Before G.S. Singhvi, Jawahar Lal Gupta & Ashutosh Mohunta, JJ

THE COMMISSIONER OF INCOME TAX, CHANDIGARH,—*Petitioner*

versus

PUNJAB FINANCIAL CORPORATION—*Respondent*

I.T.A. No. 189 of 1999

4th December, 2001

Income Tax Act, 1961 —Ss.32-AB, 143(1) & 154—Failure to file audit report alongwith the return—Assessing Officer ordering withdrawal of the deductions—Provisions of S.32-AB(1) entitles an assessee to claim deduction subject to fulfilment of conditions embodied in S.32-AB(5) which require the assessee to furnish the report of the audit alongwith the return—Whether the provisions of S.32-AB(5) are mandatory and non-compliance thereof disentitles an assessee to claim benefit of deduction—Held, no—Claim for deduction depends on deposit of the amount within the stipulated time—An assessee also entitled to file a revised return and rectify the defect in the return—An asseessee cannot be deprived of the benefit of deduction if audit report is filed before the finalisation of the assessment.

(Commissioner of Income Tax v. Jaideep Industries, (1989) 180 I.T.R. 81 and Commissioner of Income Tax v. Shahzedanand Charity Trust, (1997) 228 I.T.R. 292, dissented)

Held that Sections 32-A to 44-D of the 1961 Act speak of various deductions. Clause (a) of sub-section (1) of Section 32-AB lays down that where an assessee whose total income includes income chargeable to tax under the head profits and gains of business or profession has, out of such income, deposited any amount in an account maintained by him with the Development Bank before the expiry of six months from the end of previous year or before furnishing the return of his income, whichever is earlier in accordance with, and for the purposes specified in a scheme to be framed by the Central Government, then he shall be allowed a deduction of a sum equal to the amount or aggregate of the amounts so deposited. Clause (b) of sub-section (1) of Section 32-AB lays down that where an assessee whose total income chargeable under the head'Profits and gains of business or profession' has, out of such income, utilised any amount during the previous year for the purchase of any new ship, new

aircraft, new machinery or plant, without depositing any amount in the deposit account under clause (a), then the assessee shall be allowed a deduction of a sum equal to the amount so utilized. The purpose of sub-section (1) of Section 32-AB is to give an incentive in the form of deduction on the amounts deposited with the Development Bank or utilized for purchase of new ship, new aircraft, new machinery or plant, of course, subject to the fulfilment of the conditions embodied in that sub-section. Sub-Section (5) of Section 32-AB of the Act is couched in a nagative form. It declares that deductions under sub-section (1) shall not be admissible unless the accounts of the business or profession of the assessee for the previous year relevant to the assessment year for which the deduction is claimed have been audited by an accountant as defined in the Explanation below sub-section (2) of section 288 and the assessee furnishes along with his return of income the report of such audit in the prescribed form duly signed and verified by such accountant. Proviso to sub-section (5) recognises the fact that the account of assessee may be audited under some other compliance of sub-section (5) if such assessee gets the accounts of such business or profession audited under such law and furnishes the report of the audit in the prescribed form.

(Para 9)

Further held, that the conditions embodied in sub-section (1), the fulfilment of which entitles the assessee to claim deductions are mandatory because the substratum of the claim of deduction is the deposit of the amount in the account maintained by the assessee with the Development Bank or utilisation thereof for purchase of new ship, new aircraft, new machinery or plant and, therefore, unless the condition embodied in this sub-section are satisfied, the assessee cannot claim deductions. However, this is not true of sub-section (5) which only provisions for filing of report of audit prepared by the accountant as defined in the Explanation below sub-Section (2) of Section 288 alongwith the return of income. The assessee's claim for deduction under Clause (a of sub-section (1) of Section 32-AB does not depend on the submission of the audit report alongwith the return of income, but on deposit of the amount in the account maintained by him with the Development Bank before the expiry of six months from the end of the previous year or before furnishing the return of his income, whichever is earlier. In this context, it is important to bear in mind that Section 139 of the Act which provides for filing of return in the

prescribed form within the stipulated time also provides for filing of revised return and rectification of defect in the return. Therefore, the requirement of filing duly audited report along with the return cannot be treated as mandatory and the assessee cannot be deprived of the benefit of deductioni if the same is filing before the finalisation of the assessment. In other words, the Assessing Officer can, for the purpose of allowing deduction in terms of sub-section (1) of Section 32-AB of the Act, accept audit report even though the same may not have been filed along with the return, as required by sub-section (5).

(Para 10)

Further held, that the view taken by *Gujarat High Court in Commissioner of Income Tax* v *Gujarat Oil and Allied Industries,* (1993) I.T.R. 325 and *Madras High Court in Commissioner of Income Tax* v. *A.R. Arunachalam, 1994(208)* I.T.R. 481, that Section 80J(6A) is not mandatory is correct and contrary view expressed by the *Division Bench in Commissioner of Income Tax* v. *Jaideep Industries,* (1989) 180 I.T.R. 81 does not represent the correct law.

(Para 22)

Further held, that the observations made in *Commissioner of Income Tax* v. *Shahzedanand Charity Trust,* (1997) 228 I.T.R. 292 that the view expressed by Gujarat High Court in *Commissioner of Income Tax* v. *Gujarat Oil and Allied Industries* is similar to the one expressed by this Court in *Commissioner of Income Tax* v. *Jaideep Industries* is based on an incorrect reading of the judgment of Gujarat Oil and Allied Industries's case because Gujarat High Court had, in fact, dissented from the view expressed in Jaideep Industries's case.

(Para 23)

R.P. SAWHNEY, SENIOR ADVOCATE ASSISTED BY

MS. JAISHREE THAKUR, ADVOCATE.—for the *appellant*

A.K. MITTAL AND AKSHAY BHAN, ADVOCATES,—for the *respondent*

JUDGMENT

G.S. Singhvi, J

(1) This case has been placed before the Full Bench along with I.T.A. No. 83 of 2001—*The Commissioner of Income-tax, Chandigarh*

Versus *M/s Punjab Financial Corporation,* Sector 17-B. Chandigarh for determination of the following question of law :—

> "Whether Section 32AB(5) of the Income-tax Act, 1961 is mandatory or directory and delayed filing of audit report would disentitle an assessee from claiming the benefit of deduction under section 32AB(1)?"

The background facts :—

(2) The Income-tax returns filed by assessee-Punjab Financial Corporation for the years 1988-89 and 1989-90 were accepted by the Assessing Officer under Section 143(1) of the Income-tax Act, 1961 (for short, the Act) and deductions claimed under Section 32-AB(1) were allowed. Subsequently, he issued notices under Section 154 of the Act proposing withdrawal of the deductions on the ground that the assessee had failed to file audit report with the returns as required by Section 32-AB (5). On receipt of notices, the assessee furnished audit report in the prescribed form but the Assessing Officer declined to accept the same and order withdrawal of the deductions. The Commissioner of Income-tax (Appeals), [for short,, CIT(A)] dismissed the appeal of the assessee, but the Income Tax Appellate Tribunal (hereinafter described as the Tribunal) reversed the order of the Assessing Officer and CIT(A), and restored the deductions by making the following observations :—

> "We have carefully considered the submissions made by both the parties and have perused order of the tax authorities. It is observed that AO has mentioned in the order made under section 154 in relation of both the astt. years that the assessee in its reply stated that the accounts of the Corporation were duly audited by SC Dewan & Co. and copy of audit report was submitted alongwith return and that tax audit report was also enclosed therewith. It has also mentioned that copies receipts relating to deposits with IDBI were also submitted alongwith return. It is also mentioned in the order that the assessee-corporation filed copies of audit report under section 32AB alongwith the reply. It is observed that on the basis of the said information filed by the assessee alongwith return AO allowed deduction under section

32AB in proceedings under section 143(1). It is also not controverted by learned DR that no deficiency letter was issued by AO under section 139(9). Explanation below secton 139(9) clearly provides in clause (e) that a return of income shall be regarded as defective unless it is accompanied by copies of audited profit and loss account and balance sheet and the auditor's report. It is further observed that under the provisions of section 32AB(1), the assessee is entitled to deduction in relation to the amounts deposited in an account maintained with the Development Bank where the amount is deposited before the expiry of six months from the end of the previous year or before furnishing return of income, whichever is earlier. The provisions of Section 32AB(5) further impose a condition that the said deduction under sub-section (1) shall not be admissible unless the accounts have been audited by an accountant, as defined in Explanation below sub-section (2) of Section 288 ad the assessee furnishes along with his return report of such audit in the prescribed form, i.e. form No. 3AA, duly singned and verified by such accountant. Proviso to Section 32AB (5) stipulates that it shall be sufficient compliance with the above provisions if the assessee gets the accounts audited under any other law and furnishes report of audit as required under such other law and further report in the form prescribed under the sub-section. We may mention that the first proviso is of no help to the assessee as the further report mentioned therein relates to part III of form No. 3AA, as prescribed under section 32AB (5). In view of the above facts, we are required to consider as to whether the provisions of section 32AB(5) relating to furnishing of audit report along with return are mandatory in nature or are directory. As already mentioned above, the main thrust of the provision of section 32 AB(1) is that the assessee is entitled to deduction in relation to the deposit made under the relevant Scheme with IDBI subject to the conditions that the account are

duly audited by an accountant. We feel that the asseessee had filled the basic information relating to audit of accounts along with auditor's report u/s 44AB and tax audit report along with receipt showing deposit of amounts with IDBI for credit into investment Deposit A/c No. CHD-75. We feel that the decision in the case of Jaideep Inds. (supra), which relates to the provisions of section 80J(6A) is not strictly applicable, though the provisions of section 32AB(5) may be somewhat pari materia with the said provisions. The provisions of Section 32AB(5)have to be construed in the context of the provision of section 32AB(1), whereunder deduction is admissible to the assessee on making of deposit with the IDBI or utilisation of any amount for the purchase of any new machinery or plant. Of course, the provision of clause (b) of course, the provision of section 32AB (1) are not relevant in the context of the said provisions. We feel that the observations made by High Court in the case of Shahzedanand Charity Trust (supra) at p. 299 that By showing sufficient cause. the auditor's report could be produced at any later stage either before the Income Tax Officer or before the appellate authority, are relevant. In the present case, deduction was allowed by A.O. under the provisions of section 143(1) on the basis of information furnished by the assessee along with the return, which included the above mentioned documents futher, during proceedings under Section154 the assessee filed copies of the actual audit report and in the context of the provision of section 32AB, we feel that such compliance was sufficient to entertain the claim of the assessee."

(3) The revenue filed appeal under Section 260A and prayed that Tribunal's order may be set aside because Section 32AB(5) of the Act is Mandatory and on account of its failure to file audit report along with the return, the assessee was not entitled to clam deduction in terms of Section 32AB (1).

(4) After considering the arguments of the counsel for the appellant and the judgments of this Court in *Commissioner of Income-tax Versus Jaideep Industries* (1), *Commissioner of Income-tax versus Shahzedanand Charity Trust (2)* and of Gujarat High Court in *Commissioner of Income-tax versus Gujarat Oil and Allied Industries*(3), the Division Bench framed the question of law and referred the same to a larger Bench.

(5) Shri R.P. Sawhney argued that Section 32-AB (5) of the Act is mandatory in character and, therefore, the assessee's failure to file audit report along with the return is sufficient to decline the benefit of deduction under section 32AB(1). He submitted that the use of expression "shall not be admissible" in Section 32AB(5) is clearly indicative of the Legislature's intention that for the purpose of claiming deduction under Section 32AB(1), the assessee must fulfil the requirement of furnishing audit report along with the return. Section 32AB(1), Shri Sawhney relied on the decisions of this Court in *Commissioner of Income-tax Versus Jaideep Industries* (supra) in which section 80-J (6A) was held to be mandatory and argued that as the provision of Section 32AB(5) is pari materia to section 80-J(6A), the same should also be treated mandatory. He pointed out that in *Shahzedanand charity Trust's* case, the Division Bench had approved the ratio of *Jaideep Industries's* case, but treated the provisions Section 12-A (b) as directory in view of circular dated 9th February, 1978 issued by the Central Board of Direct Taxes. He also relied on the decisions of the Supreme Court in *State of U.P.* Versus *Manbodhan Lal Srivastava* (4) *Ram Avtar Singh Bhadauria* Versus *Ram Gopal Singh* and others(5) and *Govind Lal Chaggan Lal Patel* Versus *The Agriculture Produce Market Committee and others* (6).

(6) Shri A.K. Mittal, counsel for the assessee agrued that the conditions embodied in sub-section (1) of Section 32AB which the assessee is required to fulfil in order to claim the benefit of deductioin

(1) (1989) 180 ITR 81
(2) (1997) 228 ITR 292
(3) (1993) ITR 325
(4) AIR 1957 SC 912
(5) AIR 1975 SC 2182
(6) AIR 1976 SC 263

are mandatory, but the one contained in sub-sectioin (5) requiring the assessee to furnish the report of audit along with the return of income is directory in nature and non-compliance thereof is not sufficient to disentitle the assessee to avail the benefit of deduction. He referred to the provisions of Sections 12-A(b), 33-AB(2), 33-ABA(2), 35-CC(3), 36(1)(xi), 80-HHC (1) & (4) and 80 J (1) and (6A) (omitted by Finance Act, 1996 w.e.f. 1st April, 1989) which contain provision similar to Section 32-AB (1) and (5) and argued that the entitlement of the assessee to claim deductions subject to the fulfilment of conditions embodied in the substantive part of the provisions cannot be defeated on account of non-compliance of the condition of filing of audit report or certificate along with the return of income. In support of his submissions, Shri Mittal relied on the following decisions :—

(1) *Commissioner of Income-tax, Central, Calcutta versus Natioinal Taj Raders, (7)*

(2) *Commissioner of Income-tax versus Gujarat oil and Allied Industries (supra);*

(3) *Commissioner of Income-tax versus A.N., Arunachalam. (8)*

(4) *Commissioner of Income-tax versus Devradhan Madhavlal Genda Trust, (9) and*

(5) *Murali Export House and others versus Commissioner of Income-tax,(10)*

(7) We have given serious thought to the respective submission. For the purpose of deciding whether Section 32AB (5) is mandatory and the assessee's failure to file report of audit along with the return is sufficient to deprive him of the benefit of deductions in terms of Section 32AB (1), it will be useful to notice the language of two provision. The same read as under :-

"32AB. (1) Subject to the other provisions of this Section, whose total income includes income chargeable to tax under the head 'profits and gains of business or profession", has, out of such income,-

(7) 1980 (121) ITR 535
(8) 1994 (208) ITR 481
(9) 1998 (230) ITR 714
(10) 1999 (238) ITR 257

(a) deposited any amount in an account (hereafter in this section referred to as deposit account) maintained by him with the Development Bank before the expiry of six months from the previous year or before furnishing the return of his income, whichever is earlier: or

(b) utilised any amount during the previous year for the purchase of any new ship, new aircraft, new machinery or plant, without depositing any amount in the deposit account under clause (a),

In accordance with, and for the purposes specified in, a scheme (hereafter in this Section referred to as the scheme) to be framed by the Central Government, or if the assessee is carrying on the business of growing and manufacturing tea in India, to be approved in this behalf by the Tea Board, the assessee shall be allowed, a deduction (such deduction being allowed before the loss, if any, brought forward from earlier year is set off under section 72) of-

(i) a sum equal to the amount, or the aggregate of the amount , so deposited and any amount so utilised: or

(ii) a sum equal to twenty per cent of the profits of business or profession as computed in the accounts of the assessee audited in accordance with sub-section (5) whichever is less:

Provided that where such assessee is a firm, or any association of persons or any body of individuals, the deduction under this section shall not be allowed in the computation of the income of any partner or as the case may be, any member of such firm, association of persons or body of individuals;

Provided further that no such deduction shall be allowed in relation to the assessment year commencing on the Ist day of April, 1991, or any subsequent assessment year.

(5) The deduction under sub-section (1) shall not be admissible unless the accounts of the business or profession of the assessee for the previous year relevant to the assessment year for which the

deduction is claimed have been audited by an accountant as defined in the Explanation below sub-section (2) of Section 288 and the assessee furnishes, along with his return of income, the report of such audit in the prescribed form duly signed and verified by such accountant :

> Provided that in a case where the assessee is required by or under any other law to get his accounts audited, it shall be sufficient compliance with the provisions of this sub-section if such assessee gets the accounts of such business or profession audited under such law and furnishes the report of the audit as required under such other law and a further report in the form prescribed under this sub-section."

(8) Before proceeding further, we may notice some of the principles of interpretation of the statutes, These are :—

(1) The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other. — Crawford on Statutory Construction (Edition 1940, Art. 261. page 516).

(2) The use of the word shall in a statutory provision, though general taken in mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, that unless the words of the statutes are punctiliously followed, the proceeding or the outcome of the proceeding, would be invalid. On the other hand, it is not always correct to say that where the word may has been used, the statute is only permissible or directory in the sense that non-compliance with those provisions

will not render the proceedings invalid. *State of U.P.* Versus *Manbodhan Lal Srivastava* (supra).

(3) All the parts of a statute or sections must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that construction put to be on a particular provision makes consistent enactment of the whole statute. This would be more so if a liberal construction of a particular clause leads to manifestly absurd and anomalous results which could not have been intended by the Legislature.

(4) The principle that a fiscal statute should be construed strictly is applicable only to taxing provisions such as a charging provision or a provision imposing penalty and not to those parts of the statute which contain machinery provisions. - *Commissioner of Income-tax, Centaral Calcutta* Versus *National Taj Traders* (supra).

(9) We may now analyse sub-sections (1) and (5) of Section 32-AB of the Act in order to determine whether the requirement of furnishing report of the audit in the prescribed form along with the returns of income embodied in sub-section (5) is mandatory and non-compliance thereof has the effect of depriving the assessee of his right to get the benefit of deductions under sub-section (1). Section 32-AB falls in Chapter-IV of the Act which contains provisions relating to computation of total income. This chapter is divided into parts A to F. Part-D contains Sections 28 to 44-D relating to profits and gains of business or profession. Sections 32-A to 44-D of the Act speak of various deductions. Clause (a) of sub-section (1) of Section 32-AB lays down that where an assessee whose total income includes income chargeable to tax under the head profits and gains of business or profession has, out of such income, deposited any amount in an account maintained by him with the Development Bank before the expiry of six months from the end of previous year or before furnishing the return of his income, whichever is earlier in accordance with, and for the purposes specified in a scheme to be framed by the Central

Government, then he shall be allowed a deduction of a sum equal to the amount or aggregate of the amounts so deposited. Clause (b) of sub-section (1) of Section 32-AB lays down that where an assessee whose total income chargeable under the head profits and gains of business or profession has, out of such income, utilised any amount during the previous year for the purchase of any new ship, new aircraft, new machinery or plant, without depositing any amount in the deposit account under clause (a), then the assessee shall be allowed a deduction of a sum equal to the amount so utilised. The purpose of sub-section (1) of Section 32-AB is to give an incentive in the form of deduction on the amounts deposited with the Development Bank or utilised for purchase of new ship, new aircraft, new machinery or plant, of course, subject to the fulfilment of the condition is embodied in that sub-section. Sub-section (5) of Section 32-AB of the Act is couched in a negative form. It declares that deductions under sub-section (1) shall not be admissible unless the accounts of the business or profession of the assessee for the previous year relevant to the assessment year for which the deduction is claimed have been audited by an accountant as defined in the Explanation below sub-section (2) of section 288 and the assessee furnishes along with his return of income the report of such audit in the prescribed form duly signed and verified by such accountant. Proviso to sub-section (5) recognises the fact that the account of assessee may be audited under some other provision of law and lays down that it shall be sufficient coompliance of sub-section (5) if such assessee gets the accounts of such business or profession audited under such law and furnishes the report of the audit in the prescribed form.

(10) In our opinion, the conditions embodied in sub-section (1), the fulfilment of which entitles the assessee to claim deductions are mandatory because the substratum of the claim of deductions is the deposit of the amount in the account maintained by the assessee with the Development Bank or utilisation thereof for purchase of new ship, new aircraft, new machinery or plant and, therefore, unless the conditions embodied in this sub-section are satisfied, the assessee cannot claim deductions. However, this is not true of sub-section (5) which only provides for filing of report of audit prepared by the

accountant as defined in the Explanation below sub-section (2) of Section 288 along with the return of income. The assessee claim for deduction under Clause (a) of sub-section (1) of Section 32-AB does not depend on the submission of the audit report along with the return of income, but on deposit of the amount in the account maintained by him with the Development Bank before the expiry of six months from the end of the previous year or before furnishing the return of his income, whichever is earlier. In this context, it is important to bear in mind that Section 139 of the Act which provides for filling of return in the prescribed form within the stipulated time also provides for filing of revised return and rectification of defect in the return. Therefore, the requirement of filing duly audited report along with the return cannot be treated as mandatory and the assessee cannot be deprived of the benefit of deduction if the same is filed before the finalisation of the assessment. In other words, the Assessing Officer can, for the purpose of allowing deductions in terms of sub-section (1) of Section 32-AB of the Act, accept audit report even though the same may not have been filed along with the return, as required by sub-section (5).

(11) In *Commissioner of Income-Tax* Versus *Sita Ram Bhagwan Dass, (supra),* a Division Bench of Patna High Court interpreted unamended Section 184(7) which requires the furnishing of a declaration in the prescribed form and verified in the prescribed manner that there has been no change in the constitution of the firm or the shares of the partners so as to ensure continuation of the registration of the firm in the subsequent years. It was argued on behalf of the Revenue that the provision for filing declaration is mandatory and non-compliance thereof disentitled the firm from claiming benefit of the substantive part of Section 184(7). While rejecting the argument, the Division Bench held as under :—

> "Having regard to the spirit and substance of the provisions regarding registration of firms in section 184(7) of the Income-tax Act, 1961, it is clear that the term" along with its return of income" (as it stood before 1st April, 1971) is merely directory and not mandatory. The law must be so construed as to not

make it in any way illogical or ridiculous. All that the legislature intended was that the return should be duly filed and that the declaration should be duly made and both the documents should be before the assessing authority at the time when he is applying his mind to the assessment of any particular firm. If he is then satisfied that the return had been duly filed and that there has been no change in the constitution of the firm and no change in the shares of the partners and the firm was registered during the previous year, then the necessary advantage of renewal conferred by sub-section (7) of Section 184 must undoubtedly follow to the assessee-firm. The declaration could not be held to be invalid for the reason that it was not filed along with the return."

(12) In *Additional Commissioner of Income-tax* Versus *Murly Dhar Mathura Ram, (supra),* a Division Bench of Allahabad High Court expressed the same view and held that non-furnishing of declaration does not disentitle the assessee to claim the benefit of Section 184(7) and observed as under :—

"The essence of section.184(7) of the I.T. Act, 1961, is that once registration has been granted to a firm, it is to have effect for every subsequent year in case there has been no change in the constitution of the firm or in the shares of its partners. The other requirements are merely to evidence this fact. The requirement that a firm shall furnish a declaration in Form No. 12 is merely to prove the facts in a particular way. The requirement that the declaration shall be filed along with the return of income is a procedural requirement. The legislative intent appears to be that while dealing with the assessment of a firm the ITO should have clear-cut evidence that the essential fact that there has been no change in the constitution of the firm or in the shares of the partners, has been proved satisfactorily in the required manner. Hence, the procedural requirements are to be treated as directory. If there is some defect in the declaration form, the assessee is to be given an opportunity for rectifying it under S. 185(2). It cannot be

> ignored or rejected straightaway. Similarly, the requirement that the declaration should be filed along with the retun is directory. A firm has four years to file a return under s. 139(4) or a revised return under s. 139(5) and it could validly file the declaration in Form No. 12 along with such return and it is entitled to continuation of registration. It does not then stand to reason that an assessee who is prompt and files a return before the time prescribed under sub-s. (1) or sub-s. (2) of s. 139 should suffer merely because the declaration was not filed physically along with it. The Taxation Laws (Amendment) Act, 1970, which came into force on Ist April, 1971, has repealed and re-enacted s. 184(7) and now the requirement that the declaration should accompany the return has been given up. However, a definite time limit has been fixed for the filing of the declaration. This is another indication that prior to the amendment there was no specific time-limit and the declaration could be filed up to the time of assessment."

(13) In *Commissionier of Income-tax* Versus *Gujarat Oil and Allied Industries (supra),* Gujarat High Court interpreted Section 80-J (6A) and held it to be directory by making the following observations :—

> "In our view, the first part of section 80J is mandatory in nature *but the second part thereof which is procedural in nature and requires the assessee to submit a report of the audit along with the return is merely directory in nature and it calls for only substantial compliance.* The reasons are obvious. It is possible that at the time when the returns of income are filed, by some mischance or negligence of the clerk or for any other reason, even though the audited report is available, it might not have been annexed to the return and on such mistake being found out, the report may be tendered on the next day or even a few days thereafter to the Income-tax Officer. *If any literal compliance with the words "assessce furnishes report along with his return of income" is insisted upon, then, in such an unforeseen contingency, the assessee would be denied benefit*

of section 80J of the Act. One other illustration can be considered to highlight the position. As per section 139(1) read with section 139(5) of the Act, the assessee can file return within the period permitted thereunder and even during the extended period or can file a revised return as per this provision, of course, after following the procedure laid down therein. If the assessee is prompt, he may file the return in time, but at that stage, for reasons beyond his control, the audit report is not ready, he files the return in time but without its being accompanied by the auditors report while another assessee who is not prompt enough may not file the return at the first opportunity. In such a contingency, a prompt assessee who files the return in time would stand to suffer only because the auditors report has not physically accompanied the return while another assessee who waits till the end of the expiry of the period and files the return with the report will stand to gain as he would get the benefit of section 80J(1) while the assessee who files the return at the first opportunity would stand to suffer though, in both the case, at the time when the assessments are framed, the audited reports are made available by both the assessees to the Income-tax Officer. This would result in absurdity. Hence, in our view, the Tribunal was right when it took the view that the second part of the provision regarding furnishing of the report of the auditor along with the return is not a mandatory provision and it requires subtantial compliance in the sense that it should be made available to the Income-tax Officer before the assessment is framed and, by that time, if the assessee puts his house in order, the Income-tax Officer will be required to consider the case of the assessee for deductions under section 80J(1) of the Act on the merits. It has also to be kept in view that, by the mere non-filing of the auditor's report along with the return of income, the assessee does not stand to gain anything nor does the Revenue stand to lose as even after the return is filed, it is obvious that it may take time before the Income-tax Officer applies his mind to the merits of the return when he sits down to frame the assessment. In fact, that is the relevant stage at which the house of the

assessee should be in order. If that stage is missed, obviously, the assessee will not be entitled to the benefit of section 80J(1) but, till that time, the return filed would be just lying in the office of the Income-tax Officer awaiting disposal and the Income-tax Officer, in the meantime, was not expected to apply his mind to such a pending return till he takes it up for consideration. By that time, if the report is already made available, all the procedural requirements of sub-section (6A) can be considered to have been complied with,

xx xx xx xx xx xx xx

It is obvious that the main purpose and object of section 80J(1) is to give incentive and development benefit to the new industries covered by the provisions of the Act. consequently, while considering it care has to be taken to see that the relevant purpose underlying section 80J is augmented and fortified and not frustrated by a construction put upon the said provision. Even assuming that another view is possible on the construction of the second part of sub-section (6A) of section 80J, as that view is likely to frustrate the very object and purpose of the scheme underlying section 80J(1) and would result in absurdity as indicated earlier, the other view by which the beneficial provision of section 80J(1) is made fully operative should be preferred and even in that view of the matter also, we endorse the interpretation put upon these provisions by the Tribunal. It is true that, as submitted by learned counsel for the Revenue, a Division Bench of Punjab and Haryana High Court has taken a contrary view in the case of CIT v. jaideep Industries (1989) 180 ITR 81 (P & H). In that case, the Division Bench of the Punjab and Haryana High Court examined the very same question. Sodhi, J., speaking for the Division Bench of that High Court, read section 80J(1), sub-section (6A) and observed that there is no escape from the conclusion that the requirement of filing the auditor's report along with the return is rendered mandatory by the provisions thereof. It is pertinent to note in this behalf that this provision

clearly lays down for the assessee to file along with the return, the audit report in the prescribed form duly signed and verified by the accountant. With due respect, it is not possible to agree with this view of the Punjab and Haryana High Court which is merely an ipse dixit of the learned judges. They have not shown how the second part of section 80J, sub-section (6A) is mandatory in nature. So far as the admissibility of the deductions is concerned, it is found in the first part of the provision. We have already seen that it is mandatory in nature. So far as the second part which is procedural is concerned, we fail to appreciate how non-annexing or furnishing the audit report along with the return would necessrily put the assessee out of the court so far as a claim for deduction under section 80J(1) is concerned. We, therefore, with respct, do not find ourselves in agreement with the view expressed by the Punjab and Haryana High Court."

(14) The same view has been expressed by Madras High Court in *Commissioner of Income-tax* Versus *A.R. Arunachalam,* (supra) in the following words :—

"The opening words of sub-section (6A) of section 80 itself indicate the necessity for submitting an audit report inasmuch as the accounts of companies are audited and assessees other than companies are required to get the accounts audited for the purpose of section 80J. In the case of companies there is no insistence on the audit report accompanying the return for obtaining relief under section 80J. Therefore, if the section is so construed as to make the filing of the audit report along with the return mandatory, it would discriminate between companies on the hand and other assessees on the other. Morever, a section of an Act should not be so construed as to make it unconstitutional. Further, there is no stipulation in the section as to the time when the audit report should be filed except that it should be filed along with the return. Since there is a provision for extending the time for filing the return, all that the assessees is required to do is to delay the filing of

the return until the audit report is made available. Where the preparation of the audit report is beyond the control of the assessees, the assessees can justifiably delay the filing of the return itself so that it is accompanied by the audit report. In such an event, the Income-tax Officer cannot deny the claim for relief since the purpose of the section would have been fulfilled even though the return itself is filed beyond the prescribed time. The stress laid by section 80J (6A) is only the accounts audited and to make the audit report available to the Income tax Officer to make a proper assessment. Hence the audit report can be made available before the assessment is made. *The objective of section 80J(6A) should be carried out by granting the relief rather than picking out a venial fault for denying the relief intended to be given by the statute.*"

(15) In *Murali Export House and others Versus Commissioner of Income-tax* (supra), a learned Single Judge of Calcutta High Court interpreted Section 80-HHC (4) of the Act which requires furnishing of special audit certificate along with the return as a condition precedent to the claim of deduction and held that the provisions not manadtory. In that case, the Assessing Officer had declined to accept the assessee's claim for deduction on the ground that the certificate was not filed with the return in terms of the requirements of sub-section (4) of Section 80-HHC. The learned Single Judge reversed the orders passed by the authorities constituted under the Act and held as under :—

" I cannot share the views expressed by the concerned authorities in the matter of interpretation of section 80 HHC of the Act. In my view, the first part of sub-section (4) of section 80 HHC of the Act makes it mandatory to an assessees to furnish in a prescribed form the report of the accountant certifying that the deduction was correctly claimed in accordance with the provisions of section 80 HHC(4) of the Act. But the second part thereof in my view is procedural in nature and requires the assessees to submit certificate of the special audit report along with the return. It is merely directory in nature as it calls for substantial compliance as observed

hereinbefore. It is possible as it happened in this case, that at the time the return of income was filed by the firm, due to some negligence of some persons or for any other good reason, even though the special audit certificate was available, it could not be annexed with the return and on such mistake being found out the report could be filed before the Income Tax Officer before the income of the assessee was assessed and, tax was demanded from such assessment of income. If any literal compliance with the words ("the assessee furnished in the prescribed form along with the return of income the report of an accountant certifying that the deduction was correctly claimed") is insisted upon then in such unforeseen contigency as it happened in this case the assessees would be denied benefit of section 80 HHC of the Act. In my view, as I have held that the second part of sub-section (4) of section 80 HHC regarding furnishing of the special audit certificate along with the return is not a manadory provision but only a directly one, as it requires only substantial compliance in the sense that whenever the income tax authority in the sense that concerning computation of the assessee's income if it is found that some documents which were required to be filed along with the return were not filed he should ask the assessee to furnish the same within a time specified by him before making any compoutation of the income of the assessee."

(16) In *Commissioner of Income-tax versus Devradhan Madhavlal Genda Trust,* (supra) a Division Bench of Madhya pradesh High Court held that filing of audit report in Form No. 10B along with the return of income was not mandatory for the purpose of seeking exemption under Section 11 of the Act.

(17) We may now advert to the two decisions of this Court. In *Jaideep Industries case* (supra), the Division Bench considered the following two querstions :—

"1. Whether, on the facts and in the circumstances of the case, the Appellate Tribunal has been right in law in allowing investment allowance under section 32A on the

total cost of machinery of Rs. 1,64,638.00 and dies and moulds of Rs. 17,616 ?

2. Whether the Tribunal was right in holding that filing of the audit report under section 80J (6A) during the assessment proceedings and not along with the return of income would satisfy the requirements of the aforesaid section ?

(18) On the first question, the Court upheld the view taken by the Tribunal, but answered the second question in favour of the Revenue by making the following observations :—

"Turning now to the other question posed, namely, with regard to the filing of the audit report along with the return of income in terms of Section 80J(6A), there can, indeed, be no escape from the conclusion that the requirement of the audit report being filed along with the return of income is rendered mandatory by the provisions thereof. It is pertinent to note in this behalf that this provision clearly lays down that deduction claimed shall not be admissable unless the assessee also furnishes along with the return, the audit report in the prescribed form duly signed and verified by the accountant. This being so, the second question referred has to be answered in the negative, in favour of the Revenue and against the assessee. This reference is disposed of accordingly."

(19) In *Shahzedanand Charity Trust's case* (supra), the Division Bench interpreted Section 12A(b) of the Act. After making reference to the judgments of Calcutta High Court in *Commissioner of Income-tax versus Rai Bahadur Bissesswarlal Motilal Malwasie Trust, (11).* Gujarat High Court in *Commissioner of Income-tax Versus Gujrat Oil and Allied Industries* (supra) and this Court in *Commissioner of Income-tax versus Jaideep Industries (supra),* the Division Bench observed as under :—

"The Gujarat High Court in CIT v. Gujarat Oil and Allied Industries [1993] 201 I.T.R. 325 was considering section 80J (6A). The Gujarat High Court took the view put by

(11) 1992 (195) ITR 825

this court in CIT v. Jaideep Industries [1989] 180 I.T.R. 81. It was held that the provision about furnishing of the auditor's report along with the return has to be treated as procedural provision and, therefore, directory in nature."

(20) the Division Bench further observed as under :—

"The provisions of section 80J(6A) and section 12A of the act are pari materia. The ratio of the law laid down in CIT v. Jaideep Industries [1989] 180 ITR (P & H) would have been applicable to the facts of the present case as well had the Central Board of Direct Taxes not issued the circular dated 9th February, 1978, reproduced in the earlier part of the judgment. As per this circular it is not mandatory under section 12A(b) to file the audit report along with the return of income. Normally, a charitable or religious trust or institution is excepted to file the auditor's report along with the return but in cases where for reasons beyond the control of the assessee some delay has occurred in filing the said report, the Income-tax Officer, for reasons to be recorded, has been authorised to condone the delay in furnishing the auditor's report and accept the same at a belated stage. It has been clarified that the exemption available to the trust under section 11 may not be denied merely on account of delay in furnishing the auditor's report. The word "shall" occurring in section 12A cannot, under the circumstances, be read as a "must" making it mandatory for the trust to furnish the auditor's report along with the filing of the return. If for certain unavoidable circumstances, the assessee is unable to furnish the auditor's report along with the return then the same can be furnished at a later date with the permission of the Asessing Officer who may permit the assessee to do so after recording his reasons for so doing."

(21) In view of the above discussion, we hold that Section 32AB(5) is not mandatory and the Assessing Officer has the discretion to entertain the audit report even though the same has not been filed

with the return and give benefit of deduction to the assessee in terms of Section 32AB (1).

(22) We also hold that the *view taken by Gujarat* High Court in *Gujarat Oil and Allied Industries's case (supra)* and Madras High Court in *A.R. Arunachalam's case (supra)* that Section 80J (6A) is not mandatory is correct and contrary view expressed by the Division Bench in *Commissioner of Income-tax versus jaideep Industries (supra)* does not represent the correct law.

(23) We are further of the view that the observations made in *Shahzedanand Charity Trust's case* (supra) that the view expressed by Gujarat High Court in *Commissioner of Income-tax Versus Gujarat Oil and Allied Industries* (supra) is similar to the one expressed by this Court in *Commissioner of Income-tax Versus Jaideep Industries* (supra) is based on an incorrect reading of the judgment of*Gujarat Oil and Allied Industries's* case because Gujarat High Court had, in fact, dissented from the view expressed in*Jaideep Industries's case.* That apart, in Shahzedanand Charity Trust's case, the Division Bench took the view that section 12A of the act cannot be read as mandatory.

(24) The appeal may now be listed before the Division Bench for disposal in accordance with law.

R.N.R.

Before V.M. Jain, J

CHARANJIT SINGH—*Petitioner*

versus

STATE OF PUNJAB AND OTHERS—*Respondents*

Crl. M. No. 27680/M of 2000

22nd May, 2001

Code of Criminal Procedure, 1973—Ss. 267 to 270—Constitution of India, 1950—Art.21—Accused facing trial in various Courts in different States—Supdt. Jail refusing to produce the accused in the Courts in other States despite service of production warrants