A M/S. VIJAY INDUSTRIES

v.

COMMISSIONER OF INCOME TAX

(Civil Appeal Nos.1581-1582 of 2005)

B MARCH 01, 2019

[A. K. SIKRI, S. ABDUL NAZEER AND M. R. SHAH, JJ.]

Income Tax Act, 1961 – ss. 80HH(1), 80A, 80AB and ss. 30 to 43D – Assessees claimed deduction u/s. 80HH @ 20% of profits and gains, i.e. gross profits – Whereas, the stand of the Income Tax Department was that deduction @ 20% is to be computed after taking into account depreciation, unabsorbed depreciation and investment allowance – In other words, as per Department, the income of the assessee is to be computed in accordance with the provisions contained in ss.28 to 44DB which are the provisions for computation of 'income' under the head 'profits and gains of business or Professions' and once income is arrived at, 20% thereof is allowable as deduction u/s. 80HH – Further, the Revenue sought the application of s.80AB – Held: In the instant case, Assessment Years 1979-1980 and 1980-1981 were under consideration – s.80HH specifically mentions that deduction @ 20% of 'profit and gains' – Reading of s. 80HH along with s. 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 ss. 30 to 43D of the Act – Insofar as s.80AB is concerned, the said section was inserted by Finance (No.2) Act, 1980 with effect from 1st April, 1981 – Clearly, s.80AB is a provision made with prospective effect – Therefore, it cannot apply to the Assessment years 1979-80 and 1980-81 – Finance (No.2) Act, 1980.

Allowing the appeals, the Court

G **HELD: 1. The scheme of the Income Tax Act, 1961 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**

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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'. 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. [Paras 18 and 19] [942-F-H; 943-A-F]

A *Motilal Pesticides (I) Pvt. Ltd. v. Commissioner of Income Tax, Delhi-II* **(2000) 9 SCC 63 – overruled.**

M/s. Cloth Traders (P) Ltd. v. *Additional C.I.T., Gujarat-I* **(1979) 3 SCC 538 : [1979] 3 SCR 984;** *Commissioner of Income Tax, T.N.-V, Madras v. Kotagiri*
B *Industrial Cooperative Tea Factory Ltd., Kotagiri* **(1997) 9 SCC 537 : [1997] 2 SCR 738 – inapplicable.**

Cambay Electric Supply Industrial Co. Ltd. v. CIT **(1978) 2 SCC 644 : [1978] 3 SCR 660;** *H.H. Sir Rama Varma (Dead) By LRs. v. Commissioner of Income Tax,*
C *Kerala* **[1994] 1 Suppl. SCC 473;** *Distributors (Baroda) Pvt. Ltd. v. Union of India & Ors.* **(1986) 1 SCC 43 : [1985] 1 Suppl. SCR 778 – referred to.**

Case Law Reference

(2000) 9 SCC 63	**overruled**	**Para 4**
[1978] 3 SCR 660	**referred to**	**Para 13**
[1979] 3 SCR 984	**inapplicable**	**Para 13**
[1994] 1 Suppl. SCC 473	**referred to**	**Para 14**
[1985] 1 Suppl. SCR 778	**referred to**	**Para 14**
[1997] 2 SCR 738	**inapplicable**	**Para 15**

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CIVIL APPELLATE JURISDICTION: Civil Appeal Nos.1581-1582 of 2005.

From the Judgment and Order dated 17.05.2004 of the High
F Court of Rajasthan at Jaipur in D.B.L.T. No.80/87 and D.B.I.T. No.7/1995

With

Civil Appeal Nos.2875 and 2877 of 2015

G Civil Appeal Nos.2416-2417, 2420-2421, 2414-2415, 2418-2419 and 2422-2423 of 2019.

S.K. Bagaria, Sr. Adv., K. Ajit Singh, Bhargava V. Desai, Akshat Malpani, Sanjay Jhanwar, Tarun Gupta, E.C. Agrawala, P.S. Sudheer, Advs. for the Appellant.

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Ms. Vibha Datta Makhija, Sr. Adv., Arijit Prasad, Sayooj Mohandas M., Praveen, Mrs. Anil Katiyar, B.V. Balaram Das, Advs. for the Respondent. A

The Judgment of the Court was delivered by

A.K. SIKRI, J. Leave granted. Delay condoned. B

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: C D

> "80HH. Deduction in respect of profits and gains from newly established industrial undertakings or hotel business in backward areas. E
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> (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." F

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 G H

A 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) Pvt. Ltd. vs. Commissioner of Income Tax, Delhi-II***[1] 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*** case is not a correct view as it ignores certain earlier judgments on this very issue. Therefore, according to them, ***Motilal Pesticides*** case 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.

[1](2000) 9 SCC 63

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

A 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
B 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
C 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
D 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.

E 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.
F 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
G 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
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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'*** case, 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 80I. 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.*** vs. ***CIT***[2], 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 ***M/s. Cloth Traders (P) Ltd.*** v. ***Additional C.I.T., Gujarat-I***[3] led to the insertion of Section 80AB in the Act. The purpose, therefore, was to take away the effect of the judgment in ***M/s. Cloth Traders (P) Ltd.*** According to her, Section 80AB makes it clear that deductions to be made is with reference to Income included in the Gross

[2](1978) 2 SCC 644
[3](1979) 3 SCC 538

A 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.

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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 (Dead) By LRs.*** v. ***Commissioner of Income Tax, Kerala***[4]. She has also referred to the Constitution Bench judgment in ***Distributors (Baroda) Pvt. Ltd.*** v. ***Union of India & Ors.***[5], which has over-ruled ***M/s. Cloth Traders (P) Ltd.***, and in particular paragraph 12 thereof which reads as under:

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> "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."

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[4]1994 Supp (1) SCC 473

H [5](1986) 1 SCC 43

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 80-M 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 80-M 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."

A 15. Ms. Makhija also relied upon the judgment of this Court in ***Commissioner of Income Tax, T.N.-V, Madras*** v. ***Kotagiri Industrial Cooperative Tea Factory Ltd., Kotagiri***[6] wherein provisions of Section 80P of the Act are interpreted in the following manner:

> "1. … The Tribunal referred the following question for the opinion
> B of the High Court:
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> "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?"
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> 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:
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> D "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."
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> 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:
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> " 'gross total income' means the total income computed in
> F accordance with the provisions of this Act, before making any deduction under this Chapter."
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> 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
> G 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.
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[6](1997) 9 SCC 537

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 sub-section (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. Vs. Commissioner of Income Tax, Delhi-II (2000) 9 SCC 63. The

A 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. Vs. 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.
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> (2) This section applies to
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> (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.

A 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-
B 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
C 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
D 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
E 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)."

F 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 the concept 'income' on the one hand and 'profits
G 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
H 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*** case, the Court followed the judgment rendered in the ***M/s. Cloth Traders (P) Ltd.*** 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*** 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

A 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 ***M/s. Cloth Traders*** case 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 carefuly 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 ***M/s. Cloth Traders*** relied by the Revenue will be of no relevance. Likewise, judgment in ***Kotagiri Industrial Cooperative Tea Factory Ltd.*** 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.

Ankit Gyan Appeals allowed.