IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL NO. 65 of 2009

With
R/TAX APPEAL NO. 1191 of 2010

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE J.B.PARDIWALA

and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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VODAFONE ESSAR GUJARAT LIMITED
Versus
ASSISTANT COMMISSIONER OF INCOME TAX CIRCLE-8

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Appearance:
MR SN SOPARKAR SR COUNSEL WITH MR BANDISH SOPARKAR for the Appellant(s) No. 1
MR MANISH BHATT SR COUNSEL WITH MRS MAUNA M BHATT(174) for the Opponent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 03/03/2020

CAV JUDGMENT

(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. The Tax Appeal No.65/2009 is arising from the impugned order passed by the Income Tax Appellate Tribunal ("the Tribunal" for short) dated 9th January, 2009 in the ITA No.1369/Ahd/2008 for the assessment year 2005-2006. The Tax Appeal No.1191/2010 is arising from the impugned order passed by the Tribunal dated 27th January, 2009 in the ITA No./1361/Ahd/2009 for the assessment year 2006-2007.

2. As the issues involved in both the captioned tax appeals are interconnected, those were heard analogously and are being disposed of by this common judgment and order.

3. For the sake of convenience, the Tax Appeal No.65/2009 is treated as the lead appeal.

4. We are called upon to consider the following substantial question of law :

   "Whether on the facts and in the circumstances of the case, Income Tax Appellate Tribunal was justified in law in holding that the appellant was not entitled to deduction of Rs.191,59,84,008/- under Section 80IA of the Income Tax Act,1961 as for the purpose of calculation of deduction under Section 80-IA read with Section 80IA(5) of the Act, provisions of Section 79 of the Act are not applicable?"

5. The appellant- Vodafone Essar Gujarat Limited (here-in-after referred to as "the assessee") is a company engaged in

the business of providing cellular telecommunication services in the State of Gujarat. The assessee was established in the year 1997-1998. During the previous year relevant to the assessment year 2001-2002, there was a change in the share holding of the assessee company, as a result of which the provisions of section 79 of the Income Tax Act, 1961 ("the Act, 1961" for short) was made applicable and the accumulated losses from the assessment years 1997-1998 to 2001-2002 lapsed.

5.1) The assessee earned profit during the assessment year 2005-2006 and it being a telecommunication service provider was eligible for 100% deduction under section 80-IA of the Act, 1961 in respect of the profits derived from the telecommunication services. The assessee therefore, made a claim for deduction under section 80-IA of the Act, 1961 for the first time for the assessment year 2005-2006.

5.2) The assessee filed its return of income for the assessment year 2005-2006 declaring total income at Rs. Nil. The assessee company computed the gross total income after reducing its carry forward losses and unabsorbed depreciation after the assessment year 2001-2002. The assessee company did not claim the losses prior to 2001-2002 during which the change in the share holding took place by applying the provision of section 79 of the Act, 1961. Therefore, in the return of income after computing the gross total income, in the aforesaid manner, the assessee claimed deduction under section 80-IA of the Act,1961. The assessee being eligible for deduction of 100% profit from the business of telecommunication services,

the whole of the gross total income was claimed as deductible under section 80-IA of the Act, 1961.

5.3) In the return of income, the appellant assessee has shown total income of Rs.191,59,84,008/- and the entire amount was claimed as deduction under section 80-IA(4)(ii) of the Act, 1961. It was noticed by the Assessing Officer that the assessee has not brought forward the losses prior to the assessment year 2001-2002 as per the provisions of section 79 of the Act, 1961. According to the Assessing Officer, the quantum of deduction available to the assessee under section 80-IA(4)(ii) of the Act, 1961 is to be computed as per the provisions of section 80-IA(5) of the Act, 1961 without the application of the provision of section 79 of the Act, 1961.

5.4) The Assessing Officer therefore, issued a show cause notice dated 22nd December, 2007 calling upon the assessee to show cause as to why the deduction under section 80-IA claimed by the assessee should not be withdrawn as there would not be any positive profit available for deduction after considering the losses of the previous years to be set off against the income of the current year because for the purpose of calculation of deduction under section 80-IA read with section 80-IA(5), the provisions of section 79 of the Act, 1961 cannot be applied. The assessee filed its reply to the show cause notice contending that there cannot be two computations of the gross total income, i.e. one for determining the quantum for taxable income and the other for claiming of deduction under Chapter VI-A of the Act, 1961. It was

submitted that by invoking section 80-IA(5), the provisions of section 79 cannot be ignored for computing the deduction under section 80-IA of the Act, 1961.

5.5) The Assessing Officer rejected the contention of the assessee and disallowed the claim of the assessee for deduction under section 80-IA of the Act, 1961 considering the deduction under section 80-IA at Rs. Nil determining the total income of Rs.191,71,47,056/-.

5.6) Being aggrieved by the aforesaid order, the assessee preferred appeal before the CIT(Appeals). CIT (Appeals) confirmed the assessment order and dismissed the appeal.

5.7) The assessee therefore, preferred Appeal before the Tribunal. The Tribunal after considering the provisions of section 80-IA(5) of the Act, 1961 held that the unabsorbed losses and the unabsorbed depreciation relating to the earlier years and relating to the eligible undertaking are to be taken into account in determining the quantum of deduction under section 80-IA(1) of the Act, 1961 even though those might actually have been set off against the profits of the assessee from other sources. It was held that the provisions of section 80-IA(5) of the Act, 1961 starting with the non obstante clause would override the provisions of the Act, 1961 and therefore, for the purpose of computation of deduction under section 80-IA of the Act, 1961, no effect to section 79 of the Act can be given. The Tribunal therefore, concurred with the findings arrived at by the Assessing Officer and the CIT(Appeals) and dismissed the appeal filed by the assessee on this issue.

The Tribunal relied on the decision of a Special Bench of the Ahmedabad Tribunal in the case of **ACIT v. Goldmines Shares and Finance Pvt. Ltd** reported in 2008-TIOL-220-ITAT/AHM-(SB), decision of Supreme Court in case of **IPCA Laboratories Ltd. v. DCIT** reported in (2004) 266 ITR 521 (SC) and the decision of Mumbai Bench Tribunal in case of **Additional CIT v. Ashok Alco Chem Limited** reported in (2005) 96 ITD 160 (Mum) to come to the conclusion that losses will not lapse and the provisions of section 79 will not apply for computation of deduction under section 80-IA in view of provisions of section 80-IA(5) of the Act, 1961 which starts with a non obstante clause and is wide enough to override the provisions of section 79 of the Act, 1961.

: Submissions of the assessee :

6. Learned Senior Counsel Mr. S.N. Soparkar assisted by learned advocate Mr. B.S. Soparkar for the assessee submitted that the Tribunal has confirmed the order passed by the Assessing Officer and CIT(Appeal) by wrongly applying the provisions of section 80-IA(5) of the Act, 1961 to interpret that provisions of section 79 are not applicable for computation of deduction under section 80-IA of the Act, 1961. It was submitted that the Central Board of Direct Taxes by Circular No. 1/2016 has clarified the term "initial assessment year" in section 80-IA(5) of the Act, 1961. He submitted that as per the circular no. 1/2016, it is clarified that once the initial assessment year has been opted by the assessee, the assessee would be entitled to claim deduction under section 80-IA for 10 consecutive

years beginning from the year in respect of which he has exercised such option subject to fulfillment of conditions prescribed in the section. According to Mr. Soparkar, as the assessee in the facts of the case had opted for the first time to claim deduction under section 80-IA in the assessment year 2005-2006, the same would be the initial assessment year. Accordingly, it was contended that the assessee would be entitled to claim deduction considering the unabsorbed losses or unabsorbed depreciation available to the assessee at the beginning of the year.

6.1) It was therefore, submitted that once the losses prior to the assessment year 2001-2002 stood lapsed by operation of section 79 of the Act, 1961 on account of the change in the shareholding pattern of the assessee, the authorities and the Tribunal could not have invoked the provision of section 80IA(5) of the Act, 1961 for the purpose of calculation of set-off of losses. The provisions of section 79 are not applicable.

6.2) It was also sought to be contended that as per the provisions of section 80-IA(1), the deduction is to be given from the gross total income as per the computation under section 80A and 80AB of the Act. Therefore, the gross total income has to be the same for the purpose of computation of deduction available under section 80-IA of the Act, 1961 and under section 80AB of the Act.

6.3) It was submitted that the computation of gross total income under the provisions of the Act, 1961 cannot be different than the purpose of computation of deduction

under section 80-IA of the Act.

6.4) It was submitted that the non obstante clause of section 80-IA(5) provides for considering the profit and gains of eligible business on standalone basis. In the facts of this case, it is not in dispute that the assessee had only one business i.e telecommunication services for the assessment year under consideration. Therefore, applicability of section 80-IA(5) of the Act is only for the purpose of computation of profit and gains of the eligible business of telecommunication services to which the provisions of sub-section(1) of section 80-IA of the Act applies. It was submitted that the provisions of section 80-IA(5) cannot be interpreted to oust the applicability of provisions of section 79 of the Act, 1961. It was therefore, submitted that if the provisions of section 79 of the Act cannot be considered, then the provisions of section 72 of the Act which provides for carry forward and set off of business losses would also not be required to be considered.

6.5) It was submitted that the authorities below and the Tribunal have misinterpreted the provisions of sections 72, 79, 80-IA read with section 80-IA(5) of the Act, 1961.

: **Submissions of the Revenue** :

7. On the other hand, the learned Senior Counsel Mr. M.R. Bhatt with learned counsel Mrs. Mauna Bhatt for the Revenue submitted that the reliance placed by the assessee on the circular no. 1/2016 dated 15th February, 2016

issued by the Central Board of Direct Taxes is completely misplaced because the issue in the present case is with regard to the interpretation of the provisions of section 80-IA read with sections 72 and 79 of the Act, 1961 and the issue does not relate to the choice of option of the initial year being exercised by the assessee.

7.1) It was submitted that the option to choose the initial assessment year is provided under section 80-IA(2) of the Act, 1961 read with Rule 18 BBB of the Income Tax Rules, 1962 ("the Rules" for short) read with Form 10 CCB and more particularly, clauses 8 and 9 of the form. It was submitted that there is no factual foundation laid by the assessee by bringing on record the Form No. 10 CCB to indicate that the year in question i.e the assessment year 2005-2006 is the initial assessment year as per the say of the assessee. According to Mr. Bhatt the year in question is not the initial assessment year but is the third year of claim. It was therefore, submitted that in the absence of any foundational fact emerging from the record, the say of the assessee that the assessment year 2005-2006 is the initial assessment year cannot be accepted.

7.2) On merits of the case, it was submitted that the non obstante clause of section 80-IA(5) would override the non obstante clause of section 79 of the Act, 1961. A fine distinction is sought to be drawn by pointing out that section 80-IA(5) falls under Chapter VIA whereas section 79 falls under Chapter VI of the Act, 1961. The attention of the Court was drawn to point out that Chapter VI pertains to the aggregation of income and set off losses whereas the

Chapter VI-A pertains to the deduction to be made in computing the total income.

7.3) It was therefore, submitted that in order to compute the deduction available under section 80-IA(1) of the Act, 1961, the non obstante clause in section 80-IA(5) would override the non obstante clause contained in section 79 of the Act. Having regard to the difference in the two non obstante clauses, it was submitted that as per section 80-IA(5), the source of income should only be the eligible business, whereas section 79 would operate to calculate the aggregate total income as per Chapter-VI of the Act, 1961. Therefore, according to Mr. Bhatt, there would be two different calculations of the profit and gains of eligible business i.e one for the purpose of calculating the aggregate total income under Chapter VI and the other calculation would be for the purpose of computing deduction under section 80-IA of the Act read with Section 80-IA(5) of the Act, 1961.

7.4) In support of the above submissions, the learned Senior Counsel placed reliance on the following decisions :

i) **Synco Industries Ltd. v. Assessing Officer, Income-Tax, Mumbai** reported in 2008 (299) ITR 444.

ii) **IPCA Laboratories Limited v. Deputy Commr of I-t, Mumbai** reported in 2004 (266) ITR 521.

iii) **Commissioner of Income-tax v. Ganga Corporation Asbestos Pvt Ltd reported** in 2014 (366) ITR 582

iv) **Commissioner of Income-tax, Bangalore v. J.H. Gotla** reported in 1985 (1560 ITR 323.

7.5) Relying on the aforesaid decisions, it was submitted that the Tribunal was justified in law in holding that the assessee was not entitled to deduction under section 80-IA of the Act, 1961 as for the purpose of calculation of deduction under section 80-IA read with section 80-IA(5) of the Act, the provisions of section 79 of the Act, 1961 are not applicable. Learned Senior Counsel in the alternative also argued that in the present case, it would be necessary to ascertain as to whether the loss claimed to have lapsed relates only to the business loss or not. It was also contended that the provisions of section 79 would not be applicable if it is found that there is unity of control and there is no change in the share holding of the assessee company and it requires to be ascertained as to whether after the alleged change in the year 2001, transferee shareholders had unity of control or not. It was therefore, alternatively submitted to remit the matter back to the Assessing Officer to ascertain such facts. In support of such contention, reliance was placed on the following decisions :

i) **Commissioner of Income-tax v. ACME Paper Ltd** reported in 1996(218) ITR 475.

ii) **Commissioner of Income-tax v. Shri Subhulaxmi Mills Ltd.** reported in 249 ITR 795 (SC)

iii) **Commissioner of Income-tax v. Amarsinghji Mills Ltd** reported in 2006(286) ITR 129

: Analysis :

8. In order to answer the substantial question of law arising as to whether for the purpose of calculation of deduction under section 80-IA read with section 80-IA(5) of the Act, provisions of section 79 of the Act are applicable or not, it would be germane to refer to relevant provisions of the Act, 1961.

Section 2(45) reads as under :

"2(45) "—total income" means the total amount of income referred to in section 5, computed in the manner laid down in this Act;"

Section 66 reads as under :

"CHAPTER VI

AGGREGATION OF INCOME AND SET OFF OR CARRY FORWARD OF LOSS Aggregation of income

Total income.—

66. In computing the total income of an assessee, there shall be included all income on which no income-tax is payable under Chapter VII."

Section 72(1) reads as under :

"Carry forward and set off of business losses.—

72.(1) Where for any assessment year, the net result of the computation under the head —Profits and gains of business or profession is a loss to the assessee, not being a loss sustained in a speculation business, and such loss cannot be or is not wholly set off against income under any

head of income in accordance with the provisions of section 71, so much of the loss as has not been so set off or, where he has no income under any other head, the whole loss shall, subject to the other provisions of this Chapter, be carried forward to the following assessment year, and—

(i) it shall be set off against the profits and gains, if any, of any business or profession carried on by him and assessable for that assessment year;

(ii) if the loss cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following assessment year and so on:]"

Section 79 reads as under :

"79.Carry forward and set off of losses in the case of certain companies.—Notwithstanding anything contained in this Chapter, where a change in shareholding has taken place in a previous year in the case of a company, not being a company in which the public are substantially interested, no loss incurred in any year prior to the previous year shall be carried forward and set off against the income of the previous year unless—

(a) on the last day of the previous year the shares of the company carrying not less than fifty-one per cent of the voting power were beneficially held by persons who beneficially held shares of the company carrying not less than fifty-one per cent of the voting power on the last day of the year or years in which the loss was incurred:

Provided that nothing contained in this section shall apply to a case where a change in the said voting power takes place in a previous year consequent upon the death of a shareholder or on account of transfer of shares by way of gift to any relative of the shareholder making such gift:

Provided further that nothing contained in this section shall apply to any change in the shareholding of an Indian company which is a subsidiary of a foreign company as a result of amalgamation or demerger of a foreign company subject to the condition that fifty-one per cent shareholders of the amalgamating or demerged foreign company

continue to be the shareholders of the amalgamated or the resulting foreign company."

Section 80A reads as under :

"Chapter VIA
DEDUCTION TO BE MADE IN COMPUTING TOTAL INCOME
A-General
80A. Deductions to be made in computing total income.—

(1) In computing the total income of an assessee, there shall be allowed from his gross total income, in accordance with and subject to the provisions of this Chapter, the deductions specified in section 80C to [80U].

(2)The aggregate amount of the deductions under this Chapter shall not, in any case, exceed the gross total income of the assessee.

(3) Where, in computing the total income of an association of persons or a body of individuals, any deduction is admissible under section 80G or section 80GGA [or section 80GGC] or section 80HH or section 80HHA or section 80HHB or section 80HHC or section 80HHD or section 80-I or section 80-IA [or section 80-IB] [or section 80-IC] [or section 80-ID or section 80-IE] [or section 80J] [or section 80JJ], no deduction under the same section shall be made in computing the total income of a member of the association of persons or body of individuals in relation to the share of such member in the income of the association of persons or body of individuals."

Section 80AB reads as under :

"[80AB. Deductions to be made with reference to the income included in the gross total income. Where any deduction is required to be made or allowed under any section 3*** 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.]"

Section 80B(5) reads as under :

"80B(5) "gross total income" means the total income computed in accordance with the provisions of this Act, before making any deduction under this Chapter."

Section 80-IA(1) (2) and (5) reads as under :

"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, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred percent of the profits and gains derived from such business for ten consecutive assessment years.

(2) The deduction specified in sub-section(1) may, at the option of the assessee, be claimed by him for any ten consecutive assessment years out of fifteen years beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure facility or starts providing telecommunication service or develops an industrial park (or develops) a special economic zone referred to in clause (iii) of sub-section (4) or generates power or commences transmission or distribution of power or undertakes substantial renovation and modernisation of the existing transmission or distribution lines.

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(5) Notwithstanding anything contained in any other provision of this Act, the profits and gains of an eligible

business to which the provisions of sub-section (1) apply shall, for the purposes of determining the quantum of deduction under that sub-section for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, be computed as if such eligible business were the only source of income of the assessee during the previous year relevant to the initial assessment year and to every subsequent assessment year up to and including the assessment year for which the determination is to be made."

9. Upon analysis of the above provisions, it appears that

i) The assessee is required to compute total income from which carry forward and set off of business loss is granted under section 72 of the Act, 1961

ii) Section 79 starts with a non obstante clause "Notwithstanding anything contained in this Chapter" where a change in the shareholding takes place in a previous year in the case of a company not being a company in which the public are substantially interested, no loss incurred in any year prior to the previous year shall be carried forward and set off against the income of the previous year. In other words the company shall not carry forward or set off the business losses against the income of the previous year where there is a change in the shareholding of the company subject to the conditions prescribed in clause (a) of section 79 of the Act, 1961.

iii) Section 66 which falls under Chapter-VI and Section 80-A which falls under Chapter VIA pertain to the computation of 'total income' of the assessee. Section 66 provides that in computing the total income of an assessee,

there shall be included all income on which no income tax is payable under Chapter-VII. Chapter -VI also provides for set-off and carry forward of losses and the mechanism for claim of set-off of losses. Whereas Chapter VIA provides for the deduction to be made in computing total income. Section 80A provides that in computing the total income of an assessee, there shall be deduction specified in section 80C to 80U from the gross total income, in accordance with and subject to the provisions of Chapter VIA.

iv) As per Section 80B(5) of the Act, 1961, the 'Gross total income' means the 'total income' computed in accordance with the provisions of the Act before making any deduction under Chapter VIA meaning thereby that the assessee is required to calculate the total income computed in accordance with the provisions of the Act, 1961 to arrive at the gross total income prior to deduction under Chapter VIA.

v) Section 80-IA of the Act, 1961 which is inserted by the Finance Act, 1999 with effect from 1st April, 2000 and substituted by Finance Act, 2001 with effect from 1st April, 2002 provides that where the 'Gross total income' of an assessee includes any profit and gains derived by an undertaking or an enterprise from any business referred to in sub-section(4), there shall, in accordance with and subject to the provisions of section 80-IA, be allowed in computing the total income of the assessee, a deduction of an amount equal to 100% of profit and gains derived from such business for 10 consecutive assessment years. Sub-section(2) of Section 80-IA provides option to select 10

consecutive years out of 15 years beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure facility or starts providing telecommunication services etc.

vi) In the case on hand, the assessment year 2005-2006 was opted as the first year in the block of 10 consecutive assessment years for claiming deduction under section 80-IA (1) of the Act 1961. This fact of the option exercised by the assessee is not disputed by the Assessing Officer. Therefore, the assessment year 2005-2006 is initial assessment year and circular no. 1/2016 would be applicable to the facts of the case.

vii) Section 80-IA(5) of the Act, 1962 stipulates that in order to compute the quantum of deduction under sub-section(1) of section 80-IA, the profit and gains of the eligible business shall be computed as if such eligible business were the only source of income of the assessee. It is also stipulated that for this purpose the other provisions of the Act are to be ignored meaning thereby, the profit and gain of the eligible business of the assessee is to be computed on standalone basis only. If the assessee has more than one business and one of such is eligible business for the purpose of deduction under section 80-IA(1) of the Act, 1961, then the profit and gains of such eligible business is required to be computed as if no other business of assessee is in existence. To illustrate, if loss of eligible business is set off against the business income of other business which is not eligible for deduction under section 80-IA of the Act, 1961, then such loss which is

already set-off is to be considered for the purpose of computation of quantum of deduction under section 80-IA of the Act from the profit and gains of eligible business and such loss would be deducted from the profit and gains at the time of computation of quantum of deduction under section 80-IA(1) of the Act, 1961. However, in the facts of present case, the profit of the assessee for the year under consideration is only from the eligible business of the assessee and therefore, the profit and gains of the business for the purpose of determining the quantum of deduction under sub-section (1) of section 80-IA of the Act, 1961 is to be computed applying the provisions of the Act, 1961.

10. In order to apply the provisions of the Act, 1961, first 'gross total income' is to be computed. In order to compute 'gross total income' for the year under consideration, it is to be verified whether the assessee is entitled to any carry forward or set off of the business losses of the previous year or not which is available at the beginning of the year. For the purpose of computing 'gross total income' in the facts of the case, it is not in dispute that after the carry forward loss is set off, there was positive income prior to deduction under Chapter VI A of the Act, 1961.

11. The submission made on behalf of the Revenue that only section 72 of the Act should be considered for the purpose of computation of quantum of deduction under section 80-IA without giving effect to the provisions of section 79 of the Act, is contrary to the Scheme of the Act inasmuch as it is not the intention of the legislature to deny legitimate deduction available to the assessee in the

manner in which the authorities have tried to apply the provisions of section 80-IA(5) of the Act.

12. The plain reading of section 80-IA(5) of the Act indicates that it nowhere provides that for the purpose of computation of quantum of deduction under sub-section(1) of section 80-IA, the losses which have lapsed by operation of section 79 of the Act has to be ignored and thereafter the provisions of section 72 has to be applied. If such interpretation is accepted, the carry forward of losses which otherwise is not available to the assessee to be set off, cannot be considered for the purpose of computation of quantum of deduction under sub-section(1) of section 80-IA of the Act, 1961 when there is only one eligible business from which the profit and gain is derived by the assessee for the year under consideration.

13. Reliance placed by the learned Senor Counsel for the Revenue in case of **Synco Industries Ltd.**(supra) is of no assistance as in the said decision, the Apex Court has held that as the gross total income of assessee was Nil, the assessee was not entitled to deduction under Chapter VI-A which includes section 80-I. The issue of interplay of sections 72 and 79 of Chapter-VI was not before the Apex Court. The Apex Court has held as under :

"10. This Court further notices that predominant majority of the High Courts have taken the view that deductions under Chapter VI-A of the Act would be available only if the computation of gross total income as per the provisions of the Act after setting off carried forward loss and unabsorbed depreciation of earlier years is not 'Nil'. In Commissioner of Income-Tax, Tamil Nadu- III, Madras v.

Madras Motors (P) Ltd. (1984) 150 ITR 150, after noticing the definition of 'gross total income' the Madras High Court has held that the intention of the Parliament, that the deduction under Chapter VI-A is contemplated only after the total income is computed after setting off of the unabsorbed depreciation as per Section 72 is evident and therefore Section 72 has to be applied before the total income of an assessee is determined i.e., before the deductions under Chapter VI-A are allowed. In Commissioner of Income-Tax v. Midda Ram (1984) Vol.19 Taxman Pg. 23 again the Madras High Court has taken the view that having regard to the provisions of Section 80A and 80B, before making any deduction under Chapter VI-A the total income of the assessee is to be computed in accordance with the provisions of the Act and such total income will have to be taken as gross total income from which the deduction under Chapter VI- A has to be allowed. In the said case the gross total income so computed after set off of unabsorbed depreciation was 'Nil'. It was, therefore, held that there was no positive figure from which the deduction under Chapter VI-A could be allowed. In Commissioner of Income-Tax, West Bengal-II, Calcutta v. Bengal Assam Steamship Company Ltd. (1985) 155 ITR 26 the Calcutta High Court has held that deduction under Section 80L and 80M of the Act are to be allowed after setting off of losses under Section 71 and 72 because Section 80A(2) limits the aggregate of the deduction allowable to the amount of the gross total income of the assessee which means that the deduction allowable cannot result in a negative figure of loss. What is held in the said decision is that where the gross total income is found to be a net loss there is no question of any further deductions under Section 80L and 80M. In G.Atherton & Co. v. Commissioner of Income-Tax (1987) 165 ITR 527 it is held that the gross total income and also the dividend income of the assessee had to be computed in accordance with the provisions of the Act without making any deduction under Section 80M contained in Chapter VI-A of the Act and as the gross total income was computed to be a loss, no relief was available to the assessee under Section 80M. In Commissioner of Income-Tax, Bombay City-III, Bombay v. Mercantile Bank Ltd. (1988) 169 ITR 44 after examining the scheme envisaged by Sub-Section 1 of Section 80A, Sub-Section 2 of Section 80A and Sub-Section 5 of Section 80B the

Calcutta High Court has held that the gross total income defined by Section 80B(5) is the total income computed under the provisions of the Act, but before making any deductions under Chapter VI-A and if the total income computed under the Act before making the deductions under Chapter VI-A is found to be a positive figure, can the deductions permissible under Chapter VI-A be given. In Commissioner of Income-Tax v. Rambal (P.) Ltd. (1988) 169 ITR 50 the Madras High Court has taken the view that the relief under Section 80-I would not be available if net taxable income determined is 'Nil' after computation of gross total income as per the provisions of the Act, after setting off carried forward loss and unabsorbed depreciation of earlier years. In Orient Paper Mills Ltd. V. Commissioner of Income Tax (1986) 158 I.T.R. 695 the Calcutta High Court has taken the view that deductions under Section 80-I cannot exceed gross total income and if gross total income found is 'Nil' or a net loss the assessee is not entitled to deduction under Section 80-I of the Act. The principle of law enunciated in the said decision is that Section 80A of the Act lays down certain general principles for the purpose of deductions to be allowed in computing the total income under Section 80C to 80U and such deductions are to be allowed from the gross total income of the assessee in computing the total income. After noticing the definition of the term gross total income as given in Clause 5 of Section 80B it is held in the said decision that in the case of a company, total income computed is in accordance with the provisions of the Act before making any deduction under Chapter VI-A: what is laid down as principle is that Section 80A(2) limits the aggregate of the deductions allowable to the amount of the gross total income of the assessee and therefore deductions allowance cannot result in any negative figure or loss and therefore where the gross total income is 'Nil' or net loss in the relevant year the assessee will not be entitled to any relief under Section 80-I. In Commissioner of Income Tax v. Sundaravel Match Industries (P) Ltd. (2000) 245 ITR 605 the Madras High Court has held that losses should be set off against the profits of the industrial undertaking before granting the deduction under Section 80HH of the Income-Tax Act, 1961, in view of the specific provisions found in Section 80AB. In Commissioner of Income-Tax v. Nima Specific Family Trust (2001) 248 ITR 29 the Bombay High

Court has taken the view that the legislature has introduced Section 80A(2) and Section 80A(5) in order to put a ceiling on the claim for deduction which indicates that if the deductions under Chapter VI-A are to be claimed then the gross total income should be sufficient to absorb such deductions i.e. if the gross total income is 'Nil' then deduction under Section 80HH and 80I cannot be claimed because it would mean that aggregate amount of the deduction would exceed the gross total income of the assessee. In Commissioner of Income-Tax v. Atam Ballabh Finance Pvt. Ltd. (2002) 258 ITR 485 after noticing the definition of gross total income as given under Section 80B(5) the Delhi High Court has held that while computing the income, all provisions are required to be applied and only thereafter the deductions have to be allowed. In IPCA Laboratory Ltd. V. Dy. Commissioner of Income-Tax, Mumbai (2004) 12 SCC 742 the appellant was a holder of an Export House certificate. It exported self-manufactured goods as well as goods manufactured by supporting manufacturers. It had earned a profit from the export of self-manufactured goods and had suffered loss from the export of trading goods. In its return for assessment year 1996-97, it claimed deduction under Section 80HHC contending that profits from the two types of export should be considered separately and the profit in respect of one could not be negated or set off against the loss from the other. Dismissing the appeal the Supreme Court ruled that although Section 80HHC has been incorporated with a view to provide incentive to export houses, if there is a loss then no deduction would be available under Section 80H-HC(1) or (3). What is held is that in arriving at the figure of positive profit both the profits and loss will have to be considered and if the net figure is the positive profit then the assessee will be entitled to a deduction but if the net figure is a loss then the assessee will not be entitled to a deduction. In Commissioner of Income-Tax v. Lucky Laboratories Ltd. (2006) 284 ITR 435 (ALL) it is held that Section 80A (1) of the Act says that in computing the total income of an assessee it shall be allowed from the gross total income in accordance with and subject to the provisions of this Section the deductions specified in Section 80C to 80U whereas sub-section 2 of Section 80A says that the aggregate amount of the deductions under this Chapter shall not be in any case exceed the gross total income of

the assessee and therefore the total deduction under Sections 80HH and 80I should not exceed the gross total income of the assessee. In Commissioner of Income Tax and Another v. R.P.G. Telecoms Ltd. (2007) 292 ITR 355 the Karnataka High Court has held that Section 80AB of the Income-Tax Act, 1961, would override all other Sections for the purpose of deduction under Chapter VI-A of the Act and while calculating the gross total income of the company, one has to adjust the losses from one priority unit against the profits of the other priority unit and if the resultant gross total income is 'Nil' then the assessee cannot claim deduction under Chapter VI-A.

11. The above discussion makes it very evident that predominant majority of the High Courts have taken the view that while working out gross total income of the assessee the losses suffered have to be adjusted and if the gross total income of the assessee is 'Nil' the assessee will not be entitled to deduction under Chapter VI-A of the Act. It is well settled that where the predominant majority of the High Courts have taken certain view on the interpretation of certain provisions, the Supreme Court would lean in favour of the predominant view. Therefore, this Court is of the opinion that the High Court was justified in holding that gross total income must be determined, by setting off against the income, the business losses of earlier years, before allowing deduction under Chapter VI-A and if the resultant income is 'Nil', then the asessee cannot claim deduction under Chapter VI-A.

14. In view of the above dictum the gross total income of the assessee is to be determined first after adjusting the losses etc, and if the gross total income of the assessee is Nil, the assessee would not be entitled to deduction under section VI-A of the Act, 1961. The Apex Court had no occasion to consider as to whether for computation of gross income of the assessee, the losses already lapsed are required to be again adjusted or not. Therefore, the aforesaid dictum would not be of any assistance to the

Revenue.

15. The decision of the Apex Court in the case of **IPCA Laboratories Ltd.** (supra) reiterate that after adjustment if there is a positive profit, the assessee would be entitled to deduction under section 80HHC(i) and if there is loss, the assessee would not be entitled to any deduction. The Apex Court was not considering as to how the total income is to be computed to arrive at the gross total income for the purpose of deduction under section 80IA(1) of the Act, 1961.

16. In the case of **Amarsinghji Mills Ltd**(supra), the question before this Court was whether new business carried out by the assessee was same as that of the earlier years and whether the assessee would be entitled to carry forward of loss or not. This Court held as under :

"11. After stating thus, it is laid down that for the purpose of determining whether the business is the same a fairly adequate test would be whether there was inter-connection, interlacing, inter -dependence and unity by the existence of common management, common business organisation, common administration, common fund and a common place of business. In the facts of the case before the Apex Court the assessee was originally importing certain articles from abroad which business came to be dis-continued and the assessee started exporting articles manufactured in India to different foreign countries. The Apex Court held that the fact that the procedure involved in the two activities was entirely different was not by itself sufficient to establish that the business was not the same. That there was a common control and common management of the same Board of Directors carrying on both the activities in two different years.

12. Applying the tests to the facts found by the Tribunal, it

can be seen that the Tribunal has recorded that the assessee had common management and common control of business. That there was no difference in the business carried on by the assessee in two different accounting periods considering the unity of control. Nothing has been pointed out on behalf of the applicant-revenue to even suggest that these findings of fact recorded by the Tribunal are not correct, except for making a faint effort that the Tribunal had not found that there was common place of business. As can be seen from facts on record the decision in the case of B.R. Ltd. (supra) had been pressed into service on behalf of the assessee even before the Commissioner (Appeals) as well as the Tribunal. None of the authorities have been invited to render any such finding. Therefore, at this stage, it is not possible to raise a presumption that the place of business was not common, nor is it necessary to send the matter back for this limited purpose, considering the period which has elapsed, the accounting period being year ended on 30th June, 1982."

17. In the case on hand, there is no dispute with regard to the business of the assessee which is providing telecommunication services, therefore, the decision in case of **Amarsinghji Mills Ltd**(supra), relied upon by the Revenue for alternative submission would also not be applicable in the facts of the case.

18. In the case of **ACME Paper Ltd** (supra), a Division Bench of the Madhya Pradesh High Court had considered the issue of section 79(b) of the Act, 1961, wherein the Court held as under :

"6. **Section** 79 of the **Income**-tax Act clearly lays down the carry forward and set off of losses in the case of certain companies. It is true that both the conditions as mentioned in **Section** 79(a) and (b) of the **Income**-tax Act are that on the last day of the previous year, the shares of the company carrying not less than fifty-one per cent. of the

voting power were beneficially held by the persons who beneficially held shares of the company carrying not less than fifty-one per cent. of the voting power on the last day of the year or years in which the loss was incurred and Sub-clause (b) as it stood at the relevant time was that the Assessing Officer is satisfied that the change in the shareholding was not effected with a view to avoiding or reducing any liability to tax. The burden is on the Revenue to show whether any change in the shareholding was not effected with a view to avoiding or reducing any liability to tax. No such finding has been recorded by the Assessing Officer or by the appellate authority, therefore, the Tribunal has held that in the absence of this finding, there is no reason to deny the benefit of set off of the losses. We are of the opinion that the view taken by the Tribunal is well founded that it was one of the first conditions to deny this benefit clause to record the finding that any change in shareholding was effected with a view to avoiding or reducing any liability to tax. Since there is no positive finding that this change in shareholding was done for the purpose of avoiding orreducing the tax liability, then in that case, there was no option with the Tribunal, but to permit the set off of the losses during the assessment year 1978-79. This was permitted obviously that there was no such reason for avoiding or reducing the tax liability. The Tribunal has allowed the set-off on being satisfied that the change in shareholding was not effected with a view to avoiding or reducing the tax liability. Therefore, in this view of the matter, the view taken by the Tribunal appears to be justified. Hence, this reference is answered against the Revenue and in favour of the assessee. The reference is answered accordingly."

19. From the above dictum, it is clear that the burden is on the Revenue to establish that any change in the shareholding was not effected with a view to avoiding or reducing any tax liability. As the Assessing Officer has not gone into this aspect at the time of assessment, at this stage, it would not be appropriate to consider the issue as to whether the shareholding was genuine or not for the

purpose of computation of quantum under section 80-IA(1) for the year under consideration. Similarly in the decision in the case of **Ganga Corporation Asbestos Pvt Ltd** (supra), the Division Bench of the Allahabad High Court considered the issue whether business of the assessee had remained the same or whether there was cause of unity of control and common management. Such a issue is not arising from the facts of the case, reliance placed by the Revenue for the alternative submission is not required to be considered.

20. The reliance placed on the decision of Supreme Court in case of **J.H. Gotla** (supra), for the purpose of considering as to what constitutes the income of the assessee, the Supreme Court has held as under :

"41. The question in the instant case is within a short compass. It can be accepted without much doubt that income would include loss. If it were a question of inclusion of the income the wife or minor child to whom assets have been transferred by the assessee and with which the business was carried on or by which income was derived by the wife or he minor child, then in including that income either of the wife or nor child. such income should be computed in accordance with Section 10 and other provisions of the Act i.e. including Section 24(1) and Section 24(2) of the Act. But the question that arises here is whether against the inclusion of such income, loss suffered by the assessee in a previous year which was carried forward under Section 24(1) of the Act should be allowed to be set off or not. The revenue contends that it cannot be. It lays emphasis on the fact that set off for the carried forward loss is permitted only by Section 24(1) of the Act and there should be strict literal construction of Section 24(2) and as such in view of the provisions of Section 24(2)(ii) which stipulates that loss to be carried forward must be 'loss sustained by him in any other business, profession or vocation, it shall be set off against the profits and gains, if any, of any business, profession or vocation carried on by him in that year; provided that the business, profession or vocation in which the loss was originally

sustained continued to be carried on by him in that year'. Therefore, it is required that the business, profession or vocation against profits of which the set off is claimed must be carried on by the assessee in that year. But the problem here is that the business out of whose share income of the wife or minor child is derived is no longer carried on by the assessee himself in the subsequent year in which set off is being claimed. On behalf of the revenue it was emphasised that this requirement is to be strictly followed. Revenue emphasised that the requirement continues irrespective of the clarification of the Board of Revenue by Circular in 1944 and in spite of the addition of Explanation 2 to Section 64(2) by Amending Act of 1979 with effect from 1980. Therefore, it was urged that legislative intent was clear and it was not possible to hold other-wise.

42. On the other hand on behalf of the assessee it was contended that it would often result in extreme anomaly and hardship, for instance in the example noticed before. It was further stressed on behalf of the revenue that equity has no place in interpreting fiscal legislation.

43. We need not, for the purpose of the instant case, express any opinion whether circulars in the instant case should be construed as contemporaneous exposition of the Legislative intent. The question was discussed exhaustively in the case of Desh Bandhu Gupta and Co. and Others. v. Delhi Stock Exchange Association Ltd. [1979] 4 S.C.C. 565 (AIR 1979 SC 1049)

44. Our attention was also drawn to the decision in the case of Manickam and Co. v. The State of Tamil Nadu 39 S.T.C. 12 at page 18 as well as Craies on Statute Law (Sixth Edn.) page 147."

21. Thus, the Apex Court held that if strict literal construction leads to an absurd result i.e result not intended to be served by the object of the legislation, then if other construction is possible, such construction should be preferred and attempt should be made to prefer construction which results in equity rather than justice.

22. Therefore, in the facts of the case, when there is no

issue of any strict or otherwise literal construction of the provisions of the Act, the application of section 80-IA(5) of the Act to deny the effect of provisions of section 79 of the Act cannot be sustained as per the Scheme of the Act,1961. When the loss of earlier years have already lapsed, then the same cannot be notionally carried forward and set off against the profit and gains of the assessee's business for the year under consideration in computing the quantum of deduction under section 80-IA(1) of the Act, 1961. The provision of section 80-IA(5) of the Act, 1961 cannot be invoked to ignore the provisions of section 79 by virtue of which the business loss of the assessee prior to year 2001-2002 has already lapsed. The Assessing Officer, CIT(Appeals) and the Tribunal were therefore, not justified in applying section 80-IA(5) of the Act so as to ignore the losses which have already lapsed by operation of section 79 of the Act.

23. For the foregoing reasons, the appeals are allowed. The Impugned orders passed by the Tribunal in the respective Tax Appeals are quashed and set aside. The substantial question is answered in favour of the assessee and against the Revenue. Tax Appeals are disposed of with no order as to costs.

(J. B. PARDIWALA, J)

(BHARGAV D. KARIA, J)

RAGHUNATH R NAIR