* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA No. 165/2001**

Reserved on:13th October, 2014

% Date of Decision: 19th January, 2015

COMMISSIONER OF INCOME TAX ....Appellant

Through Mr. N.P. Sahni, Sr. Standing Counsel and Mr. Nitin Gulati, Jr. Standing Counsel.

Versus

M/S KELVINATOR OF INDIA LTD. …Respondent

Through Mr. Ajay Vohra, Sr. Advocate with Ms. Kavita Jha and Mr. Vaibhav Kulkarni, Advocates.

ITA No. 170/2001

COMMISSIONER OF INCOME TAX ....Appellant

Through Mr. N.P. Sahni, Sr. Standing Counsel and Mr. Nitin Gulati, Jr. Standing Counsel.

Versus

M/S KELVINATOR OF INDIA LTD. …Respondent

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CORAM:
HON'BLEMR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J.

Revenue has preferred these two appeals under Section 260A of the Income Tax Act, 1961 (Act, for short) in the case of Kelvinator of India Ltd. (now known as Whirlpool India Ltd.). These appeals pertain to assessment years 1989-90 and 1990-91. The orderimpugned, common to both appeals, passed by the Income Tax Appellate Tribunal (Tribunal, for short) is dated 30th August, 2000.

2. By order dated 6th December, 2001, the following substant questions of law were framed:-

ITA 170/2001 (Assessment Year 1989-90)

> "(A) Whether ITAT is correct in law in deleting the addition of Rs.7,28,400/- being the guest house expenses relying on its earlier order when the same are not accepted by the Department and the same expenditure is clearly disallowable u/s 37(4) of the Act?
>
> (B) Whether ITAT was correct in law in taking into consideration interest on FDR, Misc. Receipts and interest from customers on delayed payments for the purpose of Section 80-I of the Act?
>
> (C) Whether ITAT was correct in law in holding that the deduction u/s. 32AB was available on the profits of industrial undertaking and not on the aggregate profit of the assessee?"

ITA 165/2001 (Assessment Year 1990-91)

> "(A) Whether ITAT is correct in law in deleting the addition of Rs.51655/- being the depreciation on guest house when the same is clearly disallowable u/s 37(4) of the Act?
>
> (B) Whether ITAT is correct in confirming the order of CIT(A) and thereby allowing the expenditure of Rs.1,88,610/- incurred by the assessee on rent and repairs of the Guest House when the same is clearly disallowable u/s 37(4) of the Act?
>
> (C) Whether ITAT is correct in law in taking into consideration interest on FDRs. Misc. Receipts, interest from customers on delayed payments and dividend for the purpose of Section 80-I of the Act?
>
> (D) Whether ITAT was correct in law in taking into consideration amount of interest on debentures, loans and inter corporate deposits and dividend for the purpose of computing the deduction u/s. 32AB?"

3. Questions no. (A) and (B) in ITA 170/2001 and question (A), (B) and (C) in ITA 165/2001 were disposed of and decided by order dated 14th February, 2014, in the following manner:-

> "The learned counsel for the parties submits that the first two questions framed in the present appeals are covered. So far as question No.1 i.e. the deductibility of guest house expenses under Section 37(4) is concerned it is not disputed that the matter is covered by the decision of the Supreme Court in Britannia Industries Ltd. vs. CIT and Ors., (2005) 278 ITR 546 (SC). The question is accordingly answered in terms of the said decision, in favour of the revenue and against the assessee.
>
> Question No.3 in ITA 165/2001 corresponds to question No.2 in ITA 170/2001. This pertains to permissibility of interest on FDR, on miscellaneous interest, on delayed payments and their eligibility under section 80I of the Act. It is not disputed that so far as the first limb i.e. interest received from customers on account of late payment beyond the credit period goes, the matter is covered against the revenue in the decisions of this Court reported as CIT V. Advance Detergents Ltd., (2011) 339 ITR 81 and CIT V. Jackson Engineers Ltd., (2012) 341 ITR 518. Accordingly, it is held in favour of the assessee that such interest received from customers due to late payment beyond credit period is permissible as a business income and entitled to benefit under section 80(I). As far as the second limb i.e. interest on FDR, bank guarantees, deposits and miscellaneous receipts are concerned, the benefit of section 80I would be not available in view of the conclusion in CIT V. Shri Ram Honda Power Equipment and Ors., (2007) 289 ITR 475. The assessee would be entitled to clam a limited benefit of the expenditure of net interest by application of principles/conclusions No.s 8 and 9 in Shri Ram Honda Power Equipment and Ors. (supra). The matter is remitted to the AO to this limited extent to enable the assessee to prove the nexus as stipulated in Shri Ram Honda Power Equipment and Ors. (supra). The question of law is accordingly answered in favour of the revenue but partly granting the relief to the extent indicated to the assessee by limited remand.
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> The surviving question for consideration is as to the permission of deduction under section 32AB to the assessee in this case."

4. In terms of the aforesaid order, question A in ITA 170/2001 and questions A & B in ITA No. 165/2001 have been decided in favour of the appellant Revenue and against the respondent assessee. Question B in ITA 170/2001 and question C in ITA No. 165/2001 have been partly decided in favour of the respondent assessee but by observing that assessee would be entitled to netting of the interest paid from interest accrued on application of principles/conclusions nos. 8 and 9 in the case of ***CIT versus Shri Ram Honda Power Equipment &Ors.***, (2007) 289 ITR 475. An order of remand stands passed.

5. Thus, what remains to be examined and decided is question C in ITA No. 170/2001 relating to assessment year 1989-90 and question D, in ITA No. 165/2001 relating to assessment year 1990-91. However, we notice that question C in ITA 170/2001 also arises for consideration in ITA 165/2001 and it appears that by mistake the said question has not been framed in the latter ITA. Accordingly, we deem it appropriate to frame fourth substantial question in ITA 165/2001 relating to assessment year 1989-90 which will read as under:

> "(E) Whether ITAT was correct in law in taking into consideration amount of interest on debentures, loans and inter corporate deposits and dividend for the purpose of computing the deduction u/s. 32AB?"

6. The questions of law which have to be answered relate to interpretation under Section 32AB of the Act as it then existed. For the sake of convenience, we are reproducing the relevant portion of the said provisions as it was applicable in the assessment year 1989-

90 and 1990-91. The, amendments effective from 1st April, 19 have been indicated in italics:

> "32AB. Investment deposit account.--(1) Subject to the other provisions of this section, where an assessee, whose total income includes income chargeable to tax under the head "Profits and gains of business or profession", has, out of such income,--
>
> (a) deposited any amount in an account (hereafter in this section referred to as deposit account) maintained by him with the Development Bank before the expiry of six months from the end of the previous year or before furnishing the return of his income, whichever is earlier; or
>
> (b) utilised any amount during the previous year for the purchase of any new ship, new aircraft, new machinery or plant, without depositing any amount in the deposit account under clause (a),
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> in accordance with, and for the purposes specified in a scheme (hereafter in this section referred to as the scheme) to be framed by the Central Government, or if the assessee is carrying on the business of growing and manufacturing tea in India, to be approved in this behalf by the Tea Board, the assessee shall be allowed a deduction (such deductrion being allowed before the loss, if any, brought forward from earlier years is set off under section 72) of--
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> (i) a sum equal to the amount, or the aggregate of the amounts, so deposited and any amount so utilised; or
>
> (ii) a sum equal to twenty percent. of the profits of *eligible* business or profession as computed in the accounts of the assessee audited in accordance with sub-section (5), whichever is less.
>
> Provided that where such assessee is a firm, or any association of persons or any body of individuals, the deduction under this section shall not be allowed in the computation of the income of any partner, or, as the case may be, any member, of such firm, association of persons or body of indiviudals.
>
> *(2) For the purposes of this section,--*
>
> *(i) "eligible business or profession" shall mean business or profession, other than--*
>
> *(a) the business of construction, manufacture or*

production of any article or thing specified in the list in t Eleventh Schedule carried on by an industrial undertaking, which is not a small-scale industrial undertaking as defined in section 80HHA;

(b) the business of leasing or hiring of machinery or plant to an industrial undertaking, other than a small-scale industrial undertaking as defined in section 80HHA, engaged in the business of construction, manufacture or production of any article or thing specified in the list in the Eleventh Schedule;

(ii) "new ship" or "new aircraft" includes a ship or aircraft which before the date of acquisition by the assessee was used by any other person, if it was not at any time previous to the date of such acquisition owned by any person resident in India ;

(iii) "new machinery or plant" includes machinery or plant which before the installation by the assessee was used outside India by any other person, if the following conditions are fulfilled, namely:--

(a) such machinery or plant was not, at any time previous to the date of such 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 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 ;

(iv) "Tea Board" means the Tea Board established under section 4 of the Tea Act, 1953 (29 of 1953) ;

(3) [The profits of eligible business or profession of an assessee for the purposes of sub-section (1) shall,--

(a) in a case where separate accounts in respect of such

eligible business or profession are maintained][1], be an amou arrived at after deducting an amount equal to the depreciation computed in accordance with the provisions of sub-section (1) of section 32 from the amounts of profits computed in accordance with the requirements of Parts II and III of the Sixth Schedule to the Companies Act, 1956 (1 of 1956), as increased by the aggregate of—

(i) the amount of depreciation ;

(ii) the amount of income-tax paid or payable, and provision therefor ;

(iii) the amount of surtax paid or payable under the Companies (Profits) Surtax Act, 1964 (7 of 1964) ;

(iv) the amounts carried to any reserves, by whatever names called ;

(v) the amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities ;

(vi) the amount by way of provision for losses of subsidiary companies ; and

(vii) the amount or amounts of dividends paid or proposed

if any debited to the profit and loss account ; and as reduced by any amount or amounts withdrawn from reserves or provisions, if such amounts are credited to the profit and loss account ; and

(b) in a case where such separate accounts are not maintained or are not available, be such amount which bears to the total profits of the business or profession of the assessee after allowing depreciation in accordance with the provisions of sub-section (1) of section 32, the same proportion as the total sales, turnover or gross receipts of the eligible business or profession bear to the total sales, turnover or gross receipts of the business or profession carried on by the assessee.

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[1] Substituted by the Finance Act, 1989 w.e.f. 1.4.1991 with the following: - "The profit of business or profession of an assessee for the purpose of sub-section (1) shall";

> (5) The deduction under sub-section (1) shall not be admissil unless the accounts of the business or profession of the assessee 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:
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> Provided that in a case where the assessee is required by or under any other law to get his accounts audited, it shall be sufficient compliance with the provisions of this sub-section if such assessee gets the accounts of such business or profession audited under such law and furnishes the report of the audit as required under such other law and a further report in the form prescribed under this sub-section.
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> xxxxxxxxx"

7. Sub-section (1) of Section 32AB of the Act, stipulates the conditions when benefit of the said Section is available to the assessee; (i) the assessee should have income chargeable under the head "profits and gains from business or profession" and out of such income should have (a) deposited an amount in an account maintained with the development Bank within the stipulated time; or (b) utilized an amount during the previous year for purchasing new ship, aircraft or machinery and plant without depositing any amount under clause (a). The said sub-section, thus, prescribes pre-conditions for claiming the deduction under Section 32AB of the Act. Sub-section (1) of Section 32AB, then stipulates that the deduction allowed would be equal to (i) the sum or aggregate thereof so deposited or the amount so utilized; or (ii) equal to 20% of profits of eligible business or profession as computed in the accounts of the assessee audited in accordance with sub-section (5), whichever is less. Therefore, quantum under (i) and (ii) have to be quantified and the deduction under section 32AB is allowed on lower of the two

amounts. The latter portion, therefore, quantifies the amount deduction to be claimed under Section 32AB of the Act. Sequitur, is that quantum of deduction under the section would never exceed 20% of the profits of eligible business or profession.

8. In the present case, we are concerned with clause (ii) of Section 32AB(1),i.e. computation of 20% of the profits of eligible business or profession and the said profits audited in accordance with sub-section (5). The expression 'eligible business or profession' has been defined in sub-section (2) to Section 32AB, to exclude businesses mentioned in sub-clauses (a) and (b) to sub-section(2).

9. There is no dispute that the assessee was engaged in eligible business. In fact the respondent assessee was a multi-product company, having following separate divisions:-

1. Refrigeration
2. Compressor
3. lamination
4. control
5. control tool room
6. scooter
7. moped
8. pressing
9. cash register

The cash register business/division was not an eligible business under section 32AB, thus, profits from the said business would not be eligible for the purposes of computation of deduction.Other divisions/businesses were eligible businesses.

10. In the assessment year 1989-90, the assessee had claim deduction under Section 32AB at Rs.3,95,85,158/- as the sum equivalent to 20% of profits earned from the eligible business. The aforesaid computation was made after taking into account only four eligible business units which had earned profits; the eligible businesses, which had suffered losses, were ignored and profits and losses were not aggregated. The Assessing Officer recomputed the deduction under Section 32AB to Rs.2,15,83,649/- by taking into account aggregate of profits earned by all businesses units, thus meaning that losses suffered in five other business units including the non-eligible business unit, i.e. cash register unit, were also taken into consideration. The Assessing Officer held that the losses suffered in the five unit including cash register division should be also set off and reduced from the profits earned from the four eligible units for computing the deduction.

11. Similarly, in the assessment year 1990-91, deduction under Section 32AB of the Act had been claimed at Rs.2,97,37,455/- being 20% of the profit of Rs.14,86,87,276/- earned in three units and ignoring the losses suffered in the remaining five eligible divisions. The Assessing officer, disagreeing, held that the aggregate of all the eligible businesses should be taken into consideration and, therefore, losses suffered in the five divisions (he excluded cash register division) should be reduced from the profits earned by the three eligible divisions. He recomputed the deduction claimed under Section 32AB of the Act at Rs.1,20,53,907/.

12. In the first appeal, the assessee succeeded on the question of aggregation of profits. Appropriate in this regard would be to

reproduce the findings recorded by Commissioner of Income T (Appeals) in respect of assessment year 1989-90, which reads:

> "9.3 I have carefully considered the submissionsmade on behalf of the appellant. I find considerable merit in the arguments raised
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> Sub-section (1) of section 32AB clearly specifies that the deduction to be allowed will either be of a sum equal to the amount or the aggregate of the amounts deposited with I.D.B.I. and utilised for purchase of new machinery etc. or a sum equal to 20% of the profits of eligible business or profession as computed in the accounts of the assesses. Sub-section (3) as existed before its amendment by Finance Act, 1989, w.e.f. 1.4.1991 provides as to how the profits of eligible business or profession have to be arrived at in a situation where separate accounts in respect of such eligible business are maintained as well as a case where separate accounts are not maintained or are not available. It would thus be seen that the quantification of the deduction has to be done with reference to the profits of eligible business or profession. It logically follows that no deduction u/s 32AB is to be allowed where there is no profit in an eligible business or there is a loss. It will be clear from the language of section 32AB that there is no warrant for aggregating the profits and losses of different businesses carried on by an appellant, as has been done by the assessing officer. The issue presently in appeal before us actually covered by clarifications issued by the Senior Departmental Officers in a session with ASSOCHAM. It will be useful to quote the relevant question and the answer:-
>
> Q. Where an aisessee operates a single business, 32AB deduction is available in a year in which profit ie earned. No allowance is made in a year of loss. In other words, the worst that can happen to an industry is a zero allowance in year of loss. In case of a multibusiness industry where profits are earned in some businesses and losses in others, the profits of eligible business would be entitled to the allowance while the losing businesses will be denied the incentive.
>
> Thisshould be made abundantly clear, sothat there is no attempt at aggregating and offsetting profits and losses of different businesses carried on by the same assesses.
>
> ANS. In case of so multi business assesses, bothprofits and losses in different units are to be considered to ensure that the claim made by the aseessee in

> respect of the profit earning unit is limited to and is not in excess of the overall profits of the business. If there r.re two units of businesses A & B run by an aseessee, A earning a profit of Rs.100 and B incurring loss of Rs.85, the maximum amount of claim that can be made by the assessee will be limited to Rs.15/-(100 - 85) , notwithstanding a A's entitlement to 20 (20% of 100)."
>
> 9.3 It will be observed from a perusal of theabove clarification that if the view taken by the assessing officer was to be accepted than the permissible deduction u/s 32AB would have been stated to be 20% of Rs.15 'tm the abovementioned illustruation."
>
> 9.4 having regard to the aforementioned facts and circumstances I hold that that the assessing officer was not justified in his action in restricting the deduction u/s 32AB at 2,15,83,649 by taking the aggregate of profits/losses for all businesses including the non-eligible business of cash register division. He is directed to work out the deduction u/s 32AB with reference to the profits of eligible business on the lines mentioned in the preceding paragraphs."

13. The Tribunal in the impugned order has affirmed the said findings.

14. We are in agreement with the aforesaid finding and would like to come back to the legal provision i.e. section 32AB of the Act, as it then existed. Reference to sub-section (3) to Section 32AB would be illuminating. The said sub-section uncertainly and clearly postulates that profits of eligible business of respondent assessee should be separately computed. In case separate accounts in respect of eligible business were maintained, clause (a) to Section 32AB(3) was applicable and clause (b) to Section 32AB(3) was applicable when independent accounts were not maintained. The present case, it is not disputed that separate accounts for each eligible business was maintained. In sub-section (3) to Section 32AB, the Legislature had consciously and deliberately used the expression 'profits of eligible

business or profession' and clause (a) or (b) would apply to compu such eligible profit.The expression 'eligible business or profession' was defined in sub-section (2). Under sub-section (5) to Section 32AB, the assessee was required to get the accounts audited by an accountant defined in Explanation below Section 288(2) and furnishes a report of audit in the prescribed form and verified by the accountant.

15. When we collate and harmoniously read different sub-sections, it is clear that special deduction under Section 32AB has to be quantified under sub-section (1) clause (b)(ii) on a sum equal to 20% of the profits of eligible business. The assessee entitled to compute the deduction under the said clause with reference to the profits earned by the eligible business. The section did not have any reference to the losses suffered or aggregation of profits and losses from distinct and separate eligible businesses. We have already interpreted sub-section (1) and observed that it consists of two parts. First part relates to eligibility requirement that an assessee must have income chargeable under the head 'income from profits and gains from business or profession' and from the said income, the assessee should have under clause (b) purchased any new ship, new aircraft, new machinery or plant. Quantum of the said deduction was dependent upon the amount spent on purchase of new ship, new aircraft, new machinery or plant, but the quantum could not exceed 20% of the profits from the eligible business or profession. The quantum of profits refers to the specific eligible business and profession and did not postulate aggregation or setting off of losses in the eligible business or profession.

16. Similar issue and contention was examined by the Supreme Court in ***CIT vs. Canara Workshops (P) Ltd.*** (1986) 161 ITR 320 (SC). In the said case, the assessee had claimed deduction under Section 80E of the Act on manufacture of springs at Mangalore and Nagpur plant and manufacture unit of hubs and brake drums. However, the assessee had not taken into account,the losses suffered in the alloy steel industry. The question of aggregation or setting off of losses suffered in the alloy steel industry from the profits of spring units and manufacture of hubs and brake drums, came up for consideration before the Supreme Court. The issue was decided in favour of the assessee, in the following words:

> "It is obvious from the object underlying the enactment of section 80E and the terms in which it provides relief that the intention of Parliamentin enacting the provision was to encourage the setting up of industries concerned with the generation or distribution of electrical or any other energyand the construction, manufacture or production of articles or thingsspecified in the list in the Fifth Schedule. The intention goes further. Bymaking a provision for a rebate year after year on the industry makingprofits and gains during the year, the intention also was to provide anincentive for promoting efficiency in the industry. It is clear that thebenefit was directed to the setting up and also the efficient working of thepriority industries. How is the benefit to be worked out ? First, it mustbe a company to which section 80E applies, that is to say, a companywhich satisfies the requirements of sub-section (2) of section 80E. Second,the total income as computed in accordance with the Income-tax Act,1961, without taking into regard the provisions of section 80E, shouldinclude profits and gains attributable to the business or the industry mentioned in the section. Third, from the profits and gains attributable tosuch business or industry, a deduction has to be allowed of an amount equalto eight per cent. of such profits and gains and effect must be given to thisdeduction when computing the total income of the company.
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> The assessee in this case carries on two industries, both of which findplaces in the list in the Fifth Schedule and can, therefore, be described aspriority industries. It is

> urged by the learned Additional Solicitor-General, appearing for the Revenue, that on a true application of section 80E, the profit in the industry of automobile ancillaries must bereduced by the loss suffered in the manufacture of alloy steel, and reference has been made to a number of cases to which we shall presentlyrefer. After giving the matter careful consideration, we do not find itpossible to accept the contention. It seems to us that the object in enactingsection 80E is properly served only by confining the application of theprovisions 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. Itwas never intended that the merit earned by such industry should be lostor diminished because of a loss suffered by some other industry. It makes no difference that the other industry is also a priority industry. The co-existence of two industries in common ownership was not intended by 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. Toconstrue section 80E to mean that you must determine the net result of all the priority industries and then apply the benefit of the deduction to the figure so obtained will be, in our opinion, to undermine the object of the section. An example will illustrate this. An industry entitled to the benefit of section 80E could have its profits wholly wiped out on adjustment against a heavy loss suffered by another industry, and,thus, be totally denied the relief which should have been its due by virtueof its profits. In our opinion, each industry must be considered on its own working only when adjudging its title to the deduction under section 80E.It cannot be allowed to suffer because it keeps company with some other industry in the hands of the assessee. To determine the benefit under section 80E on the basis of the net result of all the industries owned by the assessee would be, moreover, to shift the focus from the industry to the assessee. We hold that in the application of section 80E, the profits and gains earned by an industry mentioned in that section cannot be reduced by the loss suffered by any other industry or industries owned by the assessee."

17. The aforesaid paragraph would indicate that alloy steel industry was also a priority industry but this did not compel the Supreme Court to follow the principle of aggregation. It was observed that the provisions did not intend that the loss suffered in one priority industry

should be set off from the profits earned from another priori industry, on which deduction was allowable. The assessee had the option to only take into account the profits making priority industry to claim deduction under Section 80E. The stance and stand of the assessee was, therefore, affirmed. The said principle would be equally and squarely applicable to section 32AB of the Act, as it then existed. An identical controversy in relation to Section 32AB of the Act arose in the ***Commissioner of Income Tax vs. Pudumjee Agro Industries Ltd.*** (2006) 285 ITR 301 (Bom), and the plea of the Revenue was rejected, inter alia, observing:-

> "11. At the relevant time, deduction under Section 32AB(1) of the Act was available to an assessee who had income chargeable under the head "Profit and gains of business or profession" and out of the said business income, the assessee had either deposited certain amount with the industrial bank of India or utilised the business income for acquisition of certain assets before the expiry of 6 months from the end of the previous year or before furnishing the return of income whichever is earlier. On fulfilment of the above conditions, the assessee was entitled to deduction of a sum equal to the amount deposited/utilised or a sum equal to 20% of the profits of eligible business or profession computed under Section 32AB(3), whichever is lower.
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> 12. Section 32AB(2) of the Act inter alia sets out the meaning of the word "eligible business or profession" used in Section 32AB(1) and Section 32AB(3) of the Act sets out separate methods for determining the profits of eligible business or profession in cases where the accounts of the eligible business are maintained separately and in cases where the accounts of the eligible business are not maintained separately. Section 32AB(3)(a) deals with determination of the profits of the eligible business or profession where the accounts are maintained separately and Section 32AB(3)(b) deals with the determination of the profits of eligible business where accounts are not maintained separately.
>
> Thus, Section 32AB(3)(a) of the Act deals with each eligible business separately and the profits of each eligible

business has to be determined by increasing or decreasing the profits of each eligible business computed separately under the provisions of the Companies Act, 1956. The increases and decreases permitted under Section 32AB(3)(a) do not contemplate setting off the loss of another eligible unit. Therefore, in the absence of any provision for setting off the loss suffered by one eligible business from the profits of another eligible business for the purpose of deduction under Section 32AB(1) of the Act, the Tribunal was justified in upholding the claim of the assessee.

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15. There can be no dispute that where an assessee carried on an eligible business and a non eligible business and the assessee had maintained accounts of the above two businesses separately and there was profit in the eligible business and loss in the non eligible business, then for the purpose of deduction under Section 32AB(1) of the Act, the profits of the eligible business alone would be considered without deducting therefrom the loss suffered in the non eligible business. If the loss suffered in the non eligible business is to be ignored for determining the profits of the eligible business, then, there is no reason as to why the loss suffered by one eligible business should not be ignored from the profits of the other eligible business under Section 32AB(3)(a) of the Act. In other words, where the accounts of each of the eligible business are maintained separately, then the profits of each of the eligible businesses for the purpose of deduction under Section 32AB(1) has to be determined separately under Section 32AB(3)(a) of the Act and merely because there is loss suffered by one eligible business, it cannot be said that the said loss is to be set off from the profits of the other eligible business.

16. It is pertinent to note that by Finance Act, 1989 the concept of eligible business and determination of profits of eligible business whose accounts have been maintained separately have been done away with prospectively with effect from 1/4/1991. As a result from 1/4/1991, maintaining separate accounts has no relevance for the purpose of deduction under Section 32AB(1) of the Act and what is relevant from 1/4/1991 is the profits of business or profession of an assessee and not the profits of each business of the assessee. Therefore, for the AY 90-91 with which we are concerned in this appeal, the deduction under Section 32AB(1) of the Act in respect of the profits of the

> paper division has to be determined from the profits of the paper division as determined under Section 32AB(3)(a) of the Act without setting off the loss suffered by the agro division.
>
> 17. It is true that under Section 70 of the Act, while determining the total income chargeable to tax under the head "profits and gains of business", the loss from the agro division has to be set off against the profits of the paper division. However, the said set off is not relevant for the purpose of computing 20% deduction under Section 32AB(1) of the Act, in view of the specific provisions contained in Section 32AB(3)(a) of the Act for determining the profits of each eligible business of the assessee."

18. The aforesaid paragraphs refer to the amendments made by Finance Act, 1989 applicable from 1st April, 1991. With effect from the said date, the concept of eligible business referred to in Section 32AB was negated. With effect from 1st April, 1991, the provisions of Section 32BA will have to be read and interpreted in light of the said amendments. However, for the assessment years in question under the applicable provisions only the profits of the eligible business can be taken into consideration for computing the deduction under Section 32AB of the Act and aggregation will not be permissible. Accordingly, Question C in ITA No. 170/2001 and Question E in ITA 165/2001 are decided in favour of the assessee and against the Revenue.

19. This brings us to the question D in ITA 165/2001. The relevant facts which are found in the assessment order are that the assessee for the purpose of computation of profits earned by eligible business under Section 32AB had included the following incomes:

Schedule – 'K'

Other Income	(Rs.in lacs)
Miscellaneous Income	52.56
Interest received (TDS Rs.102.87)	530.77
Dividend (TDS Rs.0.70)	3.01
Profit on sale of assets	2.74
Duty drawback and cash assistance	202.74
As per profit & Loss Account	791.82"

20. The Assessing Officer, during assessment proceedings, called upon the assessee to explain why the aforesaid incomes should not be shown under the head 'Other income' and excluded from the head 'income from business or profession' for the purpose of computing allowable deduction under Section 32AB of the Act. The assessee in response had submitted that they had computed the deduction under Section 32AB of the Act in accordance with Part II and III of Schedule VI of the Companies Act and other income should not be excluded from the business income of the assessee company while computing deduction under section 32AB. The Assessing Officer thereafter observed as under:

> "I have carefully examined the assessee's claim. As explained by the assessee's representative, the nature of the income as shown under the head other income is summarized as under:

I. Misc. Receipts	Rs.52,56,000/-	Which consists of insurance receipt on account of repairs, rebate on timely deposits of sales-tax, receipts on disposal of various scrap items, sale of tender forms and forfeiture of security deposit etc.
II. Interest on debentures /FD	Rs.20,775/-	Represents interest on investments
III. Interest from Banks/ other deposits	Rs.1,36,389/-	It represents interest on bank deposits which are compulsory required like margin money advance to supplier/telephone

		deptt. Etc. during the course business.
IV. Interest received from customers/Moped installments	Rs.4,43,11,016/-	This represents interest received from the customers in the ordinary course of business.
V. Interest loans inter corporate deposits	Rs.86,16,571/-	Represents interest on investment deposits with several companies made out of surplus fund of the Co.
VI. Dividend	Rs.3,01,460/-	Interest on shares of various companies
VII. Profit on sale of assets	Rs.2,73,537/-	Represents profit on sale of business assets.
VIII Duty draw back and cash assistance	Rs.2,02,74,000/-	Nature of assistance received in the export business.

I am unable to accept the assessee's contention that the total income shown under the head 'other income' should be assessed as the assessee's business income. On verification of the above details it may be appreciated income shown against item No. I, II, IV, VII and VIII have been earned in the ordinary course of business carried on by the assessee. However, the income from the remaining heads represents the receipt from the various investments. The assessee company itself has shown the dividend income and interest on debentures under the head income from other sources. The following income will therefore, be assessed under the head income from other sources:-

I.	Interest on debentures/F.D.	Rs.20,775
II.	Interest on loans/intercorporate Deposits	Rs.86,16,571
III.	Dividend	3,01,460
		89,38,806

As the above income is being assessed under the head 'income from other sources', the same is also required to be excluded from the total business income for the purpose of section 32AB of the I.T. Act."

21. The Commissioner of Income Tax (Appeals) held that the only profits of business and profession were to be considered for the purpose and the Assessing Officer was right in excluding non-

business income from business profit for computation for deducti under Section 32AB. However, he held that the Assessing Officer had erred in excluding Rs.1,84,80,973/- being interest offered for taxation for the assessment year 1989-90 and Rs.56,91,243/- being interest payable on convertible debentures for assessment year 1990-91, observing that the assessee had himself reduced these amounts and the Assessing Officer's action amounted to double reduction. The said claim of the assessee was factually correct.

22. Therefore, what was subject matter of the appeal before the Tribunal was only interest on debentures/fixed deposits of Rs.20,775/-, interest on loan/inter-corporate deposits of Rs.86,16,571/- and dividend of Rs.3,01,460/-, totaling Rs.89,38,806/-. The Tribunal in the impugned order decided the issue in favour of the assessee, inter-alia, observing that the issue was covered by finding of the tribunal in an appeal against the order under Section 263 of the Act relating to assessment year 1989-90, in which it was held as under:-

> "We are of the opinion that for the purpose of deduction u/s 32AB, the benefit of said section will be available to all business income from whatever source, other than those mentioned in sub-section (a)(b) of clause (1) of sub sec.(ii) of the said section. Therefore, the view of the CIT (A) that income from other sources will not be considered is not correct in the matter. As such for the purpose of deduction u/s 32AB, the profit of the eligible business are not to be computed in accordance with the provisions of the I.T. Act but are to be computed in accordance with the requirement of sixth schedule to the Companies Act, 1956. Similar view was taken by the Tribunal also in the case of Indian Transformers Ltd. vs. CIT reported in 58 TTJ page 654."

23. Copy of the order under Section 263 of the Act as well as findings or ratio recorded therein is not available before us. What has

been mentioned in the quoted portion above is that benefit of Secti 32AB would be available to income from eligible business i.e. income from whatever source other than those mentioned in sub-sections (a) and (b) of clause (i) to sub-section (2) to Section 32AB of the Act. Further, the deduction under the said section was to be computed in accordance with Schedule VI of the Companies Act.

24. Similar controversy had arisen before the Supreme Court in ***Apollo Tyres Limited vs. CIT*** *(2002)* 255 ITR 35 (SC) and was answered in the following manner:

> "The second question framed by us hereinabove arises for our consideration in the following factual background. The assessee-company in its books of account had shown certain sums of money representing "dividend" from units of the UTI and had included the said sums in the computation of its profit as income from "eligible business". It also claims that out of such income from "eligible business" it had purchased certain new machineries for its factory because of which it claimed a deduction of 20 per cent. of the said income as provided in section 32AB of the Income-tax Act. This claim of the company has been allowed by the Tribunal and confirmed by the High Court. The argument of the Revenue in this regard is that the income received by the assessee-company from its investment in the UTI has been declared by the company itself as an "income from other sources" which head of income is different from income from "profits and gains of business or profession" and under section 32AB, income from business alone is entitled for the benefit of that section. The assessee contends that its income from sale and purchase of units of the UTI is part of its regular business and that it has held these units as stock-in-trade and has been doing the business of buying and selling the same. The assessee also contends that its income from this business of invest- ment in the units of the UTI and its business of manufacture and sale of tyres are pooled together in a common account of funds which is managed by one common management. It is also the submission of the assessee that these two businesses, namely, the business of buying and selling units of the UTI and the manufacture and sale of tyres are so intertwined and interlaced that the same cannot be separated and

treated independently, therefore, this income from the UTI being part of its business income, it is entitled to claim the bene- fit of section 32AB.

A perusal of section 32AB, as it stood at the relevant time, shows that if an assessee has a total income including income chargeable to tax under the head "Profits and gains of business or profession" and if the income from such business is derived from an "eligible business" and if the assessee has out of such income utilised any amount during the previous year for the purchase of new plant or machinery then it is entitled to a set off of a sum equal to 20 per cent. of the profit of such eligible business as computed in the accounts of the assessee which account has been audited in accordance with sub-section (5) of section 32AB.

The dispute in the present case is in regard to the question whether the assessee's investment in the UTI is business, and if so, is it a business which qualifies to be an "eligible business" under section 32AB ? In regard to the first aspect, we must note that the Tribunal as a question of fact based on material on record has come to the conclusion that the investment in the UTI by the assessee-company is in the course of its business and its business of manufacture and sale of tyres and sale and purchase of units of the UTI are common in nature and both the businesses are intertwined and interlaced. This finding is accepted by the High Court also. We also find that this busi- ness of the assessee-company of buying and selling of units is a business as contemplated under section 32AB of the Act. The question then is : is it an eli- gible business under the said section ? The term "eligible business" is defined under sub-section (2) of section 32AB. As per that definition, all business of an assessee-company will be an eligible business unless it falls under the type of business enumerated in sub-clauses (a) and (b) of section 32AB(2). It is nobody's case that this business of the assessee-company is one of those busi- nesses which fall under business enumerated in sub-clauses (a) and (b) of sub-section (2) of section 32AB. Therefore, there is no doubt that the business of the assessee-company is an eligible business. The fact that it is shown under a different head of income would not deprive the company of its benefit under section 32AB so long as it is held that the investment in the units of the UTI by the assessee-company is in the course of its "eligible business". Therefore, in our opinion, the dividend income earned by the assessee-company from its investment in the UTI should be included in computing the

profits of eligible business under section 32AB of the Act."

25. The aforesaid paragraph indicates that to qualify for deduction under Section 32AB of the Act, the earning must be from an eligible business. In the case of Apollo Tyres (supra), investment in UTI was held to be eligible business as defined in sub-section (2) to Section 32AB of the Act and, therefore, had to be taken into consideration for computing deduction under section 32AB of the Act. As per the findings recorded by the Tribunal, the interest income on debentures and fixed deposits of Rs.20,775/-, interest on loan and intercorporate deposits amounting to Rs.86,16,571/- and dividend of Rs.3,01,460/- were income from business and was accordingly shown in Part II and II of the Sixth Schedule of the Companies Act. Identical view is found to have been taken by the Calcutta High Court in ***Britannia Industries Ltd. vs. JCIT (2004)*** 271 ITR 123, and the Madras High Court in ***Carborandum Universal Ltd. vs. CIT (2004)*** 265 ITR 372 (Mad.), where earlier decisions in ***CIT vs. Dinjoye Tea Estate (P) Ltd.*** (1997) 224 ITR 263 (Gauhati) and ***CIT vs. Warren Tea Ltd.*** (2001) 251 ITR 382 (Cal.) were dissented from and it was observed, they was no longer good law in view of the decision in ***Apollo Tyres (supra)***. The aforesaid ratio find resonance in subsequent decision of the Madras High Court in ***CIT vs. Tirupattur Coop. Sugar Mills Ltd.*** (2009) 310 ITR 360 (Mad.), ***CIT vs. McMillan India Ltd.*** (2007)295 ITR 67 (Mad) and ***DCIT vs. United Nilgiri Tea Estates Co. Ltd.*** (2005) 273 ITR 470 (Mad.).

26. A Full Bench of Kerala High Court in ***Perry Agro Industries Ltd. vs. CIT*** (2006) 156 Taxman 184 (Ker.), has taken a somewhat a different view after referring to the Part II of the Sixth Schedule of

the Companies Act, inter alia, recording that by sub-section (3) Section 32AB, the Legislature wanted profits from business and profession alone should be included in profits of business computed according to second part of Schedule VI of Companies Act and not net profits. They interpreted the judgment in the case of ***Apollo Tyres (supra),*** holding that the only income from the business of the assessee himself and not any other income of the assessee could be included for calculating deduction under section 32AB of the Act.

27. We need not enter into this question as the findings recorded by the Tribunal are that the income earned by way of interest on debentures of Rs.20,755/-, interest on loans of Rs.86,16,571/- and dividend of Rs.3,01,460/- was business income. The Revenue has not placed any material documents or papers on record to show that the aforesaid finding is wrong and incorrect. The assessment order and the first appellate order in this regard are not lucid. Further, Revenue has not placed the complete order under Section 263 on record. In these circumstances, and in view of the findings recorded by the Tribunal, the question no.D in ITA 165/2001 is to be decided in favour of the assessee and against the Revenue. The appeals are accordingly disposed of. In the facts of the case, there will be no order as to costs.

(SANJIV KHANNA)
JUDGE

(V. KAMESWAR RAO)
JUDGE

January 19th, 2015
kkb