
(2010) 03 AHC CK 0234
In the Allahabad High Court

Commissioner of Income Tax

APPELLANT

Vs

Arif Industries Ltd.

RESPONDENT

Date of Decision : 12-03-2010

Acts Referred:

Income Tax Act, 1961 — Section 260A, 288, 33B, 5, 72

Citation : (2010) 231 CTR 271

Hon'ble Judges : Rakesh Tiwari, J;Anil Kumar, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Rakesh Tiwari, J.—Heard learned Counsel for the parties and perused the record.

2. This appeal has been preferred by the appellant CIT-I, Lucknow u/s 260A of the IT Act, 1961 (hereinafter referred to as the "Act") challenging the validity and correctness of the judgment and order dt. 31st March, 2003 passed by the Tribunal, Lucknow Bench, Lucknow in ITA No. 769/Luck/2001 for the asst. yr. 1995-96.

3. The facts of the case are that the assessee is a closely held domestic company which filed its return of income on 30th Nov., 1995 after setting off the brought forward losses of earlier years against the current year's income computed at Rs. 10,14,442. The income from the various divisions of the company in the relevant year 1995-94 was as under:

Division Income Income from construction division Rs. 3,76,939 Loss of cement division Rs. (21,63,703) Income from Nainital Hotel Rs. 35,01,828 Income from Lucknow Hotel Rs. 33,25,612

The aggregate income set off of all the units came to Rs. 35,43,845. After allowing the unabsorbed brought forward losses (depreciation) of earlier years, the aforesaid income/loss was set off to the extent of aforesaid income/loss. As the gross total income as defined u/s 80B(5), was a loss, the assessee's claim

for deductions under Sections 80HH (Rs. 7,03,695), 80HHD (Rs. 8,318) and u/s 80I (Rs. 8,79,619) were not allowed by the AO.

4. The assessee preferred an appeal before the CIT(A). The appellate Court vide its order dt. 1st June, 2001 allowed the deduction u/s 80I to extent of unabsorbed depreciation relating to hotel divisions at Lucknow and Nainital brought forward from earlier years. However, the appellate Court allowed full claim of deduction u/s 80I upholding the order of the AO disallowing the claim of deduction under Sections 80HH and 80HHD.

5. The assessee not being satisfied with the aforesaid relief took the matter before the Tribunal, Lucknow claiming full deductions under Sections 80I, 80IA, 80HH and 80HHD, The Tribunal vide its impugned order has allowed full relief allegedly in contravention of the expressed provisions of Sections 80AB and 80B(5).

6. The following substantial questions of laws were framed on 21st Jan., 2008 by this Court:

1. Whether under the facts and in the circumstances of the case, the learned Tribunal was justified in holding that full deduction under Sections 80I, 80IA, 80HH and 80HHD were admissible out of the current year's income from eligible unit even though gross total income is negative within the meaning of Section 80AB r/w Section 80B(5) of the IT Act?

2. Whether under the facts and in the circumstances of the case, the learned Tribunal was justified in holding that deduction in Sections 80I, and 80HH are allowable in view of Commissioner of Income Tax (Central), Madras Vs. Canara Workshops (P) Ltd., Kodialball, Mangalore, according to which loss of a unit cannot be set off against the profit of eligible unit for the purposes of quantification of deduction and ignoring the fact that the said facts merely lay down the method of quantification of deduction but does not lay down when the deduction so quantified will be allowable even in a case where gross total income is negative within the meaning of Section 80A r/w Section 80B of the IT Act?

Appellants case:

7. The contention of learned Counsel for the appellant is that the AO has disallowed the claim of the assessee for deduction under Sections 80HH, 80HHD and 80I of the IT Act, 1961 on the ground that the gross total income of the assessee as defined u/s 80B(5) was in loss. In appeal the CIT(A) allowed the claim of deduction u/s 80I to the extent of unabsorbed depreciation relating to hotel divisions at Lucknow and Nainital brought forward from earlier years and upheld the order of the AO disallowing claim of deduction under Sections 80HH and 80HHD.

8. He further submits that in appeal preferred by the assessee the Tribunal while allowing full deduction has relied on the order of the apex Court in the case of Commissioner of Income Tax (Central), Madras Vs. Canara Workshops (P) Ltd.,

Kodialball, Mangalore, that the Tribunal has held that deduction under Sections 80I and 80IA is based on performance on year to year and the profits and losses of earlier years and subsequent years have no bearing on it on quantum of allowance of deduction and the non obstante clause Section 80I(6) and 80IA(7) makes these deductions unique.

9. He also submits that the assessment year involved in the case before the Hon"ble Supreme Court is asst. yr. 1967-68 and the issue involved is with regard to deduction u/s 80E prevailing during that period. Section 80E as in force from 1st April, 1966 to 31st March, 1968 dealt with deduction in respects of profits and gains from priority and reads thus:

Deduction in respect of profits and gains from specified industries in the case of certain companies--(1) In the case of a company to which, where the total income (as computed in accordance with the other provisions of this Act) includes any profits or gains attributable to the business of generation or distribution of electricity or any other form of power or construction, manufacture or production of any one or more of the articles or things specified in the list in the Fifth Schedule, there shall be allowed a deduction from such profits and gains of an amount equal to eight per cent thereof, in computing the total income of the company.

(2) this section applies to--

(a)....

(b)....

10. He next submits that the Tribunal has wrongly applied the ratio laid down in the case of Canara Workshops (P) Ltd. (supra) as the facts therein and the facts involved in the case before it were quite different. In the facts of the present case the provisions of Section 80I would apply and the provisions of Section 80E as they were then would not apply. In support of his contention he has relied upon the judgment rendered by the Allahabad High Court in Commissioner of Income Tax Vs. Chhata Sugar Co. Ltd., wherein it has been held that in view of the specific definition of gross total income as given in Section 80B(5) of the Act, for computation of special deduction u/s 80HH, set off of losses to be done before allowing special deduction. Where after the set off of losses of earlier years the gross total income resulted in loss, no deduction u/s 80HH was admissible. If the resultant figure is a loss, deduction u/s 80HH cannot be allowed.

11. He states that the Bombay High Court in the case of Synco Industries Ltd. (Formerly known as Synco Textiles Pvt. Ltd.) Vs. Assessing Officer of Income Tax and Others, has held that the non obstante clause in Sub-section (6) of Section 80I Is applicable only to quantum of deduction. Gross total income referred to in Section 80I(1) is to be read as defined in Section 80B(5) and is required to be computed in the manner provided in the Act. Sections 80A(2) and 80B(5) are

declaratory in nature. They apply to all sections falling under Chapter VI-A. Non obstante clause in Section 80I(6) therefore, cannot restrict Sections 80A(2) and 80B(5).

12. Sri D.D. Chopra, learned Counsel for the Department has then urged that a study of the provisions of Sections 80A, 80B(5) and 80HHC makes it clear that in computing the total income of an assessee deductions specified in Sections 80C to 80U shall be allowed from the "gross total income" and such deduction shall not exceed the gross total income. Gross total income, as defined in Section 80B(5), would be computed in accordance with the provisions of the Act, before making any deduction under Chapter VI-A of the Act. The mandate contained in Sections 80A and 80B(5) clearly requires that the gross total income is to be computed after setting off the brought forward deficiencies of business loss and unabsorbed depreciation etc. This is the first step to be taken in order to compute the "total income" for the purpose of allowing deductions specified in Sections 80C to 80U of Chapter VI-A. The step would be to allow deduction under Chapter VI-A from the resultant positive income of the previous year, if any, which is left after set off of the aforesaid deficiencies of business loss and unabsorbed depreciation etc.

13. He has placed reliance upon the following rulings in support of these contentions:

1. Monarch Foods (P) Ltd. v. Asstt. CIT (1995) 52 TTJ (Ahd) 294 : (1995) 214 ITR 64 (Ahd) (AT);
2. Commissioner of Income Tax, Tamil Nadu-III, Madras Vs. Madras Motors (P.) Ltd.,
3. Commissioner of Income Tax, Bombay City-III, Bombay Vs. Mercantile Bank Ltd.,
4. Commissioner of Income Tax Vs. Rambal (P) Ltd.,
5. Murugappa and Sons Vs. Commissioner of Income Tax,
6. Kesoram Industries and Cotton Mills Ltd. Vs. Commissioner of Income Tax,

14. It is further urged that the findings of the Tribunal are erroneous and that the Tribunal has misplaeed reliance upon the ease of Canara Workshops (supra) for the reason that the case merely talked about as to how the eligible profits u/s 80E will be computed. As per this decision losses of other units should not be set off against the profits of unit for working out the eligible profits u/s 80E. The ease does not at all deal with the issue of applicability of Section 80A as has been done by AO and CIT(A) in present case. The Tribunal ignored that Section 80A (earlier Section 80E) provides method of quantification of deduction i.e. once the amount is quantified, it will be reduced from gross total income only if it is so permitted by the Section 80A . Since the gross total income, in the instant ease, was nil, there was no question of allowing any deduction in view of the provisions

of Sections 80A(1) and 80A(2) . It is stated that the Tribunal's allowance of full deduction is also not acceptable as its findings in its order referred in ITA No. 571/All/1995 (asst. yr. 1988-89); ITA Nos. 898 and 1837/All/1996 (asst. yr. 1993-94 and asst. yr. 1994-95) have been challenged in appeal u/s 260A before this Court. This appeal has been filed for quashing the impugned order and restoration of the orders of the CIT(A) based on aforesaid Income Tax appeals.

Respondent's case:

15. The respondent's counsel argued that the assessee is a company incorporated. For the assessment year in question the assessee carried on various businesses i.e. construction activity, cement production, running hotels at Lucknow and Nainital. In the mining division, it has not shown any production and that the assessee maintains separate accounts in respect of each division, as also for the head office, copies of which were filed during the course of assessment proceedings. According to him, Chapter VI-A of the IT Act, 1961 deals with various deductions available to various assessees. Referring to Sections 80A(1), 80A(2) and 80B(5) he submits that since the two hotel units of the assessee i.e. the hotel unit at Nainital was entitled to deduction u/s 80HH and deduction u/s 80I and the hotel unit at Lucknow was entitled to deduction u/s 80IA, therefore, the respondent claimed the said deduction as under:

Nainital Hotel Net profit as per P & L a/c Rs. 25,51,341 Add : Depreciation debited in P & L a/c Rs. 18,13,808 ----- Less : Profit on sale of vehicle Rs. 19,520 ----- Rs. 43,45,637 Less : Depreciation as per IT Rules Rs. 8,18,893 ----- Rs. 35,26,744 Less : Deduction u/s 80HHD Rs. 8,318 ----- Rs. 35,18,426 Less : Deduction u/s 80HH 20% Rs. 7,03,695 Less : Deduction u/s 80I 25% Rs. 8,79,619 ----- Rs. 19,35,112 -----
Lucknow Hotel Net loss as per P & L a/c Rs. 47,54,437 Add : Depreciation debited in P & L a/c Rs. 14,62,433 ----- Rs. 62,16,870 Less : Depreciation as per IT Rules Rs. 28,91,317 ----- Rs. 33,25,553 Less : Deduction u/s 80IA Rs. 9,97,666 ----- Rs. 23,27,887 -----

16. It is submitted that the matter was carried in appeal by the respondent assessee. The Tribunal allowed the appeal of the assessee relying upon the decision of the apex Court in the case of CIT v. Canara Workshops (P) Ltd. (supra) and, therefore, the controversy involved in the instant case is that whether the deductions under Sections 80I and 80HH are to be allowed taking into income of the individual unit or is it to be deducted from the income arrived at by deducting the amount of losses of other units and also adjusting the losses of the previous years carried forward.

17. It is then submitted that a perusal of Sections 80A(1) , 80A(2) , 80B(5), 80I and 80HHC, would reveal that Section 80A provides that "in accordance with and subject to the provisions of this chapter" therefore, deductions are to be calculated and allowed, in the particular manner provided in section. It is stated that Section 80A(1) of the Act provides that in computing the total income of an

assessee, there shall be allowed from his gross total income, in accordance with and subject to the provisions of this chapter, the deductions specified in Sections 80C to 80U and that Section 80A(2) of the Act provides that the aggregate amount; of the deductions under that chapter shall not, in any case, exceed the gross total income of the assessee. Section 80B(5) defines "gross total income" means the total income computed in accordance with the provisions of this Act, before making any deduction under the said chapter. But however, as the gross total income of the respondent assessee, after taking into consideration the losses of the other units and after taking into consideration the losses carried forward from the previous year came to nil, the assessing authority, although not doubting the entitlement of the assessee to the deduction, did not allow the deduction.

18. Learned Counsel for the respondent would argue that Section 80I(6) is a non obstante clause and therefore, the manner of computation by the Department is incorrect. According to him, the gross total income is to be computed and thereafter 20 per cent profits are to be adjusted in the gross total income from the industry, which was earning profits and only thereafter computation according to the procedure prescribed u/s 80A will come into play.

19. He submits that the respondents are entitled to the deduction u/s 80I(6) r/w Section 80HH of the Act and has relied upon the following observation of the apex Court in case of CIT v. Canara Workshops (P) Ltd. (supra):

It is obvious from the object underlying the enactment of Section 80E and the terms in which it provides relief that the intention of Parliament in enacting the provisions was to encourage the setting up of industries concerned with generation or distribution of electrical.... By making a provision for a rebate year after year on the industry making profits and gains during the year, the intention also was to provide an incentive for promoting efficiency in the industry.

...It seems to us that the object in enacting Section 80E is properly served only by confining the application of the provisions of that section to the profits and gains of a single industry. The deduction of eight per cent is intended to be an index of recognition that a priority industry has been set up and is functioning efficiently. It was never intended that the merit earned by such industry should be lost or diminished because of a loss suffered by some other industry. It makes no difference that the other industry is also a priority industry. The coexistence of two industries in common ownership was never intended by the Parliament to result in the misfortune of one being visited on the other. The legislative intention was to give to the meritorious its full reward.

20. It is next submitted that a perusal of Section 80I (one of the sections under which the assessee-respondent is seeking deduction) would reveal that it reads "Where the gross total income of an assessee includes any profits and gains derived from an industrial undertaking or a ship or the business of a hotel or the business of repairs to ocean-going vessels or other powered craft, to which this

section applies, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to twenty per cent". It is provided that the deduction is not to be made from the gross total income, rather it is to be made from the profits and gains derived from the industrial undertaking, thus making it clear that the deduction is to be made only from the income of that particular undertaking (or unit as in the case of the assessee). It is stated that Section 80I nowhere provides that the deduction is to be made from the gross total income, it provides "a deduction from such profits and gains".

21. It is further stated that this submission of the assessee further finds support from a perusal of Sub-section (6) which starts with a non obstante clause which reads as under:

(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 repairs 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 ship or the business of the hotel or the business of repairs to ocean-going vessels or other powered craft were the only source of income of the assessee during the previous years relevant to the initial assessment year and to every subsequent assessment year upto and including the assessment year for which the determination is to be made.

22. According to the counsel for the respondent, this provision clearly provides that while calculating the deduction u/s 80I, it has to be assumed by the assessing authority that the unit entitled for deduction under this section was the only source of income of the assessee. Thus, the non obstante clause excluding the application of any other section and the artificial presumption created by Section 80I(6) precludes the assessing authority from taking into consideration of the losses incurred in the other units and the unabsorbed losses of the previous years. It is stated that even assuming, though without admitting that the Sections 80A and 80B(5) are to be read in a manner that the deductions under the chapter are to be allowed from the gross total income, even then this interpretation would not govern the application of Section 80I in view of the language of Section 80I(1) and the non obstante clause of Section 80I(6).

23. It is urged that regarding the deduction claimed u/s 80HH, Sub-section (9) of Section 80HH provides that "In a case where the assessee is entitled also to the deduction u/s 80I or Section 80J in relation to the profits and gains of an industrial undertaking or the business of a hotel to which this section applies, effect shall first be given to the provisions of this section". It is stated that it is clear that the said deduction is to be calculated from the income on which the deduction u/s 80I is to be calculated and before deducting the deduction

provided u/s 80I. Since deduction u/s 80I is to be calculated on the income of the individual unit, the deduction u/s 80HH is also to be calculated on the income of the individual unit. According to him, this interpretation also finds support from the fact that the language of Sections 80I(1) and 80HH(1) is similar and in Section 80HH(1) also it is provided that the deduction is not to be made from the gross total income, rather it is to be made from the profits and gains derived from the industrial undertaking, thus making it clear that the deduction is to be made only from the income of that particular undertaking (or unit as in the case of the assessee).

24. It is then urged that if the interpretation given by the Revenue is accepted then the same would make the specific provisions of Sections 80I(6) and 80HH(9) redundant. Further, such an interpretation would also be against the express language of Sub-section (1) of both the sections.

25. It is lastly submitted that it is a settled principle of law that while interpreting any provision of law, meaning should be given to each and every word used therein.

26. In the alternate, it is argued by the counsel for the respondent deductions under Chapter VI-A especially the deductions under Sections 80I and 80HH are provided to industrial undertakings being beneficiary provisions, hence a liberal interpretation should be given to these provisions.

27. Me also relied upon a recent judgment of the Delhi High Court in the case of CIT v. Sona Koyo Steering Systems Ltd. (2010) 230 CTR (Del) 251 : (2010) 35 DTR (Del) 273 : (2010) 1 Taxmann Com. 102 (Del) where a similar argument raised by the Revenue was rejected upholding the order of the Tribunal. The Court also distinguished the decision in the case of Synco Industries (supra) being relied upon by the Revenue.

28. In rebuttal the learned Counsel for the Department submits that in the case of CIT v. Chhata Sugar Co. Ltd. (supra) the Court held that in view of the specific definition of gross total income as given in Section 80H(5) of the Act, for computation of special deduction u/s 80HH, set off of losses is to be done before allowing special deduction. It has further held that as after the set off of losses of earlier years the gross total income resulted in loss, no deduction u/s 80HH was admissible; that in the case of Commissioner of Income Tax, Tamil Nadu-V, Madras Vs. Kotagiri Industrial Co-operative Tea Factory Ltd., Kotagiri, the Court while considering the claim of deduction u/s 80P of the Act which falls under Chapter VI-A of the IT Act, 1961, that deals with special deduction, has held that the gross total income must be determined by setting off business losses of earlier years against the income before allowing the deduction u/s 80P; and that in the case of Commissioner of Income Tax Vs. Kedia Leather and Liquor Ltd., the Court has held that deduction under Sections 80I and 80HH of the Act, are available only on profits and gains from business.

Conclusions:

29. After hearing learned Counsel for the parties it appears that the dispute before this Court is regarding the manner of computation taking into consideration the profit and loss made by the various divisions of the assessee.

30. The undisputed facts are that the AO has disallowed the claim of the assessee for deduction under Sections 80HH, 80HHD and 80I of the Act on the ground that the gross total income of the assessee as defined u/s 80B(5) was in loss whereas in appeal the CIT(A) allowed the claim of deduction u/s 80I to the assessee to the extent of unabsorbed depreciation relating to hotel divisions at Lucknow and Nainital brought forward from the earlier years while upholding the case of the AO insofar as deductions under Sections 80HH and 80HHD were concerned. The Tribunal has allowed the full deduction to the assessee by relying upon the case of Canara Workshop (P) Ltd. (supra). Section 80E was in force from 1st April, 1966 to 31st March, 1968, which dealt with deduction in respect of profits and gains from priority industry and was transported the subject matter, the Finance (No. 2) Act, 1967 w.e.f. 1st April, 1968 covered by Section 80E to Section 80I. It thus appears that the Tribunal has wrongly applied the ratio laid down by the apex Court as in that case the assessment year involved was asst. yrs. 1966-67 and the issue involved was with regard to the deduction u/s 80E of the Act prevailing during that period viz., deduction in respect of profits and gains from specific industries in the case of certain companies. The Finance Act, 1967 w.e.f. 1st April, 1968 transported subject-matter hitherto covered by Section 80E to Section 80I of the Act. In the present case, the issue involved is with regard to the deduction u/s 80I of the Act, therefore, the Tribunal has grossly erred in relying upon the ratio laid down by the apex Court in the case of Canara Workshops (supra).

31. The provisions of Section 80I in this backdrop would apply and the provisions of Section 80E would not apply as is apparent from the judgment rendered by this Court in CIT v. Chhata Sugar Co. Ltd. (supra) referred by the learned Counsel for the appellant. In that case, the Court held that specific definition of gross total income as given in Section 80B(5) of the Act, for computation of special deduction u/s 80HH, set off of losses is to be made prior to allowing of special deduction, where after set off of losses of earlier years the gross total income resulted in loss, no deduction u/s 80HH would be admissible. If the resultant figure is a loss deduction u/s 80HH cannot be allowed. The non obstante clause in Sub-section (6) of Section 80I refers to only the quantum of deduction, therefore, the gross total income referred to Section 80I(1) is to be r/w Section 80B(5) and only then the computation is to be made in the manner provided under the Act. Since, Sections 80A(2) and 80B(5) are declaratory in nature, hence they apply to all sections falling under Chapter VI-A of the Act.

32. For ready reference the relevant provisions are extracted below:

Section 80A(1).--In computing the total income of an assessee, there shall be allowed from his gross total income, in accordance with and subject to the provisions of this chapter, the deductions specified in Sections 80C to 80U.

(2) The aggregate amount of the deductions under this chapter shall not, in any case, exceed the gross total income of the assessee.

Section 80B(5) "Gross total income" means the total income computed in accordance with the provisions of this Act, before making any deduction under this chapter.

Section 80I Deduction in respect of profits and gains from industrial undertakings after a certain date, etc.--(1) Where the gross total income of an assessee includes any profits and gains derived from an industrial undertaking or a ship or the business of a hotel or the business of repairs to ocean-going vessels or other powered craft, to which this section applies, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to twenty per cent thereof:

Provided that in the case of an assessee, being a company, the provisions of this sub-section shall have effect in relation to profits and gains derived from an industrial undertaking or a ship or the business of a hotel as if for the words "twenty per cent", the words "twenty-five per cent" had been substituted.

(1A) Notwithstanding anything contained in Sub-section (1), in relation to any profits and gains derived by an assessee from--

(i) an industrial undertaking which begins to manufacture or produce articles or things or to operate its cold storage plant or plants; or

(ii) a ship which is first brought into use; or

(iii) the business of a hotel which starts functioning,

on or after the 1st day of April, 1990, but before the 1st day of April, 1991, there shall, in accordance with and subject to the provisions of this section, be allowed in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to twenty-five per cent thereof:

Provided that in the case of an assessee, being a company, the provisions of this Sub-section shall have effect in relation to profits and gains derived from an industrial undertaking or a ship or the business of a hotel as if for the words "twenty-five per cent", the words "thirty per cent" had been substituted.

(2) This section applies to any industrial undertaking which fulfills all the following conditions, namely:

(i) it is not formed by the splitting up, or the reconstruction, of a business already in existence;

(ii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose:

(iii) it manufactures or produces any article or thing, not being any article or

thing specified in the list in the Eleventh Schedule, or operates one or more cold storage plant or plants, in any part of India, and begins to manufacture or produce articles or things or to operate such plant or plants, at any time within the period of ten years next following the 31st day of March, 1981 or such further period as the Central Government may, by notification in the Official Gazette, specify with reference to any particular industrial undertaking;

(iv) in a case where the industrial undertaking manufactures or produces articles or things, the undertaking employs ten or more workers in a manufacturing process carried on with the aid of power, or employs twenty or more workers in a manufacturing process carried on without the aid of power:

Provided that the condition in Clause (i) shall not apply in respect of any industrial undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such industrial undertaking as is referred to in Section 3313, in the circumstances and within the period specified in that section:

Provided further that the condition in Clause (iii) shall, in relation to a small-scale industrial undertaking, apply as if the words "not being any article or thing specified in the list in the Eleventh Schedule" had been omitted.

Explanation 1.--For the purposes of Clause (ii) of this sub-section, any machinery or plant which was used outside India by any person other than the assessee shall not be regarded as machinery or plant previously used for any purpose, if the following conditions are fulfilled, namely:

(a) such machinery or plant was not, at any time previous to the date of the installation by the assessee, used in India;

(b) such machinery or plant is imported into India from any country outside India; and

(c) no deduction on account of depreciation in respect of such machinery or plant has been allowed or is allowable under the provisions of this Act in computing the total income of any person for any period prior to the date of the installation of the machinery or plant by the assessee.

Explanation 2.--Where in the case of an industrial undertaking, any machinery or plant or any part thereof previously used for any purpose is transferred to a new business and the total value of the machinery or plant or part so transferred does not exceed twenty per cent of the total value of the machinery or plant used in the business, then, for the purposes of Clause (ii) of this sub-section, the condition specified therein shall be deemed to have been complied with.

Explanation 3. For the purposes of this Sub-section, "small-scale industrial undertaking" shall have the same meaning as in Clause (b) of the Explanation below Sub-section (8) of Section 80HHA.

(3) This section applies to any ship, where all the following conditions are

fulfilled, namely:

(i) it is owned by an Indian company and is wholly used for the purposes of the business carried on by it;

(ii) it was not, previous to the date of its acquisition by the Indian company, owned or used in Indian territorial waters by a person resident in India; and

(iii) it is brought into use by the Indian company at any time within the period often years next following the 1st day of April, 1981.

(4) This section applies to the business of any hotel, where all the following conditions are fulfilled, namely:

(i) the business of the hotel is not formed by the splitting up, or the reconstruction, of a business already in existence or by the transfer to a new business of a building previously used as a hotel or of any machinery or plant previously used for any purpose;

(ii) the business of the hotel is owned and carried on by a company registered in India with a paid-up capital of not less than five hundred thousand rupees;

(iii) the hotel is for the time being approved for the purposes of this subsection by the Central Government;

(iv) the business of the hotel starts functioning after the 31st day of March, 1981, but before the 1st day of April, 1991.

(4A) This section applies to the business of repairs to ocean-going vessels or other powered craft which fulfills all the following conditions, namely:

(i) the business is not formed by the splitting up, or the reconstruction, of a business already in existence;

(ii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose;

(iii) it is carried on by an Indian company and the work by way of repairs to ocean-going vessels or other powered craft has been commenced by such company after the 31st day of March, 1983, but before the 1st day of April, 1988; and

(iv) it is for the time being approved for the purposes of this Sub-section by the Central Government.

(5) The deduction specified in Sub-section (1) shall be allowed in computing the total income in respect of the assessment year relevant to the previous year in which the industrial undertaking begins to manufacture or produce articles or things, or to operate its cold storage plant or plants or the ship is first brought into use or the business of the hotel starts functioning or the company commences work by way of repairs to oceangoing vessels or other powered craft

(such assessment year being hereafter in this section referred to as the initial assessment year) and each of the seven assessment years immediately succeeding the initial assessment year:

Provided that in the case of an assessee, being a co-operative society, the provisions of this sub-section shall have effect as if for the words "seven assessment years", the words "nine assessment years" had been substituted:

Provided further that in the case of an assessee carrying on the business of repairs to ocean-going vessels or other powered craft, the provisions of this Sub-section shall have effect as if for the words "seven assessment years", the words "four assessment years" had been substituted:

Provided also that in the case of--

(i) an industrial undertaking which begins to manufacture or produce articles or things or to operate its cold storage plant or plants; or

(ii) a ship which is first brought into use; or

(iii) the business of a hotel which starts functioning,

on or after 1st day of April, 1990 but before the 1st day of April, 1991, provisions of this Sub-section shall have effect as if for the words "seven assessment years", the words "nine assessment years" had been substituted:

Provided also that in the case of an assessee, being a co-operative society, deriving profits and gains from an industrial undertaking or a ship or a hotel referred to in the third proviso, the provisions of that proviso shall have effect as if for the words "nine assessment years", the words "eleven assessment years" had been substituted.

(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 repairs 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 ship or the business of the hotel or the business of repairs to ocean-going vessels or other powered craft were the only source of income of the assessee during the previous years relevant to the initial assessment year and to every subsequent assessment year upto and including the assessment year for which the determination, is to be made.

(7) Where the assessee is a person other than a company or a cooperative society, the deduction under Sub-section (1) from profits and gains derived from an industrial undertaking shall not be admissible unless the accounts of the industrial undertaking for the previous year relevant to the assessment year for which the deduction is claimed have been audited by an accountant, as defined

in the Explanation below Sub-section (2) of Section 288, and the assessee furnishes, along with his return of income, the report of such audit in the prescribed form duly signed and verified by such accountant.

(8) Where any goods held for the purposes of the business of the industrial undertaking or the hotel or the operation of the ship or the business of repairs to ocean-going vessels or other powered craft are transferred to any other business carried on by the assessee, or where any goods held for the purposes of any other business carried on by the assessee are transferred to the business of the industrial undertaking or the hotel or the operation of the ship or the business of repairs to oceangoing vessels or other powered craft and, in either case, the consideration, if any, for such transfer as recorded in the accounts of the business of the industrial undertaking or the hotel or the operation of the ship or the business of repairs to ocean-going vessels or other powered craft does not correspond to the market value of such goods as on the date of the transfer, then, for the purposes of the deduction under this section, the profits and gains of the industrial undertaking or the business of the hotel or the operation of the ship or the business of repairs to ocean-going vessels or other powered craft shall be computed as if the transfer, in either case, had been made at the market value of such goods as on that date:

Provided that where, in the opinion of the AO, the computation of the profits and gains of the industrial undertaking or the business of the hotel or the operation of the ship or the business of repairs to oceangoing vessels or other powered craft in the manner hereinbefore specified presents exceptional difficulties, the AO may compute such profits and gains on such reasonable basis as he may deem fit.

Explanation.--In this sub-section, "market value", in relation to any goods, means the price that such goods would ordinarily fetch on sale in the open market.

(9) Where it appears to the AO that, owing to the close connection between the assessee carrying on the business of the industrial undertaking or the hotel or the operation of the ship or the business of repairs to ocean-going vessels or other powered craft to which this section applies and any other person, or for any other reason, the course of business between them is so arranged that the business transacted between them produces to the assessee more than the ordinary profits which might be expected to arise in the business of the industrial undertaking or the hotel or the operation of the ship or the business of repairs to ocean-going vessels or other powered craft, the AO shall, in computing the profits and gains of the industrial undertaking or the hotel or the ship or the business of repairs to ocean-going vessels or other powered craft for the purposes of the deduction under this section, take the amount of profits as may be reasonably deemed to have been derived therefrom.

(10) The Central Government may, after making such inquiry as it may think fit,

direct, by notification in the Official Gazette, that the exemption conferred by this section shall not apply to any class of industrial undertakings with effect from such date as it may specify in the notification.

Section 80HH of the IT Act reads as under:

80HH. Deduction in respect of profits and gains from newly established industrial undertakings or hotel business in backward areas.--(1) Where the gross total income of an assessee includes any profits and gains derived from an industrial undertaking, or the business of a hotel, to which this section applies, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to twenty per cent thereof.

(2) This section applies to any industrial undertaking which fulfills all the following conditions, namely:

(i) it has begun or begins to manufacture or produce articles after the 31st day of December, 1970 but before the 1st day of April, 1990, in any backward area;

(ii) it is not formed by the splitting up, or the reconstruction, of a business already in existence in any backward area:

Provided that this condition shall not apply in respect of any industrial undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such industrial undertaking as is referred to in Section 33B, in the circumstances and within the period specified in that section;

(iii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose in any backward area;

(iv) it employs ten or more workers in a manufacturing process carried on with the aid of power, or employs twenty or more workers in a manufacturing process carried on without the aid of power.

Explanation.--Where any machinery or plant or any part thereof previously used for any purpose in any backward area is transferred to a new business in that area or in any other backward area and the total value of the machinery or plant or part so transferred does not exceed twenty per cent of the total value of the machinery or plant used in the business, then, for the purposes of Clause (iii) of this sub-section, the condition specified therein shall be deemed to have been fulfilled.

(3) This section applies to the business of any hotel, where all the following conditions are fulfilled, namely:

(i) the business of the hotel has started or starts functioning after the 31st day of December, 1970 but before the 1st day of April, 1990, in any backward area;

(ii) the business of the hotel is not formed by the splitting up, or the

reconstruction, of a business already in existence;

(iii) the hotel is for the time being approved for the purposes of this subsection by the Central Government.

(4) The deduction specified in Sub-section (1) shall be allowed in computing the total income in respect of each of the ten assessment years beginning with the assessment year relevant to the previous year in which the industrial undertaking begins to manufacture or produce articles or the business of the hotel starts functioning:

Provided that,--

(i) in the case of an industrial undertaking which has begun to manufacture or produce articles, and

(ii) in the case of the business of a hotel which has started functioning, after the 31st day of December, 1970, but before the 1st day of April, 1973, this subsection shall have effect as if the reference to ten assessment years were a reference to ten assessment years as reduced by the number of assessment years which expired before the 1st day of April, 1974.

(5) Where the assessee is a person other than a company or a cooperative society, the deduction under Sub-section (1) shall not be admissible unless the accounts of the industrial undertaking or the business of the hotel for the previous year relevant to the assessment year for which the deduction is claimed have been audited by an accountant as defined in the Explanation below Sub-section (2) of Section 288 and the assessee furnishes, along with his return of income, the report of such audit in the prescribed form duly signed and verified by such accountant.

(6) Where any goods held for the purposes of the business of the industrial undertaking or the hotel are transferred to any other business carried on by the assessee, or where any goods held for the purposes of any other business carried on by the assessee are transferred to the business of the industrial undertaking or the hotel and, in either case, the consideration, if any, for such transfer as recorded in the accounts of the business of the industrial undertaking or the hotel does not correspond to the market value of such goods as on the date of the transfer, then for the purposes of the deduction under this section, the profits and gains of the industrial undertaking or the business of the hotel shall be computed as if the transfer, in either case, had been made at the market value of such goods as on that date:

Provided that where, in the opinion of the AO, the computation of the profits and gains of the industrial undertaking or the business of the hotel in the manner hereinbefore specified presents exceptional difficulties, the AO may compute such profits and gains on such reasonable basis as he may deem fit.

Explanation.--In this sub-section, "market value" in relation to any goods means

the price that such goods would ordinarily fetch on sale in the open market.

(7) Where it appears to the AO that, owing to the close connection between the assessee carrying on the business of the industrial undertaking or the hotel to which this section applies and any other person, or for any other reason, the course of business between them is so arranged that the business transacted between them produces to the assessee more than the ordinary profits which might be expected to arise in the business of the industrial undertaking or the hotel, the AO shall, in computing the profits and gains of the industrial undertaking or the hotel for the purposes of the deduction under this section, take the amount of profits as may be reasonably deemed to have been derived therefrom.

(8)....

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

(9A) Where a deduction in relation to the profits and gains of a small-scale industrial undertaking to which Section 80HHA applies is claimed and allowed under that section for any assessment year, deduction in relation to such profits and gains shall not be allowed under this section for the same or any other assessment year.

(10) Nothing contained in this section shall apply in relation to any undertaking engaged in mining.

(11) For the purposes of this section, "backward area" means such area as the Central Government may, having regard to the stage of development of that area, by notification in the Official Gazette, specify in this behalf:

Provided that any notification under this sub-section may be issued so as to have retrospective effect to a date not earlier than the 1st day of April, 1983.

33. In our considered view, the non obstante clause in Section 80I(6) cannot therefore, restrict Sections 80A(2) and 80B(5), which are declaratory in nature. In this regard, the matter has been firmly settled by the apex Court in *Synco Industries Ltd. Vs. Assessing Officer, Income Tax, Mumbai and Another*, and in the following decisions:

(i) *Commissioner of Income Tax Vs. Rockweld Electrodes India Ltd.*,

(ii) *CIT v. Rambal (P) Ltd.* (supra); and

(iii) *Commissioner of Income Tax Vs. Mohd. Amin Tyamboo*,

34. In the case of *CIT v. Rockweld Electrodes India Ltd.* (supra) it has been held that the definition of "gross total income" contained in Section 80B(5) of the Act, clearly shows the intention of Parliament that Section 72 has to be applied before

the total income of an assessee is determined, that is, before the deductions under Chapter VI-A are allowed. Hence, the set off of deduction u/s 80J should be made after setting off business losses of earlier years which have been carried forward.

35. In CIT v. Rambal (P) Ltd. (supra) it has been held that if the total income as computed u/s 80B(5) is nil, then no relief can be granted u/s 80I in view of limitations contained in Section 80A(2) which lays down that the aggregate amount of deductions under Chapter VI-A shall not, in any case, exceed the gross total income of the assessee. Thus, 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 as that will clearly exceed the gross total income of the assessee.

36. In the case of CIT v. Mohd. Amin Tyamboo (supra) it has been held that "total income" chargeable u/s 5 of the Act, is not the same as "gross total income" defined in Section 80B(5).

37. A perusal of Section 80B(5) of the Act shows that the total income of the assessee is to be computed after specified deductions in Sections 80C to 80U is not to exceed the gross total income. The mandate contained in Sections 80A and 80B(5) requires that gross total income should be computed after setting off the brought forward business loss and unabsorbed depreciation etc. for allowing of the deductions specified under Sections 80C to 80U. It is only then that from the resultant positive income of the previous year, if any, that deficiencies of business loss can be made.

38. The findings of the Tribunal are, therefore, erroneous; it has misdirected itself in placing reliance upon the case of Canara Workshops" case (supra), which is not applicable to the facts of the instant case at all. Therein only the procedure as to how the eligible profits u/s 80E will be computed has been considered. It may be noted here that the Finance (No. 2) Act, 1967 w.e.f. 1st April, 1968 transported the subject matter hitherto covered by Section 80E to Section 80I. This case does not at all deal with the issue of applicability of Section 80A as has been done by the AO and the CIT(A). Reliance in this regard has been placed upon following decisions:

1. Commissioner of Income Tax Vs. Balmer Lawrie and Co. Ltd.,
2. CIT v. Visakha Industries Ltd. (2001) 171 CTR 300 (AP); and
3. Commissioner of Income Tax Vs. R.B. Jodha Mal Bishan Lal,

39. The cases of Balmer Lawrie (supra), Visakha Industries (supra) and R.B. Jodha Mai Bishan Lal (supra) have been referred by the learned Counsel for the respondent for the purpose of liberal construction but in the instant case, specific manner has been provided in the various provisions referred by the learned Counsel for the appellant, hence the ratio laid down in the aforesaid cases cited by the learned Counsel for the respondent is not applicable to the facts of the

present case.

40. In the present case, the Tribunal has failed to consider this aspect, since the gross total income in the instant case was shown nil, hence there was no question of permitting deduction to the assessee in view of the provisions contained in Sections 80A(1) and 80A(2). The findings of the Tribunal which are based upon its order referred in ITA No. 571/All/1995 (asst. yr. 1988-89); ITA Nos. 898 and 1837/All/1996 (asst. yr. 1993-94 and asst. yr. 1994-95) against which appeal has been preferred is without reason, hence, the contention of learned Counsel for the respondent that the gross total income is to be computed first u/s 80I(6) and thereafter 20 per cent profits are to be adjusted in the gross total income from the industry, which was earning profits and only then computation according to the procedure prescribed u/s 80A would come into play does not appear to be correct.

41. We have already considered the case of Canara Workshops (supra) referred to in this regard in the order of CIT(A). The cases of CIT v. Balmer Lawrie and Co. Ltd. (supra), CIT v. Visakha Industries Ltd. (supra) and CIT v. R.B. Jodha Mai Bishan Lal (supra) cited by the respondent's counsel are not relevant for the purpose of manner of computation specifically provided in the section referred above. These cases have been placed before us for taking a liberal interpretation in the matter. We do not consider it appropriate that any liberal consideration of the provisions should be taken where a specific manner is provided and strict interpretation is required. Sections 80A(1), 80A(2), 80B(5), 80I and 80HH reflect the intention of legislature and the assent of income by the Department according to it is correct.

42. The aim and object of the IT Act, 1961 is to consolidate and amend the law relating to the Income Tax and super-tax, further Chapter VI-A of the Act deals with the deduction to be made in computing total income.

43. Section 80A(1) which falls in Chapter VI-A of the Act provides in respect to computing the total income of assessee, there shall be allowed from his gross total income, in accordance with and subject to the provision of this chapter, the deductions specified in Sections 80C to 80U.

44. Section 80AB of the Act starts with the words "where any deduction is required to be made or allowed under any section of this chapter". This would include Section 80HHD to Section 80U, moreover as the Section 80AB further provides that "notwithstanding anything contained in that section", so Section 80A read as the Section 80B(5) will prevail over other provisions in Chapter VI-A of the Act.

45. In view of abovesaid facts the provisions as provided u/s 80A of the Act will have an over riding effect over all other sections in the Chapter VI-A of the Act as per the intention of the legislature. Thus, Section 80HH or any other section upto Section 80U in Chapter VI-A would be governed by Section 80A of the Act as Section 80AB makes it clear that the computation of income has to be in

accordance with the provisions of the Act. As such, if the income has to be computed in accordance with the provisions of the Act, then not only profits but also losses have to be taken into consideration.

46. Further, as Section 80HH to Section 80U under Chapter VI-A are not independent and shall be governed by the provisions of Section 80A r/w Section 80B(5) of the Act, thus, the losses of other units of the assessee in the present case were to be set off against the profit earned by the assessee from other units.

47. In the case of Income Tax Officer, Bangalore Vs. Induflex Products (P) Ltd., , the apex Court has held thus:

It is no doubt true that the term "profit" implies positive profit which has to be arrived at after taking into consideration the profit earned from export of both self-manufactured goods and the trading goods and the profits and losses in both the trades, have, thus, to be taken into consideration.

48. In the case of P.R. Prabhakar Vs. Commissioner of Income Tax, Coimbatore, , Hon"ble Supreme Court has held as under:

The expression "income arising out of business of export" brings" within its sweep not only the export of any goods or merchandise manufactured or processed by the assessee but also of trading goods. Parliament, therefore, intended to provide incentive when a positive profit is earned by an exporter.

49. For the foregoing reasons, the substantial questions of law raised by the Revenue Department in the present case are answered in affirmative and are accepted and the appeal filed by the appellant (IT Department) is allowed and the order dt. 31st March, 2003 passed by the Tribunal is set aside.