

**REPORTABLE**

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

Judgment reserved on : 13.08.2008
% Judgment delivered on : 01 .09.2008

+ **ITA 579/2007**

DABUR INDIA LIMITED

....Appellant

versus

**COMMISSIONER OF INCOME TAX,
NEW DELHI**

..... Respondent

Advocates who appeared in this case:

For the Applicant : Mr Pankaj Jain
For the Respondent : Mr R. D.Jolly

CORAM :-

**HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE RAJIV SHAKDHER**



1. Whether the Reporters of local papers may be allowed to see the judgment ?
2. To be referred to Reporters or not ?
3. Whether the judgment should be reported in the Digest ?

RAJIV SHAKDHER, J

1. This is an appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the Act) against the judgment dated 31.1.2007 passed by the Income Tax Appellate Tribunal (hereinafter referred to in short as the ITAT) in ITA No. 1063/Del/2004.

2. Before we consider the submissions made in support of the Appeal the following facts require to be noted:-

2.1 The Assessee is in the business of manufacturing herbal products and cosmetics. On 30.11.2000 assessee filed its return for Assessment year 2000-01 wherein, it declared an income of Rs 12,15,25,093/-. On 10.5.2001 the return was processed under Section 143(1)(a) of the Act as the returned income. However, notices were issued under Section 143(2) of the Act.

2.2 In response to the aforesaid notices, hearing was attended by an authorized representative before the Assessing Officer.



Details were sought and clarifications were supplied by the assessee. The net result was that with regard to issue, whether in calculating deduction under Section 80 IB and Section 80 HHC the assessee had deducted depreciation from profits and gains derived from such businesses - it was revealed that the assessee's six (6) industrial units at Baddi, which are eligible for deduction under Section 80 IB, no depreciation had been provided for in determining profits and gains eligible for deductions under Section 80 IB while, with regard to all other industrial units of the assessee depreciation had been charged.

2.3 It was also noticed that similarly, in the case of deduction under Section 80 HHC deduction had been claimed without deducting depreciation while arriving at eligible profits and gains in terms of the said section.

2.4 The Assessing Officer after a detailed discussion, and specially, after noticing the judgment of Supreme Court in the case of *CIT vs. Mahindra Mills Ltd., 243 ITR 56* came to the conclusion that depreciation is a statutory allowance and even if the Assessee has not furnished the particulars, it is open to



the Assessing Officer to grant depreciation. The Assessing Officer pointedly referred to distinguishing features obtaining in *Mahindra Mills Ltd. (supra)* and the present case, in as much as, crucially, the fact that Mahindra Mills Ltd. (supra) dealt with the period prior to 1.4.88 when, Section 34 was present on the Statute book. The Assessing Officer noticed that with the enactment of Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986 w.e.f 1.4.88 Section 32 of the Act was amended and Section 34 of the Act was deleted and hence, Mahindra Mills Ltd. (supra) had no applicability to the present case.

2.5 Accordingly, the Assessing Officer made the necessary adjustment in profits and gains returned by the Assessee by deducting the depreciation in order to arrive at the eligible profits for purpose of deduction under Section 80IB and 80 HHC.

3. Being aggrieved, the assessee preferred an Appeal to the Commissioner of Income Tax (Appeals) [(hereinafter referred to as CIT (A))]. The CIT (A) by his order dated 8.12.2003



allowed the Appeal and directed the Assessing Officer to re-compute the deductions under Section 80 IB and 80 HHC after withdrawing the depreciation quantified at Rs 11,41,47,451/-. The CIT (A) based his order on the decision of his predecessors in earlier assessment years i.e assessment years 1997-98, 1998-99 and 1999-2000.

4. Aggrieved by the aforesaid decision of the CIT (A), the Revenue preferred an Appeal to the ITAT.

5. The ITAT after considering submissions of both sides allowed the Appeal of the Revenue.

6. Being aggrieved, the Assessee has raised the following issues before us:-

i) that ITAT ought to have adhered to the principle of consistency and followed the decision of co-ordinate benches of the ITAT in the case of the Assessee for assessment years 1997-98 to 2000-01. It was further submitted by the learned counsel that, in the event, the ITAT was not for some reason in agreement with the earlier decision of the co-ordinate benches of ITAT, it was duty bound to refer the matter to a larger



bench. Reliance in support of this submission was placed on a judgment of this Court in the case of *DLF Universal Ltd. Vs. CIT (2008) 6 DTR 113.*

(ii) the judgment of the Special bench of the ITAT in case of *Vahid Papers Converters (supra)* was distinguishable and,

(iii) on merits of the case, it was submitted, that the, Assessee had an option to claim depreciation under Section 32 of the Act, and that, it cannot be thrust on the Assessee while determining the eligible profits and gains for the purpose of ascertaining the amount deductible under Section 80 IB and 80 HHC.

1st contention

7. In so far as the first contention is concerned, according to us, the submission is thoroughly misconceived. The ITAT has, after considering the applicability of the decision of the special bench in the case of *Vahid Paper Converters (supra)*, come to the conclusion that the ratio of the said decision is squarely applicable to the facts of the instant case. That being so, in our view, the ITAT had no choice but to pay obeisance at the altar



of judicial discipline and abide by the decision of the larger bench. The submission that the ITAT ought to have followed the decision of a co-ordinate bench in the teeth of the decision of a larger bench is wholly untenable as it would amount closing one's eyes to the exceptions to the principle of consistency – one such exception being; that it need not be followed where a decision is passed in ignorance of a decision of a bench of a greater numerical strength or, of a higher judicial authority.

2nd contention

8. The second contention that decision in the case of *Vahid Papers Converters (supra)* is distinguishable is also unsustainable. The decision in the *Vahid Papers Converters (supra)* pertains to Appeals relevant to not only assessment year 2001-02, but also, with respect to Appeals, for assessment year 1999-2000 to 2002-03. As a matter of fact, it deals with law as it subsisted between 1.4.1988 to 31.3.2002. The only issue that the Special bench of ITAT did not decide in *Vahid Papers Converters (supra)* was, whether Explanation 5 to



Section 32 of the Act inserted by Finance Act, 2001 was clarificatory in nature and hence, would apply to earlier years as well. The ITAT considered it unnecessary to decide this issue in view of the decision it had taken, dehors the amendment, which is that depreciation was required to be charged in calculating eligible profits and gains for the purpose of deduction under Section 80 IB and 80 HHC.

3rd contention

9. On merits, the issue raised by the assessee that if it has an option to claim depreciation under Section 32 of the Act with respect to computation of normal income then the claim of depreciation allowance cannot be thrust upon the Assessee for determining profits and gains eligible for the purposes of ascertaining amount deductible under Section 80 IB and 80 HHC is untenable for the reasons delineated below:-

9.1 To answer this contention we would have to analyse, based on the scheme of the Act, as to the manner in which income of an assessee is to be calculated in the normal course in contrast to calculation of income i.e, profit and gain for the



purpose of deduction under Chapter VI-A of the Act, in particular, Section 80 IB and Section 80HHC.

9.2 The Scheme of the Act :- Chapter I of the Act provides for definition of terms and expressions used in the Act. Chapter-II broadly deals with basis of charge, the scope of total income, provisions by which a person is held to be resident in India, and incomes which are deemed to accrue or arises in India. Reference in this regard may be had briefly to the following sections appearing in Chapter-II of the Act:-

9.2.1 Section 4 of the Act provides that income tax shall be charged for any assessment year in respect of the total income of the previous year of every person. 'Previous year' has been defined under Section 3 of the Act to mean any financial year which immediately precedes the assessment year. The expression 'total income' is in turn defined under Section 2(45) of the Act. The said section defines 'total income' to mean total amount of income referred to in Section 5, computed in the manner laid down in the Act. The scope of 'total income' is provided under Section 5 of the Act. Section 5, inter alia, provides that the total income of any previous year of a person



who is a resident will include all income derived from any source which is, received or is deemed to have been received in India by or on behalf of such person ; or accrues or arises or is deemed to accrue or arise in India or, even that, which accrues or arise outside India. Similarly, sub-Section (2) of Section 5 of the Act provides that total income of any previous year of a person who is ‘non-resident’ is that, which is, received or deemed to be received in India or, that which accrues or arises or is deemed to accrue or arise to a ‘non-resident’ in India during such year. The indicia for a person to be held as ‘resident’ in India is contained in Section 6 of the Act. Section 9 of the Act is a deeming section which provides for incomes, which are, deemed to accrue or arise in India.

9.3 Chapter III in the Act makes provision for incomes which are not required to be included in the total income of the previous year in respect of an assessee. Chapter IV of the Act contains provisions beginning with Section 14 and ending with Section 59. The provisions of Chapter IV essentially pertain to computation of total income of an assessee under various heads of income. As a matter of fact, Section 14 of Chapter IV of the



Act clearly provides that save as otherwise provided in the Act, all income shall, for the purposes of charge of income tax and computation of total income, be classified under the five heads provided therein i.e

(A) – Salaries

(B) – Interest on securities (omitted by the Finance Act, 1988 w.e.f from 1.4.1989).

(C) - Income from house property

(D) – Profits and gains of business or profession

(E) – Capital gains

(F)- Income from other sources.

9.4 In the instant case, we are concerned with “profits and gains of business or profession”. Section 28 of the Act provides that, amongst others, income from “profits and gains of business or profession” which was carried on by the assessee during the previous year will be chargeable to income tax under the said Act. Section 29 which is crucial for the purposes of the present appeal, provides that the income referred to in



Section 28 shall be computed in accordance with the provisions contained in Sections 30 to 43D.

9.5 It is, thus, evident that in computing the income chargeable to income tax under the head “profits and gains from business or profession”, the provisions contained in Sections 30 to 43D will have to be borne in mind. Since we are concerned with the chargeability of depreciation in computing the total income of the Assessee, the reference to Section 32 of the Act becomes necessary. Section 32(1) of the Act allows for deduction on account of depreciation in respect of (i) buildings, machinery, plant or furniture, being tangible assets; (ii) know-how patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after 1.4.1998, owned, wholly or partly, by the assessee and used for the purposes of the business or profession. Sub-section (2) of Section 32 provides that where an assessee has not been able to give full effect to depreciation allowance as provided in sub-Section (1) in any previous year, owing to the fact that there are no profits or gains chargeable for that previous year, or



owing to the fact that profit or gains chargeable being less than the depreciation allowance then, the Assessee can carry forward unabsorbed depreciation subject to the provisions of sub-Section (2) of Section 72 and sub-Section (3) of Section 73 of the Act. Sections 30, 31 and 32 (A) to 35(E) provide for rebates, allowances and deductions under various heads. Section 36 provides for certain “other deductions” specified therein while, computing the income referred to in Section 28. Section 37 of the Act is a residuary head whereby, any expenditure which, not being in the nature of a capital expenditure or a personal expense of the assessee but being otherwise laid out or expended fully and exclusively for the purposes of business or profession is allowed to be deducted in computing income chargeable under the head “Profits and gains of business or profession.” The other provisions mentioned in Chapter IV and provisions of Chapter V not being relevant for the issue at hand are not referred to herein.

9.6 Chapter VI-A provides for deductions which are permitted under the Act from the gross total income in computing the ‘total income’ of the assessee. Chapter VI-A for



this purpose is divided into four parts – A, B, C & D. Part A deals with general provisions with respect to deductions; beginning with Section 80A and ending with the definitions for the said chapter, as provided in Section 80B. Part B deals with deductions ‘in respect of payments made by the Assessee.’ Part-C with which we are concerned, deals with deductions in respect of ‘certain incomes of the assessee’. Finally, Part-D deals with ‘other deductions’.

9.7 In this background let us touch upon various sections in each part under Chapter VI-A which are relevant for the issue at hand. Section 80A(1) states that in computing total income of an assessee, there shall be allowed from his gross total income, in accordance with and subject to provisions of Chapter VI-A, deductions specified in Sections 80C to 80U. Sub-Section (2) of Section 80A specifically sets out that the aggregate amount of deductions under this Chapter shall not, in any case, exceed the gross total income of the assessee. Section 80AB which is important, clearly provides where any deduction is required to be made or allowed under any section included in this Chapter under the heading “C-Deductions in



respect of certain incomes” in respect of any income of the nature specified in that section which is included in the gross total income of the assessee, then, notwithstanding anything contained in that section, for the purpose of computing the deduction under that section, the amount of income of that nature as computed in accordance with the provisions of this Act (before making any deduction under this chapter) shall alone be deemed to be the amount of income of that nature which is derived or received by the assessee and which is included in his gross total income. Importantly, gross total income for the purposes of this chapter (i.e, Chapter VI-A) has been defined in Section 80B(5) in the following terms :- “gross total income means total income computed in accordance with the provisions of this Act, before making any deduction under this chapter.”

9.8 The incomes in respect of which deductions is sought, in the instant case, are those which are referred to in Section 80-IB and 80HHC. Under Section 80 HHC a prescribed percentage of deduction is allowed while computing the total income of the assessee on the profits and gains derived by the



assessee from the export of such goods or merchandise. Similarly, under Section 80 IB an Assessee is allowed a deduction in computation of his total income of a prescribed percentage of his profits and gains derived from industrial undertakings which are defined as eligible businesses under sub-Sections (3) to (11) & (11A) of Section 80-IB, for such assessment years as provided therein.

10. A conjoint reading of the provisions of the Act would show that Chapter VIA of the Act refers to special types of deductions available to the assessee while computing his total income. Section 80A(1), referred to herein above, clearly sets out that in computing the Assessee's total income there shall be allowed from his gross total income, in accordance with and subject to the provisions of the Chapter VI-A deductions specified in Section 80 (C) to 80(U). The deductions sought by the assessee under Section 80-IB and 80 HHC therefore are required to be allowed in computing the total income of the assessee. Section 80-B(5) in turn, as noticed above, defines gross total income for the purposes of Chapter VI-A to mean total income computed in accordance with the provisions of



this Act before making any deductions under Chapter VI-A. Sections 80-IB and 80 HHC fall in Part C under the heading “deductions in respect of certain incomes”. The said Part C of Chapter VI-A begins with Section 80H. Therefore, in calculating the deductions under Section 80-IB and 80 HHC firstly, gross total income would have to be calculated, which would mean, calculation of total income in accordance with the provisions of this Act. In the instant case we are concerned, with calculation of deductions under 80-IB and 80HHC.

11. In arriving at the extent of the permissible deduction under section 80 IB and section 80HHC, the income which is to be considered is that which is calculated in accordance with the provisions of the Act alone. Thus, in calculating profits and gains of business ‘derived’ from the industrial undertakings i.e, eligible businesses, under Section 80-IB or export business under Section 80 HHC, we would have to bear in mind the provisions of Sections 30 to 43D as referred to in Section 29, Section 80AB and Section 80B(5). A conjoint reading of these provisions leads to the conclusion that depreciation allowance under Section 32 will have to be deducted in arriving at the



‘profits and gains’ of business derived by an Assessee, from an industrial undertaking specified under Section 80-IB or export business under Section 80 HHC.

12. In the instant case as noticed by the Assessing Officer, the Assessee while claiming depreciation for all his units except six (6) units located in Baddi had attempted to seek a dual benefit, not envisaged under the provisions of the Act. Firstly, by opting out of a claim for depreciation allowance under Section 32 of the Act which resulted in enhancement of profit and gains derived from the industrial undertakings and/or businesses specified under Section 80-IB and Section 80 HHC of the Act, and consequent thereto led to an enhancement of the quantum of deduction under the said provisions. Secondly, by this methodology the Assessee ensured that it could avail the benefit of depreciation allowance on a higher written value of the assets in the years subsequent to the period over which the deductions under Sections 80-IB and 80 HHC would be available.



13. It is, thus, according to us important to bear in mind the scheme of the Act which envisages that, while computing normal profits which does not involve relief by way of special deduction provided for under Chapter VI-A of the Act, an Assessee is entitled to opt out of a claim for depreciation allowance. In other words, the Assessee can choose to declare and pay tax on a greater amount of income. Where, however, the Assessee seeks to claim ‘special deductions’ under Chapter VI-A of the Act, there is no option available to the assessee, but to provide for depreciation allowance while calculating the eligible profits and gains on which deduction is permissible under the provisions specified in Chapter VI-A. In this context, as discussed also by the authorities below, the decision of the Supreme Court in the case of *CIT vs. Mahindra Mills Ltd.* (2000) 243 ITR 246 is clearly distinguishable for following reasons:-

13.1 Firstly, the decision in *Mahindra Mills Ltd. (supra)* pertained to assessment years 1974-75 when, Section 34 was present on the Statute book. Briefly, Section 34 provided that in order to claim depreciation under Section 32 of the Act, the



Assessee was required to give particulars as specified under Section 34 of the Act. With effect from 1.4.1988 Section 34 was deleted from the Statute book and, a consequential amendment was made in Section 32 of the Act. It was in this context that the Supreme Court had observed that the Assessee had an option to claim depreciation and the same could not be thrust upon the assessee.

13.2 The case which is apposite to the facts of the present case is the judgment of the Supreme Court in the case of *Cambay Electric Supply Industrial Company Ltd. Vs. CIT (1978) 113 ITR 84*. The assessee in the said case was in the business of generation and distribution of electricity, and as such, was entitled to deduction under Section 80E(1) of the Act as obtaining at the relevant point in time. The Assessing Officer had included income earned by the assessee on sale of machinery under Section 41(2) as balancing charge. Apart from the issue whether income from sale of machinery and the resulting balancing charge could be included in arriving at profits 'attributable' (the expression then appearing in the Act as against 'derived') to the business of the Assessee, the other



issue which the Supreme Court was called upon to answer was whether unabsorbed depreciation and unabsorbed development rebate would have to be adjusted in computing the eligible profits 'attributable' to such business. The Supreme Court answered the question as follows:-

“.....The court has further observed that in its opinion the deduction under Section 80E is a special benefit given to a company which satisfies the conditions under Section 80E and the deduction permissible thereunder is only from profits and gains attributable to the specified activities and this benefit should not be diminished by the other benefits conferred by the Act, such as the right to have the previous losses set off, that the two serve different purposes and the benefit of both must be available to an assessee, without the one impinging on the other. It will thus appear that the Kerala High Court has regarded section 72 appearing in Chapter VI as a provision unconnected with the computation of the total income of an assessee and a provision which comes into operation at a stage subsequent to the computation of the total income arising from business done in accordance with Sections 30 to 43A occurring in Chapter IV of the Act and, therefore, the unabsorbed losses cannot be set off before calculating the deduction under Section 80E. It is not possible to accept the view that section 72 has no bearing on, or is unconnected with, the computation of the total income of an assessee under the head “Profits and gains of business or profession”. Actually, section 72(1) provides that where the net result of computation under the head “Profits and gains of business or profession” is a loss and such loss cannot be or is not wholly set off against the income under any head of income in accordance with the provisions of section 71, so much of the loss as has not been so set off, subject to the other provisions of the Chapter, shall be carried forward to the following assessment year and shall be set off against



the profits and gains, if any, of any business or profession for that assessment year. Therefore, section 72(1) has a direct impact upon the computation under the head “Profits and gains of business or profession”. In other words, the correct figure of total income, which is otherwise taxable under other provisions of the Act, cannot be arrived at without working out the net result of computation under the head “Profits and gains of business or profession”. Further, the question whether special benefit under section 80E as well as the normal or usual benefit of carry forward of losses of previous years should both be available to an assessee, without one impinging on the other must depend upon the intention of the legislature and such intention has to be gathered from the language employed. In this view of the matter it is extremely doubtful whether in spite of the legislative mandate contained in the three steps provided for by sub-section (1) of section 80E, the carried forward losses would not be deductible before working out the 8% deduction contemplated by Section 80E and, therefore, the contention that by parity of reasoning or on a *priori* reasoning unabsorbed development rebate and unabsorbed depreciation should be held to be non-deductible before working out the 8% deduction under section 80E(1) cannot be accepted. As observed earlier, on a proper construction of the provision contained in sub-section(1) of section 80E, items like unabsorbed depreciation and unabsorbed development rebate will have to be deducted in arriving at the figure which would be exigible to deduction of 8% under section 80E(1).”

14. The controversy at hand was examined by the Bombay High Court in the case of *Indian Rayon Corporation Ltd. Vs. Commissioner of Income Tax* (2003) 261 ITR 98. The Bombay High Court examined the issue at great length. The relevant observations read as follows:-



.....Secondly, in any event, the controversy in *Mahendra Mills' case (2000) 243 ITR 56 (SC)* was not concerning deductions under Chapter VI-A of the Income-tax Act. Therefore, that judgment would not apply to this case. The important distinction, which is required to be noticed in this case, is that we are required to compute the total taxable income of the assessee who has claimed special deduction under Chapter VI-A. For that purpose, one has to keep in mind the provisions of sections 80B(5) and 80AB. Consequently, section 80HH, inter alia, lays down that if the gross total income includes profits from a newly established undertaking then 20 per cent of such profits would be deductible from the gross total income in order to arrive at the total taxable income. That, in such a case, profits derived from a newly established undertaking shall be computed in accordance with the provisions of the Act, i.e., section 29 to section 43A. Therefore, net profit will have to be computed in accordance with the provisions of the Act. The argument of the assessee is that in view of the judgment of the Supreme Court in *Mahendra Mills' case (2000) 243 ITR 56*, it is open to the assessee not to claim depreciation allowance under section 32 and consequently it is argued that 20 per cent rate of deduction should be applied to Rs.100 in the above illustration, without taking into account the depreciation. We do not find any merit in this argument. The scheme of section 4 and section 5 of the Income-tax Act does indicate that income-tax is a tax in respect of income computed as per the provisions of the Act. There is a distinct dichotomy between cases of computation of normal income under the Act de hors Chapter VI-A and computation of taxable income where the assessee claims the benefit of deduction under Chapter VI-A because the Legislature has intended that these special deductions should be restricted to the profits derived from a newly established undertaking. To give an illustration, export profits under section 80HHC are required to be restricted to the receipt of foreign exchange. If this object is kept in mind, then it is clear that the analogy of section 32(2) given by the assessee will not apply in cases where an assessee claims special deduction



under Chapter VI-A. The matter can be looked at from another angle. While computing normal income, an assessee may set off depreciation against its gross income. In such cases, depreciation is like any other ordinary expense. However, such depreciation cannot be equated with special deduction under Chapter VI-A. In any event, in this case, on the facts, the assessee claims depreciation of Rs.75 from the balance income of Rs. 80 and, therefore, the judgment of the Supreme Court in *Mahendra Mills case (2000) 243 ITR 56* has no application.

In the above judgments of the Bombay High Court to which one of us (Kapadia J.) was a party it has been held, inter alia, that Chapter VI-A of the Income-tax Act deals with special deductions. That, Chapter VI-A, for the purposes of computing such deductions, constituted a separate code by itself. In order to compute the total taxable income of the assessee, deductions computed under section 80HH have to be reduced from the gross total income of the assessee. The question basically in this matter is concerning computation of deduction under Chapter VI-A in which section 80HH falls. Profits and gains of a newly established undertaking, therefore, have got to be computed as per the provisions of section 29 to section 43A and if the assessee claims relief under Chapter VI-A of the Act, then it is not open to the assessee to disclaim depreciation allowance. This is because Chapter VI-A is an independent code by itself for computing these special types of deductions. In other words, one must first calculate the gross total income from which one must deduct a percentage of incomes contemplated by Chapter VI-A. That such special incomes were required to be computed as per the provisions of the Act, viz., section 29 to section 43A, which included section 32(2). Therefore, one cannot exclude depreciation allowance while computing profits derived from a newly established undertaking for computing deductions under Chapter VI-A. Therefore, the appellant's claim for allowance of deduction under section 80HH, without taking into consideration the current depreciation will have to be rejected.”



15. We are in agreement with the ratio of the decision of the Bombay High Court in the case of *Indian Rayon Corporation Ltd.* (*supra*).

16. In view of the discussion above, no fault can be found with the decision of ITAT on merits as well. The Tribunal has correctly applied the law. Consequently, no substantial question of law arises for our consideration. The appeals are dismissed.

RAJIV SHAKDHER, J

BADAR DURREZ AHMED, J

September 01, 2008

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