Commissioner of Income Tax Vs Victoria Mills Ltd.

Court: Bombay High Court

Date of Decision: Sept. 21, 1984

Acts Referred: Income Tax Act, 1961 â€" Section 10, 14, 15, 16, 17

Citation: (1985) 46 CTR 180 : (1985) 153 ITR 733

Hon'ble Judges: Desai, J; Bharucha, J

Bench: Division Bench

Judgement

Bharucha, J.
An interesting point concerning the carry forward of development rebate is raised in this reference, at the instance of the

Revenue, under s. 256(1) of the I.T. Act, 1961. The question posed reads as follows :

Whether the finding of the Tribunal that unabsorbed development rebate is not to be set off against capital gains but is to be carried forward is, in

law, justified ?

2. The assessee runs a cotton mill. The relevant assessment year is 1967-68. An assessment was made. The assessee went in appeal and in further

appeal. The Income Tax Appellate Tribunal allowed it some deductions, as a consequence of which its income from business, after allowing

depreciation, was computed at Rs. 2,34,992. The development rebate was allowable to the assessee in the sum of Rs. 3,54,802. The assessee

also had income from property and dividends, aggregating to Rs. 1,03,093, and long-term capital gains in the amount of Rs. 40,750. The ITO set

off the assessee''s income from business in the sum of Rs. 2,34,992 against the development rebate of Rs. 3,54,802 and reduced the income from

business to nil. He set off the unabsorbed development rebate of Rs. 1,19,810 against the income from property and dividends aggregating to Rs.

1,03,093. The yet unabsorbed development rebate of Rs. 16,717 was then set off by the ITO against the long-term capital gains of Rs. 40,750,

reducing the long-term capital gains to Rs. 24,033. These were determined to be taxable.

3. The assessee appealed. It contended before the AAC, as it had contended before the ITO, that the unabsorbed development rebate of Rs.

16,717 should not be set off against its long-term capital gains but should be carried forward to be set off during the subsequent years against its

income for those years. Both the ITO and the AAC rejected this contention.

4. The assessee appealed to the Income Tax Appellate Tribunal. It appeared to the Tribunal that the controversy depended upon the connotation

of the expression ""total income"" in s. 33(2) of the I.T. Act, 1961. The controversy arose from the fact that (long-term) capital gains in the hands of

a company were chargeable to tax at a rate lower than that for its other income. It was ""more appropriate to hold with the assessee that, in the

present context, the expression ''total income'' in s. 33(2) does not include capital gains. This interpretation would enure for the full allowance of the

benefit intended to be given to the assessees in the shape of development rebate, and would harmonise the provisions of ss. 71(2) and 33(2).'''' The

provisions of s. 71(2) of the I.T. Act, 1961, did not come into play because there was no loss under any head of income. The ""assessee''s

contention that the balance of the development rebate is not to be set off against the capital gains but is to be carried forward"" was accepted by the

Tribunal and the appeal allowed.

5. To understand the discussion that follows, the relevant provisions of s. 33 and the provisions of ss. 71, 72 and 74 of the I.T. Act, 1961, must be

quoted :

''33. (1)(a) In respect of a new ship or new machinery or plant (other than office appliances or road transport vehicles) which is owned by the

assessee and is wholly used for the purposes of the business carried on by him, there shall, in accordance with and subject to the provisions of this

section and of section 34, be allowed a deduction, in respect of the previous year in which the ship was acquired or the machinery or plant was

installed or, if the ship, machinery or plant is first put to use in the immediately succeeding previous year, then, in respect of that previous year, a

sum by way of development rebate as specified in clause (b).....

(2) In the case of a ship acquired or machinery or plant installed after the 31st day of December, 1957, where the total income of the assessee

assessable for the assessment year relevant to the previous year in which the ship was acquired or the machinery or plant installed or the

immediately succeeding previous year, as the case may be [the total income for this purpose being computed without making any allowance under

sub-section (1) or sub-section (1A) of this section or sub-section (1) of section 33A or any deduction under Chapter VI-A or section 280(O) in

nil or is less than the full amount of the development rebate calculated at the rate applicable thereto under sub-section (1) or sub-section (1A), as

the case may be, -

(i) the sum to be allowed by way of development rebate for that assessment year under sub-section (1) or sub-section (1A) shall be only such

amount as is sufficient to reduce the said total income to nil; and

(ii) the amount of the development rebate, the the extent to which it has not been allowed as aforesaid, shall be carried forward to the following

assessment year, and the development rebate to be allowed for the following assessment year shall be such amount as is sufficient to reduce the

total income of the assessee assessable for that assessment year, computed in the manner aforesaid, to nil, and the balance of the development

rebate, if any, still outstanding shall be carried forward to the following assessment year and so on, so, however, that no portion of the

development rebate shall be carried forward for more than eight assessment years immediately succeeding the assessment year relevant to the

previous year in which the ship was acquired or the machinery or plant installed or the immediately succeeding previous year, as the case may be.''

''71. (1) Where in respect of any assessment year the net result of the computation under any head of income other than ''Capital gains'', is a loss

and the assessee has no income under the head ''Capital gains'', he shall, subject to the provisions of this Chapter, be entitled to have the amount of

such loss set off against his income, if any, assessable for that assessment year under any other head.

(2) Where in respect of any assessment year the net result of the computation under any head of income other than ''Capital gains'' is a loss and the

assessee has income assessable under the head ''Capital gains'', such loss may, subject to the provisions of this Chapter, be set off -

(i) against the income, if any, of the assessee assessable for that assessment year under any head including income assessable under the head

''Capital gains'' (whether relating to short-term capital assets or any other capital assets), or

(ii) if the assessee so desires, only against his income, if any, under the hear ''Capital gains'', in so far as such income relates to short-terms capital

assets, and income under any other head.

(3) Where in respect of any assessment year the net result of the computation u/s 48 to 55 in respect of capital gains relating to short-term capital

assets is a loss and the assessee has income assessable under any head of income other than ''Capital gains'', the assessee shall, subject to the

provisions of this Chapter, be entitled to have such loss set off against the income aforesaid.

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 the assessee has income only

under the head "Capital gains" relating to capital assets other than short-term capital assets and has exercised the option under sub-section (2) of

that section 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 :

Provided that the business or profession for which the loss was originally computed continued to be carried on by him in the previous year relevant

for that assessment year; and

(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 :

Provided that where the whole or any part of such loss is sustained in any such business as is referred to in s. 33B which is discontinued in the

circumstances specified in that section, and, thereafter, at any time before the expiry of the period of three years referred to in that section, such

business is re-established, reconstructed or revived by the assessee, so much of the loss as is attributable to such business shall be carried forward

to the assessment year relevant to the previous year in which the business is so re-established, reconstructed or revived, and -

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

year; and

(b) if the loss cannot be wholly so set off, the amount of loss not so set off shall, in case the business so re-established, reconstructed or revived

continues to be carried on by the assessee, be carried forward to the following assessment year and so on for seven assessment year immediately

succeeding.

(2) Where any allowance or part thereof is, under sub-section (2) of section 32 or sub-section (4) of section 35, to be carried forward, effect shall

first be given to the provisions of this section.

(3) No loss other than the loss referred to in the proviso to sub-section (1) of this section shall be carried forward under this section for more than

eight assessment year immediately succeeding the assessment year for which the loss was first computed.

74. (1)(a) Where in respect of any assessment year the net result of the computation under the head "Capital gains" is a loss, such loss shall,

subject to the other provisions of this Chapter, be dealt with as follows :-

(i) such portion of the net loss relating to short-term capital assets as cannot be or is not wholly set off against income under any head in

accordance with the provisions of section 71 shall be carried forward to the following assessment year and set off against the capital gains, if any,

relating to short-term capital assets assessable for that assessment year and, if it cannot be so set off, the amount thereof not so set off shall be

carried forward to the following assessment year and so on :

(ii) such portion of the net loss relates to capital assets other than short-term capital assets shall be carried forward to the following assessment

year and set off against the capital gains, if any, relating to capital assets other than short-term capital assets assessable for that assessment year

and, if it cannot be so set off, the amount thereof not so set off shall be carried forward to the following assessment year and so on;

Provided that where, in the case of any assessee not being a company, the net loss computed in respect of such capital assets for any assessment

year does not exceed five thousand rupees, it shall not be carried forward under this section.

(b) Notwithstanding anything contained in the Indian Income Tax Act, 1922 (11 of 1922), any loss computed under the head "Capital gains" in

respect of the assessment year commencing on the 1st day of April, 1961, or any earlier assessment year which is carried forward in accordance

with the provisions of sub-section (2B) of section 24 of that Act, shall be dealt with in the assessment year commencing on the 1st day of that

April, 1962, or any subsequent assessment year as follows :-

(i) in so far as it relates to short-term capital assets, it shall be carried forward and set off in accordance with the provisions of sub-clause (i) of

clause (a) and sub-section (2); and

(ii) in so far as it relates capital assets, other than short-term capital assets, it shall be carried forward and set off in accordance with the provisions

of sub-clause (ii) of clause (a) and sub-section (2).

(2)(a) No loss referred to in sub-clause (i) of clause (a) of sub-section (1) or sub-clause (i) or sub-clause (ii) of clause (b) of that sub-section shall

be carried forward under this section for more than eight assessment years immediately succeeding the assessment year for which the loss was first

computed under this Act or, as the case may be, the Indian Income Tax Act, 1922 (11 of 1922).

(b) No loss referred to in sub-clause (ii) of clause (a) of sub-section (1) shall be carried forward under this section, for more than four assessment

years immediately succeeding the assessment year for which the loss was first computed under this Act.

6. As a matter of convenience, during the discussion, the figure of the assessee"s business income (Rs. 2,34,992) shall be referred to as Rs. 234,

of the property and dividend income (Rs. 1,03,093) as Rs. 103, of the long-term capital gains (Rs. 40,750) as Rs. 40, of the allowable

development rebate (Rs. 3,54,802) as Rs. 354, and of the unabsorbed development rebate (Rs. 16,717) as Rs. 17.

7. The assessee''s arguments before us ran a course somewhat different to the course followed before the Tribunal. It is more convenient to set

them out first.

8. Mr. Dastur, learned counsel for the assessee, submitted that if, as the Revenue contended, long-term capital gains formed part of the assessee''s

total income, s. 33(2) did not apply in the instant case. The assessee''s total income would then be comprised of the business income of Rs. 234,

the property and dividend income of Rs. 103 and the long-term capital gain of Rs. 40, adding up to Rs. 377. The total income of Rs. 377 was

greater than the full amount of the development rebate, to which the assessee was entitled, of Rs. 354. Section 33(2) could apply only when an

assessee''s total income was nil or was less than the full amount of the development rebate.

9. Mr. Dastur drew our attention to ss. 28 and 29 which require that income under the head ""Profits and gains of business or profession"" must be

computed in accordance with the provisions contained, inter alia, in s. 33. Section 33(1)(a) requires that an assessee should be allowed a

deduction by way of development rebate in a sum to be calculated in the manner set out in clause (b). Setting off of the business income of the

assessee of Rs. 234 against the full amount of the development rebate of Rs. 354 under the provisions of s. 33(1)(a) resulted, Mr. Dastur

submitted, in a business loss in the form of unabsorbed development rebate of Rs. 120. The provisions of s. 71 were then required to be applied

and the business loss of Rs. 120 set off against the assessee''s property and dividend income of Rs. 103. This resulted in a business loss in the form

of yet unabsorbed development rebate of Rs. 17. The assessee had exercised the option under s. 71(2)(ii) not to set off its long-term capital gains

of Rs. 40 against the business loss of Rs. 17. The result was that the long-term capital gains of Rs. 40 were subject to tax in the assessee''s hands.

The result also was that the business loss of Rs. 17 was carried forward under the provisions of s. 72. Mr. Dastur pointed out, however, that s. 72

permitted set off of a business loss carried forward only against the business profits of succeeding years, whereas s. 33(2) permitted set off of

unabsorbed development rebate carried forward against the total income of succeeding years.

10. Mr. Dastur argued, and this was his main argument, that the phrase ""total income"" in s. 33(2) had to be construed to mean such income as was

available for set off against development rebate. The option under s. 71(2)(ii) having been exercised by the assessee, its long-term capital gains of

Rs. 40 were not available for set off against the development rebate and its total income was only Rs. 337. The phrase ""total income of the

assessee assessable for the assessment year"" in s. 33(2) was the assessee"s total income computed under the provisions of the Act except for

specific deductions excluded by the sub-section.

11. Mr. Dastur argued that if the expression ""total income"" in s. 33(2) was construed to mean, as the Revenue suggested, as assessee"s income

from all sources, anomalies and absurdities would result. Mrs. Dastur urged that it was an anomaly that though the assessee had exercised the

option of not setting off its business loss against its long-term capital gains under s. 72(2)(ii), it should lose the benefit of that option in carrying

forward development rebate. It was absurd, Mr. Dastur suggested, that the carry forward of development rebate should depend upon an

assessee"s other income. Mr. Dastur took a hypothetical assessee"s income under the head of business to be Rs. 10, his income under the head of

long-term capital gains to be minus Rs. 4 and the development rebate to be Rs. 30. The hypothetical total income, if the expression was construed

as the Revenue suggested, would be (10-4) = 6. The development rebate allowed to the hypothetical assessee would, under s. 33(2)(i), be Rs. 6.

Under s. 33(2)(ii), he would be entitled to carry forward development rebate of (30-6) = 24, but he would be obligated to pay tax on the business

income of Rs. 4 that was not set off. If the expression ""total income"" was construed to mean only that which was available for setting off against

development rebate, the hypothetical assessee"s total income would be Rs. 10; the development rebate allowed under s. 33(2)(i) would be Rs.

10; he would carry forward development rebate of Rs. 20 and he would not be liable to pay any tax.

12. Mr. Dastur relied upon the judgment of the Supreme Court in K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another, The Supreme

Court observed that it was a well-recognised rule of construction that a statutory provision must be so construed, if possible, that absurdity and

mischief are avoided. There were many situations where the construction suggested on behalf of the Revenue led to a wholly unreasonable result

which could never have been intended by the Legislature. The court should eschew literalness in interpretation and try to arrive at an interpretation

which avoided absurdity and mischief and made the provision rational and sensible, unless, of course, its hands were tied and it could not find any

escape from the tyranny of the literal interpretation. It was now a well-settled rule of construction that where the plain literal interpretation of

statutory provision produced a manifestly absurd and unjust result which could never have been intended by the Legislature, the court could modify

the language used or even ""do some violence to it so as to achieve the obvious intention of the legislature and produce a rational construction. The

court could also in such a case read into a statutory provision a condition which, though not expressed, was implicit as constituting the basic

assumption underlying the statutory provision. The judgments of this court in Petlad Bulakhidas Mills Co. Ltd. Vs. Raj Singh, , and in Ajit

Investment Co. Private Ltd. and Another Vs. K.G. Malvandkar, Sub-registrar, Bombay Suburban Division, , make the same point. From the latter

case, a sentence or two may be quoted (p. 559) :

In determining either the general object of the legislature, or the meaning of its language in any particular passage, it is obvious that the intention

which appears to be most in accord with convenience, reason, justice and legal principles should, in all cases of doubtful significance, be presumed

to be the true one. An intention to produce an unreasonable result is not to be imputed to a statute if there is some other construction available.

Where to apply words literally would ''defeat the obvious intention of the legislation and produce a wholly unreasonable result'', we must ''do some

violence to the words'' and so achieve that obvious intention and produce a rational construction.

13. Mr. Dastur submitted that the scheme behind s. 33(2) was that development rebate should be allowed to an assessee in the relevant

assessment year only to the extent that it could be set off and the balance was permitted to be carried forward. The interpretation suggested by the

Revenue could result in a situation where an assessee was obliged to pay tax on his income for the relevant assessment year but was entitled to

carry forward development rebate to be adjusted against his total income in succeeding years. This was an anomaly that could never have been

intended. The interpretation sought to be placed by the Revenue, though a more literal one, ought to be eschewed to produce the intended result.

14. Mr. Dhanuka, learned counsel for the Revenue, Submitted that s. 33 was a self-contained code which provided for the computation of

development rebate, the mode and manner of its deduction and its carry forward to subsequent years. Development rebate, when unabsorbed,

retained its character as such and could not be carried forward as a business loss under s. 72. Sub-section (1) of s. 33 had to be read in

conjunction with and subject to the other provisions of that section. So read, it was clear that sub-s. (1) implied that where the total income was

more than the development rebate the development rebate had to be set off against the total income. Where the total income was less than the

development rebate the provisions of sub-s. [2] applied. The total income referred to in s. 33 was the total income contemplated by S. 2(45), 5,

10 and 14 and comprised the six heads of income under the Act, including capital gains. The language of s. 33 was plain and unambiguous and had

to be interpreted literally. A literal interpretation thereof did not give rise to anomaly or absurdity. In any event, where the language was plain, it had

to be interpreted in its literal sense and the consequences of such interpretation were irrelevant.

15. Regarding Mr. Dastur''s example of a hypothetical assessee, Mr. Dhanuka submitted that the anomaly, if any, arose by reason of the

provisions of s. 74 and could not affect the construction of s. 33. In the alternative, he submitted that if the expression ""total income"" was construed

to mean the total positive income, no anomaly arose.

16. Mr. Dhanuka cited the judgment of the Karnataka High Court in Mysore Paper Mills Ltd. Vs. Commissioner of Income Tax, Karnataka-I, .

The judgment considered the argument that unabsorbed development rebate should be treated as part of business loss which is allowed to be

carried forward and is given priority, by reason of s. 72(2), over unabsorbed depreciation allowance. The court was unable to accept the

argument. It observed that s. 33 did not deal with any trading loss as as ordinarily understood. The Madras High Court in Commissioner of

Income Tax, Tamil Nadu Vs. Coromandel Steels Ltd., , was concerned with the order of priority in the adjustment of the unabsorbed

development rebate, unabsorbed depreciation and unabsorbed business loss. The court noted that the allowance of development rebate, as shown

by s. 33, was so limited as to reduce the total income to nil. In other words, it was not treated as a kind with the other deductions contemplated by

ss. 30 to 43. It stood in a class by itself.

17. In Rajapalayam Mills Ltd. Vs. The Commissioner of Income Tax, Madras, the Supreme Court considered s. 10(2)(vi-b) of the Indian I.T.

Act, 1922, which dealt with development rebate. The provisions thereof are much the same as those of s. 33 of the I.T. Act, 1961, except that the

relevant phrase there used is ""the total income of the assessee for the year."" The Supreme Court held that though the amount of development

rebate was, under the main provision of clause (vi-b), allowable in the first instance against the profits or gains of the particular business whose

profits or gains were being computed, clause (i) of Explanation 1 (equivalent to s. 33(2)(i)) made it clear that if any part of the development rebate

remained unabsorbed, it was to be set off against the other income of the assessee under any of the chargeable heads and it was only if some part

of the development rebate still remained outstanding that it could be carried forward to the following assessment year and set off against the total

income of the assessee for that year. It was only where the amount of development rebate had not been fully set off against the total income of the

assessee and a part of it remained unabsorbed and was carried forward that if could be allowed against the profits or gains for the particular

assessment year and if there was still some balance outstanding, then against the other income of the assessee for that assessment year.

18. The expression ""total income"" in s. 10(2)(vi-b) of the Indian I.T. Act, 1922, was held by the Madras High Court in Radhika Mills Ltd. Vs.

Commissioner of Income Tax, to mean ""the income aggregated from all heads and before deduction of development rebate and as assessed.

19. Section 33(1)(a) requires an assessee to be ""allowed a deduction"" of ""a sum by way of development rebate as specified in clause (b)"" if the

conditions prescribed in clause (a), with which we are not here concerned, are fulfilled. The deduction is to be made from the profits and gains of

business. This is clear from ss. 28 and 29. Under clause (i) of sub-s. (2) of s. 33, where the total income of the assessee for the relevant

assessment year (the total income for this purpose being computed without making any allowance under sub-s. (1) or the other stated provisions)

is nil or is less than the full amount of the development rebate, the sum to be allowed by way of development rebate for that assessment year shall

only be such amount as is sufficient to reduce the total income to nil. Under clause (ii), the amount of the development rebate, to the extent to

which it has not been allowed as aforesaid, must be carried forward to the following assessment year. The development rebate to be allowed for

the following assessment year shall be such amount as is sufficient to reduce the total income of the assessee assessable for that assessment year to

nil, and so on for a period of eight years.

20. The sub-section of a section must be construed as a whole, ""each portion throwing light, if need be, on the rest"" (see Madanlal Fakirchand

Dudhediya Vs. Shree Changdeo Sugar Mills Ltd., So read, it is implicit in sub-s. (2) of s. 33 that the development rebate which is unabsorbed by

the business income must be set off against the balance of the total income. What remains yet unabsorbed is to be carried forward. This is what the

Supreme Court held in the case of Rajapalayam Mills Ltd. Vs. The Commissioner of Income Tax, Madras, in regard to the similar provisions of s.

10(2)(vi-b) of the Indian I.T. Act, 1922.

21. Section 33, therefore, provides for the giving of a deduction by way of development rebate. It sets out how the development rebate is to be

calculated. It provides that for the relevant assessment year only so much of the development rebate is to be allowed as is sufficient to reduce the

assessee''s total income to nil. It provides for the carrying forward of the excess for adjustment against the total income over the succeeding eight

years. Where the development rebate is less than the total income, it is to be wholly adjusted against the total income. Where the development

rebate is more than the total income, it is to be first adjusted against the business income and then against the total income, it is to be first adjusted

against the business income and then against the total income. What is in excess must be carried forward for adjustment against the assessee''s total

income in succeeding years. The provisions of s. 33 alone govern the application and carry forward of development rebate.

22. Unabsorbed development rebate cannot be carried forward as a business loss under the provisions of s. 72. The provisions of s. 72 are

general provisions applicable to business losses. Section 33 is a special provision relating specifically to development rebate. The special provision

in s. 33 prevails over the general provision in s. 72.

23. Unabsorbed development rebate can then be carried forward only as development rebate under the provision of s. 33.

24. Section 33(2) talks of ""nil"" total income to obviate a possible argument that development rebate can be carried forward only if there is a

positive income. When the total income is ""nil"", it can absorb no part of the development rebate and the full amount thereof is to be carried

forward.

25. This brings to the next question : what does the phrase ""total income of the assessee assessable for the assessment year"" comprehend, and how

is it to be computed ?

26. Section 2(45) defines ""total income"" to mean ""the total amount of income referred to in section 5, computed in the manner laid down in this

Act"". Section 5 relates to the scope of total income and state that if ""includes all income from whatever source derived"". Chapter III, comprising ss.

10 to 13A, deals with incomes which do not form part of total income; long-term capital gains are not shown as income which does not form part

of total income. Chapter IV, comprising ss. 14 to 59 provides for the computation of total income. Section 14 states that ""all income shall, for the

purpose of charge of Income Tax and computation of total income, be classified"" under the six heads of income therein mentioned; the fifth head is

Capital gains"". Sections 32A(3) and 33A(2) use the identical phrase, namely, ""total income of the assessee assessable for the assessment year"".

Section 45 deals with capital gains and provides that ""any profits or gains arising from the transfer of a capital asset effected in the previous year

shall... be chargeable to Income Tax under the head ''capital gains'', and shall be deemed to be the income of the previous year in which the

transfer took place''''. 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 Chap. VII''''. Chapter VII is entitled ''''Incomes forming part of total income on which no Income Tax is payable''''. By virtue of

s. 80A, ''''in computing the total income of an assessee, there shall be allowed from his gross total income... the deductions specified'''' in the sections

therein mentioned.

27. Logically and on a plain reading, therefore, the ''''total income of the assessee assessable for the assessment year'''' must mean his income from

whatever source derived which must be computed under the provisions of the Act for the relevant assessment year. The expression ''''total income

must bear the same connotation wherever it is used in the Act. Total income for the purpose of s. 33(2) must be computed as total income is

computed for the purpose of the other provisions of the Act, except for the deductions specifically excluded thereby. Such computation must take

into account the additions, the deductions and allowances and the set-off provided for by various provisions of the Act, except, of course, for the

deductions specifically excluded by sub-s. (2).

28. In computing the total income for the purpose of s. 33(2), regard must, therefore, be had to s. 74. By reason thereof, a long-term capital loss

can be carried forward and set off only against long-term capital gains in subsequent years. In computing total income, a long-term capital loss

cannot, hence, be set off against income under any other head. Consequently, in Mr. Dastur''s example, the hypothetical assessee''s total income is

not (10-4) = 6, but Rs. 10; the allowable development rebate is not Rs. 6, but Rs. 10; the development rebate that can be carried forward is not

(30-6) = 24, but (30-10) = 20; and no tax is payable.

29. In computing the total income for the purpose of s. 33(2), regard must also be had to the set-off under s. 71 of a loss from one head of income

against income from another. By virtue of sub-s. (1) thereof, where there is a loss under any head of income other than capital gains, an assessee is

entitled to have it set off against income under any other head. By virtue of cl. (i) of sub-s. (2), where there is a loss under any head of income

other than capital gains and an assessee has income assessable under the head of capital gains and an assessee has income assessable under the

head of capital gains, whether relating to short-term capital assets or any other capital assets, the loss may be set off against such income or, by

virtue of cl. (ii) of sub-s. (2), it may be set off only, if the assessee so desires, against the short-term capital gains and his income under any other

head. In other words, an assessee is, by virtue of the provisions of sub-s. (2) given the option to set off or to decline to set off his long-term capital

gains. The exercise of the option so as to decline to set off the long-term capital gains does not mean that they thereupon cease to form part of the

assessee''s total income. The long-term capital gains remain, even after such exercise of the option, part of the total income. Though an assessee

may have so exercised the option, his long-term capital gains have to be taken into account in the computation of his total income assessable for

the assessment year for the purpose of s. 33(2); and the development rebate must, before it is allowed to be carried forward, be set off

thereagainst. No provision of the Act gives an assessee the option to exclude his long-term capital gains from his total income or to decline to set

off the long term capital gains against development rebate. It is not absurd or unreasonable or anomalous that the legislature should permit the carry

forward of the advantage of development rebate, which can be set off against total income in subsequent years, only after it is utilised to absorb an

assessee''s total income for the relevant assessment year, from whatever source derived, including capital gains. There is no justification for reading

the expression ''''total income'''' in s. 33(2) so as to exclude long-term capital gains.

30. Applying the conclusions to the facts before us, the assessee''s total income for the relevant assessment year must be computed to be (234 +

103 + 43) = 377. The total income is, therefore, more than the amount of the development rebate of Rs. 354. The development rebate is,

therefore, fully absorbed by the total income and nothing is left to be carried forward.

31. The question put to us is, accordingly, answered in the negative and in favour of the Revenue.

32. The assessee shall pay to the Revenue the costs of the reference.