

(1980) 04 AP CK 0010

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 2453, 6001 to 6003 and 6005 of 1978, 4532, 4898 and 4899 of 1979 and 198 of 1980

Warner Hindustan Ltd. and Another

APPELLANT

Vs

Income Tax Officer and Others

RESPONDENT

Date of Decision : 25-04-1980

Acts Referred:

Income Tax Act, 1961 — Section 10(5), 132(4), 143(3), 147, 148

Citation : (1982) 134 ITR 158

Hon'ble Judges : K. Madhav Reddy, J;K. Amareswari, J

Bench : Division Bench

Advocate : Dastur, for the Appellant; P. Rama Rao, for the Respondent

Judgement

Madhava Reddy, J.—In these writ petitions the validity of r. 19A of the I.T. Rules, 1962, as it stood applicable to the assessment years 1969-70 and 1974-75, is challenged as ultra vires of s. 80J of the I.T. Act, 1961, in so far as it prescribes that in computing the capital employed in an industrial undertaking, (1) the borrowed money and debts due by the assessee should be deducted, (2) that it should be computed as on the 1st day of the previous year, and (3) that it should be assessed at the written down value of the asset after allowing depreciation. These writ petitions can be conveniently disposed of by a common judgment.

2. Section 80J of the I.T. Act, in so far as it is relevant for our present purpose, reads as follows:

"80J. Deduction in respect of profits and gains from newly established industrial undertakings or ships or hotel business in certain cases. - (1) Where the gross total income of an assessee includes any profits and gains derived from an industrial undertaking or a ship or the business of a hotel, to which this section applies, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains (reduced by the aggregate of the deductions, if any, admissible to the assessee u/s 80H and section 80HH) of so much of the amount

thereof as does not exceed the amount calculated at the rate of six per cent. per annum on the capital employed in the industrial undertaking or ship or business of the hotel, as the case may be, computed in the prescribed manner in respect of the previous year relevant to the assessment year (the amount calculated as aforesaid being hereafter, in this section, referred to as the relevant amount of capital employed during the previous year):.....

(2) The deduction specified in sub-section (1) shall be allowed in computing the total income in respect of the assessment year relevant to the previous year in which the industrial undertaking begins to manufacture or produce articles or to operate its cold storage plant or plants or the ship is first brought into use or the business of the hotel starts functioning (such assessment year being hereafter, in this section, referred to as the initial assessment year) and each of the four assessment years immediately succeeding the initial assessment year:....."

3. In exercise of the rule-making power vested under s. 296 of the Act, the Central Board of Revenue has framed r. 19A, which reads as follows:

"19A. (1) For the purposes of section 80J the capital employed in an industrial undertaking or the business of a hotel shall be computed in accordance with sub-rules (2) to (4), and the capital employed in a ship shall be computed in accordance with sub-rule (5).

(2) The aggregate of the amounts representing the values of the assets as on the first day of the computation period, of the undertaking or of the business of the hotel to which the said section 80J applies, shall first be ascertained in the following manner:-

- (i) in the case of assets entitled to depreciation, their written down value;
- (ii) in the case of assets acquired by purchase and not entitled to depreciation, their actual cost to the assessee;
- (iii) in the case of assets acquired otherwise than by purchase and not entitled to depreciation, the value of the assets when they became assets of the business;
- (iv) in the case of assets being debts due to the person carrying on the business, the nominal amount of those debts;
- (v) in the case of assets being cash in hand or bank, the amount thereof.

Explanation 1. - In this rule 1 "computation period" means the period for which profits and gains of the industrial undertaking or business of the hotel are computed under sections 28 to 43A.

Explanation 2. - The value of any building, machinery or plant or any part thereof as is referred to in clause (a) or clause (b) of the Explanation at the end of sub-section (6) of section 80J shall not be taken into account in computing the capital employed in the industrial undertaking or, as the case may be, the business of the hotel.

Explanation 3. - Where the cost of any asset has been satisfied otherwise than in cash, the then value of the consideration actually given for the asset shall be treated as the actual cost of the asset.

(3) From the aggregate of the amounts as ascertained under sub-rule (2) shall be deducted the aggregate of the amounts, as on the first day of the computation period, of borrowed moneys, and the debts owed by the assessee (including amounts due towards any liability in respect of tax) not being, -

(a) in the case of an assessee being a company, the amount of its debentures, if any, and

(b) in the case of any assessee (including a company), any moneys borrowed from an approved source for the creation of a capital asset in India, if the agreement under which such moneys are borrowed provides for the repayment thereof during a period of not less than seven years.

Explanation. - For the purpose of this sub-rule, -

(i) "approved source" means the Government or the Industrial Finance Corporation of India or the Industrial Credit and Investment Corporation of India Ltd., or any banking institution or any person in a country outside India or any of the following financial institutions, namely:-

(a) a State Financial Corporation established under the State Financial Corporation Act, 1951 (63 of 1951);

(b) the Industrial Development Bank of India, established under the Industrial Development Bank of India Act, 1964 (19 of 1964);

(c) the Madras Industrial and Investment Corporation of India Ltd.;

(d) the Re-finance Corporation for Industry Ltd.;

(e) the Life Insurance Corporation of India established under the Life Insurance Corporation Act, 1956 (31 of 1956);

(ii) "tax" means -

(a) Income Tax or super tax (including advance tax), due under any provision of the Act;

(b) wealth-tax due under any provision of the Wealth-tax Act, 1957 (27 of 1957);

(c) super profits tax due under any provision of the Super Profits Tax Act, 1963 (14 of 1963);

(d) surtax due under any provision of the Companies (Profits) Surtax Act, 1964 (7 of 1964);

(iii) any liability in respect of tax shall be deemed to have become due -

(a) in the case of advance tax due under any provision of the Act, on the date on

which the payment first became due; and

(b) in the case of any other tax, on the first day of the period within which it is required to be paid.

(4) The resultant sum as determined under sub-rule (3) shall be diminished by the value, as ascertained under sub-rule (2), of any investments the income from which is not taken into account in computing the profits of the business and any moneys not required for the purpose of the business, in so far as the aggregate of such investments or moneys exceed the amount of the borrowed moneys which under sub-rule (3) are required to be deducted in computing the capital.

(5) The capital employed in a ship shall be taken to be the written down value of the ship."

4. Section 80J directs that in computing the total income of the assessee derived from an industrial undertaking to which that section applies, the deduction of so much of the amount from profits and gains as does not exceed the amount calculated at the rate of 6 per cent. per annum on the capital employed in the industrial undertaking..... and computed in the manner prescribed in respect of the previous year relevant to the assessment year (sic).

5. The contention of the assessee is that while s. 80J of the Act directs the calculation of 6% per annum on the capital employed in the industrial undertaking, r. 19A prescribes a different mode of calculation of the deduction admissible under s. 80J. In so far as, (i) r. 19A(1) directs that from out of the capital employed the borrowed moneys and debts should be excluded, (ii) r. 19A(1)(iii) directs that the capital employed on the first day of the previous year and not the capital employed "in respect of the previous year" should be calculated, and (iii) r. 19A(3) directs the value of the asset as per the written down value after allowing for depreciation should be taken as the capital employed in the industrial undertaking in that previous year, is ultra vires s. 80J of the Act.

6. W.P. Nos. 6001, 6002 and 6003/78:

These three writ petitions are by the India Fruits (Private) Ltd., Kadiyam, represented by its managing director. The petitioner is a private limited company. In these three writ petitions, the reassessment order for the Income Tax assessment year 1970-71, assessment order for the Income Tax assessment year 1976-77 and reassessment order for the Income Tax assessment year 1969-70, respectively, are challenged and a writ of certiorari to quash each of the said orders is prayed for. Suffice, for the appreciation of the contentions in these writ petitions and the disposal of the same, to refer to the facts in Writ Petition No. 6001/1978. The petitioner- company was initially assessed by order dated February 26, 1971, for the assessment year 1970-71 on an income of Rs. 24,89,970 allowing relief at 6% under s. 80J of the I.T. Act, 1961, to the extent

of Rs. 6,01,483 on a computation of the capital employed in the industrial undertaking at Rs. 1,00,24,716 as returned by the petitioner. Later, the ITO issued notice under s. 148 requiring the petitioner-company to file a revised return on the alleged ground that income had escaped assessment. The petitioner-company while filing the return in response to the notice objected to the reassessment and protested against the enquiry. However, the ITO passed a reassessment order under s. 143(3) read with s. 147(a) on March 30, 1978. By the reassessment order the ITO held that under the original assessment order relief under s. 80J was wrongly allowed to the extent of Rs. 1,43,000 and, accordingly, determined the taxable income at Rs. 26,32,970 by recomputing the capital employed in the industrial undertaking in terms of r. 19A by excluding therefrom the borrowings made and debts due by the petitioner-assessee and also by calculating the capital employed as on the first day of the computation period and not the capital employed during the previous year. The petitioner preferred appeals and raised the plea that r. 19A(3) in so far as it prescribes the deduction of monies borrowed and debts due from the assessee from the capital employed, and r. 19A(2) in so far as it directs a computation of the capital employed as on the first day of the computation period were ultra vires of s. 80J of the Act. But since in view of the judgment of the High Court of Andhra Pradesh in Commissioner of Income Tax Vs. Warner Hindustan Ltd., the validity of the rule could not be questioned before the I.T. authorities constituted under the Act and can be questioned only by way of a petition under art. 226 of the Constitution of India, the petitioner-company has filed this petition for issuing a writ of certiorari to quash the order of reassessment dated March 30, 1978, made by the ITO, A-Ward, Visakhapatnam, and to declare rr. 19A(3) and 19A(2) referred to above as ultra vires of s. 80J.

7. W.P. Nos. 6005/1978 and 198/1980:

These two writ petitions are by IDL Chemicals Ltd., Hyderabad, a public limited company with its registered office at Hyderabad, carrying on business, inter alia, in the manufacture of explosives. In these two writ petitions, the petitioner-company seeks a direction against the ITO, "C" Ward, Company Circle, Hyderabad, and Secretary, CBDT, New Delhi, to compute the capital employed in its new industrial undertaking for the assessment years 1974-75 and 1975-76, respectively, by taking into account not only the assets on the first day of the computation period but also assets acquired up to the end of the computation period and further to compute the moneys borrowed and debts owed by the petitioner-company in the capital employed by it in the industrial undertaking in the relevant assessment years.

It would be sufficient to mention the facts in W.P. No. 6005/1978, so far as these two writ petitions are concerned. The petitioner-company filed a return for the Income Tax assessment year 1974-75 on June 22, 1974. It filed a revised return on December 18, 1976. In both these returns, it claimed relief under s. 80J of the I.T. Act, 1961, at 6% on a total capital of Rs. 1,81,19,282 employed in the

new industrial undertakings comprising of Delay Detonators Unit, Boosters Unit, High Explosives Unit and PETN Unit. The relief claimed amounted to Rs. 10,87,156. The ITO by his order dated September 29, 1977, allowed relief of Rs. 1,60,614 on Delay Detonators Unit and Boosters plant but not on High Explosives Unit and PETN Unit. The petitioner-company filed an appeal against the said assessment before the AAC, Estate Duty Range, Hyderabad, in which it questioned the validity of rr. 19A(2) and 19A(3) in so far as they direct the computation of capital as on the first day of the assessment year and in so far as they direct the exclusion of moneys borrowed and debts owed by the assessee in the computation of the capital employed in the industrial undertaking for granting relief under s. 80J. But in view of the judgment of the High Court of Andhra Pradesh in Commissioner of Income Tax Vs. Warner Hindustan Ltd., it has invoked the jurisdiction of this court under art. 226 of the Constitution of India questioning the validity of the said rules and for the issue of a writ of mandamus to grant the relief under s. 80J ignoring rr. 19A(2) and 19A(3) in so far as they are ultra vires of s. 80J.

8. W.P. No. 4532/1979:

This writ petition is by the Andhra Pradesh Paper Mills Ltd., Rajah mundry, a public limited company, inter alia, carrying on business in the manufacture and sale of paper. Filing the return of income for the assessment year 1975-76, the petitioner-company claimed a deduction of Rs. 4,63,845, and in the revised return a relief of Rs. 5,92,264 under s. 80J of the Act. But the ITO failed to deal with the petitioner- assessee's claim for deduction. In the appeal preferred by the petitioner-assessee, the AAC upheld the assessment holding that in view of r. 19A the computation adopted by the ITO was correct. As in the other writ petitions the validity of rr. 19A(2) and 19A(3) is questioned in this writ petition and a direction for quashing the assessment order of the ITO dated January 22, 1979, is sought.

9. W.P. No. 2453/1978:

The petitioner in this writ petition is a firm carrying on the business of manufacture of wire drawing and wire galvanising, having its factory at Nacharam, Hyderabad. The petitioner-firm seeks a writ of mandamus or any appropriate writ or direction to quash the orders of the ITO in GIR No. 303-H dated March 23, 1978; PA 314-H dated March 20, 1976, and GIR NO. 303 H dated March 23, 1978, relating to assessment year, 1972-73, 1973-74 and 1975-76, respectively, in so far as the relief under s. 80J is refused by computing under r. 19A(2) the capital employed in the industrial undertaking as on the first day of the relevant accounting period, and in so far as the capital employed is computed by excluding, as laid down by r. 19A(3), the moneys borrowed and debts owed by the petitioner-assessee for granting relief under s. 80J.

10. It is the petitioner-assessee's contention that rr. 19A(2) and 19A(3) in so far as they direct as above, are ultra vires of s. 80J. The petitioner is a public limited

company to which s. 80J of the Act applies and is assessed as such under the I.T. Act, 1961. It started a pharmaceutical unit in August, 1968. It is assessed to Income Tax and its assessment year is the calendar year. For the purpose of application of s. 80J for the assessment year 1969-70, the previous year was 1968-69. During the calendar year 1969-70, which was the second year of the pharmaceutical unit, the ITO, by his order dated August 6, 1970, following r. 19A of the I.T. Rules, 1962, granted certain reliefs, but not to the extent claimed by the assessee in respect of the said industrial undertaking. Aggrieved by that order, the assessee preferred an appeal to the AAC. Before the AAC, the assessee contended that the liabilities of the assessee should not be deducted in computing the capital employed in the industrial undertaking for the purpose of granting relief under s. 80J of the Act. The assessee, however, did not raise the other two contentions, viz., (1) that the average of the capital employed during the entire previous year should be taken into account and not merely the asset employed on the first day of the previous year, and (2) that the capital employed must be computed at the cost incurred by the assessee for acquiring that asset and not at the written down value of the asset after allowing for depreciation. The AAC rejected the assessee's contention holding that r. 19A does not so provide and affirmed the decision of the ITO, by his order dated May 31, 1974. The assessee carried the matter in appeal to the Appellate Tribunal and the Appellate Tribunal, by its order dated February 28, 1975, held that for computing the capital employed in the industrial undertaking, r. 19A has to be followed and that there was no inconsistency between s. 80J of the Act and r. 19A. The assessee sought a reference to this court in respect of the above question in Commissioner of Income Tax Vs. Warner Hindustan Ltd.,). This court held that in disposing of the reference the High Court cannot go into the vires of the rule and has to dispose of the questions under the Act and the Rules. It further held that the contention, that r. 19A is ultra vires of s. 80J was not raised before the ITO or before the AAC or before the Appellate Tribunal and as such cannot be allowed to be raised at the hearing of the reference. The assessee has, therefore, filed this petition under art. 226 of the Constitution of India specifically calling in question the vires of r. 19A on the above three points.

11. The assessee also started a chemical unit in March, 1969, and a chewing gum unit in July, 1969. The assessment year 1974-75 was the fifth year of the commencement of those units, and the last year for which the assessee could claim the benefit of s. 80J of the Act. For the said assessment year, the assessee raised the first two points, viz., that the borrowing and liabilities should not be deducted in computing the capital employed in the industrial undertaking for the purpose of granting relief under s. 80J of the Act and that the capital employed during the course of the entire previous year should be computed and not merely the capital as on the first day of the previous year. The last contention, viz., that the asset must be computed at the cost incurred in acquiring the asset and not at the written down value after allowing for depreciation, was not raised. Rule 19A was slightly amended and, as it stood applicable to the assessment year

1974-75, read as follows:

"19A. (1) For the purposes of section 80J, the capital employed in an industrial undertaking or the business of a hotel shall be computed in accordance with sub-rules (2) to (4), and the capital employed in a ship shall be computed in accordance with sub-rule (5).

(2) The aggregate of the amounts representing the values of the assets as on the first day of the computation period, of the undertaking or of the business of the hotel to which the said section 80J applies, shall first be ascertained in the following manner:- (i) in the case of assets entitled to depreciation, their written down value;

(ii) in the case of assets acquired by purchase and not entitled to depreciation, their actual cost to the assessee;

(iii) in the case of assets acquired otherwise than by purchase and not entitled to depreciation, the value of the assets when they became assets of the business;

(iv) in the case of assets being debts due to the person carrying on the business, the nominal amount of those debts;

(v) in the case of assets being cash in hand or bank, the amount thereof.

Explanation 1. - In this rule, "computation period" means the period for which profits and gains of the industrial undertaking or business of the hotel are computed under sections 28 to 43A.

Explanation 2. - The value of any building, machinery, plant or any part thereof as is referred to in clause (a) or clause (b) of the Explanation at the end of sub-section (6) of section 80J shall not be taken into account in computing the capital employed in the industrial undertaking or, as the case may be, the business of the hotel.

Explanation 3. - Where the cost of any asset has been satisfied otherwise than in cash, the then value of the consideration actually given for the asset shall be treated as the actual cost of the asset.

(3) From the aggregate of the amounts as ascertained under sub-rule (2) shall be deducted the aggregate of the amounts, as on the first day of the computation period, of borrowed moneys and debts owed by the assessee (including amounts due towards any liability in respect of tax).

Explanation. - For the purpose of this sub rule, -

(i) "tax" means -

(a) Income Tax or super-tax (including advance tax) due under any provision of the Act;

(b) wealth-tax due under any provision of the Wealth-tax Act, 1957 (27 of 1957);

- (c) gift-tax due under any provision of the Gift-tax Act, 1958 (18 of 1958);
- (d) super profits tax due under any provision of the Super Profits Tax Act, 1963 (14 of 1963);
- (e) surtax due under any provision of the Companies (Profits) Surtax Act, 1964 (7 of 1974);
- (ii) any liability in respect of tax shall be deemed to have become due -
 - (a) in the case of advance tax due under any provision of the Act, on the date on which such advance tax is payable; and
 - (b) in the case of any other tax, on the first day of the period within which it is required to be paid.
- (4) The resultant sum as determined under sub-rule (3) shall be diminished by the value, as ascertained under sub-rule (2), of any investments the income from which is not taken into account in computing the profits of the business and any moneys not required for the purpose of the business, in so far as the aggregate of such investments or moneys exceed the amount of the borrowed moneys which under sub-rule (3) are required to be deducted in computing the capital.
- (5) The capital employed in a ship shall be taken to be the written down value of the ship as reduced by the aggregate of the amounts owed by the assessee as on the computation date on account of moneys borrowed or debts incurred in acquiring that ship.

Explanation. - In this sub-rule "computation date", in relation to a ship, means, -

- (a) in respect of the previous year in which the ship is first brought into use, the date on which it is so brought into use;
- (b) in respect of any subsequent previous year, the first day of such previous year."

12. The ITO, the AAC as well as the Appellate Tribunal rejected the assessee's contention on all the points raised by it.

It is unnecessary to mention the several averments made in the counters filed in these several writ petitions, for, ultimately if the principal contention raised by the petitioners viz., that rr. 19A(2), 19A(3) and 19A(2)(i) are ultra vires, is accepted, the assessment orders have to be quashed and the matter remitted to the appropriate ITOs for fresh assessment and if the contention is rejected it would not be open to this court to go into the correctness of the assessments on facts of each case. We, therefore, refrain from referring to the averments in the counters and would content ourselves by referring at the appropriate stage to the contentions raised in support of r. 19A being intra vires of s. 80J in all respects.

13. It is common ground that the new industrial undertaking, in respect of which the benefit of s. 80J read with r. 19A is claimed, applies to the assessee in question, who are the petitioners in these writ petitions.

14. Section 80J of the Act provides for deduction in respect of profits and gains from newly established industrial undertakings or ships or hotel business in certain cases. As we are concerned in these writ petitions with newly established industrial undertakings, we would omit references to ship or hotel business to which also s. 80J applies, except when it is necessary to appreciate the contentions. In computing the total income of the assessee which includes any profits and gains from a newly established industrial undertaking, s. 80J directs deduction from such profits and gains of so much of the amount as does not exceed the amount at the rate of 6% per annum "on the capital employed in the industrial undertaking computed in the manner in respect of the previous year relating to the assessment year". Rule 19A prescribes the mode of computation of capital employed in an industrial undertaking or a ship or the business of a hotel for the purpose of s. 80J. Rule 19A(1) directs the computation of the capital employed in an industrial undertaking or of a hotel business in accordance with sub-rr. (2) to (4) and the capital employed in a ship to be computed in accordance with sub-r. (5) of r. 19A. Rule 19A (3) directs that from the aggregate of the amounts as ascertained under sub-r. (2), "borrowed monies and debts owed by the assessee" shall be deducted. The contention of the petitioner is that while s. 80J directs the computation of the entire capital employed in the industrial undertaking for the purpose of calculating the deduction not exceeding 6% from such profits and gains in computing the total income, without making any distinction between the capital invested from the assessee's own funds or monies and the funds borrowed by the assessee from the other source, r. 19A(3) directs that from the total capital employed amounts borrowed or debts owed by the assessee for the purpose of receiving the capital and investing the same in the new industrial undertaking should be deducted. In so directing, r. 19A(3) runs contrary to the express provision of s. 80J and also the intendment of the said provision. It is, therefore, necessary to ascertain what the terms "capital employed" and "industrial undertaking" mean. "Capital" has not been defined under the Act. In Black's Dictionary, at p. 262, "capital" is stated to mean "aggregation of all capital". In American Jurisprudence, Vol. 13, item 172, it is stated that whatever is invested in an undertaking is capital. The term "employed" means, as stated in Webster's Dictionary, p. 476, "to make use of or use". Thus, capital from whatever source it may have been raised, whether it belongs to the assessee himself or it is raised by the assessee from other individuals or institutions by way of borrowing or hand-loans, if used in the industrial undertaking, would be "capital employed". Merely because the funds have been raised by way of borrowings, they do not cease to be capital employed in the undertaking. So far as the undertaking is concerned, the capital, whether raised from out of the assessee's own funds or out of his borrowings, yields the same result or benefit. What is relevant for the purpose of s. 80J is the total

amount of capital employed in the industrial undertaking and not the source from which this capital is raised. This is implicit in the words employed in the section and from the intendment of s. 80J.

15. The deductions in respect of profits and gains from newly established industrial undertakings have not been allowed for the first time under the 1961 Act. Even in the Indian I.T. Act, 1922, a similar provision was inserted by way of s. 15C with effect from April 1, 1948, which read thus:

"15C. Exemption from tax of newly established industrial undertakings.-

(1) Save as otherwise hereinafter provided, the tax shall not be payable by an assessee on so much of the profits or gains derived from any industrial undertaking or hotel to which this section applies as do not exceed six per cent. per annum on the capital employed in the undertaking or hotel, computed in accordance with such rules as may be made in this behalf by the Central Board of Revenue.

(2) This section applies to any industrial undertaking which-

(i) is not formed by the splitting up, or the reconstruction of, business already in existence or by the transfer to a new business of building, machinery or plant previously used in any other business;

(ii) has begun or begins to manufacture of or produce articles in any part of the taxable territories at any time within a period of eighteen years from April 1, 1948, or such further period as the Central Government may, by notification in the Official Gazette, specify with reference to any particular industrial undertaking;

(iii) employs ten or more workers in a manufacturing process carried on with the aid of power, or employs twenty or more workers in a manufacturing process carried on without the aid of power:

Provided that the Central Government may, by notification in the Official Gazette, direct that the exemption conferred by this section shall not apply to any particular industrial undertaking.

(2A) This section applies to any hotel which -

(a) starts functioning on or after the April 1, 1961, and is not formed by the splitting up, or the reconstruction of business already in existence or by the transfer to a new business of building, machinery or plant previously used in any other business;

(b) is owned and run by a company registered in the taxable territories with a paid-up capital of not less than five hundred thousand rupees;

(c) is run in premises which are owned by the company;

(d) has such number and types of guest rooms and provides such amenities as

may be prescribed, having regard to the population and the tourist importance of the place in which the hotel is located; and

(e) is for the time being approved for the purposes of this sub-section by the Central Government.

(3) The profits or gains of an industrial undertaking or a hotel to which this section applies shall be computed in accordance with the provisions of section 10.

(4) The tax shall not be payable by a shareholder in respect of so much of any dividend paid or deemed to be paid to him by an industrial undertaking or a hotel as is attributable to that part of the profits or gains on which the tax is not payable under this section.

Explanation. - The amount of dividend in respect of which the tax is not payable under this sub-section shall be computed in accordance with such rules as may be made in this behalf by the Central Board of Revenue.

(5) Nothing in this section shall affect this application of section 23A in relation to the profits or gains of an industrial undertaking or a hotel to which this section applies.

(6) The provisions of this section shall, in relation to an industrial undertaking, apply to the assessment for the financial year next following the previous year in which the assessee begins to manufacture or produce articles and for the four assessments immediately succeeding.

Provided that where the assessee is a co-operative society, this sub-section shall have effect as if for the words "four assessments", the words "six assessments" had been substituted.

The provisions of this section shall, in relation to a hotel, apply to the assessment for the financial year next following the previous year in which the hotel starts functioning and for the four assessments immediately succeeding."

16. The provisions corresponding to the present s. 80J was s. 84 in the I.T. Act, 1961, which reads as follows:

"84. Income of newly established industrial undertakings or hotels. - (1) Save as otherwise hereinafter provided, Income Tax shall not be payable by an assessee on so much of the profits and gains derived from any industrial undertaking or business of a hotel or from any ship, to which this section applies, as does not exceed six per cent. per annum on the capital employed in such undertaking or business or ship, computed in the prescribed manner.

(2) This section applies to any industrial undertaking which fulfills all the following conditions, namely:-

(i) it is not formed by the splitting up, or the reconstruction, of a business already in existence;

(ii) it is not formed by the transfer to a new business of a building, machinery or plant previously used for any purpose;

(iii) it manufactures or produces articles or operates one or more cold storage plants, in any part of India, and has begun or begins to manufacture or produce articles or to operate such plant or plants, at any time within the period of twenty-three years next following the April 1, 1948, or such further periods as the Central Government may, by notification in the Official Gazette, specify with reference to any particular industrial undertaking;

(iv) in a case where the industrial undertaking manufactures or produces articles, it employs ten or more workers in a manufacturing process carried on with the aid of power, or employs twenty or more workers in a manufacturing process carried on without the aid of power:

Provided that the condition in clause (i) shall not apply in respect of any industrial undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such industrial undertaking as is referred to in section 33B, in the circumstances and within the period specified in that section:

Provided further that the condition in clause (ii) shall be deemed not to have been contravened if the industrial undertaking is set up in rented premises.

(3) This section applies to the business of any hotel where all the following conditions are fulfilled, namely:-

(a) the business of the hotel starts functioning on or after April 1, 1961, and is not formed by the splitting up, or the reconstruction, of a business, already in existence or by the transfer, to a new business, of a building previously used as a hotel, or of any machinery or plant previously used for any purpose;

(b) the business of the hotel is owned and carried on by a company registered in India with a paid-up capital of not less than five hundred thousand rupees;

(c) the hotel has such number and types of guest rooms and provides such amenities as may be prescribed, having regard to the population and the tourist importance of the place in which the hotel is located; and

(d) the hotel is, for the time being, approved for the purposes of this sub-section, by the Central Government.

Explanation. - Where -

(a) in the case of an industrial undertaking, any building, machinery or plant, or any part thereof, previously used for any purpose, or

(b) in the case of the business of a hotel, any building, or any part thereof, previously used as a hotel or any machinery or plant, or any part thereof, previously used for any purpose, is, in either case, transferred to a new business, and the total value of the building, machinery or plant or part so transferred does

not exceed twenty per cent. of the total value of the building, machinery or plant used in the business, then, for the purpose of clause (ii) of sub-section (2) and clause (a) of sub-section (3), the condition specified therein shall be deemed to have been complied with and the total value of the building, machinery or plant or part so transferred shall not be taken into account in computing the capital employed in the industrial undertaking or the business of the hotel.

(3A) This section applies to any ship where all the following conditions are fulfilled, namely:-

(i) it is owned by an Indian company and is wholly used for the purposes of the business carried on by it;

(ii) it was not, previous to the date of its acquisition by the Indian company, owned and used in Indian territorial waters by a person resident in India; and

(iii) it is brought into use by the India company at any time within a period of twenty-three years next following April 1, 1948.

(4) The Central Government may, after making such enquiry as it may think fit, direct, by notification in the Official Gazette, that the exemption conferred by this section shall not apply to any class of industrial undertakings with effect from such date as it may specify in the notification.

(5) The profits and gains derived from an industrial undertaking or business of a hotel or from a ship to which this section applies shall be computed in accordance with the provisions contained in Chapter IV-D.

(6) Nothing in this section shall affect the application of the provisions contained in Chapter XI in relation to the profits and gains derived from an industrial undertaking or business of a hotel or from a ship to which this section applies.

(7) The provisions of this section shall, in relation to an industrial undertaking, apply to the assessment -

(i) for the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce articles, or, as the case may be, operate the cold storage plant or plants, and

(ii) where the assessee is a co-operative society, for the six assessment years immediately succeeding, and where the assessee is any other person for the four assessment years immediately succeeding.

(8) The provisions of this section shall, in relation to the business of a hotel, apply to the assessment for the financial year next following the previous year in which the business of the hotel starts functioning and for the four assessments immediately succeeding.

(9) The provisions of this section shall, in relation to a ship, apply to the assessment for the assessment year relevant to the previous year in which the ship is brought into use by the Indian company and for the four assessment

years immediately succeeding."

17. The present s. 80J was inserted by the Finance (No. 2) Act of 1967, with effect from April 1, 1968. The object of s. d 15C of the Indian I.T. Act, 1922, which is similar to the present s. 80J, is elucidated by the Supreme Court in *Textile Machinery Corporation Limited, Calcutta Vs. The Commissioner of Income Tax, West Bengal*,

"The principal object of section 15C is to encourage setting up of new industrial undertakings by offering tax incentives within a period of 13 years from April 1, 1948. Section 15C provides for a fractional exemption from tax of profits of a newly established undertaking for five assessment years as specified therein. This section was inserted in the Act in 1949 by section 13 of the Taxation Laws (Extension to Merged States and Amendment) Act, 1949 (Act 67 of 1949), extending the benefit to the actual manufacture or production of articles commencing from a prior date, namely, April 1, 1948. After the country had gained independence in 1947, it was most essential to give fillip to trade and industry from all quarters. That seems to be the background for insertion of section 15C.

It is also significant that the limit of the number of years for the purpose of claiming exemption has been progressively raised from the initial 3 years in 1949 to 6 years in 1953, 7 years in 1954, 13 years in 1956 and 18 years in 1960. The incentive introduced in 1949 has been thus stepped up ever since and the only object is that which we have already mentioned."

18. The same is the objective of s. 80J, viz., to act as an incentive to set up new industrial undertakings and give an impetus to rapid industrialisation of the country.

19. If that be the intendment and purpose of s. 80J and the Legislature has directed the computation of the capital employed in the new industrial undertaking to be made in accordance with the prescribed rules, the rules obviously cannot be so framed as to whittle down the scope of the section. Any rule which takes away the benefit conferred by the Act cannot obviously be within the scope of the rule-making authority nor can it be said to advance the intendment of the Act. While r. 19A(1) in accordance with s. 80J directs capital employed in a new industrial undertaking to be computed, it makes provision in sub-r. (3) of r. 19A for the deduction of certain "borrowed monies and debts due by the assessee". In other words, though the capital employed by the assessee in an industrial undertaking may be a certain sum if that sum comprises of assessee's own funds and also funds raised by way of borrowings and debts, that which is raised by the assessee by way of borrowings or debts should be deducted. But for r. 19A, the capital employed in the industrial undertaking would have been the aggregate of all sums from whatever source they may have been raised. But as a result of the direction contained in r. 19A(3) the capital employed would be the aggregate of all such sums less the borrowed monies and

debts due by the assessee. The amount of capital employed calculated in accordance with r. 19A(3) would be different from and less than the amount of capital employed as envisaged by s. 80J. It is well settled that when a rule framed in exercise of the rule-making authority conferred by the Act travels beyond the scope of the section or takes away the benefit conferred by the Act, that rule cannot be sustained. The Supreme Court in *The Director of Inspection of Income Tax (Investigation), New Delhi and Another Vs. Pooran Mal and Sons and Another*, dealing with the question whether r. 112A of the I.T. Rules, 1962, could whittle down the power of the ITO under s. 132(4) to pass an order within ninety days, held that a rule made under that section could not do so. In *Commissioner of Income Tax, Andhra Pradesh Vs. Taj Mahal Hotel, Secunderabad*, the Supreme Court considering the question whether sanitary and pipeline fittings in the hotel of the respondent-assessee fell under "furniture and fittings" contemplated by r. 8(2) of the Indian I.T. Rules, 1922, or fell under the definition of plant" in s. 10(5) of the Act, held that the rules were made only for the purpose of carrying out the provisions of the Act and they could not take away what was conferred by the Act or whittle down its effect. Even if the rules framed in pursuance of the rule-making authority conferred by the Act are placed before the Houses of Legislature or Parliament, they cannot travel beyond the scope of the Act and they do not receive any immunity from attack on the ground that they are ultra vires of the provisions of the Act.

20. In *Kerala State Electricity Board Vs. The Indian Aluminium Co. Ltd.*, the court declared:

"In India many statutes both of Parliament and of State Legislatures provide for subordinate legislation made under the provisions of those statutes to be placed on the table of either the Parliament or the State Legislature and to be subject to such modification, amendment or annulment, as the case may be, as may be made by Parliament or the State Legislature. Even so, we do not think that where an executive authority is given power to frame subordinate legislation within stated limits, rules made by such authority is outside the scope of the rule-making power should be deemed to be valid merely because such rules have been placed before the Legislature and are subject to such modification, amendment or annulment, as the case may be, as the Legislature may think fit. The process of such amendment, modification or annulment is not the same as the process of legislation and in particular it lacks the assent either of the President or the Governor of the State, as the case may be... the correct view is that notwithstanding the subordinate legislation being laid on the table of the House of Parliament or the State Legislature and being subject to such modification, annulment or amendment as they may make, the subordinate legislation cannot be said to be valid unless it is within the scope of the rule-making power provided in the statute."

21. Hence the fact that r. 19A was placed before the Houses of Parliament and was not amended, modified or annulled by Parliament would not render it

immune from attack if it takes away the benefit conferred by the Act.

22. In construing a taxing provision especially where such provision grants exemption from liability to tax or grants some allowance in the matter of assessing the income to tax with a view to give an impetus to industrial development, the provision must be construed liberally. Section 80J being one such provision, the interpretation of that provision should not be such as to deprive its benefit to the assessee (owner) of new industrial undertaking. Merely because power is conferred on the Board to frame rules for the purpose of computing the capital employed, a rule cannot be so framed as to take away this benefit. In *Commissioner of Income Tax, Bombay City-I Vs. Gaekwar Foam and Rubber Co. Ltd.*, a Bench of the Bombay High Court, dealing with s. 15C of the Indian I.T. Act, 1922, at p. 672 observed:

"The object (of section 15C) is to benefit newly established industrial undertakings... that a provision relating to exemption must as far as possible be liberally construed and in favour of the assessee, provided in doing so no violence was being done to the language used. But in this case, as we have already mentioned, we find no difficulty in interpreting the relevant provision of the Act. If we had found any difficulty, it would have been necessary for us to bear in mind that salutary canon of construction."

23. So too the Supreme Court in *Sheikh Gulfan and Others Vs. Sanat Kumar Ganguli*, considering the contention that a liberal interpretation should be given in construing s. 30(c) of the Thika Tenancy Act, 1949, observed (p. 1845):

"The words used in s. 30(c) of the Act are, in a sense, simple enough, but it must be conceded that the problem of their construction is not very easy and so, we might attempt to resolve this problem by considering what our approach should be in construing the relevant provision. Normally, the words used in a statute have to be construed in their ordinary meaning; but, in many cases, judicial approach finds that the simple device of adopting the ordinary meaning of words does not meet the ends of a fair and reasonable construction... in deciding the true scope and effect of the relevant words in any statutory provision, the context in which the words occur, the object of the statute in which the provision is included and the policy underlying the statute assume relevance and become material. As Halsbury has observed, the words "should be construed in the light of their context rather than what may be either their strict etymological sense or their popular meaning apart from that context".

24. Keeping these principles in view, we find that if we give full effect to the provisions contained in r. 19A(3), from out of the total capital employed in an industrial undertaking, the funds brought by the assessee by borrowing and by incurring debts have to be deducted and as a result of that, the capital employed in the undertaking for the purpose of giving benefit of s. 80J becomes reduced. That could not be the intendment of s. 80J in conferring the rule making authority on the Government to frame rules for the purpose of arriving at the

capital employed in the industrial undertaking. Rule 19A(3) certainly travels beyond the scope of s. 80J.

25. Mr. P. Rama Rao, the learned counsel for the revenue, however, contends that the term "capital employed" occurring in s. 80J cannot be read out of its context. For the purpose of the deductions in respect of profits and gains from newly established undertakings, the capital employed, even according to s. 80J would be only such capital as is computed in the manner prescribed in respect of the previous year relevant to the assessment year. According to him, it is not "capital employed" as understood in the ordinary sense or common parlance nor according to the dictionary meaning of these terms, but as prescribed by the rules framed in exercise of the rule-making authority conferred on the Government/Board. In other words, according to him, the Legislature, while declaring that the deductions from profits and gains at a rate not exceeding 6% should be allowed on the capital employed in the new industrial undertaking, at the same time, intended that the power to frame rules to compute the capital employed should be conferred on the Central Govt./Board having regard to the conditions and circumstances existing from time to time. The Legislature in its wisdom thought it expedient to confer this wide power on the rule-making authority and if the rule-making authority in exercising that power has, in its discretion, framed a rule directing the computation of the capital employed by deducting the amounts borrowed and debts owed by the assessee, that rule cannot be termed as ultra vires or beyond the scope of the rule-making authority or contrary to the intendment of the Act. Capital employed for the purpose of s. 80J is itself such capital as computed in accordance with the rule prescribed. The computation of capital is not a mere mathematical exercise. Capital, according to the learned standing counsel for the revenue, has various connotations. In directing the capital employed to be computed, the Legislature, in enacting s. 80J, has not indicated whether it should be gross capital or liquid capital or any particular type of capital. It has left this aspect to be specified by rules framed under the Act and the amount of capital of computation prescribed by the rules itself would be the capital employed for the purpose of s. 80J. According to him the connotation of the expression "capital employed" in s. 80J cannot be comprehended as understood in common parlance but should be taken as what is prescribed by the rules. There is no provision of law that the capital employed, as computed in accordance with the rules, should be identical with the total amount of capital actually employed in an industrial undertaking.

26. In this connection, Mr. Rama Rao referred to the several sections of the I.T. Act which make a special provision with respect to the expression "total income" occurring in s. 2(45). The total income as understood in common parlance is not the same as the one defined in s. 2(45). It is argued that just as the computation of the total income has to be made in accordance with ss. 30 to 43A, so also the computation of the total "capital employed" for the purpose of applying s. 80J has to be made in accordance with the rules and not as it is ordinarily understood in common parlance. This argument ignores the fact that "capital

employed" is not defined under the Act while "total income" is defined in s. 2(45). However, how that total amount has to be computed is not left to be prescribed by rules, but is stated in the Act itself in ss. 30 to 43A. The question of ss. 30 to 43A, which prescribe the mode of computation of total income, being at variance with s. 2(45) of the Act, would not, therefore, arise. In the absence of a similar provision in the Act defining "capital employed", that term must necessarily be understood as any person engaged in an industrial undertaking understands it or as that expression is understood in business or mercantile use.

27. Mr. Rama Rao, learned counsel for the revenue, also pointed out that r. 19(3) in so far as it directs the deduction of borrowings and debts due by the assessee does not lay down anything unusual. In several taxation statutes in computing the capital, current liabilities and borrowings are excluded. He referred in this behalf to s. 2(3) of the E.P.T. Act, 1940, which defines the "average amount of capital" as follows:

""Average amount of capital" means the average amount of capital employed in any business as computed in accordance with the Second Schedule."

28. In the Second Schedule of the said Act are the rules for computing the "average amount of capital". Rule 2(1) of the Second Schedule of the said Act directs that any borrowed money and debts shall be deducted and in particular there shall be a deduction of debts incurred in respect of the business for Income Tax or super-tax or excess profits tax or for advance payments due under any provisions of the Indian I.T. Act, 1922(XI of 1922), or for any further sum payable in relation to the E.P.T. Act under s. 2 of the E.P.T. Ordinance, 1943 (XVI of 1943).

29. He also referred in this behalf to the Business Profits Tax Act, 1947 (XXI of 1947), Sch. II, r. 2(1) of which provides for a computation of the capital of a company for the purpose of the Business Profits Tax Act Rule 2(1) and (2) of the said Schedule provides as under:

"(1) Where the company is one to which clause (a) rule 3 of Schedule I applies, its capital shall be the sum of the amounts of its paid-up share capital and of its reserves in so far as they have not been allowed in computing the profits of the company for the purposes of the Indian Income Tax Act, 1922(XI of 1922), diminished by the cost to it of its investments or other property, the income from which is not includible in the profits, so far as that cost exceeds any debt for money borrowed by it.

(3) In all other cases, the capital shall be the sum ascertained in accordance with the said sub-rule, diminished by the cost to the company of its investments so far as that cost exceeds any debt for money borrowed by it."

30. Rules for the computation of "capital" under s. 2(9) read with the Second Schedule of the S.P.T. Act, 1963, for the purpose of determining the standard deduction allowable on the capital of the company for assessing the super profits

tax under the S.P.T. Act, 1963 (XIV of 1963), are contained in the Second Schedule to the Act. Rule 1 thereof reads as follows:

"1. Subject to the other provisions contained in this Schedule, the capital of a company shall be the sum of the amounts, as on the first day of the previous year relevant to the assessment year, of its paid up share capital and of its reserve, if any, created under the proviso (b) to clause (vi) of sub-section (2) of section 10 of the Indian Income Tax Act, 1922 (11 of 1922), or under sub-section (3) of section 34 of the Income Tax Act, 1961 (43 of 1961), and of its other reserves in so far as the amounts credited to such other reserves have not been allowed in computing its profits for the purposes of the Indian Income Tax Act, 1922 (11 of 1922), or the Income Tax Act, 1961 (43 of 1961), diminished by the amount by which the cost to it of the assets the income from which in accordance with clause (iii) or clause (vi) or clause (viii) of rule 1 of the First Schedule is not includible in its chargeable profits, exceeds the aggregate of--

(i) any money borrowed by it which remains outstanding; and

(ii) the amount of any fund, any surplus and any such reserve as is not to be taken into account in computing the capital under this rule.

Explanation 1. - A paid up share capital or reserve brought into existence by creating or increasing (by revaluation or otherwise) any book asset is not capital for computing the capital of a company for the purposes of this Act.

Explanation 2. - Any premium received in cash by the company on the issue of its shares standing to the credit of the share premium account shall be regarded as forming part of its paid up share capital.

Explanation 3. - Where a company has different previous years in respect of its income, profits and gains, the computation of capital under rule 1 and rule 2 of this Schedule shall be made with reference to the previous year which commenced first."

31. It also lays down that the money borrowed which remains outstanding shall not be includible under the C. (P.) S.T. Act, 1964 (VII of 1964). Rules for computing the capital of a company for the purpose of surtax are contained in the said Schedule to that Act. Those rules also provide for the exclusion of the moneys borrowed in computation of the capital for the purpose of that Act.

32. In view of these several enactments, it is argued by Mr. Rama Rao, that r. 19A (3) which similarly provides for the exclusion of the moneys borrowed and those due by the assessee, accords with the policy of the other fiscal statutes though it may not accord with popular understanding of what "capital employed" is. It is argued that capital employed must be understood under s. 80J in the context of the other fiscal enactments and certain latitudes which are given. The Legislature, it is said, gives certain latitudes to the rule-making authority so that it may frame rules to accord with the changing times and circumstances. The Legislature itself clarified the words "capital employed" occurring in s. 80J by

employing the words "computed in the manner prescribed". Hence the expression "capital employed" cannot be understood in the popular sense but should be construed only as referring to the capital computed in accordance with the Rules.

33. It must be first pointed out that the four enactments referred to above, the E.P.T. Act, 1940, Business Profits Tax Act, 1947, S.P.T. Act, 1963, and the C. (P.) S.T. Act, 1964, which lay down the rules for computing the capital do not constitute subordinate legislation. They are contained in the Second Schedule of (each of) the Acts and the relevant definitions contained in the Acts themselves lay down that the capital shall be computed in accordance with the provisions contained in the Second Schedule. The rules contained in these Schedules constitute part of the legislative enactments themselves and not part of the rules framed by way of subordinate legislation in exercise of the rule-making power conferred by the Act. The definition or explanation of capital employed or average amount of capital contained in the Second Schedule is as if it is defined in the Act itself. Hence, the question of the rule contained in the Second Schedule being ultra vires of the enactments cannot arise under those enactments. The so-called rules contained in the Second Schedule of (each of) these enactments do not constitute subordinate legislation; they are in fact part of the statutes themselves.

34. It is not contended for the petitioners that the Legislature itself cannot lay down what capital employed should mean for the purpose of s. 80J nor is it contended that the Legislature cannot limit the scope of the expression "capital employed" by way of definition or by framing rules incorporated in the Schedule to the Act itself. The power of the Legislature to delegate the authority to frame rules by way of subordinate legislation is also not questioned. We, therefore, deem it unnecessary to refer in detail to the several decisions relied upon by Mr. Rama Rao, learned counsel for the revenue, in support of his contention that the Legislature has authority to delegate the power to select persons which was upheld in *Bangalore Woollen, Cotton and Silk Mills Co. Ltd., Bangalore Vs. The Corporation of The City of Bangalore by its Commissioner, Bangalore City*, or the power given to the Municipal Corporation to tax by framing rules which came up for consideration in *Corporation of Calcutta and Another Vs. Liberty Cinema*, or the decision in *Babu Ram Jagdish Kumar and Others Vs. State of Punjab and Others*, where the power to impose tax on certain items by amending the Schedule was held to be valid. Reliance was also placed on the decision in *Cobb & Co. Ltd. v. Kropp* [1967] AC 141 wherein it was held as follows:

""The Indian legislature has powers expressly limited by the Act of Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament but has, and was intended to have, plenary powers of the legislature as large, and of the same

nature, as those of Parliament itself.""

35. Pandit Banarsi Das Bhanot Vs. The State of Madhya Pradesh and Others, which is as follows (p. 394 of 9 STC):

"... it is not unconstitutional for the legislature to leave it to the executive to determine details relating to the working of taxation laws, such as the selection of persons on whom the tax is to be laid, the rates at which it is to be charged in respect of different classes of goods, and the like."

36. Suffice it to note that so long as there is no abdication of the essential legislative function and there is no excessive delegation, the power to tax may be exercised by the delegate, provided, necessary guidelines are laid down in or are deducible from the enactment. Neither the petitioner-assessee nor the revenue contend that s. 80J suffers from any such infirmity. What is contended is that while the Legislature has not chosen to limit the ambit of the expression "capital employed" under s. 80J (and, consequently, it has to be understood in the common parlance) the rule-making authority, in exercise of the power of subordinate legislation conferred on it has whittled down the wide ambit of the expression "capital employed" by directing the exclusion of the borrowings and debts due by the assessee even though in fact those borrowings and debts have gone for an acquisition of the capital employed in the undertaking. It is contended by Mr. Anjaneyulu, learned counsel for some of the petitioners, that the Legislature in enacting that the "capital employed" in the undertaking should be computed, has disclosed its intention to include within it all capital irrespective of the source from which it has flown but the subordinate legislation seeks to exclude from it the capital raised, by way of borrowing or debts, by the assessee.

37. Further, as rightly pointed out by Mr. Anjaneyulu, Mr. Dastoor, and Mr. Satyanarayana, learned counsel for the petitioners, that these four enactments do not disclose any general intent of the Legislature that in computing the capital employed the borrowings or debts due by the assessee should be excluded. This factual assumption by itself is not correct. It would be seen that under the E.P.T. Act, 1940, while under r. 2 borrowed money was to be deducted for computing the average amount of capital, after r. 2(a) was inserted by s. 9 of the E.P.T. 1941, for the purpose of computing the average capital, no deduction was to be made in respect of borrowed money. The Business Profits Tax Act, 1947, does not indicate any particular pattern. The S.P.T. Act (XIV of 1963), among others, provides for computing the capital of a company by diminishing it by the amount by which the cost to it of the assets exceeds the aggregate of any money borrowed by it which remains outstanding. The C. (P.) S.T. Act, 1964, takes long term borrowings into account till 1972, in computing the capital of a company for the purpose of surtax. But, with effect from April 1, 1972, they are not taken into account. Thus, no particular pattern is disclosed by these enactments so as to conclude that s. 80J also envisages rules to be framed for the purpose of computation of the capital by excluding the borrowings and debts due, raised for

the purpose of capital investment in the new industrial undertaking. Further, while the purpose of the E.P.T. Act, Business Profits Tax Act, S.P.T. Act and C. (P.) S.T. Act is to levy tax on profits, over and above the normal profits earned by the undertakings the objective of s. 80J is to give incentive for industrial expansion by encouraging persons to start new industrial undertakings by reducing the burden of tax for the initial period of the undertakings so that they may be able to tide over the teething period and establish themselves. Neither do the four enactments referred to by the learned counsel for the revenue, Mr. Rama Rao, disclose any scheme in the matter of computing the capital for the purpose of the respective enactments, nor is the scheme, if any, disclosed by those statutes could be a safe guide for determining what the scope of s. 80J is, and how far the rules framed in this behalf are intra vires of s. 80J of the Act. On the other hand, the fact that wherever the Legislature wanted that the borrowings should be excluded in computing the capital employed in the industrial undertaking it provided it in the Act or in the Schedule to the Act itself. But, where it intended, as under s. 80J of the Act, that rules should be framed, it could never have been the intention of the Legislature that the rules could be so framed as to vary the meaning of the expression "capital employed" occurring in s. 80J so as to exclude the borrowings made and debt incurred for investment in the industrial undertakings.

38. In *Century Enka Ltd. Vs. Income Tax Officer and Others*, a learned single judge of the Calcutta High Court referring to this aspect in the context of the C. (P.) S.T. Act, 1964, observed:

"..... it would be wrong to consider that the authority was given to the rule-making power to curtail the relief in a manner which has been done under rule 19A of the Rules."

39. The observation was, no doubt, made with reference to r. 19A, in so far as it directs, the computation of the capital as on the first day of the previous year. It holds good even with respect to that rule, in so far as it directs, the deduction of the moneys borrowed and debts due by the assessee.

40. It will not be out of place to mention that under s. 35D of the I.T. Act, 1961, itself, which allows amortisation of certain preliminary expenses, the capital employed in the business of a company includes long-term borrowings. If this be any indication, there is no reason why under r. 19A borrowings should be excluded. What can, therefore, be deduced is that no particular pattern is disclosed in the matter of computing the capital employed for various purposes either under the I.T. Act, 1961, itself or under the aforesaid four enactments, the objects of which are different from the object of s. 80J. That cannot, therefore, form the basis for holding that the Legislature in enacting s. 80J itself envisaged that the borrowings and debts due by the assessee should be excluded and, therefore, a provision to that effect made by way of subordinate legislation under r. 19A(3) is valid.

41. To contend that since s. 80J lays down that capital employed in an industrial undertaking shall be computed in the manner prescribed, the rule-making authority could make any rule as it deemed fit, would be to allow the object of the Legislature to be defeated, which intended that the deduction should be allowed on the entire capital employed. Under s. 295, power is vested in the rule-making authority to frame rules to carry out the purpose of the Act, which as already noticed, is to encourage new industrial undertakings and not defeat that object.

42. In *M. CT. Muthiah Chettiar Family Trust Vs. Income Tax Officer, City Circle VI, Madras 34*, and *Others*, dealing with the role of subordinate legislation, a learned single judge of the Madras High Court held (p. 288):

"Any such delegated power being essentially subordinate in its nature, is limited by the terms of the enactment whereunder it is delegated. It is, therefore, necessary that the delegated authority must be exercised strictly in accordance with the powers creating it and in the light and spirit of the parent or enabling statute. It cannot be postulated that the right of delegation can be unlimited in its scope - ... an ancillary channel, at any rate like delegation, cannot abridge rights or privileges granted by the statute itself... If the legislature in its wisdom grants a concession any by creating a concession a reciprocal right or privilege is vested in an assessee, such a reciprocal right cannot be wildly dealt with so as to negate its usefulness by making a rule which cannot be reconciled with the main statutory provision. The object of the subordinate legislature is to carry out the statutory provisions effectively and not to neutralise or contradict them. The rules made under the rule-making power should strictly conform with the intentment of the main provisions of the statute and be consistent therewith."

43. The object of s. 80J, which is in pari material with s. 15C of the Indian I.T. Act, 1922, as observed by the Bombay High Court in *Capsulation Services Pvt. Ltd. Vs. Commissioner of Income Tax, Bombay City-I*, is to "... encourage establishment of new industrial undertakings. The profits of the industrial undertaking to which the section applies are exempt from tax to the extent of 6 per cent. per annum on the capital employed in the undertaking. Rules have been framed for computing the capital employed. The scheme of the section is to encourage new industrial undertaking provided they fulfil the conditions mentioned in the various clauses of the sub-section. In order to be entitled to exemption an assessee must strictly come within the terms of the provisions under which such exemption is being claimed. But in construing the provisions of this section, one must construe the said section reasonably in the context of the purpose for which the section has been introduced. It is a well-settled canon of construction that the provision relating to exemption must as far as possible be liberally construed and in favour of the assessee provided in doing so no violence was being done to the language used".

44. If the rule is interpreted as contended for the revenue, it would defeat the very purpose of the enactment especially in these days when the "capital

employed" in the industrial undertaking is largely raised by way of borrowings and debts by the assessee from various financial institutions. It would also work out very inequitably on different types of entrepreneurs. It is common knowledge that with a view to encourage entrepreneurs and aid rapid industrial growth, the welfare State is coming forward in a big way to advance moneys through banks and other financial institutions for setting up new industrial undertakings. In the case of technically qualified but unemployed persons huge amounts are advanced from financial institutions sometimes even up to 90 per cent. for the purpose of raising capital to be employed for the purpose of new industrial undertakings. It could never be the intendment of s. 80J, which is intended to give tax relief during the formative period of the new industrial undertaking, to exclude the amount borrowed from these institutions for the purpose of s. 80J. Such an interpretation would benefit those who are financially well off and are able to invest their own capital in the new industrial undertaking and deny the benefit of s. 80J to those who are starved of capital and need such a concession most. Rule 19A, in so far as it directs the deduction of the borrowings and debts due from the assessee in computing the capital employed in the industrial undertaking, defeats the very object of the Act and is ultra vires of s. 80J.

Further, s. 80J directs that out of the profits and gains derived from an industrial undertaking a deduction not exceeding "the amount calculated at the rate of 6 per cent. per annum on the capital employed in the industrial undertaking computed in the prescribed manner shall be allowed."

45. This provision does not lay down that the capital employed in the industrial undertaking shall be capital as prescribed by the rules. The capital employed in the industrial undertaking is not the one as laid down in the rules, but is a distinct concept by itself. The expression "capital employed" in the industrial undertaking is not given any special connotation; only the method of computing the capital employed may be prescribed by the rules. What the rules can prescribe is the manner of computing the capital employed. Section 80J does not authorise the rule-making authority to give any artificial meaning to the expression "capital employed" in the industrial undertaking. In other words, if capital employed in the industrial undertaking is understood in the general commercial or industrial undertaking as comprising of the assets pooled from whatever source—those belonging to the assessee personally or raised by him by way of borrowings and loans but put in the undertaking—then in what manner the same should be computed is authorised by s. 80J to be prescribed by the Rules. If by the expression "capital employed in the industrial undertaking", as ordinarily understood, it is meant that it includes borrowings and debts of the assessee as well, then in exercise of the rule-making power conferred by s. 80J read with s. 295 of the Act, the rule-making authority cannot restrict the scope of this expression by framing a rule that the money borrowed and the debts due by the assessee shall not be included in computing the capital employed. That is to say, if capital employed in the industrial undertaking, but for the rules, means a certain quantum by any mode of computation prescribed by the rules, this

quantum cannot be reduced. An artificial definition of an expression may be given by the Legislature but where the Legislature has omitted to give any artificial definition for the purpose of the Act, that expression must be understood in the context in which it is used by the persons engaged in such business or undertaking; in other words, it should be understood in the ordinary commercial or mercantile usage. A subordinate legislative authority as the rule-making authority cannot give an artificial meaning to the expression which the Legislature did not itself do or intend to do. That would be exceeding the power vested in the rule-making authority.

46. It only authorises the rules to be framed for the method of computation and not for altering the scope and ambit of what is meant by capital employed in the industrial undertaking. If s. 80J does not lay down any guidelines then s. 80J itself would be bad for excessive delegation. That is not the case of either the assessee or of the revenue. If in using the words "capital employed" in the industrial undertaking the Legislature has itself laid down a definite guideline; then obviously the rule-making authority cannot cut down the sweep of that expression under the guise of providing rules for the computation of any amount which would normally be part of the capital employed in the industrial undertaking.

47. Dealing with the provisions of the Uttar Pradesh Industrial Disputes Act, 28 of 1947, which enlarged the scope of the expression "industrial disputes" so as to include an individual dispute within the meaning of "industrial dispute" and enabling the Government to refer such individual disputes also for adjudication under the Industrial Disputes Act, in exercise of the rule-making power, the Supreme Court in *The Newspapers Ltd. Vs. The State Industrial Tribunal, U.P.*, :

"Another objection to reading these rules in the manner above suggested is that it would be tantamount to enlarging the scope of the expression "industrial dispute" and the powers conferred on the State Government u/s 3 of the U.P. Act. The executive cannot under the power of framing rules and regulations clothe itself with powers which the statute itself does not give and which are inconsistent with the interpretation put on the expression "industrial dispute". The cardinal rule in regard to promulgation of bye-laws or making rules is that they must be *legi fidei rationi consona*, and, therefore, all regulations which are contrary or repugnant to statutes under which they are made are ineffective. If the expression "industrial dispute", as ordinarily understood and construed, conveys a dispute between an employer on the one hand and the workmen acting collectively on the other then the definition of those words cannot be widened by a statutory rule or regulation promulgated under the statute or by executive fiat.

The notification in the present case was under s. 3(c), (d) and (g) and under s. 8 which deal with (c) the appointment of industrial courts, (d) referring any industrial disputes, and (g) incidental or supplementary matters. The executive may in the exercise of these powers make such regulations which are necessary

but under that garb it cannot extend the definition of the term "industrial disputes" nor is this extended meaning necessary to subserve the objects of the Act."

But when the Legislature in enacting s. 80J has not restricted its meaning and has envisaged the rules to be framed for merely computing the capital employed and such rules cannot whittle down what is meant by capital employed in the ordinary commercial parlance, it is, therefore, necessary to gather what "capital employed" means in the ordinary mercantile usage.

In Black's Law Dictionary, 4th Edn., at p. 263, it is stated in regard to "capital" that "the word may have different meanings when used in different connections... It may mean actual property or estate; aggregate of property; all capital invested plus surplus or undivided profits; money required of partners by agreement; money which one adventures in an undertaking; the income is the fruit of capital; capital is the source of income".

48. In American Jurisprudence, vol. 13, item 172, at p. 297, it is stated that "the term "capital" generally distinguished from the capital stock of a corporation, is sometimes used broadly to indicate the entire assets of the corporation, or more narrowly that portion of the assets of a corporation regardless of their source, which is utilised for the conduct of the corporate business and for the purpose of deriving therefrom gains and profits". The word "capital" has undoubtedly various meanings and acquires a particular connotation having regard to the context in which it is used. In Finance and Cost Accountancy by Tailor and Shearing, at p. 7, it is stated that "it includes money invested by the proprietors or outsiders, loans and debentures". Batty in Management Accountancy, 3rd Edn., at p. 382, states in Chap. 15 on "Return of Capital Employed" states as follows:

""Capital employed" is used to describe the investment made in a business..... The principal definitions are summarised below:

Possible definitions of capital employed are as follows:

1. Gross Capital Employed.

This would include fixed assets and current assets (some accountants use the term "gross capital employed" even though current liabilities are deducted).

2. Net Capital Employed.

Fixed assets and current assets are added together and then current liabilities are deducted.

3. Proprietors' Net Capital Employed.

This can be obtained from the assets side of the balance-sheet. From total assets are deducted current liabilities, long-term borrowings (e.g., debentures) and any other "outside funds".

In Business Accountancy by Wood, 2nd edn., Vol. II, it is stated at pp. 875 and 876, that capital employed includes "shareholders" paid up capital, long-term loans and current liabilities".

49. In none of these, is it stated that capital employed in an undertaking excludes capital raised by way of borrowings or is restricted to the assessee's own monies. Even so, amounts once borrowed become the assessee's own money. Though he is under a liability to repay to the lender, it is his money in relation to the undertaking.

50. Any definition of "capital employed" in an undertaking, unless restricted by words employed or by the context in which it is used, must be taken as including all amounts from whatever source they are raised and ploughed for working that undertaking. There are no such restrictive words in s. 80J nor does the intendment of s. 80J, which is to give an incentive to entrepreneurs to take up new undertakings, by giving tax benefits for a period of six years, warrant any attempt to exclude any amounts invested in an undertaking merely on the ground that such moneys are raised not from out of the entrepreneurs' or the assessee's own funds but are raised by way of borrowings or advances. Any such interpretation would debar the large number of undertakings of technically educated unemployed and others starved of their own funds who are eager to start industries and need the protection of s. 80J more than those entrepreneurs who have large funds of their own to set up new industrial undertakings. That could never be the intention of the Legislature in enacting s. 80J in a welfare State which has an objective of rapid industrialisation by attracting otherwise qualified entrepreneurs but (who are) only starved of finances. There is no warrant for limiting the scope of the expression "capital employed" by excluding therefrom borrowings by or advances made to the assessee, in the application of s. 80J. In so far as r. 19A(3) directs that borrowings of and debts due by the assessee should be excluded from the capital employed is contrary to the intendment of s. 80J. In so providing it does not seek to lay down the method of computation but seeks to cut down the ambit of s. 80J itself. The expression "capital employed" conveys an abstract concept. For the purpose of application of s. 80J it has to be quantified with reference to the previous year. If capital employed were defined under the Act then it would have been easier; but, since that has not been done, the scope of the expression has to be ascertained either from judicial pronouncements or what is understood in the popular sense, i.e., by those persons in the world of business and accountancy dealing with capital. But, in quantifying the "capital employed" in an undertaking in the absence of any restrictive words in s. 80J itself one should not lose sight of the basic concept of "capital". If the Act were to define "capital employed", even if such definition were to be contrary to the popular concept or understanding of the "capital employed", the legislative definition would have to be given effect to. It is not uncommon to find the Legislature enlarging the scope of a term or expression by an inclusive definition or restricting its scope by excluding therefrom what would otherwise have been deemed included in the popular parlance. Section 35D(3) of

the I.T. Act which uses the term "capital employed" includes within that definition "long-term borrowings". In *Birmingham Small Arms Co. Ltd. v. IRC* [1951] 2 All ER 296 construing the expression "capital employed" in relation to the excess profits tax imposed by the Finance Act, 1939, Lord Simonds, speaking for the House of Lords, held that the expression (p. 299):

""Capital employed" means assets employed. For the capital is something which "consists" of money or "consists" of assets of various kinds. Then by a slight twist the "value" of the assets becomes the "amount" of the capital... "Because every asset of a trade or business is part of the capital employed in the trade or business unless expressly excepted by statute"."

51. In *Century Enka Ltd. Vs. Income Tax Officer, "D" Ward and Others*, a learned single judge of the Calcutta High Court specifically dealing with the validity of r. 19A(3) and relying upon the connotation of the term "capital employed" as explained in *Burmington Small Arms Co. Ltd. v. IRC* [1951] 2 All ER 296 held (p. 915):

"The section (80J) does not provide that the capital employed must be out of the money belonging to the assessee. Therefore, borrowed money if it is employed as capital in a new industrial undertaking, in my opinion, is entitled to computation... There is, in my opinion no warrant for restricting the computation of the capital in the manner done and in so far as rule 19A(3) does so, in my opinion, it is violative of the authority given u/s 80J and is not carrying out "the purpose of the Act"."

52. In coming to that conclusion the court earlier observed (p. 914):

"That in s. 80J the relief is granted on the basis of "capital employed in the industrial undertaking". Therefore, the relief is on the capital employed in the industrial undertaking. The authority of the rule-making body is to prescribe the rules for computation of that capital. But the relief is not restricted to capital employed in the shape of the assessee's own money. What is necessary for the grant of the relief is employment in the new industrial undertaking and employment in the shape of capital."

53. These two ingredients of s. 80J have to be satisfied in order to be entitled to this benefit.

In *Indore Malwa United Mills Ltd., Indore Vs. State of Madhya Bharat and Others*, , dealing with the question of trading loss with reference to the amount borrowed by the managing agents and brought to the company's books and withdrawn by the agents for their purposes, the court held (pp. 740, 741):

"After the borrowing the money became the company's money... The money lent would be a debit item in the accounts of the company in accordance with the accepted commercial practice and if the amount was realised, it would be a credit item. Both would be proper items of accounts for ascertaining the profit and loss of the company."

54. That being so, borrowings invested by the assessee in the undertaking for the purpose of acquiring capital constitutes "capital employed" in the undertaking.

55. In *Madras Industrial Linings Ltd. Vs. Income Tax Officer and Others*, a Bench of the Madras High Court dealing with r. 19A(3) observed (p. 259):

"We have not been referred to any authority by which capital employed would mean in the legal sense something different from what it would mean in ordinary parlance or according to the natural grammatical meaning to be attached to these words; nor have we been referred to any decision or authority for the proposition that the words should be understood in common parlance in a manner different from the way in which it should be understood in a technical sense for the purpose of understanding the words "capital employed" in the matter of the business of a company. So, we have to attribute to these words the ordinary meaning."

56. In *Madras Industrial Linings Ltd. Vs. Income Tax Officer and Others*, the court further held turning to the argument that the "capital employed" must be understood along with the words "computed in the manner prescribed" and that the rule-making authority is given full power to prescribe the manner in which the capital employed should be computed and so it would be possible by rules to reduce the quantum employed, the court observed (p. 260):

"If this argument is accepted then it must be possible for the Board to say in making the rules that if the capital employed is a lakh of rupees only 25 per cent. will be taken into account in computing "capital employed". We do not think that the words in the section can be interpreted in that manner. If we interpret the section in that manner it would certainly mean that uncanalized power would be available with the rule-making authority. This means that there will be a delegation to an extent which cannot be tolerated and which would amount to excessive delegation. Naturally we have to give a meaning to the section which will not make the section otiose."

57. It accordingly struck down the rule as violative of s. 80J.

58. In *Kota Box Mfg. Co. Vs. Income Tax Officer and Others*, a Bench of the Allahabad High Court in declaring r. 19A(3) ultra vires of s. 80J followed the earlier decisions of the Calcutta High Court in *Century Enka Ltd. Vs. Income Tax Officer, "D" Ward and Others*, and *Madras Industrial Linings Ltd. Vs. Income Tax Officer and Others*, and referred to what was stated by the Madras High Court with respect to the words "capital employed" used in s. 80J mean (pp. 639, 640):

"The amounts that have been employed as capital in the business. There is no indication that the capital employed must have come from any particular source or sources. There is no reference at all to the nature of the capital that is employed. The capital can be that which a company possessed, namely, share capital or other moneys belonging to the company. It may also be moneys that have become moneys of the company because the company had borrowed, and

if that money had been employed as capital by the company, that amount will be capital employed for the purpose of this section. The court then went on to observe that under sub r. (3) an indigent company which has to borrow, will stand on a footing less advantageous than the more affluent companies which had no need to borrow, and such a distinction would defeat the object of the provision.

It is true, that s. 80J refers to the capital employed as computed in the prescribed manner, but it gives to the rule-making authority the power to lay down the procedure or the manner of calculation. It does not entitle it to change the sense in which the legislature has used the words "capital employed" in the section. If the legislature meant to include the borrowed moneys, then the rule-making authority which could make rules to carry out the objects of the Act, could not vary the sense of the statutory provisions by providing that borrowed moneys will be deducted from the value of the assets computed in accordance with sub-r. (2). We, are, therefore, in respectful agreement with the view of the Calcutta and Madras High Courts that sub-r. (3) of r. 19A was ultra vires of the rule-making power conferred by the I.T. Act. This sub-rule cannot be relied upon for the purpose of computing the capital employed for purposes of s. 80J"

59. Both on principle and on the authority of judicial pronouncements, as discussed above, we must hold that r. 19A(3) in so far as it directs the exclusion of moneys borrowed and debts due from the assessee should be excluded in computing the capital employed in an undertaking during the previous year is in excess of the rule-making authority and does not fulfill the purpose of the Act, but defeats its intendment. Even if any other view were possible as laid down in Mohan Meakin Breweries Ltd. Vs. Commissioner of Income Tax (No. 2), and Commissioner of Income Tax, Bombay City-I Vs. Alcock Ashdown and Co. Ltd., we do not find any overriding considerations for taking a different view. We, therefore, hold that r. 19A(3) is ultra vires of s. 80J and as such cannot be sustained.

60. The other portion of r. 19A which is attacked as ultra vires of s. 80J is r. 19A(2) which directs the ascertainment of the aggregate of the amounts representing the value of the assets as on the first day of the computation period of the undertaking. It would be seen that s. 80J does not in terms lay down that for the purpose of allowing the deduction in respect of the profits and gains from a newly established industrial undertaking in certain cases, the capital employed in the industrial undertaking should be computed as on the first day of the computation period of the undertaking. It directs the computation of the capital employed in the industrial undertaking "in respect of the previous year". The previous year relevant for the assessment year for an industrial undertaking may be the financial year or the calendar year or from deepavali to deepavali. Capital is employed in an industrial undertaking, be it new or old, not on any particular day nor only on the first day of any year. It will be employed from time to time as the exigencies of the industrial undertaking require. In a particular

undertaking on the first day of the previous year relevant to the assessment year of that industrial undertaking, no capital may have been employed but on and from the very next day large amounts of capital may have been employed or the new industrial undertaking may itself be started after the first day of that year. When s. 80J directs that the capital employed in that industrial undertaking should be computed in the prescribed manner "in respect of the previous year" relevant for the assessment year, the previous year relevant for the assessment year cannot be the first day of the previous year only. It would be the entire period of 365 days comprised in the previous year. It is the capital employed in the industrial undertaking over these 365 days that should be ascertained and s. 80J directs the computation of that capital in the prescribed manner. Section 80J does not lay down that capital employed in the industrial undertaking in respect of the previous year shall be the capital computed in the prescribed manner. It directs the computation of the capital in respect of the previous year and the rules which may be prescribed must effectuate this purpose. The computation of the capital employed must be no doubt in accordance with the rules. But that computation must be in respect of the previous year, not with reference to any single day, be it the first day or the last day of the previous year. What has to be computed in respect of the previous year must necessarily take into account, the entire capital employed during that year. Even if a single day of that year is omitted, the capital employed so computed would not be in respect of the entire previous year but only part thereof, large or small. When the computation is with reference to the first day of the computation period, then it necessarily ignores the capital employed in the rest of the 364 days of the previous year. Thus, while s. 80J directs the computation of the capital employed in the industrial undertaking in respect of the 365 days which are comprised in the previous year relevant for the assessment year, r. 19A prescribed the computation "of the aggregate amounts representing the value of the assets as on the first day of the computation period. The rule is in direct conflict with s. 80J. If capital employed is to be computed in respect of the previous year, the capital employed on any day of the previous year could not be excluded. Of course, if the capital employed during the previous year, is wholly employed in the last month of the previous year or even on the last day of the previous year, could it be deemed to be the capital employed during the entire previous year ? Certainly it could not. The capital employed in the previous year must, therefore, be the average aggregate value of the asset in respect of the previous year which has to be taken into account. As observed by a learned single judge of the Calcutta High Court in *Century Enka Ltd. Vs. Income Tax Officer and Others*, the main consideration upon which this question has to be resolved is (p. 132), "whether having regard to the purpose for which provision of s. 80J of the Act was introduced, it was the legislative intent to restrict the capital employed in any manner so as to limit it to the first day of the computation period". So far as s. 80J is concerned, it does not give any such indication. That apart, such computation of capital employed in an industrial undertaking would defeat the very purpose of the undertaking and would lead to incongruous and anomalous

results. While an assessee who has employed the capital in an industrial undertaking on the very first day but has withdrawn it for the major part of the year would be entitled to the full benefit, an assessee who has not employed the capital on the first day but has employed it during the major part of the previous year would be deprived of the benefit. If the intendment of the Act is to give tax holiday for the new industrial undertaking with a view to help them find their roots and encourage entrepreneurs to establish new industrial undertakings and pave the way for rapid industrial growth in the country, then that purpose would be not served. In fact, it would be defeated if the capital employed is computed with reference to the first day of the computation period and not in respect of the previous year relevant to the assessment year. In the above decision, the learned judge pointed out thus (p. 132):

"This is an anomaly which will result if such a construction is put as to mean that the capital employed must be restricted as on the first day of the previous year. It however, is well settled that in a fiscal provision if the section is clear, then, whether it would lead to incongruity or not is a matter with which judicial review is not at all concerned. But, if the section is not clear, then the court should lean against an interpretation which will lead to absurd or incongruous result."

61. The court held that the relief under s. 80J should be granted to the assessee on the basis of the capital employed on an average during the previous year, and, in so far as it was deemed to be on the basis of a computation of the capital as on the first day of the previous year, it was held to be erroneous and, accordingly, the assessment was quashed and the ITO was directed to make an assessment in the light of the judgment.

62. A rule made in pursuance of the authorisation under s. 80J for purpose of computing the "capital employed" in the previous year cannot restrict the scope of the expression of the previous year to a single day-be it the first day of the previous year or the last day of the previous year or any other single day of the previous year. Such a computation would not be in respect of the previous year but an ascertainment of the "capital employed" on a particular day of that year which is not what s. 80J lays down or intends.

63. Even the previous history of the legislation in this regard does not disclose the legislative intent to ascertain the "capital employed" for the purpose of granting relief to the new industrial undertaking as on the first day of the previous year. Section 15C, which was introduced in 1949, in the Indian I.T. Act, 1922, which also directs the computation of the "capital employed" in the undertaking in accordance with the rules does not stipulate that the capital employed should be computed as on the first day the previous year. Rule 3 of the Indian Income Tax (Computation of Capital of Industrial Undertakings) Rules, 1949, framed in this behalf directs the computation of the average cost which has been defined in r. 2(ii) as follows:

"2. (ii) "Average cost" in relation to any asset means such proportion of the

actual cost thereof as the number of days of the computation period during which such asset is used in the business bears to the total number of days comprised in the said period."

64. Section 84 of the I.T. Act, 1961, which is the provision equivalent to s. 15C of the Indian I.T. Act, 1922, which also directs the computation of the capital employed in the industrial undertaking in the manner prescribed does not lay down that the capital employed should be computed as on the first day of the previous year. Rule 19 of the I.T. Rules, 1962, which is the relevant rule in this behalf just as r. 3 of the Indian Income Tax (Computation of Capital of Industrial Undertakings) Rules, 1949, directs the computation of the average cost of the asset for the relevant computation period. Section 80J which also directs the computation of the capital employed in the industrial undertaking in respect of the previous year which is also intended to give relief to the new industrial undertakings does not disclose an intention on the part of Parliament to make a departure from the above and authorise the rule-making authority to frame a rule so as to compute the capital employed as on the first day of the previous year relevant to the assessment year. Rule 19A(2) in so far as it directs the computation of the capital employed in the industrial undertaking as on the first day of the previous year relevant to the assessment year makes a departure neither warranted by the wording of s. 80J nor by the legislative intent disclosed by it. Nor does it conform to the pattern disclosed by the legislative history of that provision. The rule framed, apart from running counter to the express words of s. 80J, would lead to absurd results and anomalous results. Rule 19A(2) of the Rules must, therefore, be held to be ultra vires of s. 80J of the Act and cannot be sustained.

65. The last contention of some of the petitioners, for whom Mr. Dastoor, learned counsel, appears, that r. 19A(2)(i) which prescribes that in the case of assets entitled to depreciation allowance, the written down value shall be the capital employed in an industrial undertaking (sic). Section 80J directs capital employed in the industrial undertaking to be computed for the purpose of allowing deduction of a sum not exceeding 6% thereon where the gross total income of the assessee includes any profits any gains derived from the new industrial undertaking. In the case of an asset entitled to depreciation the written down value is required to be computed while in the case of an asset not entitled to depreciation, the actual cost to the assessee is required to be taken into account in computing the capital employed in the undertaking. It is the contention of the assessee that when s. 80J contemplates the deduction of an amount equal to 6% calculated on the capital employed in the industrial undertaking, it must necessarily mean the entire amounts expended for acquiring the capital asset employed in the undertaking. Merely because on a particular asset certain depreciation is allowed for certain purpose, the written down value of that asset cannot be taken as the capital employed in the industrial undertaking. It is pointed out that when under r. 19A(2)(ii) an asset not entitled to deduction of depreciation is employed, the actual cost to the assessee is computed as the

capital employed, there is no reason why the written down value of an asset which is entitled to depreciation should be computed as the capital employed in the undertaking. So far as the asset acquired and employed in the undertaking is concerned, whether it is entitled to depreciation allowance or not, the amount expended to acquire that asset would be the capital employed by the assessee. In fact, it is also urged that according to s. 80J, the actual cost to the assessee for acquiring the capital employed in the industrial undertaking must be computed and not the aggregate amount representing the value of the asset. There is no direct decision on this point and the question is not free from difficulty.

66. It is true that money expended for acquiring an asset irrespective of whether depreciation allowance is deductible or not on that asset for the purpose of assessing the tax liability would be the capital employed in the undertaking. That does not vary having regard to the depreciation allowable on the particular asset.

67. It is argued by Mr. Dastoor, learned counsel for the petitioners, that s. 80J requires capital employed to be computed and not the value of the asset; hence the price originally paid for acquiring the particular capital must be taken into account, i.e., the money actually expended for acquiring that capital. Reliance was placed on a case under the E.P.T. Act of the Madras High Court in Jayaram Mills Ltd., Rajapalayam Vs. The Commissioner of Excess Profits Tax, Madras, in which it was held thus (headnote): "if the funds of the assessee had been employed to acquire assets for being used in the business of the assessee that would be capital employed in the business". This decision was rendered in the context of the E.P.T. Act, where the contention was raised that irrespective of whether the asset is used or not once it is acquired and was still available for use of business, it should be taken into account and should be treated as capital employed in the business. Though in that context it was observed that the word "employed" used in the sub-rule relates to capital and not to assets. Actual employment of the assets acquired is not necessary. The assessee may buy a large stock of spare parts. It may happen that no occasion arises to utilise those spare parts. Still the money spent in acquiring the spare parts would be the capital employed in the business of the assessee. It must, however, be observed "what the capital employed is must depend on the context of the particular provisions and also upon its intendment". The court further observed (at p. 660) "that once capital has been introduced into a business it may naturally be regarded as still employed in it until such capital is lost or withdrawn". The court finally held that "it is sufficient if the asset has been acquired for the purposes of the business to be treated as capital employed in the business".

68. In Ravi Machine Tools (P.) Ltd. Vs. Commissioner of Income Tax, the Karnataka High Court held that (headnote) "the relief u/s 80J of the Income Tax Act, 1961, refers to capital employed in a newly established industrial undertaking and not the user of any asset as such. Therefore, where a company acquires an asset for its undertaking, the capital employed in the undertaking

includes "the amount paid to acquire that asset". The user or non-user of the asset so acquired is immaterial for the computation of the relief u/s 80J of the Act." In that case an amount of Rs. 1,65,000 expended for acquiring about ac. 2-11 guntas of land on the outskirts of Bangalore City for industrial undertaking was claimed as the capital in the undertaking. The Income Tax authorities came to the conclusion that the fair market value of the property as on the date of the purchase was only Rs. 64,000 and disallowed the relief under s. 80J in respect of the difference of the amount, viz., Rs. 10,000 although the assessee did in fact part with Rs. 1,65,000. The court held that "the capital employed in the undertaking is the amount paid to acquire that asset" (at p. 462). Again in the context of whether the user must be established to claim the benefit of s. 80J, in Commissioner of Income Tax Vs. Indian Oxygen Ltd., the Calcutta High Court held (at p. 120):

"... the moment capital is utilised for the purposes of acquiring any asset for a business, such capital becomes employed in the business."

69. In Commissioner of Income Tax, Gujarat-II Vs. Cibatul Ltd., the Gujarat High Court held that in assessing the value of the asset under s. 80J read with r. 19A(2) the cost of the uninstalled machinery should also be taken into consideration for the purpose of granting relief under s. 80J, for, under that clause, cash in hand or at bank was to be included in the assets and, therefore, when that cash is converted into assets in the shape of machinery, even if that has not been installed, that should be included in computing the capital employed. This decision was rendered in the context of the contention that the asset must have been used for being computed in the capital employed for the purpose of granting relief under s. 80J. In all these cases, the decision in Birmingham Small Arms Co. Ltd. v. IRC [1951] 2 All ER 296 which lays down that the moneys invested in the purchase of assets, as distinct from the actual user of the asset, was treated as "capital employed" in the industrial undertaking was accepted. The same view was taken by the Bombay High Court in Commissioner of Income Tax, Bombay City-I Vs. Alcock Ashdown and Co. Ltd., . In the cases referred to above, what came to be considered was whether the actual user of the capital asset must be established in order to claim the benefit of s. 80J in respect of a particular asset. In that context, the court observed:

"No sooner the money is expended for acquiring a particular asset for the purpose of an industrial undertaking that money becomes the "capital employed" and it is not necessary to establish that such capital was also used in order to claim the benefit of that section. The further question whether for purpose of s. 80J where the capital was entitled to depreciation, and depreciation was allowed for the purpose of computing the profits or gains from the industrial undertaking for the purpose of determining the Income Tax liability, the capital asset should be assessed at the written down value or at the original cost at which it was acquired, did not come up for consideration."

70. According to Mr. Dastoor, learned counsel for the petitioner, the capital

employed in the industrial undertaking computed in the manner prescribed cannot mean something less than the actual cost.

71. Written down value is neither actual cost nor actual market value of an asset; it is the value of the asset shown after allowing for depreciation. Depreciation is only notional expenditure and not actual expenditure. It is allowed as a deduction from gross profits to arrive at net profits. But in fact both net profits and the amount of depreciation allowed remain in cash with the assessee. It is either transferred to depreciation reserve account or general reserve account. Such depreciation is not distributed and cannot be distributed as profits. It remains very much with the assessee. In allowing the depreciation the profits and gains are already reduced. The amounts so retained or invested is not fresh capital invested. If such depreciation deducted which is reinvested is computed as capital employed then there would be double computation of the same amount of capital employed.

72. In *Advanced Accounts* by Mr. M. C. Shukla and Grewal, 9th Edn., p. 852, it is stated that capital employed is now recognised to mean "fixed assets less depreciation written off plus net working capital, i.e., current assets, current liabilities. This may also be expressed as aggregate of share capital reserves and long-term loans". The amount retained with the assessee as a consequence of depreciation allowance being deducted is not fresh capital employed. As such in respect of an asset which is acquired when initially the cost of an asset is taken as the "capital employed" in the subsequent years for which the benefit under s. 80J is available allowing depreciation and also computing the value of that asset as its original cost price, as the capital employed would amount to computing it twice over as capital. That is not the intendment of s. 80J. The rule in so far as it directs that in computing the capital employed in respect of the assets on which the depreciation is allowed, the written down value should be taken into account, in our view, does not in any way contravene s. 80J.

73. In view of the foregoing discussion, we declare, (i) that r. 19A(3) of the I.T. Rules 1962, in so far as it directs the deduction of "borrowed monies and debts due by the assessee" is ultra vires of s. 80J of the I.T. Act, 1961, and (ii) r. 19A(2) which directs the aggregation of the amounts representing the values of the assets as on the first day of the computation period of the undertaking is ultra vires of s. 80J, and (iii) r. 19A(2)(i) in so far as it directs that in the case of assets entitled to depreciation their written down value should be computed for arriving at the capital employed in the industrial undertaking is not ultra vires of s. 80J of the I.T. Act. Inasmuch as the ITOs and the AAC and the Income Tax Appellate Tribunal have assessed the tax for the relevant assessment years giving effect to r. 19A(3), 19A(2) which have now been declared ultra vires, a writ of certiorari shall issue quashing the said assessments and orders and directing the authorities concerned to make fresh assessments by ignoring r. 19A(3), in so far as it directs the deduction of "borrowed monies for debts due" from the assessee in computing the "capital employed" and ignoring r. 19A(2) in

so far as it directs aggregate of the amounts representing the values of the assets only as on the first day of the computation period of the undertaking and compute the capital employed during the previous year including the borrowed monies and debts due from the assessee and allow rebate of six per cent. on the entire capital employed during the previous year.

74. These writ petitions are, accordingly, allowed to the extent indicated above but, in the circumstances, without costs. Advocate's fee Rs. 250 in each.