

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**  
**INCOME TAX REFERENCE No. 94 of 1996**

**For Approval and Signature:**

**HONOURABLE MR. JUSTICE D.A. MEHTA** Sd/-

**HONOURABLE MR. JUSTICE Z.K. SAIYED** Sd/-

=====

1 Whether Reporters of Local Papers may  
be allowed to see the judgment ?  
YES

2 To be referred to the Reporter or not  
? YES

3 Whether their Lordships wish to see  
the fair copy of the judgment ? NO

4 Whether this case involves a  
substantial question of law as to the  
interpretation of the constitution of  
India, 1950 or any order made  
thereunder ? NO

5 Whether it is to be circulated to the  
civil judge ? NO

=====

**COMMISSIONER OF INCOME TAX - Applicant(s)**  
**Versus**  
**NIRMA CHEMICALS WORKS P.LTD. - Respondent(s)**

=====

**Appearance :**

MR BB NAIK for Applicant(s) : 1,  
MR SN SOPARKR, SENIOR ADVOCATE with MRS SWATI  
SOPARKAR for Respondent(s) : 1,

=====

**CORAM : HONOURABLE MR. JUSTICE D.A. MEHTA**  
**and**  
**HONOURABLE MR. JUSTICE Z.K. SAIYED**

**Date : 04/02/2008**

**ORAL JUDGMENT**

**(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)**

1 Though the title shows that the Commissioner of Income Tax (the CIT) is the applicant, in fact both the CIT and the assessee are the applicants and the Income Tax Appellate Tribunal, Ahmedabad Bench 'B' has referred the following questions under Section 256(1) of the Income Tax Act, 1961 (the Act) :

"At the instance of revenue :

*Whether the appellate Tribunal is right in law and on facts in setting aside the order made by the Commissioner of Income tax under section 263 of the Act whereby he had directed the assessing officer to withdraw deduction under section 80-I ?"*

"At the instance of assessee :

1 *Whether the Tribunal was justified in law in holding that the learned CIT had jurisdiction to pass order u/s. 263 of the Act and the order of Assessing Officer did not stand merged in the order of the CIT(A) ?*

2 *Whether the Tribunal was*

*justified in law in rejecting the stand of the assessee that :*

*(1) The tanks in question were being used for warehouse purposes : and*

*(2) The value therefore could not be considered for the purpose of sec. 80I(2)(ii) of the Act?*

*(3) Whether the Tribunal was justified in law in applying the statutorily laid down cut off limit of 20% of the old plant and machinery being used in the new industrial undertaking inspite of assessee's stand that the industrial undertaking was not formed by reconstruction or restructuring or splitting up of the old business ?*

*(4) Whether the Tribunal was justified in taking into account the value of the tanks received by the assessee on retirement from the firms and treating the same as transfer within the meaning of section 80-I of the Act ?*

*(5) Whether the Tribunal was justified in law in observing in the end of the order that in subsequent years the tax holiday may not be continued as future matter would be decided on merit on the*

*basis of the facts and figures?"*

2 The Assessment Year is 1985-86 and the relevant accounting period is calendar year 1984. The assessee filed return of income on 30.07.1986. Along with other claims the assessee had claimed deduction under section 80-I of the Act. On 26.08.1986 the Assessing Officer issued notice calling upon the assessee to furnish details in relation to the claim under section 80-I of the Act. The assessee submitted a detailed reply on 27.01.1987. On 26.03.1987 an assessment order came to be made under Section 143(3) of the Act wherein the Assessing Officer partially allowed the claim under section 80-I of the Act by recomputing and reducing the relief available.

3 The assessee carried the matter in Appeal before Commissioner (Appeals) who vide order dated 27.04.1988 allowed the appeal as regards the claim under section 80-I of the Act to the extent the Assessing Officer had disallowed the claim.

4 On 21.02.1989 the CIT issued notice under section 263 of the Act proposing to disallow the

claim under section 80-I of the Act on the ground that the assets used by the assessee in industrial undertaking were forming part of the old plant and machinery and the new industrial undertaking of the assessee was formed by reconstruction or restructuring or splitting up of the old business. The assessee resisted the revisional proceedings by tendering reply on 6.3.1989. However, the CIT did not accept the explanation tendered and passed order under section 263 of the Act on 20.03.1989.

5 The assessee went in Appeal before the Tribunal and the Tribunal allowed the Appeal of the assessee on merits but simultaneously rejected the contention of the assessee that the revisional order had been made without jurisdiction. While allowing the appeal on merits some of the contentions raised by the assessee were also negatived. It is in the aforesaid circumstances, that there are cross references by the revenue and the assessee.

6 The learned Standing Counsel for revenue Mr. B.B.Naik and Mr. S.N.Soparkar, learned Senior Advocate appearing for the assessee submitted that

the first question raised and referred at the instance of the assessee was a preliminary issue which was required to be decided at the outset, and in case, the Court was of the opinion that the Tribunal had committed an error in upholding the jurisdiction of CIT to exercise powers under section 263 of the Act, it was not necessary to deal with any other questions because the controversy raised by the other questions at the instance of the assessee and the question at the instance of the CIT would not thereafter survive.

7 On behalf of the assessee it was contended that once the issue of deduction under section 80-I of the Act had been considered by the Assessing Officer and the matter carried in Appeal before the Commissioner (Appeals) the assessment order would merge with the order of the Appellate Authority and in terms of Provisions of section 263 Explanation (c) of the Act the CIT did not have jurisdiction to undertake revision of the assessment order relating to the said subject matter. In support of the submissions reliance was placed on the two decisions

of this Court in the case of *CIT Vs. Shashi Theatre Pvt. Ltd. (2001) 248 ITR 126* and in the case of *CIT Vs. Mehsana District Co-operative Milk Producers Union Ltd., (2003) 263 ITR 645*. It was further submitted that the decision in the case of *CIT Vs. Shashi Theatre Pvt. Ltd. (supra)* was directly on the point as the matter involved identical fact situation except for the fact that it was a case of investment allowance under section 32A of the Act whereas the present matter relates to deduction under section 80-I of the Act. That in the aforesaid case the Assessing Officer had allowed investment allowance in relation to some of the items while disallowing investment allowance in relation to certain other items which was carried in appeal. That Commissioner (Appeals) had granted investment allowance qua the items carried in appeal. The CIT took up the matter in revision under section 263 of the Act by only referring to those items which were not carried in appeal and on which investment allowance had been granted by the Assessing Officer. However, the principal ground forming basis of revision was that cinema theatre owned by the Assessing Officer could

not be termed to be a "small scale industry" to be eligible for investment allowance. That in revenue's reference it was held by the High Court that for the purpose of considering the grant of investment allowance qua the items rejected by the Assessing Officer, the Commissioner (Appeals) was required to go into the question of validity of grant of investment allowance in relation to the items on which investment allowance had already been granted by the Assessing Officer. That the total claim for investment allowance as per return of income was before the Appellate Authority. It was therefore urged that in case of the assessee the issue was regarding relief under section 80-I of the Act and without entering into the examination of eligibility the Assessing Officer could not have granted partial deduction by allowing the claim under section 80-I of the Act by reducing the quantum thereof, and once the Commissioner (Appeals) was seized of the disallowed part of the computation as regards relief under section 80-I of the Act, issue regarding eligibility under the said provision could not be divorced and treated independent of the quantum. It

was further submitted that in the next decision the question was in relation to deduction under section 80J of the Act and the Court had followed the principle laid down in case of *CIT Vs. Shashi Theatre Pvt. Ltd. (supra)*.

8 On behalf of the revenue it was submitted by Mr. Naik that the Tribunal had rightly come to the conclusion that there was no merger of the assessment order on the aspect of deduction under section 80-I of the Act because eligibility under the said provision could be decided only upon fulfilling conditions stipulated by sub-section (2) of Section 80-I of the Act, whereas the relief had to be computed in terms of provisions of section 80-I(1) of the Act. Mr. Naik therefore submitted that CIT was justified in exercising powers under section 263 of the Act considering the fact that in the assessment order there was no discussion as to the matter having been considered by the Assessing Officer. In fact, according to the learned Counsel the assessment order did not reflect any discussion or application of mind in relation to the issue regarding

eligibility under section 80-I of the Act and the Assessing Officer had merely, while accepting the claim of the assessee, reduced quantum of relief under section 80-I of the Act. That the Commissioner (Appeals) was therefore not required to go into the aspect of eligibility under section 80-I of the Act and in absence of any such requirement there could be no decision by Commissioner (Appeals).

It was submitted that under Explanation (c) below sub-section (1) of Section 263 of the Act what was required was that the matter should be considered and decided in appeal so as to oust the jurisdiction of the CIT. In the present case it cannot be stated that there was any consideration by Commissioner (Appeals); there could be no implied consideration; application of mind by the Appellate Authority had to be reflected from the order and decision, i. e. a direct decision on the point was necessary. In support of the submissions made reliance was placed on the following decisions :

- (i) *(1998)231 ITR 50 S.C.*  
*CIT Vs. Shri Arbuda Mills Ltd.*
- (ii) *AIR 2002 SC 3404*  
*Kaiser-I-Hind Pvt. Ltd. and others, etc. Vs.*  
*National Textile orporation Ltd. and others*

*with special reference to paragraph Nos. 13 and 14.*

- (iii) AIR 1975 SC 2216 – *The Divisional Personnel Officer Southern Railway and Another Vs. T.R. Challappan with special reference to paragraph No.21.*
- (iv) AIR 1989 SC 2240 – *Pandurang Ramchandra Mandlik (since deceased by his Lrs.) and Another Vs. Smt. Shantabai Ramchandra Ghatge and others with special reference to paragraph No. 20.*
- (v) AIR 1975 SC 686 – *Mukhtiar Singh and Anr. Vs. State of Punjab with special reference to paragraph No.12*
- (vi) AIR 1971 SC 1558 – *Union of India Vs. Tarachand Gupta & Bros. with special reference to paragraph No.21.*
- (vii) AIR 1978 SC 40 - *The Addl. Commissioner of Income Tax Vs. M/s. Gurjargravures Pvt. Ltd.*
- (viii) (2002)253 ITR 656 (Guj.) 656 – *CIT Vs. Panna Knitting Industries.*
- (ix) (1997)227 ITR 216 (Guj.) *CIT Vs. Paushak Limited*
- (x) (1999)236 ITR 469 - *CIT Vs. Jaykumar B. Patil*

9. In rejoinder the learned Senior Advocate submitted that the decision in case of *CIT Vs. Panna Knitting Industries.* (supra) though apparently appeared to be in conflict with the judgment in the case of *CIT Vs. Shashi Theatre Pvt. Ltd.* (supra) in fact it was not so because in the case of *CIT Vs. Panna Knitting Industries* the

Court was dealing with provisions of Section 35B of the Act wherein by virtue of the provisions itself, of Section 35B(1)(b), each of the sub-clauses enumerated nine different items and the conditions for allowing each one of them were independent of each other. That in the case of *Panna Knitting Industries* (supra) out of deduction claimed on four items u/s.35B while allowing deduction on three items deduction was disallowed in relation to one item. That the matter was carried in appeal qua that one item only and the disallowance was confirmed by Commissioner (Appeals). The exercise of revisional powers u/s. 263 of the Act in relation to the three items allowed by the Assessing Officer was ultimately upheld by this High Court by specifically referring to Explanation (c) to Section 263(1) of the Act. The Court came to the conclusion that the three items were not the subject matter of consideration and decision by Commissioner (Appeals). Similarly other decisions referred to on behalf of the Revenue were distinguished primarily on the ground that as laid down by the Apex Court in the case of *Union of India & Anr Vs. Major Bahadur Singh (2006) 1 SCC*

368 the decisions have to be read and appreciated and applied in the context of the factual matrix by referring to paragraph Nos. 9 to 12. It was further submitted that in so far as the judgment in the case of *M/s. Gurjargravures Pvt. Ltd.* (supra) the controversy was entirely different; the dispute was in relation to entertainment of additional ground of appeal before the Appellate Authority, and the observations made in the said judgment were thereafter not approved by a Larger Bench of the Apex Court in the case of *Jute Corporation of India Ltd. Vs. CIT (1990) 187 ITR 688.*

10 As can be seen from the facts on record in the return of income filed by the assessee deduction under section 80-I of the Act was claimed at 25% of profits and gains derived from the industrial undertaking i. e. Rs.45,70,925/-. The Assessing Officer issued a notice to the assessee u/s. 142(1) of the Act on 26.08.1986 in relation to 33 items and in relation to claim of deduction u/s.80-I of the Act it was stated :

“To  
*Nirma Chemical Works P. Ltd.*  
*GIBC Vatva, Ahmedabad.*

*Sub : Enquiry us. 142(1)-A.Y.85-86  
Regarding.*

*In connection with your assessment proceedings for A.Y. 85-86 and with the pupose to determine your total income you are required to furnish the following information documents and other details “.*

*xxx                    xxx                    xxx                    xxx                    xxx*

*“6. A claim of deduction u/s. 80I has been made, In this connection you are required to satisfy the following :*

*A. Whether the business of the company is not an old business.*

*B. How much machinery and plant of the company was received from the other concern and whether the machinery was previously used. Pl. give the break up of the total machinery and indicate which is newly purchased and or machinery has been received on transfer”.*

*WEB COPY*

The assessee submitted a detailed reply on 27.01.1987 and in relation to the query regarding deduction u/s.80-I of the Act the assessee replied as under :

*“The Income tax Officer,  
Central Circle-IV  
Ahmedabad.*

*Respected Sir,*

*Sub : Assessment proceedings for A.Y.1985-86.*

*In continuation of our letter dt.8-10-1986 on the above subject we have to convey as follows :*

*In regard to your enquiry for deduction u/s.80-I we wish to inform your that during the assessment year in question we have set up new industrial undertaking in addition to the other unit engaged in warehousing activities since 1983. The Plant and Machinery of the manufacturing unit (i.e. of Industrial Undertaking) were newly acquired by this unit. Copy of the plant and machinery account of this unit is attached herewith for your perusal.*

*It is apparent from the details submitting alongwith this letter and the details on the records that we fulfill all the requirements of section 80-I deduction under that section made kindly be allowed to us."*

11 The Assessing Officer framed assessment u/s. 143(3) of the Act and worked out relief u/s. 80-I of the Act by disallowing certain items in relation to the warehousing business. This aspect was challenged before Commissioner (Appeals) in the

Appeal alongwith other grounds of appeal and the Commissioner (Appeals) allowed the claim of the assessee after considering the facts and evidence on record.

12 The CIT in the show cause notice issued u/s. 263 of the Act on 21.02.1989 stated as under :

*"It is therefore clear that the plant & machinery previously used transferred to the new business exceeds the 20% ceiling provided in Explanation 2 below section 80I(2)(ii) of the I.T. Act 1961 and as such the condition laid down in clause (ii) of the sub-section is not satisfied".*

xxx            xxx            xxx            xxx            xxx

*In the circumstances there is no doubt of the fact that the existing business is divided and another business was set up from such splitting up of assets. Therefore the conditions laid down in clause (i) of sub-section 2 of section 80I has also not been satisfied in your cases."*

Explanation tendered by the assessee was not accepted by the CIT and an order was made on 20.03.1989. The Tribunal, as noted hereinbefore accepted the explanation of the assessee partly on merits of the claim u/s.80-I of the Act while rejecting the contention regarding jurisdiction of the CIT to act u/s. 263 of the Act.

13 Section 263 of the Act and Explanation (c) thereunder as material for the present read as under :

*“Revision of orders prejudicial to revenue.*

*263.(1) The Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the [Assessing] Officer is erroneous in so far as it is prejudicial to the interest of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.”*

*“Explanation : For the removal of doubts, it is hereby declared that, for the purposes of this sub-section,*

-

XXX      XXX      XXX      XXX      XXX

*(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject matter of any appeal, the powers of the Commissioner under this sub-section shall extend to such matters as had not been considered and decided in such appeal".*

Thus the CIT is entitled to revise an assessment order in so far as the order is erroneous and prejudicial to the interest of revenue, but Explanation (c) places embargo on CIT in case of subject matter of any Appeal which has been considered and decided in such Appeal. In other words, before CIT exercises the jurisdiction u/s. 263 of the Act, the CIT is required to ascertain whether the order referred to in sub-section (1) of section 263 of the Act had been the subject matter of any appeal, and if yes, the revisional powers shall be available only if such subject matter had not been considered and decided in such Appeal.

14 The facts of the present case reveal that the assessee claimed relief u/s. 80-I of the Act. The

Assessing Officer reworked such claim after making necessary inquiries and partially reduced the claim made by the assessee. The assessee carried the matter in Appeal before Commissioner (Appeals) who allowed the Appeal on this count directing the Assessing Officer to grant relief u/s. 80-I of the Act as claimed by the assessee without any disallowance. The contention on behalf of the revenue that under provisions of section 80-I of the Act an assessee becomes eligible only if the assessee fulfills all the conditions stipulated by sub-section (2) of section 80-I of the Act and that computation u/s. 80-I(1) of the Act is independent of eligibility under sub-section (2) of the said section cannot be accepted. Section 80-I(1) of the Act stipulates that an assessee is entitled to deduction from profits and gains derived from an industrial undertaking at the stipulated percentage where gross total income of the assessee includes any profits and gains derived from an industrial undertaking in accordance with and subject to the provisions of this section. (emphasis supplied). Meaning thereby, while computing the deductible amount from the taxable income the

assessing authority is required to ensure that the profits and gains are derived from an industrial undertaking; such profits and gains are included in the gross total income of the assessee; and the allowance has to be made in accordance with and subject to the provisions of Section 80-I of the Act. Therefore, to contend that sub-section (1) of section 80-I of the Act has to be independently considered i.e. independent of other sub-sections of section 80-I of the Act is not a correct proposition, especially when the provision itself says that it has to be "*in accordance with and subject to the provisions of this section*". The provision does not use the phraseology in accordance with and subject to the provisions of the sub-section but refers to the entire section, which includes sub-section (2).

15 Therefore, when the deduction u/s. 80-I of the Act was granted by the Assessing Officer after disallowing a part of the claim which was carried in Appeal before Commissioner (Appeals), the Appellate Authority was duty bound to examine whether the claim made by the assessee was in accordance with and

subject to the provisions of section 80-I of the Act. The requirement of fulfillment of conditions stipulated by sub-section (2) of section 80-I of the Act is therefore very much subject matter of the appeal in relation to the income from warehousing which had been disallowed by the Assessing Officer.

16 The stand of the revenue that the assessment order was silent as regards eligibility or otherwise of section 80-I of the Act cannot thus be accepted. As noted hereinbefore the entire section lays down a complete codified scheme in itself for deciding not only the eligibility but also for the computation of the relief to which the assessee is entitled. When the section talks of profits and gains derived from an industrial undertaking the requirement is in relation to the industrial undertaking to which the section applies and which fulfills all the conditions laid down in sub-section (2) of section 80-I of the Act. It is not possible to read the provisions in any other manner whatsoever. Hence, the contention that the eligibility or otherwise u/s.80-I of the Act was

never the subject matter of Appeal requires to be rejected. The Tribunal thus committed an error in law in coming to the conclusion that the prohibition imposed by Explanation (c) to section 263 of the Act would not be applicable.

17 In fact, the Tribunal's order on this count does not discuss as to why and how Explanation (c) to section 263 of the Act does not apply in the facts of the present case. The order only records "9. *Considering the rival submissions and the case law cited before us we are of the view that the decision relied upon by the assessee is not applicable to the instant case. To say that the deirection of the CIT (A) to recompute the relief under the head 80-I amounts to consideration of the fact on eligibility is nor correct. So assessee pleas on lack of jurisdiction u/s. 263 are rejected*". One would expect that a preliminary issue as regards jurisdiction would have merited better consideration at the hands of the Tribunal.

18 The contention on behalf of the revenue that the

assessment order does not reflect any application of mind as to eligibility or otherwise u/s. 80-I of the Act requires to be noted to be rejected. An assessment order cannot incorporate reasons for making/granting a claim of deduction. If it does so, an assessment order would cease to be an order and become an epic tome. The reasons are not far to seek. Firstly, it would cast an almost impossible burden on the Assessing Officer, considering the workload that he carries and the period of limitation within which an order is required to be made; and, Secondly, the order is an appealable order. An appeal lies, would be filed, only against disallowances which an assessee feels aggrieved with.

As far as absence of discussion in the assessment order is concerned, this is what has been laid down by this Court in the case of *Rayon Silk Mills vs. Commissioner of Income Tax*, reported at 221 I.T.R. 155 (page 158):

*"In the first instance it was contended by learned counsel for the*

assessee that the very premise on which order under section 263 was made against the assessee, namely, that the Income-tax Officer has not at all examined the goodwill account is not existent. According to him, it is apparent from the record that the goodwill account was thoroughly examined by the Income-tax Officer before making the assessment and after examining when he accepted the contention of the assessee its discussion did not find place in the assessment order, as no additions were going to be made or no modifications in the return filed by the assessee were required to be made in that regard.

This contention of the assessee appears to be well-founded. It is true that the assessment order does not speak about the examination of goodwill account as such. However, as we have noticed above, the assessee in his reply to the show cause notice under section 263 had specifically mentioned that the entire matter was scrutinised and accepted while passing the assessment order. Our attention was also drawn to annexure "D". A submission made by the assessee to the Income-tax Officer, Surat, dated October 18, 1976, regarding the assessment year 1974-75 giving detailed chronological data of the constitution of the firm on November 11, 1968, induction of four more partners on November 7, 1972, the creation of goodwill in the books of account

of the firm by debiting the goodwill account and crediting the old partners' capital accounts in their profit sharing ratio on that date, formation of a private limited company in the name of Rayon Silk Mills Private Limited, and its induction into the firm as partner by the deed of partnership dated October 27, 1973, and the dissolution of the partnership firm on February 23, 1974, leaving the private limited company as a sole proprietor thereof and the valuation of the business at the book value as on that date. After giving the chronological sequence of events, the assessee also contended in his submission before the Income-tax Officer that there was no actual transfer of any asset inasmuch as when a partner is admitted into the firm no transfer takes place. It was also contended that no cash transfer took place from person to person and the transfer and the dissolution of the firm also did not result in accrual of capital gains. In the face of this material on record, it is difficult to explain that the assessment order was made without making any enquiry into the goodwill account of Rs.10,75,000. ... .."

19 There is another aspect of the matter. The assessee had challenged jurisdiction of the CIT to exercise powers u/s. 263 of the Act. For an order of

the Assessing Officer to be interfered with in exercise of revisional powers the CIT has to find in the first instance that the order is erroneous and secondly, the order is prejudicial to the interest of revenue. The conditions are twin conditions as held by the Apex Court and both of them have to be fulfilled before CIT can exercise jurisdiction u/s. 263 of the Act. In the case of - *Malabar Industrial Co. Ltd. Vs. CIT* (2000) 243 ITR 83 the Apex Court has held *"The phrase "prejudicial to the interests of the Revenue" has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of Revenue; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income-tax Officer is unsustainable in law. ...."*

20 Applying the aforesaid tests to the facts of the

case it is not possible to uphold the order of the Tribunal as regards jurisdiction after considering the law enunciated by the Apex Court. The Assessing Officer after making due inquiries, as noted hereinbefore, adopted one view and granted partial relief u/s. 80-I of the Act. The CIT takes a different view of the matter. However, that would not be sufficient to permit the CIT to exercise powers u/s. 263 of the Act because when two views are possible and CIT does not agree with the view taken by the Assessing Officer, the assessment order cannot be treated as erroneous and prejudicial to the interest of the revenue unless the view taken by the Assessing Officer is unsustainable in law. That is not the position in the present case. In fact even the partial denial of relief u/s. 80-I of the Act has been found to be incorrect by the Appellate Authority. Therefore existence of two views stands established. In the aforesaid circumstances, the CIT could not have exercised jurisdiction u/s. 263 of the Act as per settled legal position.

21 The view expressed by this Court in the case of

*CIT Vs. Shashi Theatre Pvt. Ltd.(supra)* therefore is in consonance with not only the requirement of law but concludes the issue in so far as the present case is concerned. Just as it is not possible to decide grant of investment allowance in relation to one or the other item without considering the eligibility thereof, similarly deduction u/s. 80-I of the Act cannot be considered without deciding whether a particular portion of profits and gains has been derived from an industrial undertaking which fulfills the requisite conditions stipulated by the section.

22 In the aforesaid set of facts and circumstances of the case and the view that the Court has adopted, it is not necessary to enter into any discussion as regards merits of the controversy which has been brought before this Court by the other questions at the instance of the assessee and the question at the instance of the revenue. The Reference is answered accordingly by holding that the Tribunal committed an error in upholding the exercise of powers u/s. 263 of the Act by CIT to be

valid in the facts and circumstances of the case, when not only was there a prohibition as stipulated by Explanation (c) of Section 263 of the Act but even the twin requirements, viz. preconditions for exercise of jurisdiction u/s. 263 of the Act were not fulfilled.

23 The Reference stands disposed of accordingly. There shall be no order as to costs.

Sd/-  
(D.A. Mehta, J.)  
Sd/-  
(Z.K. Saiyed, J.)

M.M.BHATT

