IN THE INCOME TAX APPELLATE TRIBUNAL
"A'' BENCH: BANGALORE

BEFORE SHRI GEORGE GEORGE K., VICE PRESIDENT
AND
SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

ITA No.927, 974 & 975/Bang/2023
Assessment Years: 2016-17, 2017-18 & 2020-21

M/s. Tata Elxsi Ltd. 126, ITBP Road Hoody, Whitefield Bangalore 560 048 **PAN NO : AACCV3079R**	**Vs.**	DCIT Circle-7(1)(1) Bangalore
APPELLANT		**RESPONDENT**

Assessee by	:	Shri Padam Chand Kincha, A.R.
Revenue by	:	Shri D.K. Mishra, D.R.

Date of Hearing	:	08.01.2024
Date of Pronouncement	:	08.01.2024

O R D E R

PER BENCH:

These appeals by assessee are directed against different orders of NFAC for the assessment years 2016-17, 2017-18 & 2020-21. The common ground in all these appeals is with regard to allocation of common Corporate expenditure between undertaking entitled for exemption u/s 10AA & Non-10AA of the Income Tax Act, 1961 (in short "The Act") resulting in reduction of deduction u/s 10AA of the Act at Rs.95,84,407/-, Rs.1,09,08,930/- & Rs.12,69,96,527/- for the assessment years 2016-17, 2017-18 & 2020-21 respectively.

2. The assessee is an Information Technology company, has operations from SEZ units in respect of profit from such unit, the assessee claimed deduction u/s 10AA of the Act without allocating certain common corporate expenses to the SEZ units eligible for deduction/s 10AA of the Act. While

completing the assessment, the ld. AO in these assessment years allocated the common corporate expense between the units in SEZ and Non-SEZ units on the basis of turnover of such units. On appeal, NFAC confirmed the order of the lower authorities. Against this assessee is in appeal before us.

3. After hearing both the parties, we are of the opinion that similar issue came for consideration before the Coordinate Bench Mumbai Tribunal in the case of Reliance Industries Ltd. in ITA No.7299/Mum/2017 for the assessment year 2013-14, the Tribunal vide order dated 10.11.2020 observed as under:

"105 Additional ground 5

> *"5. The learned CIT(A) Mumbai erred in allowing the deduction in respect of export profits of SEZ unit u/s 10AA of the Act with reference to the income computed under the head 'profits and gains of business or profession' of the SEZ unit instead of 'gross profits and gains' of SEZ unit, as interpreted by Supreme Court in the recent judgement in the case of Vijay Industries.*
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> *The Apex court while interpreting the provisions of section 80HH relevant to AY 1979-80 and 1980-81 has held that phrase "profits and gains" means gross profits of the business i.e. before computing income as specified in section 30 to 43D of the Act in para (18) and (19) as under:-*
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> > *"It is most humbly submitted that the concept 'profits and gains' is a wider concept than the concept of 'income'. The profits and gains/loss are arrived at after making actual expenses incurred from the figure of sales by the assesses. It does not include any depreciation and investment allowance, as admittedly these are not the expenses actually incurred by the assessee. However, the term 'income' does take into consideration the deductions on account of depreciation and investment allowance. Therefore, the term profits and gains are not synonymous with the term 'income'.....*
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> *Reading of Section 80HH along with Section 80A would clearly signify that such a deduction has to be of gross profits and gains, i.e., before computing the income as specified in Sections 30 to 43D of the Act."*

106. *Thus, it has been urged by the assessee by way of the additional ground that the ld. CIT(A), Mumbai erred in allowing the deduction in respect of export profits of SEZ units u/s.10AA of the Act with reference to the income computed under the head 'profits and*

gains of business' or profession of the SEZ unit instead of gross profit and gains of SEZ unit as interpreted by the Hon'ble Supreme Court in the recent judgment in the case of Vijay Industries vs. CIT(SC) in Civil Appeal No.1581/1582 of 2005. Referring to the above additional ground, ld. Counsel of the assessee contended that the above is a pure legal ground and the assessee seeks the same to be admitted as it does not require investigation of any new fact. He submitted that the ground has been raised in view of the interpretation of the term 'profit and gains' in the recent decision of the Hon'ble Supreme Court in the case of Vijay Industries Ltd. vs CIT supra. Therefore, the assessee contends that in view of the Hon'ble Supreme Court decision in the case of National Thermal Power Corporation 229 ITR 383, the additional ground ought to be admitted and adjudicated.

107. *The ld. Counsel of the assessee submitted that assessee has set up a refinery at Motikhavadi, P.O. Digvijayagram, Jamnagar in the Special Economic Zone (SEZ) area for refining of mineral oil. Since the assessee had complied with the conditions as specified u/s.10AA of the Act, he claimed 100% deduction of profit and gains erred in respect of export turn over from its refinery at SEZ u/s.10AA of the Act. It has been further submitted that since the refinery began refining of mineral oil on or after the first day of October 1998, and since the assessee has complied with the conditions as specified u/s.80IB(9) of the Act, he claimed deduction of the balance profits and gains u/s.80IB(9) of the Act. Though both the AO and CIT(A) had disallowed the deduction u/s.80IB(9) of the Act for A.Y. 2013-14, similar claims in earlier year was decided in favour of the assessee by the ITAT for A.Y.2012-13 and hence, the appeal raised by the assessee for A.Y.2013-14 on this ground i.e. ground No.4 in ITA No.7299/Mum/2017 is covered.*

108. *Now, the assessee contends that in light of the Apex Court decision in the case of Vijay Industries, dated 01/03/2019 the term 'profit and gains' in respect of export profit u/s.10AA of the Act ought to be interpreted as gross profit and gains of SEZ units i.e. before computing income as specified in Section 30 to 43 D of the Act. Since it is purely a legal ground we admit the same.*

109. *The elaborate submission of the assessee in this regard reads as under:-*

"The issue before the Apex Court relates to the interpretation to section 80HH relevant to AY 1979-80 and 1980-81. The relevant section is reproduced hereunder:-

"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, he 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."

The assessee in that case claimed deduction on gross profits (without depreciation and investment allowance) of the undertaking stating that "profits and gains" is not

the same as "income", whereas revenue claimed that deduction is allowable only on net profits as computed under sections 28 to 43D of the Act.

The full bench of the Apex court reproduced the reference order dated 5-11-2014 (referring the matter to full bench) highlighting the observation of Rajasthan High court as under:

> *"It is most humbly submitted that the concept 'profits and gains' is a wider concept than the concept of 'income'. The profits and gains/loss are arrived at after making actual expenses incurred from the figure of sales by the assessee. It does not include any depreciation and investment allowance, as admittedly these are not the expenses actually incurred by the assessee. However, the term 'income' does take into consideration the deductions on account of depreciation and investment allowance. Therefore, the term profits and gains are not synonymous with the term 'income'.*

The Apex Court overruled its earlier judgement in the case of Motilal Pesticides (2000) 243 ITR 83 (SC), holding that language of section 80HH and 80M are materially different as section 80HH uses the expression "profits and gains" whereas section 80M refers to "income". Therefore, the decision in the context of section 80M ought not have been relied on by the Supreme Court in the context of section 80HH.

The Supreme Court after discussing all the earlier judgements of the Supreme Court i.e. Cambay Electric Supply [1978] 113 ITR 84 (SC), Cloth Traders [1979] 118 ITR 243 (SC), Distributor Baroda [1085] 155 ITR 120 (SC), HH Sir Ram Verma [1994] 205 ITR 433 (SC), Kotagiri Industrial Co-operative Tea Factory Ltd [1997] 224 ITR 604 (SC) concluded as under:

> *"19) Reading of Section 80HH along with Section 80A would clearly signify' that such a deduction has to be of gross profits and gains, i.e., before computing the income as specified in Sections 30 to 43D of the Act. It is correctly pointed out by Division Bench in the reference order that in Mali/al Pesticides case, the Court followed Me judgment rendered in the M/s. ('b/h Traders (P) Lid. which was a case under Section 80M of the Act, on the premise that language of Section 80HH and Section 80M is the come. This basis is clearly incorrect as the language of two provisions is materially different. We are, therefore, of the considered opinion that judgment of Motilal Pesticides is erroneous. We, therefore, overrule this judgment*

The Apex Court also held that provisions of section 80AB, which is a deeming fiction to provide that for the purposes of deduction under Chapter VIA (heading C deduction in respect of certain income), only income as computed under the provisions of the Act shall be deemed to income eligible for deduction, are not clarificatory in nature and the provisions of section 80AB are applicable prospectively. Hence the same would not apply to AY 1979-80 and 1980-81.

Finally, the Apex Court allowed the appeal of the assessee holding that the phrase "profits and gains" means gross profits of the business in (19) as under:

> *"19) Reading of Section 80HH along with Section 80A would clearly signify that such a deduction has to be of gross profits and gains, i.e., before computing the income as specified in Sections 30 to 43D of the Act."*

The appellant submits that the wording "profits and gains" used in section 80HH is pari materia with the wording in section 1OAA and, hence, the ratio laid down by the Hon'ble Apex Court in the case of Vijay Industries squarely applies to the case of the assessee. Section 1OAA of the Act, reads as under:

> *Section 10AA of the Income-tax Act provides for tax incentive in respect of profits and gains of a unit set up in a SEZ as under:*
> *Special Provisions in respect of newly established Units in Special Economic Zones*
>
> *10AA (1) Subject to the provisions of this section, in computing the total income of an assessee, being an entrepreneur as referred to in clause 0) of section 2 of the Special Economic Zones Act, 2005, from his Unit, who begins to manufacture or produce articles or things or provide any services during the previous year relevant to any assessment year commencing on or after the 1st day of April, 2006, but before the first day of April, 2021, the following deduction shall be allowed-*
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> *(i)hundred per cent of profits and gains derived from the export, of such*
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> *articles or things or from services for a period of five consecutive assessment years beginning with the assessment year relevant to the previous year in which the Unit begins to manufacture or produce such articles or things or provide services, as the case may be, and fifty per cent of such profits and gains for further five assessment years and thereafter;*
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> *(ii) for the next five consecutive assessment years, so much of the amount not exceeding fifty per cent of the profit as is debited to the profit and loss account of the previous year in respect of which the deduction is to be allowed and credited to a reserve account (to be called the "Special Economic Zone Re-investment Reserve Account") to be created and utilized for the purposes of the business of the assessee in the manner laid down in sub-section (2).*
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> *[Explanation - For the removal of doubts, it is hereby declared that the amount of deduction under this section shall be allowed from the total income of the assessee computed in accordance with the provisions of this Act, before giving effect to the provisions of this section and the deduction under this section shall not exceed such total income of the assessee.]*

Thus, on perusal of section 1OAA read in light with the recent Apex Court decision in the case of Vijay Industries, it is submitted that

(1) Section 10AA provides tax incentives equal to 100% / 50% of "profits and gains" derived from exports from a unit set up in a SEZ.

(2) The term "profits and gains" has not been defined under the Act.

(3) *The full bench of the Apex court has held that the terms "profits and Gains" and "income" are different and hence are to be assigned different meaning. The term "profits and gains" mean gross profits i.e. gross revenue receipts less actual expenses. The depreciation and investment allowance, etc are not actual expense, hence need to be excluded.*

(4) *The provision of section 80AB (i.e. deeming fiction to provide deduction only from income irrespective of language used) is applicable only to sections included in Chapter VIA under the heading "C- deduction in respect of certain income'. It is not applicable to section 10AA as the said section does not come within Part 'C' of Chapter VI-A of the Act.*

The appellant submits that section 80AB was inserted by the Finance (No2) Act 1980 w.e.f 01 04.1981. Further section 10A was originally inserted w.e.f 01 .04.1981 by the Finance Act 1981. The legislature in its wisdom has not made 80AB applicable to section 10A/10AA/113A5/10B of the Act, even though the said section provide for deduction to be granted to an assessee. Therefore, the appellant submits that section 80AB cannot be applied in the present case to determine the amount of deduction to be allowed under section 10AA of the Act. The appellant submits that as section 80AB is not applicable to section 10AA, the interpretation given by the Supreme Court to the term "profits and gains" must be applied to section 10AA as well. It is further submitted that a deeming fiction should be given a stricter interpretation. Moreover, the Apex Court in Vijay Industries (supra) has held that provision of this section is not clarificatory in nature.

(5). The appellant submits that even though section 80A(1) is not applicable to section 10AA, the reference to 80A(1) in the decision of Supreme Court would not make the decision inapplicable to section 10AA for the following reasons:

(a) *Section 80A(1) only provides that deduction u/s 80C to 80U would be available to the assessee. Therefore section 80A provides the section in which deduction would be available. Section 80A does not determine the quantification of the said deduction. However, the Supreme Court was concerned with determining the quantification of deduction for the purpose of which section 80A is not relevant. Therefore, the appellant submits that the Supreme Court decision will be applicable on the facts of the present case.*

(b) *The provision of section 80A(1) is incorporated in section 10AA(1) itself. Section 80A(1) provides that - "In computing the total income of the assessee, there shall be allowed from his gross total income .....Section 10AA (1) also*

provides that - "Subject to provisions of this section, in computing the total income of an asses.cee ....the following deduction shall be allowed". Therefore, the appellant submits that both section 80A(1) as well as section 10AA(1) provide that deduction is to be allowed in computing the total income of the assessee. Therefore, the appellant submits that what has been stated in 80A(1) has been incorporated in section 10AA(1). Hence, the appellant submits that the provisions of section 10AA(1) and section 80HH r.w.s 80A(1) are pari materia.

(c) *The appellant submits that reference to 'gross total income' in section 80A(1), which is not stated in section 10AA(1), is irrelevant as the same only provides the stage at which the deduction is be allowed. The appellant submits that the Supreme Court was not concerned with the stage of allowing deduction, but was concerned with the quantification of deduction. Hence, the appellant submits that the decision of Supreme Court would apply in full force."*

110. Per contra, the ld. departmental representative elaborately argued that the said decision of Vijay Industries (supra) is not applicable in the facts of the present case. The submissions of the ld. DR in this regard are reproduced as under:-

"(ii) This issue was discussed at length during the hearing. In the appellant's case the issue is deduction under section 10AA falling under chapter III of the Act, while in the case of Vijay industries, the issue is deduction under section 80HH falling under chapter VIA of the Act .However the appellant contends that the language of section 80HH is parimateria with the language used in section 10AA.This argument is totally fallacious and the crucial points of departure in the language used in these two sections and the difference in applicability of the provisions of these two section subsequent to the decision in the case of Vijay Industries are discussed hereunder based on the language used in the act, case laws etc.

iii) The decision in the case of Vijay Industries Ltd. is rendered on the allowability of deduction u/s. 80HH of the Act, overruling the apex court decision in the case of Motilal Pesticides [243 ITR 26 (SC)]. The decision in the case of Motilal Pesticides (in respect of section 80HH) was rendered in turn relying on the decision in the case of Distributors Baroda Pvt. Ltd. vs. Union of India (1985) AIR 1585 (SC) dated 1/7/1985. The subject matter of discussion in the case of Distributors Baroda Pvt. Ltd. was Sec. 80M and in this decision, the earlier decision on Sec. 80M in the case of Cloth Traders vs. Addl. CIT was overruled. In the case of Distributors Baroda Pvt. Ltd. (supra.),it was held that the deduction under the relevant section 80M is to be allowed from the net income. It was also held that Sec. 80AA (which pertains to section 80M of the Act (introduced wr.e.f 1/4/1968 vide Finance Act (No. 2) ,1980 and since omitted w.e.f 1/4/1998) in its retrospective operation is merely clarificatory of the law as it always was since 1/4/1968 and no complaint can validly be made against it. Thereafter in the case of Motilal Pesticides (supra) pertaining to A.Y 1979-80 and 1980-81 on the issue of deduction u/s 80HH , Hon'ble Apex court held that section 80AB applicable to all sections under chapter VIA except section 80M and introduced w.e.f 1/4/1981) is merely clarificatory and the decision in the case of Distributor's Baroda (supra) (pertaining to

assessment year 1979-80 and 1980-81) is irrespective of section 80AB of the act. Therefore, in the case of Motilal Pesticides, the Hon'ble Supreme Court relied on its decision in the case of Distributors Baroda Pvt. Ltd. and held that same principles are applicable for deduction u/s.80HH. It was also held that Sec.80M and Sec.80HH are similar in nature and deduction is to allowed from the net income.

iv)In the recent judgement in the case of Vijay Industries Ltd.(A.Y 1979-90 and 1980-81), however, the judgement in the case of Motilal Pesticides is overruled. It has been held that the language of Sec.80HH and the language of Sec.80M are not similar. It has been further held that Sec. 80AB (which pertains to all sections in chapter VI A except section 80M) is not clarificatory but prospective in nature and operative from A.Y. 1981-82. The Hon'ble apex court has, therefore, held that reading of Sec.80HH along with Sec.80AB would clearly signify that the deduction u/s.80HH has to be of the gross profits and gains, i.e., before computing the income as specified in Sec. 30 to 43D of the Act.

It is in this background that the Appellant has preferred the ground on the basis of the latest decision of the Hon'ble Supreme Court in the case of Vijay Industries Ltd. and contended that the deduction of profits and gains derived from export u/s. 10AA of the Act also would mean gross profits and gains, i.e. before computing the income as specified in Sec. 30 to 43D of the Act. It is contended by the Appellant that the language of Sec. 80HH and the language of Sec. 10AA are identical and, therefore, the decision is applicable to Sec. 10AA also pertaining to "deduction provisions".

v) The first contention of the Appellant is that the decision rendered by the Hon'ble apex court in the case of Vijay Industries Ltd. pertaining to deduction allowable u/s. 80HH is applicable to Sec.10AA also. The assessment year in the case of the appellant is AY 2013-14. The relevant section 10AA, 80HH and also section 801A as applicable to the year under consideration needs to be discussed. In this connection, firstly, the relevant part of Sec. 80HH is reproduced as under:

> *"80HH. (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"*

Same provision was there in AY 1979-80/ 1980-81 also which was the year under consideration in the case of Vijay Industries. It is clear from a bare reading of the above section that the deduction u/s 80HH is allowable from the "profits and gains" of the industries. In the case of Vijay Industries Ltd. relied upon by the Appellant, only the words "profits and gains" are referred. In fact, the words "profits and gains" have been used in para 17 and 18 of the order. Further, the Hon'ble apex court states in para 17 that "thus, so far as deduction admissible under this provision is concerned it is from the "profits and gains". This particular combination of words has been used in various parts of the order and sometime within quotes.

vii) Now coming to section 10AA, relevant extract of this section, as applicable to A.Y. 2013-14 (assessment year involved in assessee's case), is reproduced here under:

"10AA. (1) Subject to the provisions of this section, in computing the total income of an assessee, being an entrepreneur as referred to in clause(j) of section 2 of the Special Economic Zones Act, 2005, from his Unit, who begins to manufacture or produce articles or things or provide any services during the previous year relevant to any assessment year commencing on or after the 1st day of April, 2006, a deduction of

(i) *Hundred per cent of profits and gains derived from the export, of such articles or things or from services for a period of five consecutive assessment years beginning with the assessment year relevant to the previous year in which the Unit begins to manufacture or produce such articles or things or provide services, as the case may be, and fifty per cent of such profits and gains for further five assessment years and thereafter;*

(ii) *For the next five consecutive assessment years, so much of the amount not exceeding fifty per cent of the profit as is debited to the profit and loss account of the previous year in respect of which the deduction is to be allowed and credited to a reserve account (to be called the "Special Economic Zone Re-investment Reserve Account") to be created and utilized for the purposes of the business of the assessee in the manner laid down in subsection (2)."*

A bare reading of this section shows that the deduction is allowable on the "profits and gains derived" from the undertaking. Thus, a very important word "derived" is used in this section and the deduction is to be allowed only on the "profits and gains "derived" from the undertaking and not from the "profits and gains". This is a very important departure from the language used in the case of section 80HH. In this connection it is worthwhile to note that that similar words as in Sec. 10AA have been used in Sec.801A of the Act applicable for the year under consideration, relevant part of which is reproduced hereunder:

"80-IA. (1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred per cent of the profits and gains derived from such business for ten consecutive assessment years."

Thus, in Sec.801A also, the deduction is allowable only from the profits and gains "derived" from the undertaking. It is also to be noted that Sec. 801A has been referred in many sub-sections of Sec. 10AA for applicability of the various provisions, which essentially is because of the fact that both the sections are similar in nature in allowing deductions from the profits and gains derived from the undertaking.

At this stage, it is necessary to understand what does this word "derive" mean and how does it render the methodology of deduction under section 801A different from that of

Sec. 8OHH, which was the subject matter of discussion in the case of Vijay Industries Ltd (supra).

In this connection, reference may be made to the decision of the Hon'ble Division Bench of the Bombay High Court in the case of Plastiblends India Ltd. vs. Addl. CIT (ITA No 1282 of 2007) dated 16/10/2009 [318 ITR 352], which was duly confirmed by the Hon'ble apex court vide order dated 09/10/2017. the decision was in respect of AY 1997-98 (i.e after incorporation of section 80AB) In the case of Plastiblends India Ltd., the Hon'ble Division Bench of the jurisdictional High Court has discussed various issues like total income, scope of total income, heads of income, deductions to be made under Chapter VIA of the Act, etc. The Hon'ble jurisdictional High Court thereafter analyzed the word "derived" used in this section (among other sections) and referred to the decision in the case of Liberty India vs. CIT. The Hon'ble High Court held that Sec. 801A is a code by itself and is a special deduction which is linked to profit. In para 43 of the order, it was noted that "thus, on analysis of all the decisions referred herein above, it is seen that the quantum of deduction allowable u/s.801A of the Act has to be determined by computing the gross total income from the business, after taking into account all the deductions allowable u/s.30 to 43D of the Act. Therefore, whether the assessee has claimed the deduction allowable u/s.30 to 43D of the Act or not, the quantum of deduction u/s.801A has to be determined on the total income computed after deducting all deductions allowable u/s.30 to 43D of the Act."

The jurisdictional High Court in para 34 to 36 observed as under:

> *"34. As noted earlier, the Apex Court in the case of Mahendra Mills (supra) has neither considered the scope of deduction under Chapter VI-A nor the said decision can be read to mean that by disclaiming current depreciation the assessee can claim enhanced deduction under any other provision in the Act. Therefore, reliance placed on the decision of the Apex Court in the case of Mahendra Mills (supra) in computing the quantum of deduction under section 80-IA of the Act is wholly misplaced.*
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> 35. *The question then to be considered is, whether on a plain reading of Section 801A read with other relevant provisions in Chapter V/-A, can it be said that the quantum of deduction allowable under Section 80/A depends upon the assessee claiming or not claiming current depreciation ? To be specific, the question is, whether the choice, if any, vested in the assessee in claiming or not claiming current depreciation has any bearing in determining the quantum of deduction allowable under Section 80/A of the Act?*
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> 36. *In our opinion, the above question is no longer res-integra. The Apex Court in the case of M/s.Liberty India V/s. Commissioner of Income Tax reported in 2009 (12) SCALE 51, held as under :*
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> *"13 Before analyzing Section 80-/B, as a prefatory note, it needs to be mentioned that the 1961 Act broadly provides for two types of tax incentives, namely,*

investment linked incentives and profit linked incentives. Chapter VI-A which provides for incentives in the form of tax deductions essentially belong to the category of "profit linked incentives". Therefore, when Section 80-IA/80-IB refers to profits derived from eligible business, it is not the ownership of that business which attracts the incentives. What attracts the incentives under Section 80-/A/80-/B is the generation of profits (operational profits). For example, an assessee company located in Mumbai may have a business of building housing projects or a ship in Nava Sheva. Ownership of a ship per se will not attract Section 80-/B (6). It is the profits arising from the business of a ship which attracts sub-section (6). In other words, deduction under sub-section (6) at the specified rate has linkage to the profits derived from the shipping operations. This what we mean in drawing the distinction between profit linked tax incentives and investment linked tax incentives. It is for this reason that Parliament has confined deduction to profits derived from eligible businesses mentioned in subsections (3) to (11A) [as they stood at the relevant time]. One more aspect needs to be highlighted. Each of the eligible business in subsections (3) to (11A) constitutes a stand-alone item in the matter of computation of profits. That is the reason why the consent of "Segment Reporting" stands introduced in the Indian Accounting Standards (AS) by the Institute of Chartered Accountants of India (ICAI).

14. Analysing Chapter V/-A, we find that Sections 80-lB I 80-IA are the Code by themselves as they contain both substantive as well as procedural provisions. Therefore, we need to examine what these provisions prescribe for "computation of profits of the eligible business". It is evident that Section 80-lB provides for allowing of deduction in respect of profits and gains derived from the eligible business. The words "derived from" in narrower in connotation as compared to the words "attributable to". In other words, by using the expression "derived from" Parliament intended to cover sources not beyond the first degree. In the present batch of cases, the controversy which arises for determination is: whether the DEPB credit I Duty drawback receipt comes within the first degree sources ? According to the assessee(s), DEPB credit/duty drawback receipt reduces the value of purchases (cast neutralization), hence, it comes within first degree source as it increases the net profit proportionately. On the other hand, according to the Department, DEPB credit, duty drawback receipt do not come within first degree source as the said incentives flow from Incentive Schemes enacted by the Government of India or from Section 75 of the Customs Act, 1962. Hence, according to the Department, in the present cases, the first degree source is the incentive scheme/ provisions of the Customs Act. In this connection, Department places heavy reliance on the judgment of this Court in Sterling Food (supra). Therefore, in the present cases, in which we are required to examine the eligible business of an industrial undertaking, we need to trace the source of the profits to manufacture (see CIT v. Kirloskar Oil Engines Ltd., reported in [1986] 157 ITR 762) 15. Continuing our analysis of Sections 80-IA/80-IB it may be mentioned that sub-section (13) of Section 80-lB provides for applicability of the provisions of sub-section (5) and sub-sections (7) to (12) to Section 80-IA, so for as may be, applicable to the eligible business under Section 804B. Therefore, at the outset, we stated that one needs to read Sections 801, 80-IA

and 80-lB as having a common Scheme. On perusal of sub-section (5) of Section 80- IA, it is noticed that it provides for manner of computation of profits of an eligible business. Accordingly, profits are to be computed as if such eligible business is the only source of income of the assessee therefore, the devices adopted to reduce or inflate the profits of eligible business has got to be rejected in view of the overriding provisions of sub-section (5) of Section 80-IA, which are also required to be read into Section 804B. [see Section 80-18(13)]. We may reiterate that Sections 801, 80-IA and 80-lB have a common scheme and if so read it is clear that the said sections provide for incentives in the form of deduction(s) which are linked to profits and not to investment. On analysis of Sections 80-IA and 80-IB it becomes clear that any industrial undertaking, which becomes eligible on satisfying sub-section (2), would be entitled to deduction under subsection (1) only to the extent of profits derived from such industrial undertaking after specified dote(s). Hence, apart from eligibility, sub-section (1) purports to restrict the quantum of deduction to a specified percentage of profits. This is the importance of the words "derived from industrial undertaking" as against "profits attributable to industrial undertaking".

Thus even for the A.Y 1997-98, in the case of Plastiblend (supra) and without reference to section 80AB, Hon'ble High court rendered the decision after discussing the scope of profits and gains derived and held that the quantum of deduction u/ s.801A has to be determined on the total income computed after deducting all deductions allowable u/s.30 to 43D of the Act.

Thereafter, the Hon'ble apex court confirmed the jurisdictional High Court decision and held (in para 18) that "the assessees/appellants want 100% deduction, without taking into consideration depreciation which they want to utilise in the subsequent years. This would be anathema to the scheme under Section 80-IA of the Act which is linked to profits and if the contention of the assessees is accepted, it would allow them to inflate the profits linked incentives provided under Section 80-IA of the Act which cannot be permitted."

The decision in the case of plastiblends is apparently not referred in the decision rendered in the case of Vijay industries.

In the case of Vijay Industries Ltd.[7] the issue involved was deduction u/s. 80HH as applicable to AN 1979-80,1980-81.The assessment year concerned is 2013-14 and for this year the language of Sec. 10AA is parimateria with Sec. 801A of the Act (and not section 80HH)and therefore decision in the case of Vijay Industries is not applicable as the deduction is now allowable from the profits and gains profits and gain derived from the undertaking in the case of 10AA/801A for the year under consideration, unlike from profits and gains as in section 80HH.

Moreover, relying on the decision in the case of Plastiblends India Ltd. (supra) on the issue of "derived from the undertaking", the ground raised by the Appellant is not maintainable and is liable to he dismissed, at the threshold.

viii) Further the scenario is also completely changed after insertion of section 80AB w.e.f 1/4/1981, and, therefore also the appellant's argument is not acceptable. As regards section 80 AB, it is also worthwhile to note that the decision in the cases of Distributors Baroda, Motilal Pesticides and Vijay Industries, the assessment years involved were 1979-80 and 1980-81.

As discussed earlier in Chapter VIA, there is a paradigm shift with the introduction of Sec. 80AB of the Act (pertaining to sections other than Sec.80M) with effect from 01/04/1981). The Hon'ble apex court in the case of Vijay Industries Ltd. held that section 80 AB is applicable from 1981-82 onwards. The assessee's case also relates to A.Y. 2013-14. Therefore, even drawing a parallel from Chapter VIA w.r.t section 80HH of the Act, to the deduction claimed u/s. 10AA (Chapter III), the decisions relied upon by the Appellant are not applicable for the year under reference. In the case of Plastiblends India Ltd., the assessment year involved was 1997-98 and the decision was mainly on interpretation of the word "derived" and from that angle also the assessee's ground can not be accepted.

(ix) Further in Sec. 10AA, there is a clarification given as under:

7. In section 10AA of the Income-tax Act, after sub-section('1), the following Explanation shall be inserted with effect from the 1st day of April, 2018, namely.--

"Explanation.—For the removal of doubts, it is hereby declared that the amount of deduction under this section shall be allowed from the total income of the assessee computed in accordance with the provisions of this Act, before giving effect to the provisions of this section and the deduction under this section shall not exceed such total income of the assessee]"

The appellant contends this explanation is prospective in nature. However the language of the explanation itself says that it is for the purpose of removal of doubts that deduction is to be allowed from the income computed as per provisions of the Act. In any case , the language of section 10AA itself makes it clear that the deduction is to be allowed from income computed as per provisions of the Act as discussed before w.r.t. the decision in the case of Plastiblends (supra) and therefore there is no substance in the arguments of the appellant.

(x) *It may be also noted that the decision in the case of Vijay Industries pertains to only section 80HH and the language used in that section as specifically pointed out by the Hon'ble Apex Court in para 17 of the order.*

(xi) *Reference is also invited to section 10AA(8) which says that provisions of section 10A(6) are equally applicable which bars giving effect to section 32(2) even in later years.*

(xii) *Further section 10AA being part of chapter III is essentially a exemption section though Post amendment, such exemption is available in form of deduction from profits and gains derived from the undertaking, the interpretation needs to be done strictly as held in the case of*

Commissioner of Customs (Import) vs. Dilip Kumar and company & Others (SC) Civil appeal number 3327 OF 2007 dated 30/7/2018 and in case of ambiguity the same needs to be interpreted in favour of revenue.

111. The rejoinder of the learned Counsel of the assessee in this regard with respect to the arguments raised by the ld. DR are as under:-

"Further, the Learned DR made the following submissions:

a. *The decision in the case of Vijay Industries is rendered in the context of section 80HH r.w.s 80AB, which is a deduction section under Chapter VI-A and therefore cannot be applied to section 10AA.*

b. *The provisions of section 80AB are pari-materia with the Explanation below section 1OAA(1).*

c. *The Explanation below section 10AA being clarificatory in nature, will apply retrospectively and, hence, deduction u/s 10AA for AY 2013-14 will be computed only w.r.t the amount of income as computed in accordance with the provisions of the Act.*

d. *The depreciation is compulsory as per Explanation 5 to section 32 and hence ought to be applied while computing profits u/s 10AA.*

The appellant submits that the arguments of the Revenue are not sustainable for the following reasons:-

(I) 10AA is deduction section :- The Learned AR, pointed out that the AO in his order at para 13.3 has explained in detail the provisions of section 10A/10B/10AA, the judicial pronouncements and Board Circular on the subject matter. In para 13.3.4, the AO himself has stated that provisions of section 10A/10B/10AA etc are "deduction provisions" and, hence, the decision of the Apex court is squarely applicable to the facts of the appellant.

(ii) Explanation to section 10AA is not pari materia to section 80AB.

The appellant submits that on plain reading it is clear that section 80AB is not pari materia to Explanation to section 1OAA. While section 80AB provides for income with reference to which the deduction has to be made under Chapter VIA i.e. deduction u/s VI-A is to be allowed with reference to income as computed in accordance with the provisions of the Act, Explanation to section 10AA provides for deduction u/s.10AA to be allowed from the total income of the assessee Thus, while deduction under Chapter VIA r.w.s 80AB is in respect of the income as computed in accordance with the provisions of the Act, the deduction u/s 10AA as per the Explanation shall not exceed the total income of the assessee i.e. while 80AB provides the basis for quantifying he deduction under various head of

chapter VIA, Explanation to section 10AA(1) provides that deduction shall be allowed from total income. Hence, Explanation to section 10AA(1) does not deal with quantification of deduction.

(ii) Further the said Explanation to section 1OAA is prospective and not retrospective.

The appellant further submits that the Explanation to section 10AA was inserted by the Finance Act 2017 w.e.f 0104.2018 and hence the same cannot be applied retrospectively.

The appellant further relies on the Explanatory Memorandum' to the Finance Bill 2017, wherein in the context of rationalization of provisions of section 10AA, it was stated that the amendment will take effect from 1St April 2018 and will accordingly apply in relation to assessment year 2018-19 and subsequent years. Hence, the appellant submits that the Explanation to section 10AA is prospective in nature and not retrospective.
Without prejudice to the above, the appellant submits that in case the Explanation to section 10AA is held to be pare materia to the provisions of section 80AB, then relying on the Apex Court decision, wherein it was held that the provisions of section 80AB cannot held to be retrospective in nature, the Explanation below 10AA(1) also cannot be applied retrospectively as it is an amendment of substantive nature.

Explanation 5 to section 32
The appellant submits that while computing the income under the heard "profits and gains of business" of the assessee, depreciation u/s 32 of the Act has been computed and, hence, Explanation 5 to section 32 is complied with. However, relying on the aforesaid Apex Court decision, while quantifying the amount of the deduction u/s. 10AA in respect both Refinery SEZ and PP SEZ , the term "profits and gains' would mean gross revenue receipts less actual expenses i.e excluding depreciation and investment allowance, etc as the same are not actual expense and hence need to be excluded.

The appellant submits that the Hon'ble Apex Court has provided the interpretation of the wording "profits and gains" for the purpose of section 80HH. As the wording of section 1OAA is para materia to the wording in section 80HH, the ratio laid down by the Apex Court would apply with full force. The narrow interpretation sought to be drawn by the DR cannot be accepted.

Thus it is submitted that deduction of profits and gains derived from the export u/s 10AA of the Act would mean gross profits and gains, i.e., before computing the income as specified in Sections 30 to 43D of the Act."

112. Further contention of the assessee Counsel is that the judgment of Hon'ble Supreme Court in the case of Plastiblends India Ltd., 398 ITR 568 is not applicable to the facts of the present case for the following reasons:-

> *"Firstly the said judgement deals with deduction under section 80IA which falls under Chapter VI-A and is therefore covered by provisions of section 80AB (i.e. the deeming fiction to provide deduction only from income as included in the gross total income of the assessee). In the appellant's case the deduction is claimed under section IOAA of the Act which is not covered in section 80AB. The legislature in its wisdom has not made 80AB applicable to section 10A/10AA/10B/10BA/10C of the Act, even though the said sections provide for deduction to be granted to an assessee.*
>
> *Secondly, deduction under section 10AA of the Act (prior to the amendment made by Finance Act 2017 by way of insertion of Explanation) was to be given at the stage of computing the gross total income of the eligible undertaking under Chapter IV of the Act i.e. prior to the commencement of the exercise to be undertaken under Chapter VI of the Act for arriving at the total income of the assessee from the gross total income. This has been held by the Supreme Court in the case of CTT v. Yokogawa India Ltd 391 ITR 274 (SC) in the context of section 10A of the Act. Plastiblends India deals with a situation of computation of deduction under Chapter VIA of the Act i.e. after computing the gross total income of the eligible undertaking under Chapter IV of the Act.*
>
> *(7) There is clear evidence in the Act that whenever the legislature wanted to allow a deduction as a percentage or fraction of the income computed under the head 'Profits and Gains from Business or Profession' it has specifically provided for the same. Thus section 33ABA reads, inter alia as follows:*
>
> > *"33ABA. (1) Where an assessee is carrying on business consisting of the prospecting for, or extraction or production of, petroleum or natural gas or both in India and in relation to which the Central Government has entered into an agreement with such assessee for such business, has before the end of the previous year—*
> >
> > (a) *deposited with the State Bank of India any amount or amounts in an account (hereafter in this section referred to as the special account) maintained by the assessee with that Bank in accordance with, and for the purposes specified in, a scheme (hereafter in this section referred to as the scheme) approved in this behalf by the Government of India in the Ministry of Petroleum and Natural Gas: or*
> > (b) *deposited any amount in an account (hereafter in this section referred to as the Site Restoration Account) opened by the assessee in accordance with, and for the purposes specified in, a scheme framed by the Ministry referred to in clause (a) (hereafter in this section referred to as the deposit scheme), the assessee shall, subject to the provisions of this section, be allowed a deduction*

(such deduction being allowed before the loss, if any, brought forward from earlier years is set off under section 12) of—

(i) *a sum equal to the amount or the aggregate of the amounts so deposited; or*

(ii) *a sum equal to twenty per cent of the profits of such business (computed under the head "Profits and gains of business or profession" before making any deduction under this section), whichever is less.... " Similarly section 80HHC provides, inter alia as follows :-*

(3) For the purposes of sub-section (1),—

(a) where the export out of India is of goods or merchandise manufactured or processed by the assessee, the profits derived from such export shall be the amount which bears to the profits of the business, the same proportion as the export turnover in respect of such goods bears to the total turnover of the business carried on by the assessee...

Explanation.—For the purposes of this section,
(a)...
(b)....
(baa) "profits of the business " means the profits of the business as computed under the head "Profits and gains of business or profession" as reduced by...
The above shows that a computation under the head 'Profits and Gains from Business or Profession is quite different from a phrase 'profits and gain" simplictor.

(8) The Explanation to section 10AA introduced by the Finance Act, 2017 with effect from 1.4.2018 makes it clear that its purpose is to allow deduction under section 10AA from the total income of the assessee and not the total income of the undertaking. The memorandum explaining the provisions of the Finance Bill 2017 at 391 1TR 1 (St) at page 214 state as follows:-

"Rationalisation of provisions of Section 10AA

Under the existing provisions of the section 10AA, deduction is allowed from the total income of an assessee, in respect of profits and gains from his Unit operating in SEZ. Subject to fulfillment of certain conditions. Section 10AA allows deduction in computing the total income of the assessee, hence the deduction is to be allowed for the total income of the assessee as computed in accordance with the provision of the Act before giving effect to the provisions of section 10AA. However, courts have taken a view (while deciding the matter pertaining to section 10A which also contains similar provision) that the deduction is to be allowed from the total income of the undertaking and not from the total income of the assessee.

In view of the above, it is proposed to clarify that the amount of deduction referred to in section 10AA shall be allowed from the total income of the assessee computed in accordance with the provisions of the Act before giving effect to the provisions of the section 10AA and the deduction under section IOAA in no case shall exceed the said total income.

This amendment will take effect from 1st April, 2018 and will, accordingly, apply in relation to the assessment year 2018-19 and subsequent assessment years. [Clause 7]"

Hence as long as the assessee has a positive total income the deduction under section 10AA must be granted. It does not deal with the method by which the deduction is to be computed."

113. *The assessee has made further submission that in alternative and without prejudice to the above arguments, the assessee submits that 100% profit and gains derived from export appearing in Section 10AA(1)(i) of the Act should be interpreted as 100% of profits and gains based on commercial principles. Thus, without prejudice to the aforesaid submission and arguments, in arriving at the commercial profit of the SEZ unit eligible for deduction 10AA of the Act, depreciation charged in the books as per the Companies Act 1956 may be deducted, instead of the depreciation allowance as computed u/s.32 of the Income Tax Act.*

114. *The ld. counsel of the assessee contends that Hon'ble Apex Court in the case of Vijay Industries (supra) has also referred to profit and gains on commercial principles. That profit and gains on commercial principles envisage allowance of deprecation as per Companies Act and not depreciation as per Income Tax Act. The ld. counsel submits that the Hon'ble Supreme Court and Hon'ble High Courts have already dealt with this proposition that commercial profits mean profits without adjustment of depreciation as per income tax act earlier also. In this regard, he referred to the following case laws:-*

1. *Hindustan Unilever Ltd. v. DCIT (Bom. HC) 325 ITR 102*
2. *Plastiblends India Ltd. v. Addl. CIT, Mumbai (SC) 398 ITR 568*
3. *CIT v. Yokogawa India Ltd. (SC) 391 ITR 274*
4. *Kilburn Properties Limited v. CIT (Kolkata HC) 17 ITR 134*
5. *Ezra Propritary Estate Ltd. v. CIT (Kolkata HC) 18 ITR 762*
6. *Indra Singh & Sons Ltd. v. CIT (Kolkata HC) 33 ITR 341*
7. *CIT v. Cocanada Radhaswami Bank Ltd. (SC) 57 ITR 306*
8. *CIT vs. Bhavnagar Trust Corporation (P.) Ltd. (Gujarat HC) 69 ITR 278*
9. *Western states Trading Co. P. Ltd. v. CIT (SC) 80 ITR 21*
10. *CIT v. Shrikishan Chandmal (Madhya Pradesh HC) 60 ITR 303*
11. *CIT v. R. Dalmia (Delhi HC) 96 ITR 463*
12. *Brooke Bond and Co. Ltd. v. CIT (SC) 162 ITR 373*
13. *Addl.CIT v. Solar Chemical Pvt. Ltd. (Allahabad HC) 190 ITR 216*
14. *CIT v. Ramnath Goenka (Madras HC) 259 ITR 26*
15. *K. Raheja IT Park v. DCIT (ITAT Hyderabad) ITANo. 1774/Hyd/14, 727/Hyd/15 & 728/Hyd/15*
16. *P.K. Badianiv. CIT(SC) 105 ITR 642*

115. We have carefully considered the submissions and perused the records. Before proceeding further it may be gainful here to refer to the decision of Hon'ble Supreme Court in the case of Vjay Industries (supra) which read as under :-

" JUDGMENT

A.K. Sikri, J. - Leave granted. Delay condoned.

2. In all these appeals issue relates to the interpretation that is to be accorded to the provisions of Section 80HH of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'). Section 80HH and other related provisions, as it existed at the relevant time, are to be taken note of since we are concerned with the Assessment Years 1979-80 and 1980-81. Section 80HH provides deduction from income at specified rates in respect of certain industrial undertakings which are covered by the said provision. Issue is limited, namely, while computing the deduction whether it is to be available out of 'income' as computed under the Act or out of 'profits and gains', without deducting therefrom 'depreciation' and 'investment allowance'. Language of sub-section (1) of Section 80HH will have to be seen, in order to comprehend the aforesaid issue. It reads:

"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."

3. As can be seen from the above, this Section grants deduction from profits and gains to an undertaking engaged in manufacturing or in the business of the hotel. The deduction is admissible at the rate of 20% of the profits and gains of undertaking for 10 assessment years. Certain conditions are to be fulfilled in order to be eligible for such a deduction, about which there is no dispute insofar as these appeals are concerned. Conflict is confined to one aspect viz. 20% deduction of gross profits and gains or net income. Whereas assessees want deduction at the rate of 20% of profits and gains, i.e., gross profits, the stand of the Income Tax Department is that deduction at the rate of 20% is to be computed after taking into account depreciation, unabsorbed depreciation and investment allowance. To put it otherwise, as per the Department, the income of the assessee is to computed in accordance with the provisions contained in Sections 28 to 44DB which are the provisions for computation of 'income' under the head 'profits and gains of business or profession'. Once income is arrived at after the application of the aforesaid provisions, 20% thereof is allowable as deduction under Section 80HH. The assessees, on the other hand, submit that Section 80HH uses the expression 'profits and gains' which is different from 'income'. Therefore, whatever profit and gains are earned by an undertaking covered by Section 80HH of the Act, 20% thereof is admissible as deduction. As a corollary, from such profits and gains of the industrial undertaking, depreciation or unabsorbed investment allowances which are the deductions admissible under Sections 32 and 32AB of the Act, cannot be taken into consideration.

4. *We may mention, at this stage, that this Court in the the case of Motilal Pesticides (I) (P.) Ltd. v. CIT [2000] 111 Taxman 83/243 ITR 26 has taken the view which is favourable to the Department. This view is followed by the High Court in the impugned judgment thereby dismissing the appeals of the appellants/assessees herein. The assessees in these appeals submit that the aforesaid view taken in Motilal Pesticides (I.) (P.) Ltd. case (supra) is not a correct view as it ignores certain earlier judgments on this very issue. Therefore, according to them, Motilal Pesticides (I.) (P.) Ltd. case (supra) needs a re-look.*

5. *These appeals had come up for hearing before a Devision Bench of this Court. After hearing the arguments advanced by the counsel for the parties on the aforesaid lines, the Division Bench noted the conflict and passed orders dated 5th November, 2014, thereby referring the matter to a larger Bench. That is how the matters have come up before this Bench.*

6. *In order to appreciate the controversy, we would have to go through certain provisions of the Act in order to understand broadly the scheme of taxation on the income of assessees.*

7. *Section 4 of the Act is a charging Section which makes total income of the previous year of every person chargeable to tax at the rates which may be specified from time to time. The said Section, thus, imposes income tax upon a person in respect of his income. Of course, income is to be charged at the rate or rates fixed for the year by the Annual Finance Act. Also the levy is to be on the total income of the assessable entity, computed in accordance with the provisions of the Act. Section 5 lays down the scope of the total income.*
While computing the total income, certain incomes are exempted which are not to be included and these are mentioned in Section 10 of the Act.

8. *Section 14 of the Act is the next provision which is relevant for these appeals. It is the first provision in Chapter IV which is titled 'computation of total income' and, obviously, contains the provision for computation of total income. Section 14 enumerates different heads of income, namely, salaries, income from house property, profits and gains of business or profession, capital gains and income from other sources. Insofar as income under the head 'profits and gains of business or professions' is concerned, provisions thereto are contained in Sections 28 to 44DB of the Act. Section 28 specifies various incomes which shall be chargeable to income tax under this head. Thereafter, Section 29 provides that income referred to in Section 28 shall be computed in accordance with the provisions contained in Sections 30 to 43D. These sections provide for deductions of various kinds. Among them, Section 32 relates to depreciation, Section 32AB gives deductions in respect of certain investment allowance. After providing for admissible deductions to an assessee, income under this head is ascertained. In a similar way, as noted above, income under the other heads is worked out. If a particular assessee has income under more than one heads, in the income tax returns, the said assessee would show the respective incomes under the aforesaid heads thereby arriving at total income on which the tax would become payable.*

9. *Chapter VIA also contains provisions in respect of certain deductions which are to be made in computing total income. Section 80A of this Chapter stipulates that in computing the total income of an assessee, there shall be allowed from 'gross total income' the deductions specified in Section 80C to 80U. It is relevant to point out that though Chapter VIA also allows certain deductions in computing total income, these provisions are not clubbed with the provisions of part of Chapter IV of the Act. There is a reason for doing so. The provisions made in Chapter IV are for the purposes of computing total income qua income under the head 'profits and gains' from business or profession. Various deductions which are specified to be given from the gross total income are in the nature of expenses incurred or to be treated as expenses. It may be rents paid, insurance premium paid for building, expenditure incurred on scientific research, various other kinds of expenditures etc. The purpose is to arrive at true income after making such expenditure admissible for deduction. Deductions provided under Chapter VIA, on the other hand, are largely in the nature of incentives. For example, under Section 80CCA deductions provided is in respect of deposits under National Savings Scheme or payment to a deferred annuity plan purpose is to encourage the assessees to make deposits under these Schemes. Likewise, under Section 80CCC, deduction is given in respect of contribution to certain Pension funds. The deductions are also given, inter alia, for donations for scientific research or rural development, to newly established industrial undertakings or hotel business in backward areas, small scale industrial undertakings, housing projects, export business, businesses earning convertible foreign exchange etc.*

10. *It is in the aforesaid scheme, one has to consider whether deductions under Section 80HH, which falls under Chapter VIA, is to be given after applying the provisions for computation of income as mentioned in Chapter IV of the Act. Once, we examine the matter keeping in view the aforesaid nature of scheme, answer becomes obvious. Chapter VIA, is a stand alone chapter dehors Chapter IV. Therefore, provisions relating to various kinds of deductions mentioned therein have to be construed independent of Chapter IV of the Act. Another pertinent aspect which is to be borne in mind is that conceptually 'income or total income' is different from 'profits and gains'. There are various heads of income and if an assessee is earning income under more than one heads, all these are to be clubbed together to arrive at total income. Profits and gains from the business or profession is only one of the heads of income.*

11. *We are to examine and interpret the provisions of Section 80HH of the Act keeping in view the aforesaid parameters. As noted above, it mentions that in computing the total income of the assessee, a deduction from profits and gains of an amount equals to 20% thereof shall be provided.*

12. *Argument of Mr. Bagaria, learned senior counsel appearing for the appellant, is that in Motilal Pesticides' (I) (P.) Ltd. case, (supra) this Court missed the marked difference in the terms 'Income' and 'Gross Total Income' as referred to in Section 80AB as against 'Profits and Gains of Business' as appearing in Section 80HH and 80-I. It is argued that the restrictive clause in Section 80AB is applicable only to the provisions based on Income/Gross Total Income/Net Taxable Income and is wholly inapplicable to provisions like 80HH/80I/80IA/80J under which the deduction has*

been provided for promoting a particular kind of activity and is accordingly calculatable on the Profit and Gains of Business, i.e. such activity. It is argued that Sections 80HH and 80I very categorically refer to and use the terminology 'profits and gains of Industrial Undertakings'. The terms 'profits and gains' and 'income' are not same but are different. The term 'profits and gains' has not been defined under the provisions of the Act whereas the term 'income' has been defined. It is further submitted that there are a number of provisions under Chapter VIA, some of which refer to the term 'profits and gains'. Whereas some other refer to the term 'income'. Thus, in some of the provisions of Chapter VIA, the deduction is intended to be given out of 'profits and gains', whereas in some other sections, the deduction has been provided to be given out of 'income'. When the term 'profits and gains' has not been defined under the Act, in that case, its meaning has to be understood as is being understood in commercial world.

13. *The aforesaid arguments is countered by Ms. Vibha Datta Makhija, learned senior counsel who appeared for the Revenue. She argues that the judgment in Cambay Electric Supply Industrial Co. Ltd. v. CIT [1978] 113 ITR 84 (SC) noted in the Reference Order, is on Section 80E of the Act which has no bearing in the instant case that pertains to Section 80HH. She also submits that legislative intent would be clear from the fact that decision in Cloth Traders (P) Ltd. v. Addl. CIT [1979] 118 ITR 243/1 Taxman 335 (SC) led to the insertion of Section 80AB in the Act. The purpose, therefore, was to take away the effect of the judgment in Cloth Traders (P.) Ltd's. case (supra) According to her, Section 80AB makes it clear that deductions to be made is with reference to Income included in the Gross Total Income under the heading 'C – Deduction in respect of certain incomes'. It also makes it clear that the amount of income of that nature is to be computed in accordance with the provisions of the Act (before making any deduction under this Chapter). That alone shall 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.*

14. *Her submission is that though Section 80AB came to be inserted by the Finance (No.2) Act, 1980 with effect from 01.04.1981, it is clarificatory in nature. To read the provision in this manner, she has relied upon the judgment in H.H. Sir Rama Varma v. CIT [1993] 71 Taxman 237/[1994] 205 ITR 433 (SC). She has also referred to the Constitution Bench judgment in Distributors (Baroda) (P.) Ltd. v. Union of India [1985] 22 Taxman 49/155 ITR 120 (SC), which has overruled Cloth Traders (P.) Ltd's., case (supra) and in particular paragraph 12 thereof which reads as under:*

> *'12. Soon after the enactment of Section 80-M a question arose before the Gujarat High Court in Addl. CIT v. Cloth Traders Pvt. Ltd. whether on a true construction of that section, the permissible deduction is to be calculated with reference to the full amount of dividends received by the assessee from a domestic company or with reference to the dividend income computed in accordance with the provisions of the Act, that is, after deducting the interest paid on monies borrowed from earning such income. The Gujarat High Court in a judgment delivered on November 28, 1973, held that the deduction permissible under Section 80-M is liable to be calculated with reference to the dividend income computed in accordance with the provisions of the Act and*

not with reference to the full amount of dividends received by the assessee. The assessee being aggrieved by this judgment preferred an appeal to this Court and this appeal was allowed by the judgment delivered in Cloth Traders case. This Court overruled the view taken by the Gujarat High Court and held that the deduction required to be allowed under Section 80-M must be calculated "with reference to the full amount of dividends received from a domestic company and not with reference to the dividend income as computed in accordance with the provisions of the Act, that is, after making deductions provided under the Act". This decision was given by the Court on May 4, 1979."

13. Now, according to Parliament, this interpretation placed on Section 80-M by the summit court was not in conformity with the legislative intent and it resulted in considerable unjustified loss of revenue. Parliament therefore immediately proceeded to set right what according to it was an interpretation contrary to the legislative intent and with a view to setting at naught such interpretation. Parliament, by Section 12 of Finance (No.2) Act, 1980, introduced in the Income Tax Act, 1961, Section 80-AA with retrospective effect from April 1, 1968, that is, the date when Section 80-M was originally enacted, providing that the deduction required to be allowed under Section 80M in respect of inter-corporate dividends "shall be computed with reference to the income by way of such dividends as computed in accordance with the provisions of this Act (before making any deduction under this Chapter) and not with reference to the gross amount of such dividends". It is the validity of this new Section 80-AA which is challenged in the present writ petition. But we may make it clear that what is challenged is not the prospective operation of Section 80-AA. That would clearly be unexceptionable because the Legislature can always impose a new tax burden or enhance an existing tax liability with prospective effect. But the complaint of the assessee was against retrospective effect being given to Section 80-AA, because that would have the effect of enhancing the tax burden on the assessee by setting at naught the interpretation placed on Section 80M by the decision in Clothe Traders case and reducing the amount of deduction required to be allowed under Section 80-M. However, as pointed out at the commencement of this judgment, it would become necessary to examine this complaint against the constitutional validity of retrospective operation of Section 80-AA only if we affirm the interpretation placed on Section 80-M by the decision of this Court in Cloth Traders case. If we do not agree with the decision of this Court in Cloth Traders case and take the view that the Gujarat High Court was right in the interpretation placed by it on Section 80-M in Addl. CIT v. Cloth Traders Pvt. Ltd., no question of constitutional validity of the retrospective operation of Section 80-AA would remain to be considered, because in that event Section 80-AA in its retrospective operation would be merely clarificatory in nature and would not involve imposition of any new tax burden.'

15. *Ms. Makhija also relied upon the judgment of this Court in CIT v. Kotagiri Industrial Co-Operative Tea Factory Ltd. [1997] 91 Taxman 214/224 ITR 604 wherein provisions of Section 80P of the Act are interpreted in the following manner:*

'1. … The Tribunal referred the following question for the opinion of the High Court:

"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that the deduction under Section 80-P of the Income Tax Act should be allowed before set-off of unabsorbed losses of earlier year?".....

5. *Reference may be made at this stage to the provisions of Section 80-P which falls in Chapter VI-A of the Act. Sub-section (1) of Section 80-P, which is relevant for the purpose of the case, provides as follows:*

"80-P. (1) Where in the case of an assessee being a cooperative society, the gross total income includes any income referred to in sub-section (2), there shall be deducted, in accordance with and subject to the provisions of this section, the sums specified in sub-section (2), in computing the total income of the assessee."

6. *For the purpose of Chapter VI-A the expression "gross total income" is defined in clause (5) of Section 80-B in the following terms:*

" 'gross total income' means the total income computed in accordance with the provisions of this Act, before making any deduction under this Chapter."

7. *If Section 80-P(1) is read with the definition of the expression "gross total income" contained in Section 80-B(5), it has to be held that for the purpose of making deduction under Section 80-P it is necessary to first determine the gross total income in accordance with the other provisions of the Act. This means that for the purposes of the present case the gross total income must be determined by setting off against the income the business losses of the earlier years as required under Section 72 of the Act.....*

12. Having regard to the law as laid down by this Court in Distributors (Baroda) (P) Ltd. [(1986) 1 SCC 43 : 1986 SCC (Tax) 159 : (1985) 155 ITR 120] and H.H. Sir Rama Varma [1994 Supp (1) SCC 473 : (1994) 205 ITR 433] , it must be held that before considering the matter of deduction under Section 80-P(2) the Income Tax Officer had rightly set off the carried-forward losses of the earlier years in accordance with Section 72 of the Act and on finding that the said losses exceeded the income, he rightly did not allow any deduction under Section 80-P(2) and the Appellate Assistant Commissioner as well as the Tribunal and the High Court were in error in taking a contrary view.

13. The principle of statutory construction invoked by Ms Ramachandran has no application in construing the expression "gross total income" in subsection (1) of Section 80-P. In view of the express provision defining the said expression in Section 80-B(5) for the purpose of Chapter VI-A, there is no scope for construing the said expression differently in Section 80-P.'

16. *We have considered the aforesaid submissions.*

17. *At the outset, it needs to be pointed out that in these cases, the Court is concerned with the provisions of Section 80HH of the Act and, therefore, the language used in that particular provision is to be kept in mind. As noted above, sub-section (1) of Section 80HH allows "a deduction from such profits and gains of an amount equal to 20 per cent thereof", in computing the total income of the assessee. Thus, so far as deduction admissible under this provision is concerned it is from the 'profits and gains'. In this context first question would be: what meaning is to be assigned to the expression 'profits and gains'? Here we find that the reference order dated 5th November, 2014 rightly draws a distinction between 'profits and gains' and 'income'. We would like to reproduce the said reference order in its entirety as we find that it captures the legal position lucidly and succinctly:*

'1. We are concerned in these cases with Assessment Year 1979-1980 and Assessment Year 1980-1981. The High Court of Rajasthan by the impugned judgment dated 17th May, 2004 construed Section 80-HH of the Income Tax Act, 1961 following a judgment of this Court in Motilal Pesticides(I) Pvt. Ltd.
v. Commissioner of Income Tax, Delhi-II [2000] 9 SCC 63. The High Court noticed an argument made before it to the following effect:

"It is most humbly submitted that the concept 'profits and gains' is a wider concept than the concept of 'income'. The profits and gains/loss are arrived at after making actual expenses incurred 2 from the figure of sales by the assessee. It does not include any depreciation and investment allowance, as admittedly these are not the expenses actually incurred by the assessee. However, the term 'income' does take into consideration the deductions on account of depreciation and investment allowance. Therefore, the term profits and gains are not synonymous with the term 'income'."
However, the High Court correctly felt that it was bound by the judgment of this Court.

2. *Motilal Pesticides(I) Pvt. Limited (Supra) is a Judgment of this Court which affirmed the Judgment of the Delhi High Court concerning the interpretation of the very same Section 80-HH of the Income Tax Act. The assessment years also happened to be the same assessment years as involved in these appeals.*

3. *The question of law set out by this Court is, whether, on the facts and circumstances of the case, the Tribunal was right in holding that the assessee was not entitled to deduction under Section 80-HH of the Income Tax Act, 1961 on the gross profit of Rs.34,30,035 (Liquid Section) but on the net income 3 therefrom for Assessment Year 1979-80?*

4. *Thereafter, this Court set out Section 80-HH in para 2 and Section 80-M in para 3 of the Judgment. It will be noticed that whereas Section 80-HH uses the expression "any profits and gains derived from", Section 80-M uses the expression "any income". Section 80-M was held, in the Cloth Traders (P) Ltd. Vs. CIT (1979) 3 SCC 538, to mean that for the purpose of that Section, deduction is to be allowed on the gross total income and not on net income. This was over-ruled in Distributors (Baroda) Pvt. Ltd. Vs. Union of India (1986) 1 SCC 43.*

5. *Bhagwati, J. who was party to the earlier decision in the Cloth Traders' case delivered a judgment in the Distributors(Baroda) case holding that the Cloth traders'*

case was obviously incorrectly decided because the words "any income" cannot possibly refer to gross total income but referred only to "net income". Further, Distributors (Baroda) case followed the judgment of this Court in Cambay Electric Supply Industrial Co. Ltd. v. The Commissioner of Income Tax, Gujarat-II, Ahmedabad [1978] 2 SCC 644 which decision concerned itself with Section 80-E of the Income Tax Act. Section 80 E reads as follows:—

> *"80E – 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 this section applies, where the total income (as computed in accordance with the other provisions of this Act) includes any profits and gains attributable to the business of generation or distribution of electricity or any other form of power or of 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) an Indian Company; or (b) any other company which has made the prescribed arrangements for the declaration and payment of dividends (including dividends on preference shares) within India. But does not apply to any Indian Company referred to in Clause (1), or to any other company referred to in clause (b), if such Indian or other company is a company referred to in Section 108 of its total income as computed before applying the provisions of sub-section (1) does not exceed twenty-five thousand rupees".*

6. *It will be noticed that in marked contrast to the Section under consideration in this appeal i.e. 80-HH, Section 80-E uses the expression "total income [as 5 computed in accordance with the provisions of this Act]" and goes on to speak of any profits and gains, so computed, for the purpose of deduction under Section 80-E. It will be seen in the present case the said words are conspicuous by their absence in Section 80-HH even though the expression "profits and gains" is the same expression used in section 80-E.*

7. *The finding in paragraph 4 in Motilal Pesticides (supra) that the language of Section 80-HH and Section 80-M is the same is, with respect, prima facie, incorrect. Conceptually, "any income" and "profits and gains" are different under the Income Tax Act.*

> *(See Section 80-M read with Sections 80-AA & AB, Section 80-T which speak of "any income" and Section 28 which speaks of "income from profits and gains" showing thereby that conceptually the two expressions are understood as distinct in law).*

8. *In paragraph 5 of the judgment in Motilal Pesticides(Supra), Shri Ramamurthi, learned senior counsel appearing for the appellant submitted that both Cloth Traders and Distributors (Baroda) were cases which pertained to Section 80-M only and this Court had no occasion to consider the application of Section 80-AB with 6 reference to Section 80-HH of the Act. The Court in repelling this contention*

referred to another decision in H.H. Sir Rama Varma v. CIT [1994] Supp(1) SCC 473, which judgment dealt with the then newly enacted Section 80-AA and 80-AB. Both these sections again are relatable to deductions made under Section 80-M; and Section 80-T with which that judgment was concerned also uses the expression "any income" as opposed to "profits and gains". It will be clear, therefore, that prima facie Varma's case again has very little to do with the concept of "profits and gains" with which we are concerned here. For these reasons, the matters be placed before the Hon'ble Chief Justice of India to constitute an appropriate Bench to consider the correctness of the judgment in Motilal Pesticides (supra).'

18. *We have already stated, in brief and broadly, the scheme of the Act insofar as assessment of income is concerned, particularly, with reference to computing the income as provided in Chapter IV of the Act and contrasted it with the deductions that are allowable under Chapter VI-A of the Act while computing total income. That scheme itself draws distinction between the concept 'income' on the one hand and 'profits and gains' on the other hand. Insofar as computation of income under the head 'profits and gains' from business or profession is concerned, Section 28 of the Act mentions various kinds of incomes which are chargeable under this head. Therefore, all those incomes specifically mentioned in that provision when earned by a particular assessee, are to be aggregated to arrive at profits and gains of the assessee. Section 29 thereof mentions the method of arriving at 'income' which is to be computed in accordance with the provisions contained in Sections 30-43D of the Act. Sections 30-43D contain deductions of various kinds which are in the nature of expenditure or the like nature. After providing the deductions admissible in these provisions, one arrives at the figure of net profits which would become the net income under the head 'profits and gains of business or profession'. In contrast, as mentioned above, under Chapter VI-A of the Act certain deductions are given by way of incentives. Assessees may earn these deductions on fulfilling the eligibility conditions contained therein, even when they are not in the nature of any expenditure incurred by the assessee. Here, Section 80A of the Act provides that in computing the total income of assessee, there shall be allowed from his gross total income, in accordance with the subject of the provisions of this Chapter, the deductions specified in Sections 80C to 80U. As mentioned above, Sections 80C to 80U contain different subject matters and also specify particular percentage of deductions for a particular period. Significantly, Section 80A itself uses the expression 'from his gross total income' as it states that deduction is to be allowed to an assessee 'from his gross total income'. Moreover, different provisions from Sections 80C to 80U, while mentioning the percentage at which and for which period a particular deduction is allowable, also specifies as to how such a deduction is to be worked out, namely, specific percentage of deduction of which component. These sections provide different parameters. Insofar as Section 80HH is concerned, it specifically mentions that deduction @ 20% of 'profits and gains'.*

19. *Reading of Section 80HH along with Section 80A would clearly signify that such a deduction has to be of gross profits and gains, i.e., before computing the income as specified in Sections 30 to 43D of the Act. It is correctly pointed out by Division Bench in the reference order that in Motilal Pesticides (I.) (P.) Ltd. case (supra), the*

Court followed the judgment rendered in the Cloth Traders (P) Ltd. case (supra) which was a case under Section 80M of the Act, on the premise that language of Section 80HH and Section 80M is the same. This basis is clearly incorrect as the language of two provisions is materially different. We are, therefore, of the considered opinion that judgment of Motilal Pesticides (I.) (P.) Ltd. case (supra) is erroneous. We, therefore, overrule this judgment.

20. *We are unable to subscribe to the contention of the learned senior counsel for the Revenue that Section 80AB, which was inserted by Finance (No. 2) Act, 1980 with effect from 1st April, 1981 is clarificatory in nature. It is a provision made with prospective effect as the very Amendment Act says so. Therefore, it cannot apply to the Assessment Years 1979-80 and 1980-81, when Section 80AB was brought on the statute book after these assessment years. This position becomes clear from the reading of Circular No. 281 dated September 22, 1980 issued by the Central Board of Direct Taxes itself. This circular inter alia describes the reasons for adding new Sections 80AA and 80AB. It refers to judgment in Cloth Traders (P.) Ltd. case (supra) and mentions that the directions specified in the aforesaid sections will be calculated with reference to the net income as computed in accordance with the provisions of the Act (before making any deduction under Chapter VIA) and not with reference to the gross amount of such income, subject, however, to the other requirements of the respective sections. Notwithstanding the same, this circular also categorically mentions that it will take effect from April 01,1981. Following portion of this circular is relevant:*

> *"The new section 80AB will take effect from 1st April, 1981, and will accordingly apply in relation to the assessment year 1981-82, and subsequent years. It should be carefully noted that the new section 80AB, unlike section 80AA, will not have any retrospective operation."*

21. *It is, thus, clear that change in legal position is brought about only, with the insertion of Section 80AB and made applicable from Assessment Year 1981-82. In view thereof, judgments in the case of Cloth Traders (P.) Ltd. (supra) relied by the Revenue will be of no relevance. Likewise, judgment in Kotagiri Industrial Co-Operative Tea Factory Ltd. case (supra) decided altogether different question, which can be discerned from the passages extracted therefrom and will have no application to the instant case.*

22. *As a result, all these appeals are allowed.*

116. *A reading of the above said makes it clear that while expounding upon the provisions of section 80 HH, the Hon'ble Court was considering as to whether while computing the deduction whether it is to be available out of income as computed under the act or out of profit and gains without deducting therefrom depreciation u/s. 32 and investment allowance u/s. 32AB of the Act.*

117. *After elaborating upon the language of the section and the arguments of the parties honourable court in paragraph 17 of the above order noted that subsection 1 of section 80 HH allows a deduction from such profits and gains of an amount equal to*

20% thereof in computing the total income of the assessee. Further Hon'ble Apex Court observed that the so far as deduction admissible under this provision is concerned it is from the profits and gains. That in this context the 1st question would be; what meaning is to be assigned to the expression profits and gains.

118. *After reproducing the reference order in this regard honourable supreme court expounded that the scheme of the act insofar as assessment of income is concerned particularly with reference to computing the income as provided in chapter IV of the act and contrasted it with the deduction that are allowable under chapter VIA of the act while computing total income. That the scheme itself draws distinction between the concept of income on the one hand and profits and gains on the other hand. That insofar as computation of income under the head profits and gains from business or profession is concerned section 28 of the act mentions various kinds of income to be chargeable under this Act. That therefore all those incomes specifically mentioned in that provision when earned by a particular assessee are to be aggregated to arrive at profits and gains of business. Section 29 thereof mentions the method of arriving at income which is to be computed in accordance with the provisions contained in section 30-43D of the act. Section 30-43D contains deductions of various kinds which are in the nature of expenditure of the likenature. After providing the deductions admissible under these provisions one arrives at the figure of the profit which would become the net income under the head profits and gains of business or profession. In contrast as mentioned above under chapter VI A of the Act certain deductions are given by way of incentives. Assessee's may earn this deductions on fulfilling the eligibility conditions contained therein, even when they were not in the nature of expenditure incurred by the assessee. Here section 80A of the act provides that in computing the total income of assessee there shall be allowed from his gross total income in accordance with the subject of the provisions of this chapter the deductions as specified in section 80C to U. As mentioned above section 80 C to 80 U contain different subject matters.*

119. *The Hon'ble Apex Court expounded that reading section 80 HH along with section 80A would clearly signify that deduction has to be of gross profits and gains that is before computing the income as a specified in section 30 to 43D. Thereafter honourable court held that the judgement of Motilal pesticides is erroneous in as much as the language of 80 M and 80H are materially different and hence the same was overruled. Thereafter the honourable court held that provisions of section 80 AB are perspective.*

120. *From the above exposition it is amply clear that honourable Supreme Court significantly brought out difference between computation of income i.e. profit which becomes the net income under the head profits and gains of business and profession in contradiction to profit and gains with reference to which the deduction is to be allowed. The exposition that emerges from the above said order is that the profit and gains of business with reference to which the assessee is eligible to get the deduction is to be computed before deduction of the depreciation and investment allowance as per the income tax act.*

121. *Now by way of this additional ground the assessee contends that it had been granted deduction under section 10 AA on the profit which is the net income under the head profits and gains of business after the depreciation as per Income Tax Act, and in view of the above said exposition it deserves that the deduction be granted with reference to profit and gain as expounded in the above said decision.*

122. *Now in this regard assessee's contention is that provisions of section 80HH and section 10AA are pari materia. This has been disputed by the Revenue.*

123. *The provisions of section 80 HH reads as under :-*

Deduction in respect of profits and gains from newly established industrial undertakings or hotel business in backward areas.

80HH. (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 fulfils 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 sub-section 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 co-operative 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 Assessing Officer, 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 Assessing Officer 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 Assessing Officer 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 Assessing Officer 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 under section 80-I 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.*

124. The provision of section 10AA reads as under:

Special provisions in respect of newly established Units in Special Economic Zones.

10AA. (1) Subject to the provisions of this section, in computing the total income of an assessee, being an entrepreneur as referred to in clause (j) of section 2 of the Special Economic Zones Act, 2005, from his Unit, who begins to manufacture or produce articles or things or provide any services during the previous year relevant to any assessment year commencing on or after the 1st day of April, 2006, but before the first day of April, 2021, the following deduction shall be allowed—

(i) *hundred per cent of profits and gains derived from the export, of such articles or things or from services for a period of five consecutive assessment years beginning with the assessment year relevant to the previous year in which the Unit begins to manufacture or produce such articles or things or provide services, as the case may be, and fifty per cent of such profits and gains for further five assessment years and thereafter;*

(ii) *for the next five consecutive assessment years, so much of the amount not exceeding fifty per cent of the profit as is debited to the profit and loss account of the previous year in respect of which the deduction is to be allowed and credited to a reserve account (to be called the "Special Economic Zone Re-*

investment Reserve Account") to be created and utilized for the purposes of the business of the assessee in the manner laid down in sub-section (2).

Explanation.—For the removal of doubts, it is hereby declared that the amount of deduction under this section shall be allowed from the total income of the assessee computed in accordance with the provisions of this Act, before giving effect to the provisions of this section and the deduction under this section shall not exceed such total income of the assessee.]

(2) *The deduction under clause (ii) of sub-section (1) shall be allowed only if the following conditions are fulfilled, namely :—*

(a) *the amount credited to the Special Economic Zone Re-investment Reserve Account is to be utilised—*

(i) *for the purposes of acquiring machinery or plant which is first put to use before the expiry of a period of three years following the previous year in which the reserve was created; and*

(ii) *until the acquisition of the machinery or plant as aforesaid, for the purposes of the business of the undertaking other than for distribution by way of dividends or profits or for remittance outside India as profits or for the creation of any asset outside India;*

(b) *the particulars, as may be specified by the Central Board of Direct Taxes in this behalf, under clause (b) of sub-section (1B) of section 10A have been furnished by the assessee in respect of machinery or plant along with the return of income for the assessment year relevant to the previous year in which such plant or machinery was first put to use.*

(3) *Where any amount credited to the Special Economic Zone Re-investment Reserve Account under clause (ii) of sub-section (1),—*

(a) *has been utilised for any purpose other than those referred to in subsection (2), the amount so utilised; or*

(b) *has not been utilised before the expiry of the period specified in subclause (i) of clause (a) of sub-section (2), the amount not so utilised,*

shall be deemed to be the profits,—

(i) *in a case referred to in clause (a), in the year in which the amount was so utilised; or*

(ii) *in a case referred to in clause (b), in the year immediately following the period of three years specified in sub-clause (i) of clause (a) of subsection (2),*

and shall be charged to tax accordingly :

Provided that where in computing the total income of the Unit for any assessment year, its profits and gains had not been included by application of the provisions of sub-section (7B) of section 10A, the undertaking, being the Unit shall be entitled to deduction referred to in this sub-section only for the unexpired period of ten consecutive assessment years and thereafter it shall be eligible for deduction from income as provided in clause (ii) of subsection (1).

Explanation.—For the removal of doubts, it is hereby declared that an undertaking, being the Unit, which had already availed, before the commencement of the Special

Economic Zones Act, 2005, the deductions referred to in section 10A for ten consecutive assessment years, such Unit shall not be eligible for deduction from income under this section :

Provided further that where a Unit initially located in any free trade zone or export processing zone is subsequently located in a Special Economic Zone by reason of conversion of such free trade zone or export processing zone into a Special Economic Zone, the period of ten consecutive assessment years referred to above shall be reckoned from the assessment year relevant to the previous year in which the Unit began to manufacture, or produce or process such articles or things or services in such free trade zone or export processing zone :

Provided also that where a Unit initially located in any free trade zone or export processing zone is subsequently located in a Special Economic Zone by reason of conversion of such free trade zone or export processing zone into a Special Economic Zone and has completed the period of ten consecutive assessment years referred to above, it shall not be eligible for deduction from income as provided in clause (ii) of sub-section (1) with effect from the 1st day of April, 2006.

(4) *This section applies to any undertaking, being the Unit, which fulfils all the following conditions, namely:—*

(i) *it has begun or begins to manufacture or produce articles or things or provide services during the previous year relevant to the assessment year commencing on or after the 1st day of April, 2006 in any Special Economic Zone;*

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

Provided that this condition shall not apply in respect of any undertaking, being the Unit, which is formed as a result of the reestablishment, reconstruction or revival by the assessee of the business of any such 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.*

Explanation.—The provisions of Explanations 1 and 2 to sub-section (3) of section 80-IA shall apply for the purposes of clause (iii) of this sub-section as they apply for the purposes of clause (ii) of that sub-section.

(5) *Where any undertaking being the Unit which is entitled to the deduction under this section is transferred, before the expiry of the period specified in this section, to another undertaking, being the Unit in a scheme of amalgamation or demerger,—*

(a) *no deduction shall be admissible under this section to the amalgamating or the demerged Unit, being the company for the previous year in which the amalgamation or the demerger takes place; and*

(b) *the provisions of this section shall, as they would have applied to the amalgamating or the demerged Unit being the company as if the amalgamation or demerger had not taken place.*

(6) *Loss referred to in sub-section (1) of section 72 or sub-section (1) or subsection (3) of section 74, in so far as such loss relates to the business of the undertaking, being the Unit shall be allowed to be carried forward or set off.*

(7) *For the purposes of sub-section (1), the profits derived from the export of articles or things or services (including computer software) shall be the amount which bears to the profits of the business of the undertaking, being the Unit, the same proportion as the export turnover in respect of such articles or things or services bears to the total turnover of the business carried on by the undertaking:*

Provided that the provisions of this sub-section [as amended by section 6 of the Finance (No. 2) Act, 2009 (33 of 2009)] shall have effect for the assessment year beginning on the 1st day of April, 2006 and subsequent assessment years.

(8) *The provisions of sub-sections (5) and (6) of section 10A shall apply to the articles or things or services referred to in sub-section (1) as if—*

(a) *for the figures, letters and word "1st April, 2001", the figures, letters and word "1st April, 2006" had been substituted;*

(b) *for the word "undertaking", the words "undertaking, being the Unit" had been substituted.*

(9) *The provisions of sub-section (8) and sub-section (10) of section 80IA shall, so far as may be, apply in relation to the undertaking referred to in this section as they apply for the purposes of the undertaking referred to in section 80-IA.*

(10) *Where a deduction under this section is claimed and allowed in respect of profits of any of the specified business, referred to in clause (c) of subsection (8) of section 35AD, for any assessment year, no deduction shall be allowed under the provisions of section 35AD in relation to such specified business for the same or any other assessment year. Explanation 1.—For the purposes of this section,—*

(i) *"export turnover" means the consideration in respect of export by the undertaking, being the Unit of articles or things or services received in, or brought into, India by the assessee but does not include freight, telecommunication charges or insurance attributable to the delivery of the articles or things outside India or expenses, if any, incurred in foreign exchange in rendering of services (including computer software) outside India;*

(ii) *"export in relation to the Special Economic Zones" means taking goods or providing services out of India from a Special Economic Zone by land, sea, air, or by any other mode, whether physical or otherwise;*

(iii) *"manufacture" shall have the same meaning as assigned to it in clause (r) of section 2 of the Special Economic Zones Act, 2005;*

(iv) *"relevant assessment year" means any assessment year falling within a period of fifteen consecutive assessment years referred to in this section;*

(v) *"Special Economic Zone" and "Unit" shall have the same meanings as assigned to them under clauses (za) and (zc) of section 2 of the Special Economic Zones Act, 2005.*

Explanation 2.—For the removal of doubts, it is hereby declared that the profits and gains derived from on site development of computer software (including services for

development of software) outside India shall be deemed to be the profits and gains derived from the export of computer software outside India.

125. *In this regard we note that section 80HH with which the honourable Supreme Court was concerned with, provided that where the gross total income of the assessee includes any profits and gains derived from an industrial undertaking, or the business of the hotel to which this section applies, there shall in accordance with an subject to the provisions of this section be allowed in computing the total income of the assessee deduction from such profits and gains of an amount equal to 20% thereof.*

126. *The provision of section 10 AA provides that in computing the total income of an assessee following deduction shall be allowed –..... Percent of profits and gains derived from exports.*

127. *From the above it is amply clear that the language of section 80 HH and 10 AA are pari materia in as much as both the section provides that in computing the total income of the assessee deduction shall be allowed at certain percentage of profit and gains derived from....*

128. *Now it was the meaning of above referred "profit and gains" derived that honourable Supreme Court expounded that the same refers to profits which are commercial profit and without deducting the depreciation and investment allowance as per the income tax act.*

129. *Thus the contention of the learned counsel of the assessee that languages of both the above section are pari materia is to be accepted. The submission of the learned departmental representative that the languages are different is not at all sustainable in light of the above said discussion. The distinction brought out by the learned departmental representative is not based upon a proper and full reading of the concerned section. The suggestion of the learned departmental representative that section 80 HH does not deal with profit and gains derived is totally fallacious. The term derived has been very much used and the same in facts controls the provision of section 80 HH. Hence learned departmental representative submission in this regard is not sustainable.*

130. *The submission of the learned departmental representative and the stand of the revenue will succeed only when the explanation below section 10 AA is considered as clarificatory. The said explanation inserted by Finance Act 2017 with effect from 1/4/18 provides that*

"For the removal of doubts, it is hereby declared that the amount of deduction under this section shall be allowed from the total income of the assessee computed in accordance with the provisions of this act, before giving effect to the provisions of this section and the deduction under this section shall not exceed such total income of the assessee".

131. *In this regard it is noted that the provisions of section 80 AB are pari matereia with the provisions of this explanation. Section 80 AB reads as under:*

"Deductions to be made with reference to the income included in the gross total income.

80AB. 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."

132. *This section was introduced by Finance Act 1980 with effect from 1.4.1981.*

133. *A bare reading of the above makes it clear that the explanation below section 10 AA and provision of section 80 AB are pari materia. Honourable Supreme Court in the case of Vijaya industries (supra) has expounded that provision of section 80 AB are prospective. In our considered opinion the ratio from the above honourable Supreme Court decision also applies here and accordingly the explanation below 10 AA has to be construed to be prospective. Hence the same cannot be invoked in determining the amount of deduction in the present assessment year. The learned departmental representative submission that the same is clarificatory accordingly fails.*

134. *Furthermore learned departmental representative submission that the decision of Vijaya industries was rendered without considering other decisions in this regard is not at all sustainable. This decision of honourable Supreme Court in the case of Vijaya Industries (supra) is a recent decision rendered by the larger bench of 3 of their Lordships from the honourable court. By no stretch of imagination it can be said that the subject dealt with by the elaborate speaking and reasoned recent order by this larger bench of the honourable Supreme Court is to be overlooked by referring to other decisions of lesser strength in judicial hierarchy. Hence the learned departmental representative submission that while rendering this decision other decisions were not referred is not at all acceptable. It is settled law that decision rendered by the honourable Supreme Court is the law of the land and is totally binding upon all the other courts and tribunals. Furthermore the submission of learned Departmental Representative that other decisions have not been considered by the Hon'ble Supreme Court is without any substance. Moreover, as cogently brought by learned Counsel of the assessee in para 9 of his submisison, the reference to decision of Plastibends India Ltd. (supra) here is not applicable. Suffice is to reiterate here that it dealt with a deduction provision under section 80IA, which falls under Chapter VI-A and is therefore covered by provisions of section 80AB (i.e. the deeming fiction to provide deduction only from income as included in the gross total income of the*

assessee). In the appellant's case the deduction is claimed under section 1OAA of the Act which is not covered in section 80AB. That the legislature in its wisdom has not made 80AB applicable to section 10A/10AA/10B/10BA/ 10C of the Act, even though the said sections provide for deduction to be granted to an assessee. Secondly, deduction under section 10AA of the Act (prior to the amendment made by Finance Act 2017 by way of insertion of Explanation) was to be given at the stage of computing the gross total income of the eligible undertaking under Chapter IV of the Act i.e. prior to the commencement of the exercise to be undertaken under Chapter VI of the Act for arriving at the total income of the assessee from the gross total income. This has been held by the Supreme Court in the case of CTT v. Yokogawa India Ltd 391 ITR 274 (SC) in the context of section 10A of the Act. Plastiblends India deals with a situation of computation of deduction under Chapter VIA of the Act i.e. after computing the gross total income of the eligible undertaking under Chapter IV of the Act.

135. *The other submission of the learned departmental representative is that section 10 AA is a part of chapter 3 and is essentially an exemption section. This the learned departmental representative himself contradicts by submitting that though post-amendment such an exemption is available in form of deduction from profit and gains derived from the undertaking. The reading of section 10AA clearly shows that the section itself provides that the same is a deduction provision. Honourable Supreme Court in the case of CIT versus Yokogawa India Ltd civil appeal No. 8498 of 2013 another's had the occasion to consider this aspect. The honourable Supreme Court settled the issue by holding that the amendment in section 10A has altered the nature of the provision from providing exemption to providing for deductions. The deductions under section 10A are prior to the commencement of the exercise to be undertaking under chapter VI of the Act i.e aggregation of income and set off of loss. The above exposition is applicable on all fours here. Hence the submission of learned departmental representative year also doesn't succeed. The last claim of The learned departmental representatives submission is that decision of honourable Supreme Court in the case of Commissioner of Customs (Import) versus Dilip Kumar and company and others Civil Appeal No. 3327 of 2007 dated 30/7/2018 provides that interpretation needs to be done strictly and in case of ambiguity the same needs to be interpreted in favour of the revenue. Here we find that it cannot be said that after the elaborate and well reasoned and speaking order rendered by the recent larger bench of three of their Lordships of the honourable Supreme Court there can be any scope of ambiguity in the interpretation of the meaning of word profit and gains with reference to which the discussion is being made here. Accordingly the submission of the learned departmental representative does not oxygenate the revenue's stand.*

136. *Accordingly in the background of aforesaid discussion and the precedent from the Hon'ble Supreme Court we direct the assessing officer to grant the deduction under section 10 AA with reference to the profit and gains as determined by the honourable Supreme Court in the case of Vijay Industries (supra)."*

3.1 In view of the above order of the Tribunal, taking a consistent view on this issue in dispute, we remit the grounds raised by the assessee to the file of ld. AO to pass a fresh order in these assessment years on this issue in the light of above order of the Tribunal cited (supra). Ordered accordingly.

4. In the result, all the appeals of the assessee are partly allowed for statistical purposes.

Order pronounced in the open court on 8th Jan, 2024

Sd/-	**Sd/-**
(George George K.)	**(Chandra Poojari)**
Vice President	**Accountant Member**

Bangalore,
Dated 8th Jan, 2024.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The DR, ITAT, Bangalore.
5 Guard file

By order

Asst. Registrar,
ITAT, Bangalore.