aforesaid questions, it would be necessary to set out a few relevant facts herein :

(I) The assessee was a textile mill which was manufacturing and selling cloth. The accounting year of the assessee was the financial year. On August 30, 1966, the board of directors resolved that the work of the mill should be closed down permanently. On that very day, the secretary of the company affixed notice on the notice board notifying the closure of the mill with effect from September 30, 1966, and further stating that all workers, clerks, officers, supervisors, etc., of the mill will be considered as discharged from that date and that the mill will not work from October 1, 1966. Pursuant to such closing the mill, the Ahmedabad Electricity Company has discontinued electricity supply to the mill with effect from October 3, 1966. The board of directors also passed a resolution that the mill company was closed down from September 30, 1966. In the application under section 33C(2) of the Industrial Disputes Act, 1947, filed before the Labour Court by the Textile Labour Association, the Labour Court also recorded that the mill company is closed down with effect from October 1, 1966. The petition for winding up of the company was also filed in the High Court of Gujarat on March 24, 1967, and by an order dated September 26, 1967, the High Court ordered winding up of the said company. The said order of winding up was revoked and there was a scheme of compromise which also failed. By an order dated October 5, 1970, there was a second order for the winding up of the company.

(II) On March 31, 1967, that is the last day of the accounting year for the assessment year 1967-68, the assessee-company held finished stock of Rs. 23,70,000. The said stock was sold in the accounting year commencing from April 1, 1967, to March 31, 1968. For the assessment year 1967-68, the assessee filed the return through the official liquidator claiming loss of Rs. 18,63,676 under the head "Business" while, for the assessment year 1968-69, the assessee claimed loss of Rs. 2,73,295. It may be mentioned that the profit and loss account of the company shows expenses like interest, stock maintenance expenses, cloth-selling expenses, office administration, salary to watch and ward staff, etc. (III) It was the contention of the assessee that its business was closed down in the accounting year relevant to the assessment year 1967-68, but not in the accounting year relevant to the assessment year 1968-69. The Income-tax Officer, however, did not accept the contention of the assessee-company because, in his view, the assessee continued the business of selling the stock of finished products in the subsequent year and, therefore, he took the closure of the business as effective in the assessment year 1968-69. In reaching such a contention, the Income-tax Officer relied upon the provisions of section 41(2)/(5) of the Income-tax Act, 1961.

(IV) Being aggrieved by the said order, the assessee preferred an appeal on the Appellate Assistant Commissioner who held that the business of the company was closed with effect from October 1, 1966, and that after March 31, 1967, that is the last day of the accounting year relevant to the assessment year 1967-68, the assessee simply sold the stock and these transactions of sale were realisation transactions and the receipt thereof was applied towards the payment of the dues of the State Bank of India. He, therefore, allowed the appeal of the assessee.

(V) Being aggrieved by the said order, the Revenue approached the Tribunal in appeal and the Tribunal found that, on March 31, 1967, the company had closing stock of Rs. 23,70,000 consisting

of textile goods manufactured by it and that such stock was sold in the subsequent accounting year. The Tribunal found that, for the assessment year 1968-69, the company filed a return of income claiming loss under the head "Business". The Tribunal, therefore, took the view that the assessee carried on the business activity even after closure and in fact in the return for the subsequent year pertaining to the assessment year 1968-69, it had claimed business loss against the other income arising from interest from the Government securities as well as the profit on sale of machinery. The Tribunal thus regarded the return filed by the assessee for the assessment year 1968-69 claiming business loss as admission by the assessee of the fact that the business of the company was continued and that the assessee had obtained the benefit of set off of its income against the business loss and, therefore, relying upon the decision in the case of CIT v. Army and Navy Stores Ltd. [1957] 31 ITR 959 (Bom), the Tribunal held that the assessee cannot urge that the business was discontinued before 1968-69. In that result, the Tribunal allowed the appeal.

4. In the aforesaid fact situation, we are now required to answer the questions referred for our opinion. Questions Nos. 1 and 3 are inter-connected and the answer to one question is reflected in the answer to another question, and, therefore, the same are discussed together.

5. In our opinion, the answer to questions Nos. 1 and 3 mainly depends upon the answer to the question as to when did the assessee actually close its business and, secondly, as to whether the submissions made by the assessee in his return of income for the assessment year 1968-69 would estop or preclude the assessee from contending that it has actually stopped the business with effect from September 30, 1966, and that various sales of finished stock were only realisation sales with a view to winding up the business. Before we proceed to decide the question as to whether the assessee is estopped from contending that it actually stopped the business in the assessment year 1967-68 in view of the fact that it has filed a return of income for the assessment year 1968-69 and has claimed business loss and set-off of income, we may proceed to discuss the facts on record. We may also proceed to mention cogent facts relied upon by the assessee to establish that in fact the business activities of the assessee had come to an end with effect from October 1, 1966.

6. Mr. Shah, learned counsel for the assessee, has invited our attention to the resolution of the board of directors dated August 30, 1966, resolving to close down the mill company permanently. Pursuant to such resolution, the notice was affixed on the notice board of the company informing all concerned that the mill shall be closed with effect from September 30, 1966, and that it will not work from October 1, 1966. It is also not disputed that, pursuant to such closure, the electricity supply which was granted to the mill company was also discontinued from October 3, 1966, by the Ahmedabad Electricity Company. It is also an admitted fact that a petition for winding up the said company was filed on March, 1967, and by an order dated September 26, 1967, the company was ordered to be wound up. In the proceedings which were initiated under section 33C(2) of the Industrial Disputes Act by the Textile Labour Association against the company, the Labour Court has also, as early as on April 10, 1967, recorded the fact that the mill company is closed with effect from October 1, 1966. It is also pertinent to note that, in the books of account of the company, no transactions of purchase and sale of cloth were noticed excepting the transactions of sale of finished goods or manufactured cloth. In the profit and loss account prepared by the official liquidator for the period from April 1, 1967, to March 31, 1968, the opening stock of finished goods is stated to be

of the value of Rs. 23,70,255. From the said statement of account, it becomes clear that the company had effected sales of finished goods. From the assessment order passed by the Income-tax Officer for the assessment year 1967-68, it becomes clear that it was the return filed by the assessee-company through the official liquidator and it is also clear that the business was carried on by the company only for a part of the year. The business loss was stated to be Rs. 18,63,676 for the assessment year. For the subsequent assessment year that is the assessment year 1968-69, the return would also show that, according to the assessee, no manufacturing operations have been carried on and no depreciation has been claimed by the assessee. However, the official liquidator has, on behalf of the company, claimed the "business loss" of the amount of Rs. 2,72,595.

7. From the aforesaid findings of facts recorded by the Income-tax Officer, in our opinion, it becomes clear that in fact the manufacturing activities of the company has come to an end with effect from October 1, 1966. The assessee-mill company was a composite unit manufacturing and selling ready cloth. The question, therefore, which would assume importance would be as to whether, on closing of the said company with effect from October 1, 1966, if the company has sold stock-in-trade subsequent to that date, it can be said that the company in fact carried on business activities at least by selling the balance stock-in-trade or such sale of balance stock was consistent with realisation sale to facilitate the winding up or effective closure of the mill company.

8. In this connection, reference can be made to the decision of the Supreme Court of India in the case of CIT v. West Coast Chemicals and Industries Ltd. 1 [962] 46 ITR 135. In the said decision, the assessee-company entered into an agreement for sale of the lands, buildings, plant and machinery of the match factory belonging to it for Rs. 5,75,000 with a view to close down the business. The purchaser made default in payment, and on August 9, 1953, a fresh agreement was entered into between the parties for the sale of the properties mentioned in the first agreement and also chemicals and papers used for the manufacture which had not been included in the first agreement. As the memorandum of association of the assessee-company allowed the assessee to manufacture and sell chemicals, and even after the sale, the company carried on manufacture on behalf of the purchaser, the Revenue sought to assessee the profit derived from the sale of the chemicals and paper as profits from business. The assessee contended that it was a realisation sale and that the amount was, therefore, not liable to tax. In the aforesaid fact situation, the Supreme Court of India held that the question whether a sale was a realisation sale or a sale in the course of business is not easy to decide and depends upon the facts of the case. The court also cautioned that the question is not easy to decide with the assistance of rulings in which the facts were different. There is a great danger of extracting a principle from the reported cases, divorced from the facts.

9. The Supreme Court of India referred to Halsbury's Laws of England, Third edition, volume 20, pages 115-117. In paragraph 211 of the Halsbury's Laws of England, it is stated as under (at page 138 of 46 ITR) :

"211. The cases illustrating the questions arising in such circumstances can be divided into two categories, first, those where the sales formed part of trading activities, and second, those where the realisation was not an act of trading."

10. Having so extracted the principles, the Supreme Court further observed that the distinction made between the sales forming part of the trading activities and those where the realisation was not forming part of the trading was a sound distinction. Having so stated, the court extensively referred to the decision of the Privy Council in Doughty v. Commr. of Taxes [1927] AC 327 and also to the Australian case and the case arising from New Zealand.

11. Having discussed the said case, the Supreme Court held that the court shall have to decide as to whether the sale was a realisation sale or whether the activity in question was part and parcel of trading or business activity so as to attract tax on the profits made. In other words, the court held that it shall have to be decided as to whether the transaction was in the course of regular business or trading activity of the assessee. If the answer to the question was in the affirmative, it can be said that the transaction was a business or trading transaction. However, when the transaction was entered into for the purpose of effectively winding up the business, it is not necessarily a part of trading activity, if the object is to close the business. Incidentally, the selling of raw material or finished goods may fall within the broad spectrum of trading activity but, if the object is not to continue the trading activity, but is only to realise the price of the assets by disposing of the same, and if the selling activity is resorted to with that objective, the sale was a realisation sale or a winding up sale with a view to realise the capital assets of the assessee.

12. Applying the aforesaid principles to the facts of the case before us, we shall have to decide firstly as to whether the manufacturing activity of the assessee continued after October 1, 1966, and as discussed hereinabove, we have found that, with effect from October 1, 1966, the manufacturing activity of the assessee has come to a grinding halt. Secondly, we shall have to decide as to whether the assessee was carrying on trading activity of selling finished goods by purchasing the same from the open market and selling it, in other words, whether the assessee was undertaking selling activity. There is no foundation or suggestion from the Revenue that the assessee was undertaking such activity, and that the selling of finished goods manufactured by someone else was not part and parcel of the business activity of the assessee. Thirdly, it is required to be examined as to whether the sale of already manufactured goods and balance stock of finished products remaining with the assessee subsequent to closure of manufacturing activity can be said to be part and parcel of trading activity or whether it was merely a realisation sale with a view to winding up the business of the assessee. As stated hereinabove, the assessee was a composite unit manufacturing and trading in cloth. Cloth which was manufactured by the company was being sold by it. It was not the case of the Revenue that there was also purchasing and selling of cloth independent of manufactured cloth by the assessee-company. Therefore, once the manufacturing activity has come to an end with effect from October 1, 1966, there was, in our opinion, little scope for any business activity being continued by the assessee-company. The manufactured goods constituted stock-in-trade on or after October 1, 1966, which was disposed of by the sales in question and, therefore, the sales in question were in the nature of realisation sales effected solely with a view to realise the price of stock-in-trade with a view to facilitate the process of winding up of the company. In fact, once the manufacturing activity came to an end with effect from October 1, 1966, there was no possibility of replenishing the existing stock-in-trade. The transaction of sale, therefore, shall have to be treated as a realisation sale with a view to realise the price of the assets and to effectively close down the business. Therefore, the Tribunal was not right in holding that the sales of stock-in-trade after October 1, 1966, were part and

parcel of business activity. They were, in substance, realisation sales with a view to facilitate the winding up of the assessee-company and, therefore, the same were not liable to tax as business profit.

13. The Tribunal has answered this question against the assessee and in favour of the Revenue by another process of reasoning. The Tribunal has come to the conclusion that, when the assessee filed its income-tax return for the assessment year 1968-69 as well as for the relevant year 1967-68, the assessee has shown business loss. From this entry in the return of the assessee claiming business loss for the particular year, it is inferred by the Tribunal that in fact the business was continued by the assessee and that the assessee cannot now be permitted to take a stand contrary to what it had taken while filing the return. In substance, the Tribunal applied the doctrine of estoppel by conduct so as to preclude the assessee from taking a position contrary to the one taken up by it by filing its return. For such course of reasoning, the Tribunal has derived support from the decision of the Bombay High Court in the case of CIT v. Army and Navy Stores Ltd. [1957] 31 ITR 959. Before the Bombay High Court, under section 10 of the Indian Finance Act, 1942, an option was given to the assessee who becomes liable to pay excess profits tax to make a deposit of 1/5th of the amount of the excess profits tax and, if he did so, he became entitled to be refunded 1/10th of the amount of the excess profits tax, or half of the said deposit, whichever is less. There was a proviso to this section that, in respect of any profits which were also liable to assessment to excess profits tax under the law in force, in the United Kingdom, it was unnecessary to make the deposit. The assessee-company which was incorporated in the United Kingdom and carrying on business in India, when called upon to make the deposit, represented to the income-tax authorities that its profit were liable to be assessed to excess profits tax in the United Kingdom and accordingly did not make the deposit. In August, 1952, the company received a refund under section 10 of the Finance Act, 1942, and in respect of the chargeable accounting periods, it contended that as it had in fact no profits assessable to excess profits tax in the United Kingdom, its case fell within the main portion of section 11(11) of the Finance Act of 1946. It was in this fact situation that the Bombay High Court held that when the assessee has obtained a benefit by making certain representations to the taxing authorities, he cannot be permitted to deny the truth of the representation before the authorities at a latter stage.

14. The following observations made by the Division Bench of the Bombay High Court are pertinent (at page 965) :

"Now, the most significant and outstanding fact in this reference is that the assessee-company obtained a particular benefit and escaped a particular obligation by reason of a representation made by it to the Taxing Department. The representation that the company made on the 24th of November, 1946, was that it was liable to excess profits tax in the United Kingdom. It was by reason of this representation that it succeeded in inducing the Department to attract to its case the proviso to section 10, sub-section (1), to which reference has been made. But for this representation and but for the statement that it was liable to pay excess profits tax in the United Kingdom, the company would have been liable to make a compulsory deposit. It was only if it had made a compulsory deposit that it would have been entitled to the refund provided in that section. It could escape obligation to make compulsory deposit only if its profits were liable to excess profits tax in the United Kingdom and it escaped that liability because it represented to the Department that its

profits were liable to excess profits tax in the United Kingdom. Now when the question arose under section 11(11) of the Finance Act, 1946, as to how the refund should be brought to tax, the assessee-company completely changed its front and took up the attitude that its profits were not liable to excess profits tax in the United Kingdom and, therefore, the case did not fall; under the proviso to section 11(11). It is difficult to understand how the assessee can be permitted to deny the truth of the representation made by it in its letter of the 24th of November, 1946, when on the strength of it obtained a certain benefit and when on the strength of it the Taxing Department relieved it of a certain obligation. The Taxing Department having changed its position to its prejudice by reason of this representation, the assessee-company cannot be permitted to deny the truth of that representation when the question arises of assessing its refund to tax under the proviso to section 11(11)."

15. In our opinion, the aforesaid principles cannot be applied to the fact situation prevailing in the present case. Firstly, because the equivocal statements made in the return filed by the assessee-company through the official liquidator claiming the business loss cannot be regarded as an intentional deliberate admission by the assessee of the fact that the assessee was actually carrying on the business in the assessment year 1967-68. Secondly, it shall have to be mentioned that, in the return itself, there is evidence of the fact that the business of the assessee has been closed with effect from October 1, 1966. A clear assertion to that effect is made in the return itself and also it is pertinent to note that no depreciation is claimed which would be suggestive of the fact that in fact no business was carried on by the assessee company. Thirdly, based on such equivocal statement made by the official liquidator on behalf of the company while filing the return, it cannot be stated that the Revenue has changed its position to its detriment or its prejudice. In fact, in view of the positive stand taken by the assessee-company in its return that its business has been closed from October 1, 1966, and from the fact of non-claiming of any depreciation for the aforesaid period, coupled with the other voluminous evidence produced before the Income-tax Officer showing the closure of the business, in our opinion, it would not be just and proper in the facts and circumstances of the case to apply the principle of estoppel so as to preclude the assessee-company from contending that in fact it had closed its business with effect from October 1, 1966.

16. We may at this stage refer to the decision of the Bombay High Court in the case of Kantilal Chimanlal Shah v. CIT [1954] 26 ITR 303. In the said case, the question of application of the doctrine of estoppel in the case of successive assessments was considered by the Division Bench of the Bombay High Court. It was observed by the Bombay High Court as under (headnote) :

"The doctrine of estoppel does not apply in the case of successive assessments. An assessment is complete in itself and the Taxing Department is not bound by any contention that it took up in one assessment when the question arises with regard to a different assessment.

The assessee, who was maintaining his accounts on the mercantile system, carried forward a debt as an asset bearing interest and paid tax on the interest credited in the accounts. In a subsequent year, the assessee wrote off the debt as a bad debt and claimed to deduct it from his assessable income. The Department held that the debt had become bad in a previous year. Held, that no question of estoppel arose and it would be open to the Department to hold that the debt had become bad in a

previous year."

17. In the case of CIT v. Manmohan Das [1966] 59 ITR 699, the Supreme Court was called upon to decide more or less an identical question. The question was as to whether the loss in any year may be carried forward to the following year and set off against the profits and gains of the subsequent year under section 24(2) has to be determined by the Income-tax Officer who deals with the assessment for the subsequent year. It was in that context that the Supreme Court held that the decision recorded by the Income-tax Officer who computes the loss in the previous year that the loss cannot be set off against the income of the subsequent year is not binding on the assessee. Applying the aforesaid analogy to the facts of the case before us, even if it is assumed that the business of the assessee was treated as continuation of business for the assessment year 1967-68, for the subsequent year, that is, 1968-69, the finding reached by the assessing authority would not be binding because for the purposes of income-tax, the preceding year shall have to be taken as a unit and the finding reached in one year shall not necessarily operate as binding for the subsequent year.

18. Similarly, in the case of CIT v. V. MR. P. Firm, Muar [1965] 56 ITR 67, Justice K. Subba Rao, speaking for the Supreme Court, has observed that the doctrine of "approbate and reprobate" is only a species of estoppel; it applies only to the conduct of parties. As in the case of estoppel, it cannot operate against the provisions of a statute. If a particular income is not taxable under the Income-tax Act, it cannot be taxed on the basis of estoppel or any other equitable doctrine. Equity is out of place in tax law; a particular income is either exigible to tax under the taxing statute or it is not. If it is not, the Income-tax Officer has no power to impose tax on the said income.

19. In the case of M. K. Mohammad Kunhi v. CIT [1973] 92 ITR 341, the Division Bench of the Kerala High Court was also required to consider the applicability of the rule of estoppel to case of successive assessments. After referring to three decisions of the Bombay High Court and one decision of the Supreme Court, it observed as under (at page 345) :

"Estoppel relates to the conduct of parties and cannot operate against the provisions of a statute or the law. If the Tribunal expresses an opinion on a proposition of law and also remands the case and if that proposition happens to be wrong, at a later stage, the Tribunal is not precluded from applying the correct law. Similarly, if the assessee made a representation or a concession on a point of law, the Revenue accepted the same and the Tribunal also approved of it, even then if that position was wrong in law, nothing precludes the Tribunal from applying the correct law in another appeal against the order passed after the remand. On the other hand, if the representation was one of fact, the truth of which was accepted by the Revenue and on that basis suffered some prejudice too, the assessee will not, at a subsequent stage of the same assessment, be allowed to go back on his earlier representation; he is estopped from doing that. We may however make it clear that this application of estoppel does not apply to cases of successive assessments; it applies only to the same assessment; in other words, the assessee will be bound by his earlier representation of fact and will not be allowed to go back on it at a subsequent stage of the same assessment. Similarly, even on a wrong decision on a point of law if the Tribunal passed an order of remand and that order has become final since no reference was obtained to question its correctness, then the decision is binding between the parties in the said assessment had neither of the parties in the said assessment

will be allowed to question it or reopen it in another appeal before the Tribunal."

20. Thus, it becomes clear that the doctrine of estoppel does not apply to the case of successive assessments. It applies only to the same assessment. In other words, the assessee will be bound by his earlier representation of fact and will not be allowed to go back on it at a subsequent stage of the same assessment. However, the representation made by him or the stand taken by him in an earlier assessment would not necessarily bind him in a subsequent assessment. The assessment is complete in itself and neither the assessee nor the Revenue should be directly bound by the stand taken by them in earlier assessments more particularly when the Revenue, as in the facts before us, has not acted to its prejudice or detriment.

21. From the discussion of law on the aforesaid principles, it becomes clear that the Tribunal was not justified in applying the doctrine of estoppel so as to preclude the assessee from taking up the contention that it has in fact closed its business with effect from October 1, 1966, nor was the Tribunal justified in reading CIT v. Army and Navy Stores Ltd. [1957] 31 ITR 959 (Bom) as laying down the absolute proposition that even the inadvertent admission made in the return shall be binding on the assessee and the assessee was not permitted to explain his position more particularly that in the case before us, from the averments contained in the return as well as from the documentary evidence, the assessee was in a position to establish that, in fact, it has closed its business with effect from October 1, 1966, and that it has in fact sold its stock-in-trade by way of realisation sale with a view to facilitate the process of winding up. In our opinion, therefore, the Tribunal was not justified in reaching the finding that it had reached.

22. At this stage, we may also mention that Mr. Thakore, learned counsel appearing for the Revenue, has urged before us that the questions Nos. 1 to 3 referred to us by the Tribunal are pure questions of fact and this court should decline to answer such questions when its opinion on any question of law is not called for. He has in this connection invited our attention to the recent decision of the Supreme Court in the case of CIT v. Cellulose Products of India Ltd. [1991] 192 ITR 155, and has submitted that, when the findings reached by the Tribunal are supported by the evidence on record and are such which cannot be regarded as perverse or patently unreasonable, it would not be permissible for us to reach findings inconsistent with those which are reached by the Tribunal.

23. No exception can be made to the aforesaid proposition of law. However, when the Tribunal ignores material evidence on record or an inferential finding is reached based on one fact alone and in disregard of voluminous documentary evidence to the contrary, it can be said that the finding reached by the Tribunal is patently unreasonable. We have also referred, in detail, to the documentary evidence on record which would establish the fact that, from October 1, 1966, the business of the assessee-company was closed. This documentary evidence is not considered by the Income-tax Officer and the Tribunal and an inferential finding is reached by drawing an inference from the filing of the return wherein business loss is claimed. Since the business loss is claimed an inference is drawn that business must have continued. As discussed hereinabove, the return was not filed by the company itself or by its directors who were in charge of the business. It was filed after October 1, 1966, i.e., the date of its closure by the official liquidator. It cannot, therefore, be regarded as conscious, intelligible and deliberate admission of the company of continuance of business. The

Tribunal was, in our opinion, therefore, not justified in ignoring various facts which were consistent with the question of closure of business. The Tribunal has failed to take into account various relevant factors while holding that the assessee has, in fact, continued his business activity after October 1, 1966. Such a finding having been rendered in disregard of the evidence on record cannot and should not debar us from answering the questions referred to us for our opinion in favour of the assessee and against the Revenue. The Tribunal has also referred to the decision of the Supreme Court in the case of West Coast Chemicals and Industries Ltd. [1962] 46 ITR 135, but has failed to consider the question as to whether the sales in the present case were either realisation sales or sales in the course of trading activities. In fact, applying the principles laid down by the Supreme Court in the aforesaid case, it was necessary for the Tribunal to decide as to whether the sales of finished products by the assessee were realisation sales or not and more particularly by keeping in mind the fact that the assessee was not dealing in purchase and sale of readymade cloth as such. Therefore, we are of the opinion that the Tribunal was not justified in reaching the findings it has reached. Therefore, we answer questions Nos. 1 to 3 in the negative, i.e., in favour of the assessee and against the Revenue.

24. Question No. 4 : The Tribunal has held that, when there was no business, the unabsorbed depreciation could not be set off in the subsequent year against the income under the head "Other sources". On this question, the matter is no longer res integra so far as this court is concerned. In the case of CIT v. Deepak Textile Industries Ltd. [1987] 168 ITR 773, the Division Bench of this High Court, speaking through Justice B. S. Kapadia, held categorically that (headnote) :

"On reading section 32(2) of the Act, it is clear that the purpose of the Legislature in introducing the legal fiction is to give the benefit of the unabsorbed depreciation in the following previous year or in the succeeding previous year and when that is the purpose of the legal fiction, all the facts necessary for the purpose of earning depreciation under section 32(1) of the Act must be secured and, therefore, for the following previous year, the ownership of machinery, user of machinery and user of machinery for the purpose of business and existence of business also will be required to be assumed for giving effect to the legal fiction. Hence, unabsorbed depreciation should be allowed to be carried forward and set off against assessable income of a subsequent year notwithstanding the fact that the business in respect of which it arose ceased to exist in the year of such set off. Moreover, receipt of income during the relevant previous year is not a sine qua non for the deduction of allowances like depreciation."

25. The Division Bench has also in the aforesaid decision noted the fact that there does exist division of judicial opinion on the question but it has, after considering various decisions, recorded the finding as aforesaid.

26. We do not think that, in the facts and circumstances of the case before us and even otherwise, we can take a view different from the one which is taken by the Division Bench of this court. Accordingly, question No. 4 shall have to be answered in the negative, that is, in favour of the assessee and against the Revenue. We, accordingly, answer this question. There shall be no order as to costs.