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M/S LOHIA MACHINES LIMITED AND ANR.

B

v.

UNION OF INDIA AND ORS.

January 25, 1985

C

[Y.V. CHANDRACHUD, C.J., P.N. BHAGWATI, AMARENDRA NATH SEN, D.P. MADON AND M.P. THAKKAR, JJ.]

Constitution of India, Articles 14 and 19 (1) (g).

D

Income Tax Act, 1968, ss.80 J (1) and (1A), s. 296—Income Tax Rules, 1962 – Rule 19A – Validity of.

"Capital employed" in industrial undertaking – Meaning of – Whether includes long term borrowings – Computed in the prescribed manner – Central Board of Revenue—Whether competent to prescribe the manner of computation by Rules—Providing for computation of "capital employed" as on "the first day of the computation period"—Whether ultra vires s. 80J (1)—Whether suffers from excessive delegation of legislative power—Whether violative of Art. 14.

E

"Capital employed" in industrial undertaking—Profits and gains derived from—Tax relief to new industries—s.80J – retrospective amendment of by Finance (No. 2) Act, 1980—Incorporation of Rule 19A—Validity of—Whether violative of Articles 14 and 19 (1) (g) of the Constitution.

F

Interpretation of statute—Interpretation of a provision – Historical Evolution – Whether could be ignornd.

Words used—Plain an unambiguous – Reasonably susceptible to one meaning only – Whether could be given effect to by the Court – Whether Court concerned with the policy invlvoed or with the result which may follow.

G

Legislative intent—Whether to be gathered from consistent practice followed – Whether cognate statutes to be lookd into.

Validating Act – Retrospective Operation of—When becomes arbitrary and unreasonable.

H

Administraitve Law – Legislative power in a taxing statute – Delegation of – Rule-making Authority—Scope of – Where relief of exemption is granted by the statute – Whether Rule-making Authority competent to work out details of relief and exemption a its discretion – Legislature's srict vigilance and control over the Rule-making Authority – Whether excessive delegation of legislative power to the Executive.

Acquiescence in an earlier exercise of ultra vires rule-making power—Whether such exercise of rule-making power valid at a subsequent date.

Words and Phrases—Meaning of "Capital employed" – 'Computed in the prescribed manner'—'Computed'—Meaning of—"Capital employed during the previous year" and "Capital employed in respect of the previous year"—Distinction between.

The Taxation Laws (Amendment) Ordinance 1949 introduced s.15C in the Indian Income Tax Act 1922 with effect from 31st March 1949. This provision was similar to s. 80J of the Income Tax Act 1961. Sub-s. (1) of s.15C exempted a part of the profits and gains of a new industrial undertaking from tax. The Central Board of Revenue made the Indian Income Tax (Computation of Capital of Industrial Undertakings) Rules, 1949 for computation of capital employed in the industrial undertaking as envisaged in s.15C(1). According to Rule 3 of these Rules the process of computation of "capital employed in the undertaking" consisted of two steps : one of addition of the value of assets of the industrial undertak'ng arrived at on the basis of differnt formulae according to the nature and the date of the purchase of the assets and the other, of deduction of "any borrowed money and debt due by the person carrying on the business". Borrowed monies and debts due from the assessee were excluded in computation of "capital employed in the undertaking" by sub-rule (3) of this Rule.

The Taxation Laws (Amendment) Ordinance 1949 was replaced by the Taxation Laws (Extension to Merged States and Amendment) Act 1949 on 31st December 1949 and s.13 thereof retained s.15C with some minor modifications. Sub-s.(1) which granted the exemption remained unchanged. While reenacting s.15C, the Legislature did not change this position but continued the same Rules and thus approved the exclusion of borrowed monies and debts in computation of capital employed in the undertaking and also made it clear that the word 'computed' has been used by it in this context in the sense of involving inclusion as well as exclusion of items which might be regarded as part of the capital employed in the undertaking.

Thereafter from time to time changes were made in s.15C by verious Finance Acts but these changes were not substantial and they merely extended the period of production for eligibility from the initial 3 years to 18 years. Business of hotel was also brought within the purview of the exemption and conditions for grant of such exemption were laid down. Thus, the basic structure of s. 15C as well as the Indian Income Tax (Computation of Capital of Industrial Undertakings) Rules 1949 remained unchanged. The result was that throughout the period from

A 31st March, 1949, when s. 15C was introduced in the Indian Income Tax Act 1922 upto the period it remained in force, borrowed monies and debts due from the assessee were excluded in computing the capital employed in the undertaking for the purpose of determining the quantum of the exemption eligible under s. 15C.

The Income Tax Act, 1961 repealed the Indian Income Tax Act 1922. Section 15C of the Indian Income Tax Act 1922 was recast as s.84 in the Income Tax Act 1961. Sub-s.(1) of s.84 granted the same exemption as was granted by sub-s.(1) of s.15C and the only change made was that the profits or gains eligible B for exemption were now to be calculated at "six per cent per annum on the capital employed in the undertaking or hotel computed in the *prescribed manner*". The word 'prescribed' according to definition in sub-s.(33) of s. 2 meant prescribed by Rules made by the Central Board of Revenue under the Act i.e. Income Tax Rules 1962. Rule 19 prescribes as to how the capital employcd in an undertaking or a hotel shall be computed for the purpose of s.84. Even under s.84 of the Income Tax Act 1961 the same position prevailed as before. This position contiC nued un-interrupted until s.84 was replaced by s.80J with effect from 1st April 1968 by Finance (No. 2) Act 1967. Sub-s.(1) of s.80J brought about a material change in the provision as it stood in sub-s.(1) of s.84.

Under sub-s.(1) of s.80J the benefit of the exemption was extended additionally to profits derived from a ship and so far as the quantum of exemption was concerned, the formula adopted for calculating it was "six per cent per annum on the capital employed in the indurstrial undertaking or ship or business of the D hotel, computed in the prescribed manner in respect of the previous year relevant to the assessment year". The new words introduced were "in respect of the previous year relevant tn the assessment year". Sub-s.(2) of s.80J laid down the period for which the exemption shall be allowable and sub-s.(3) provided that any deficiency in the benefit of the exemption arising on account of the profits and gains E being less than the relevant amount of capital employed during the previous year shall be carried forward and allowed as a straight deductioa in computing the total income of the assessee for the subsequent years subject to the proviso that in no case shall the deficiency or any part thereof be carried forward beyond the seventh assessment year as reckoned from the end of the initial assessment year. Sub-s.(4) enacted certain conditions to be fulfilled before an industrial undertaking could qualify for the benefit of the exemption and one of the conditions was F that the industrial undertaking should not have been formed "by the transfer to a new business of a building machinery or plant previously used for any purpose.' Sub-s.(5) laid down several conitions to be fulfilled before the benefit of the exemption could be made available in case of profits derived from a ship. Sub-s. (6) provided certain exceptions to the provisions contained in sub-s.(4).

G Since the profits derived from an industrial undertaking or a ship or the business of a hotel were eligible for exemption only to the extent of per annum of the capital employed in the industrial undertaking or ship or business of a hotel computed in the prescribed manner in respect of the previous year relevant to the assessment year, the Central Board of Revenue made Rule 19A prescribing the manner in which the capital employed in the industrial undertaking, ship or business of the hotel should be computed for the purpose of Section H 80J. Rule 19A made material alterations in the taxture of Rule 19.

Rule 19A brought about two noticeable changes, namely, (1) that where as under the Indian Income Tax (Computation of Capital of Industrial Undertakings) Rules 1949 and Rule 19, the average cost of assets acquired by purchase on or after the commencing date of the computation period was required to be taken into account in computing the capital employed in the industrial undertaking or hotel, a deliberate departure was made from this formula and under Rule 19A, assets acquired on or after the commencement of the computation period were to be left out of account and only the amounts representing the value of the assets as on the first day of the computation period were to enter into the computation of the capital employed in the industrial undertaking or the business of a hotel, and (2) that though under the Indian Income Tax (Computation of Capital of Industrial Undertakings) Rules 1949 and Rule 19, all borrowed monies and debts due from the assessee were required to be deducted in computing the 'capital employed' in the industrial undertaking or a hotel, a certain amount of liberalisation was introduced under Rule 19A providing that "monies borrowed from an approved source for the creatain of a capital asset in India, if the agreement under which such monies are borrowed provides for the repayment thereof during a period of not less than seven years" shall not be liable to be deducted but shall be taken into account in computing the capital employed in the industrial undertaking or the business of a hotel for the purpose of Section 80J. The result was that from and after 1st April 1968, when Rule 19A came into force, borrowings from an approved source repayable in not less than seven years started for the first time to be taken into account in computation of the capital employed in the industrial undertaking or the business of a hotel, though other categories of borrowed monies and debts due from the assessee continued to remain excluded from such compatation.

This state of affairs continued until 1st April 1971 when the Finance (No. 2) Act 1971 came into force. While introducing the Bill, the Finance Minister made a policy statement on the floor of the House, that in calculating the limit of 6 per cent of the capital for purposes of tax-exemption, debentures and long-term borrowings will be exeluded, This policy statement was implemented by the Central Board of Revenue by amending Sub-Rule(3) of Rule 19A. The consequence of this amendment was that the position as it provailed prior to the enactment of Rule 19A was again restored with effect from 1st April, 1972.

Under Rule 19 of the Indian Income-Tax (Computation of Capital of Industrial Undertakings) Rules 1949 from Ist April 1949 upto 31st March 1968 all borrowed monies and debts owed by the assessee were excluded in computing the capital employed in all industrial undertaking or the business of a hotel. No challenge was ever preferred against these Rules.

From Ist April 1968 under rule 19A a liberalisation was introduced by inclusion of long term borrowings (repayable in not less than seven years) in computation of the 'capital employed'. This liberalisation was withdrawn with effect from Ist April 1972 and only then for the first time some assessees raised a contention before the Bombay Bench of the Income Tax Appellate Tribunal in

A *M/s. Alim Chand Tapan Dass* v. *I.T.O.* that on true construction of sub-s. (1) of s.80J the capital employed in their industrial undertaking or the business of a hotel would include long term borrowings since according to fair natural construction of the words used, they were part of the 'capital employed' and Rule 19A sub-rule (3) in so far as it excluded long term borrowings from the computation of the 'capital employed was *ultra vires* sub-s. (1) of s. 80J and despite sub-rule (3) of Rule 19A, long term borrowings were liable to be taken into account in computing the 'capital employed' in the industrial undertaking or the business of a hotel.

The Bombay Bench of the Tribunal accepted this contention and held that sub-rule (3) of Rule 19A was in conflict with sub-s. (1) of s. 80J and hence it was liable to be ignored in computing the capital employed in the industrial undertaking or the business of a hotel. This decision was, however, reconsidered by a Special Bench of the Tribunal in *M/s. Emco Transformers Ltd.* v. *ITO* and the Special Bench overruled this decision and held that there was no conflict at all between sub-rule (3) of Rule 19 and sub-s. (1) of s. 80J and all borrowings including long term borrowings owing from the assessee were liable to be excluded in computing the capital employed in the industrial undertaking or the business of a hotel.

Later different High Courts had held conflicting opinions as regards the exclusion of long lerm borrowings Some of the High Courts also found fault with another provision in Rule 19A which required that the 'capital employed' should be computed as on the first day of the computation period. The Calcutta High Court in *Century Enca Ltd.* v. *ITO* ITR 909 took the view that what sub-s. (1) of s. 80J required was computation of capital in respect of the previous year and not as in the first day of the previous year and therefore Rule 19A, in so far as it provided that the computation of capital should be made as on the first day of the computation period, was *ultra vires* sub-s. (1) of s. 80J. One or two other High Courts also adopted this view.

The Government felt that this view was erroneous and did not correctly reflect the intention of Parliament as is evident clearly by the legislative history of this provision. Parliament in order to avoid confusion and uncertainty which would prevail in the state of law until a final pronouncement was made on these two issue by the Supreme Court, amended s.80J in 1980 by introducing sub-s. (1A) with retrospective effect from 1st April 1972.

The newly introduced sub-s.(1A) was in the same terms at Rule 19A. The manner of computation of the 'capital employed' in an industrial undertaking or the business of a hotel or a ship remained the same but it was now set out in sub-s.(1A) instead of Rule 19A. The words "computed in the prescribed manner" occurring in sub-s.(1) of s. 80J were also substituted by the words "computed in the manner specified in sub-s. (1A)" with retrospective effect from 1st April, 1972.

H In the writ petitions to this Court it was contended on behalf of the pe

tioners : The expression "capital employed in respect of the previous year" has two dimensions, namely, dimension of quantum and dimension of time. As regards the dimension of quantum, the expression "capital employed" in its legal as well as in its popular or commerial sense must, include long term borrowings and working capital and on a fair and liberal view, it would also include short term borrowings. In any event, long term borrowings must be held to be included in the "capital employed". Under the Companies Act 1956 a loan repayable after one year or more from the date of the balance sheet would be a long term loan and it must be held to be part of the 'capital employed'. Even assumin there was any ambiguity in the expression 'capital employed' it must necessarily include long term borrowings in the context of s.80J because Parliament could not have possibly intended to favour affluent assessees who are able to employ their own capital and to discriminate against indigent assessees who have to borrow funds to finance their undertakings.

As regards the dimension of time it was urged that the concept of 'capital employed' during or in respect of the previous year is a concept which must compel attention to the reality of the funds used durig the whole year and not merely on any one single day such as the first day of the computation period. Consequently, Rule 19A was *ultra vires* s.(1) of s.80J to the extent that it prescribed a mode of computation of the 'capital employed' in terms that excluded all borrowed capital and also provided for computation of the 'capital employed' only on the first day of computation period and ignored all additional capital employed during the rest of the computation period. Rule 19A was invalid since it derogated from the full operative effect of the provisions of Section 80J and arbitrarily abridged the scope of the exemption under that section byexcluding what was clearly part of the 'capital employed' and ignoring the 'capital employed' throughout the computation period except on the first day. Therefore, the amended sub-s.(1A) introduced in s.80J with retrospective effect from 1st April 1972 was unconstitutional as being violative of Articles 14 and 19(1)(g) of the Constitutional.

On behalf of the respondents—Union of India, it was contended : (1) that the expression 'capital employed' was neither a term of art nor an expression with a definite fixed connotatian and it meant different things in different contexts. It did not necessarily include longterm borrowings and sub-rule (3) of Rule 19A excluding long term borrowings from the computation of the 'capital employed' could not, therefore, be said to be in conflict with sub-s.(1) of s.80J Alternatively, in any event, for calculating the relief under sub-s.(1) of s.80J, the stipulated rate of percentage was to be applied not just to the 'capital employed' without any further qualification but to the 'capital employed...computed in the prescribed manner'. The manner of computation was to be prescribed by Rules made by the Central Board of Revenue. Computation involved exclusion as inclusion of items which might be regarded as forming part of the 'capital employed' and sub-rule (3) which was an integral part of the process of computation laid down in Rule 19A did not, therefore, derogate from the provisions of sub-s.(1) of s-80J and was within the mandate of that section; (2) that sub-s.(1) ofs.80J beinga provision in a taxing statute,

A it had necessarily to be left to the Central Board of Revenue to decide, having regard to the changing economic circumstances what should from time to time be taken to be 'capital employed' for the purpose of calculating the relief allowable under sub s.(1) of s.80J and moreover the Rules made by the Central Board of Revenue in that behalf were required to be placed before each House of Parliament for its approval and there was, therefore, no excessive delegation involved in sub-s.(1) of s.80J leaving it to the Central Board of Revenue to prescribe how the capital employed' should be computed and what items should be included and what items excluded;(3) that the words used in sub-s.(1) of s 80J in regard to the computation of the 'capital employed' were not 'capital employed during the previous year' but 'capital employed... *in respect of* the previous year. The words 'in respect of the previous years' were deliberately introduced in sub-s.(1) of s.80J when that section came to be enacted with the result that the 'capital employed' that was required to be computed for the purpose of s.80J was the 'capital employed *in respect of* previous year'. Rule 19A was, therefore, not in conflict with sub-s.(1) of s.80J when it provided that the 'capital employed' *in respect of* the previous year shall be computed as on the first day of the previous year. If Rule 19A was valid in its entirely no equestion of constitutional validity of the newly introduced sub-s.(1A) could possiblly arise because what sub-s.(1A) did was merely to reproduce Rule 19A *ipsissima verba* with effect from 1st April, 1972 and it was clarificatory in nature. Alternatively, if Rule 19A was invalid in both respects, the new sub s.(1A) introduced in s.80J with retrospective effect from 1st April, 1972 did not violate any of the fundamental rights under Article 14 and 19(1)(g) and was not unconstitutional or void.

Dismissing the writ petitions,

HELD : [*C.J., Bhagwati, Madon and Thakkar, JJ. Per majority.*] [*A.N. Sen, J. dissenting.*]

1 (i) Rule 19 A in so far as it excluded borrowed monies and debts in computation of the 'capital employed' and provided for computation of the 'capital employed' as on the first day of the computation period was not *ultra vires* s.80J and was a perfectly valid rule within the rule-making authority conferred upon the Central Board of Revenue. [749C]

1 (ii). So also, or the same reasons, Rule 19A in so far as it provided that 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 monies borrowed or debts incurred in acquiring that ship must be held to be valid as being within the rule making authority of the Central Board of Revenue. [749D]

1 (iii). Since, Rule 19A did not suffer from any infirmity and was valid in its entirety, Finance Act (No. 2) of 1980 in so far as it amended s.80J by incorporating Rule 19A in the section with retrospective effect from 1st April, 1972 was marely clarificatory in nature and must accordingly be held to be valid. [749E]

A

2. The exclusion of all borrowed monies including long term borrowings from computation of the 'capital employed' as being in conflict with either s.15C or s .84 remained unchallenged for a period of 19 years i e. from Ist April, 1949 to 31st March, 1968, but that cannot be a ground for negativing such challenge. Acquiescence in an earlier exercise of rule-making power which was beyond the jurisdiction of the rule-making authority cannot make such exercise of rule-making power or a similar exercise of rule-making power at a subsequent date B valid. If a rule made by a rule-making authority is outside the scope of its power, it is void and it is not at all relevant that its validity has not been questioned for a long period of time : if a rule is void, it remains void whether it has been acquiesced in or not. [722C-E]

Proprietary Articles Trade Associations v. *A.G. of Canada*, [1931] A C. C 310 and *A.C. for Australia* v. *Queen*, 95 C.L.R. 529, referred to.

3. Non-challenge of exclusion of borrowed monies from computation of capital employed' and the validity of Indian Income Tax (Computation of Capital of Industrial Undertakings) Rules 1949 and Rule 19 for 19 years shows that both the assessees as well as the Revenue proceeded on the basis that on a D true construction of the language of ss. 15C and 84, it was within the competence of the Central Board of Revenue to exclude borrowed monies in computing the 'capital employed'. Parliament also approved of this interpretation of ss. 15C and 84 and posited the validity of the Indian Income Tax (Computation of Industrial Undertakings) Rules 1949 and Rule 19. While re-enacting s 15C, Parliament continued the same rules and thereby placed its further seal of approval on such exclusion of borrowed monies in computing the 'capital E employed' for the purpose of s 15 C. If Parliament thought that the Indian Income Tax (Computation of Capital of Industrial Undertakings) Rules 1949 in so far as they provided for exclusion of borrowed monies were not in conformity with its intention, it could have easily made specific provisions indicating its intention in the clearest terms when it enacted s.84 in the Income Tax Act, 1961. Rule 19 made to give effect to s.84 again excluded borrowed monies from computation of the 'capital employed', Income Tax Rules 1962, which included Rule 19, after having laid before each House of Parliament, got the approval of the F Parliament. It is not that even if a Rule purporting to be made under a statute is outside the authority conferred by the statute, it would still be valid and have the force of law if it is placed before each House of Parliament and is not disapproved by either House. By not disapproving of Rule 19, Parliament accepted the validity of the assumption that exclusion of borrowed monies in computation of 'capital employed' was permissible under the terms of s.84 and clearly indicated that such exclusion of borrowed monies had its approval. Thus, Parliament G throughout, save in respect of the period from Ist April, 1968 to 31st March, 1972, approved of exclusion of borrowed monies in computing the 'capital employed' as being in conformity with its intention and regarded such exclusion as being within the terms of s.15C or s.84 or s.80J. [722E-H to 725A-D]

4. Even during the period from 1st April 1968 to 31st March 1972 when Rule 19A sub-rule (3) stood unamended, it is only borrowings from an approved H

source repayable within not less than 7 years which were includible in computation of the 'capital employed' and not all long term borrowings. If all long term borrowings invariably and in all cases formed part of the 'capital employed' and were liable to be included in the computation, the unamended sub-rule (3) of Rule 19 A in so far as it excluded long term borrowings, other than those from an approved source repayable within not less than 7 years, would be invalid as being in derogation of the provisions of s.80J, Sub-s. (1). The validity of the unamended sub-rule (3) of Rule 19A was never challenged by the assessees.

[731F ; 713H ; 731G-H]

5. There is no unanimity amongst accountants and lawyers in regerd to the question whether 'capital employed', either in its legal sense or in commercial parlance or accountancy practice, necessarily or always includes long term borrowings. Even the High Courts have differed in regard to the true meaning and content of the expression 'capital employed'. The expression 'capital employed' is not a term of art not is it an expression having a fixed connotation or meaning but it is susceptible of varied meanings, including or excluding short term borrowings or long term borrowings, whether of all categories or of any particular category or categories depending on its environmental context.

[730G-H; 731A-C]

The Internal Finance of Industrial Undertakings by T.G. Rose ; Terminology of Cost Accountancy published by The Institute of Cast and Works Accountants, U.K. (October, 1967) *The Director's Guide to Accounting and Finance by M.G. Wright : Modern Published Accounts by R S. Waldron and E.H.D. Sambridge ; Inter-Firm Comparison of Financial Performance by the Bombay Textile Research Association ; Dictionary of Business and Management by K.C. Parekh ; Principles and Practice of Management Accountancy by J.L. Brown ; Financial Manager's Job by Elizabeth Marting and Robert E. Finley ; Glossary of Management Accounting Terms by the Institute) of Cost and Works Accounting of India ; Finance For the Non-Accountant by L.B. Rockley ; Principles and Practice of Management by E.F.L. Brech ; Information Note No. 10 on Return on Capital Employed prepared by All India Management Association ; Advanced Accounts by Carter (5th Edn. by Douglas Garbutt) ; Book Keeping and Accounts by Spicer and Pegler and Management Accountancy by Even J. Batty ; Members Handbook of the Institute of Chartered Accountant in England and Wales ; Framework of Accountancy by C.C. Magee ; Business Accouuting 1 by B.E. Elliott ; Company Law by Palmer; and Principles of Modern Company Law by Gower* ; referred to.

5A. There is no material difference between the language of sub-s.(1) of of s.80J and the language of its predeceessor sections, namely, s.15C sub-s.(1) and s.84 sub-s.(1). The words used in sub-s.(1) of s.80J are "capital employed.... computed in the prescribed manner". The statutory rate of percentage for the purpose of calculating the relief allowable under sub-s(1) of s.80J is to be applied not just to the 'capital employed' but to the "capital employed...computed in the prescribed manner". [725E-F]

6. The expression 'capital employed' has a variable meaning and that is why Legislature has enacted that for the purpose of calculating the relief allowable under s.80J sub-s.(1), the statutory percentage must be applied to the 'capital employed' *as computed in the prescribed manner*, which was to be pres-

cribed by the Central Board of Revenue by making Rule or Rules under s.295 of the Income Tax Act, 1961. The process of computation would involve both inclu sion and exclusi n of items which may possibly be regarded as falling within the expression 'capital employed'. The Central Board of Revenue may include some items and exclude some others while prescribing the manner of computation of the 'capital employed'. This is the sense in wh'ch the word 'computed' has been consistently used by the Legislature while enecting legislation of this kind, namely, Excess Profits Tax Act, 1940, Business Profits Act, 1941. Super Profits Tax Act 1953 and Companies (Profits) Sur Tax Act 1964. The legislative history behind the use of the word 'computed' in relation to the 'capital employed' and the legislative recognition it has got indicate that it involves, as part of the pro ess of computation, both inclusion as well as exclusion of items which may otherwise be regarded as forming part of the 'capital employed'. In the definition of "total income in" s2. cl.(45) of the Income Tax Act, 1961 itself the word 'comuted' has been used by the Legislature as comprehending within its scope not only inclusion but also exclusion of certain items of income which are part of the income of the assessee. In ss.10, 11, 30 to 43A, 80A to 80VV, 80HH 80JJ and 80-O of the Income Tax Act, 1961, the word 'computed' in relation to the 'capital employed' has been ass'gned the same meaning. Even in some of sub-sections of s. 80J the word 'computed' has been used in the same sense as involving both inclusion and exclusion. The point is not whether an exclusion is made by the Legislature or by the rule- making authority but whether such exclusion is implicit in the process of computation so as to be comprised in it. It is left by the legislature to the Central Board of Revenue to prescribe the manner in which the 'capital employed' shall be computed and in so prescribing, the Central Board of Revenue may include or exclude items which may be regarded as forming part of the 'capital employed.' [732B-H ; 733 A-C]

A B C D

7. When the Central Board of Revenue prescribes by making rule or rules what items shall be included and what items excluded in computation of the 'capital employed', what the Central Board of Revenue does is to prescribe the manner or mode of computation of the 'capital employed' by laying down as to how the 'capital employed shall be computed and that would be clearly within the rule-making authority conferred upon the Central Board of Revenue. Therefore, if the Central Board of Revenue makes rule or rules providing for exclusion of long term borrowings in computation of the 'capital employed', there can be no question of encroaching upon or remoulding the substance of the 'capital employed'. The conclusion must, therefore, inevitably follow that even if long term borrowings could be said to form part of 'capital employed'-and indeed they can in a given context form part of the 'capital employed'-it was competent to the Central Board of Revenue in exercise of its rule-making power to prescribe that in computing the 'capital employed', borrowed monies and debts shall be excluded. [736A-E]

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8. The Central Board of Revenue in making sub-rule (3) of Rule 19A was guided by earlier precedents in Excess Profits Taxr Act 1940, Business Profits Tax Act 1947, and Super Profits Tax Act, 1963 and made a similar provision excluding borrowed monies and debts in computation of the 'capital employed'. In the circumstances, it could not be said to have acted arbitrarily or whimsically or in an irrational or unusual manner in enacting sub-rule(3) of Rule 19A. [737C-D]

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Utah Construction v. *Pataky*, [1965]3 All England Reports 650 and *Sales Tax officer* v. *K.I. Abraham*, [1967] 3 SCR 518, relied upon.

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A 9. Once it is conceded that the Central Board of Revenue was within its authority in including certain categories of long term borrowings and excluding certain other categorien in computation of the 'capital employed' it must follow as a necessary corollary that the Central Board of Revenue equally without exceeding the authority conferred upon it, exclude all long term borrowings to whichever category they might belong. [731H; 732A]

B 10. In the instant case, so far as sub-s. (1) of s. 80J is concerned, interest payable on borrowed monies in deductible in computing the total income of the assessee and is not required to be added back and hence it is quite consistent with the practice adopted and recognised by the Legislature in these various statutes, to exclude long term borrowings in computation of the 'capital employed', for the purpose of allowing relief under sub-s. (1) of s. 80J. [739E-F]

C

11. Although the object of the Excess Profits Tax Act 1940, Business Profits Tax Act 1947, Super Profits Tax Act 1963 and the Companies (Profits) Sur Tax Act 1964 is different from sub-s. (1) of s. 80J in that the four statutes belonging to the former group seek to tax excess profits or super profits while the statutory provisions in the latter group seek to offer tax incentive by exempting a certain portion of profits, but so far as the D question of computation of the 'capital employed' is eoncerned there is no distinction between the above-mentioned four statutes on the one hand and sub-s. (1) of s. 80J on the other. [740E-F]

12. Though the object of the two sets of provisions is different, the concept of fair return on 'capital employed' lies at the base of both sets of provisions. If for the purpose of determining the excess profits liable t(the E charge of additional tax under any of the afore-mentioned four statutes, fair return is calculated on the owner's capital employed in the undertaking excluding the borrowed monies, there is nothing irrational or unusual in the Central Board of Revenue providing that for computing the fair return on the 'capital employed' which is to be exempted from from tax uhder sub-s. (1) of s. 80J, the owner's capital alone should be taken into account and borrowed monies should be excluded. [740G-H; 741A]

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13. It is obvious that the Central Board of Revenue intended—and having regard to the retrospective amendment of s. 80J by Finance Act (No. 2) of 1980, that must also be taken to be the intention of the Legislature—that the assessees should be given relief only with reference to their own capital and not with reference to any borrowed monies, presumably because the object of giving relief was to encourage assessees to bring out their own monies for starting new industrial undertakings and the G intention was not that the assessees should be given relief with reference to monies which did not belong to them but which were borrowed from financial institutions and other parties which would have to be repaid. [742D-E]

14. In the instant case, there is no question of excessive delegation of legislative power. The essential legislative policy of allowing relief of an assessee who starts a new industrial undertaking or business of a hotel and H declaring the period for which such relief shall be granted, is laid down by

the Legislature itself in the various sub-sections of s. 80J and all that is left to the Central Board of Revenue to prescribe is the manner of computation of 'capital employed' with reference to which the quantum of relief, which would depend on diverse factors, is to be calculated. This is clearly permissible without offending the inhibition against excessive delegation of legislative power. Section 80J enacts an exemption in a taxing statute and a certain margin of latitude is always allowed to the executive in working out the details of exemption in such a taxing statute. [742F-H; 743A]

Pt. Banarsi Dass Bhanot v. *State of Madhya Pradesh*, [1959] SCR 427; *Sitaram Bishambardas and Ors.* v. *State of U.P. and Ors.* [1972] 2 SCR 141 and *Hiralal Ratan Lal* v. *State of U.P. and Anr.*, [1973] 2 SCR 502, followed.

15. Under s. 296 of the Income Tax Act, 1961 every rule made under the Act is required to be laid before each House of Parliament. Parliament has thus not parted with its control over the rule-making authority and it exercises strict vigilance and control over the rule-making power exercised by the Central Board of Revenue. [745G]

Powell v. *Appollo Candle Company Limited*, [1885] 10 AC 282, & *G.S. Grewal* v. *State of Punjab* [1959] Suppl. 1 S.C.R. 792, relied upon.

16. When sub-s. (1) of s. 80J speaks of 'capital employed' in an industrial undertaking or business of a hotel, it does not refer to 'capital employed' during the previous year but it uses the expression 'capital employed' *in respect of the previous year*. There is a vital difference between the expression "during the previous year" and the expression "in connection with the previous year". The expression used in sub-s. (1) of s. 80J being "capital employed.....computed in the prescribed manner in respect of the previous year", the computation has to be in respect of the previous year and it need not take into account the averge amount of 'capital employed' during the previous year but it can legitimately take the first day of the previous year as the point of time at which the 'capital employed' must be computed. The 'capital employed go computed would clearly fall within the expression "capital employed.....computed in the prescribed manner in respect of the previous year". The description given in the parenthetical portion at the end of sub-s. (1) of s. 80J is merely a description given to the amount calculated as provided in the main part of sub-s. 80J and in the main part the words are "in respect of the previous year" and not "during the previous year". It was following upon the introduction of the words "in respect of the previous year" in sub-s. (1) of s. 80J that Rule 19A was made providing for computation of the 'capital employed' as on the first day of the computation period. Even if the words "in respect of the previous year" were absent, it would have been competent to the Central Board of Revenue as the rule making authority to provide for the computation of the 'capital employed' as on the first day of computation period, as was done by the Legislature in the case of the Companies (Profits) Sur Tax Act, 1964. The words "in respect of the previous year" are facilitative of the computation of the 'capital employed' being prescribed as on the first day of the computation period. Sub-rule (3) of Rule 19A

A is, therefore, a perfectly valid piece of subordinate legislation. [747G-H; 748A-H; 749A]

Per A.N. Sen, J, (Dissenting).

Rule 19A in so far as it seeks to exclude the borrowed capital and fixes the first day of the year for the computation of relief under s. 80J is B invalid and unconstitutional and the same has to be struck down and has been struck down rightly by the various High Courts. The impugned amendment of 1980 incorporating the provision of the invalid Rule 19A in the section itself, is valid in its prospective operation from the date of the amendment but is unconstitutional and invalid in so far as the said amendment is sought to be brought into operation retrospectively with effect from 1st April, 1972. [782H; 783A-B]

C *Century Enka Ltd.* v. *I.T.O.*, (1977) 107 ITR 123; *Madras Industrial Ltd.* v. *I.T.O.*, (1977) 110 ITR 256; *Kota Box Manufacturing Co.* v. *I.T.O.*, (1980) 123 ITR 638; *Ganesh Steel Industries* v. *I.T.O.* (1980), 126 ITR 258 and *Warner Hindustan Ltd.* v. *I.T.O*, (1982) 134 I.T.R. 158, approved.

Commissioner of Income Tax, M.P. II v. *Anand Bahri Steel and Wire* D *Products*, (1982) 133 I.T.R. 365, over ruled.

2. (1) In the instant cases, the words 'capital employed' have to be understood and interpreted in the context the said words have been used in s. 80J. It is quite clear from the text of s. 80J that the words 'capital employed' have been used in the context of the capital which has been employed in the undertaking for producing profits and gains of the under-taking in the relevant year. If borrowed capital is also employed in the E undertaking, capital employed necessarily and clearly includes such borrowed capital which has been employed in the undertaking and which has contributed to the profits and gains of the undertaking. Therefore, s. 80J in clear language postulates that capital employed in the undertaking includes own capital and also borrowed capital employed in the undertaking in the relevant year and the section plainly and unequivocally makes this intention of the Parliament manifestly clear. [759A-C]

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2. (ii) This interpretation not only makes perfect sense but also clearly promotes the object for which this section was incorporated. The object of s. 80J which indeed replaces the earlier s. 84 which came in place of s. 15C of the earlier Income-tax Act, is to give impetus and encouragement to the setting up of new industrial undertakings by offering tax incentives or tax reliefs on the capital employed in such undertakings. [759E-F]

G *Emperor* v. *Banwari Lal Sarma*, A.I.R. 1945 P.C. 48; *Kanti Lal Sur* v. *Paramnidhi Sadhukhan*, A.I.R. 1957 S.C. 907; *Textile Machinery Corporation* v. *Commissioner of Income-tax, West Bengal*, (1977) 107 I.T.R. 195 and *Rajagapalavan Mills Ltd.* v. *Commissioner of Income Tax, Madras*, (1976) 115 ITR 777; relied on.

3. Section 80J only enjoins that capital employed is to be computed H in the manner to be prescribed and the manner of computation of the capital employed only authorises the rule-making authority to deal with

he details regarding computation of capital employed for carrying cut the provisions of the section and the provision regarding the manner of computation does not empower or authorise the rule-making authority to lay-down which part of the capital employed or how much of it will have to be included or excluded and to what extent, if any. The question whether there should be any such exclusion or inclusion in the matter of consideration of the grant of relief, is essentially a matter of policy for the Legislature to decide and is not a matter for the rule-making authority to prescribe. The power of the rule-making authority in terms of the provisions of s. 295 of the Income Tax Act is limited to the framing of the Act. The rule-making authority does not have any power to encroach upon any substantive provisions in the statute. [760H; 761A-C]

4. In the section itself or in any other provisions of the Act it does not appear that there is any provision laying down any guideline which may entitle the rule-making authority to exclude any part of the capital employed, whether it is borrowed capital or own capital. There could not possibly be any such provision or guidline in the Act, as the section itself clearly provides that the entire amount of capital employed for earning the profits will qualify for the relief. If it be held that the rule-making authority enjoys power of excluding any part of the capital employed in the undertaking. It must necessarily be held that the rule-making authority enjoys the power of framing a rule contrary to the provision of the section. It must further be held that the rule-making authority at its discretion enjoys the power to exclude the whole or part of owner's capital and also the whole or part of the borrowed capital. This interpretation would mean that uncanalised power will be available with the rule-making authority which at its discretion and in the absence of any guideline will be entitled to exclude any or every part of the capital employed even to an extent of rendering the section itself nugatory. This will have the effect of justifying a delegation of power to the rule-making authority to an extent which cannot be permitted. The rule making authority does not enjoy any such power or jurisdiction. No such power or jurisdiction in the absence of specific provision and clear guideline in the Act could be delegated to the rule-making authority. [761G-H; 762A-D]

Sales Tax Officer v. K. S. *Abraham* [1967] 3 S.C.R. 518 and *Utah Construction & Engineering Pvt. and Anr. v. Paraky*, [1965] 3 All. E.R. 650 relied on.

5. Interest paid on borrowed capital by any undertaking, whether it is an undertaking within the meaning of s. 80J or not, is taken into account as business expenditure in calculating the profits and gains of any undertaking. It is the prescribed mode of calculating the profit and gains of every undertaking and in no special benefit for any undertaking; and undoubltedly it affords no incentive or special relief to a new undertaking which has necessarily to satisfy the required conditions laid down in s. 80J for being entitled to the relief intended to be granted to an undertaking which comes within the purview of s. 80J. [764A-D]

In the instant case, the exclusion of borrowed capital by the rule-making authority in the rules prescribed for computation of the relief under s. 80J is inconsistent with and derogatory to the provisions of the statute.

The said rule not only fails to carry out the purpose of the said section but in fact tends to defeat the same and the rule runs clearly contrary to the provisions of the statute. The rule excluding borrowed capital must, therefore, be held to be bad and invalid. [764F-G]

Century Enka Ltd. v. *I.T.O.*, (1977) 107 ITR 123; *Madras Industrial Linings Ltd.* v. *I.T.O.* (1977) 110 ITR 256 : *Kota Box Manufacturing Co.* v. *I.T.O.*, (1980) 123 ITR 638 ; *Ganesh Steel Industries* v. *I.T.O.* (1980) 126 ITR 258 *and Warner Hindustan Ltd.* vs. *I.T.O.* (1982) 134 ITR 158 approved.

Commissioner of Income Tax,. M.P. II v. *Anand Bahri Steel and Wire Products* (1982) 133 I.T.R. 365 ; explained and disapproved.

7. It is entirely for the Parliament to decide whether any relief by way of incentive should be allowed and if so to what extent and in what manner. There is no obligation on the part of the Parliament to make any provision for granting relief to promote new industries. The Legislature in its wisdom may decide to grant relief and may equally decide not to grant any relief. It is essentially for the Legislature to decide as to whether any incentive for promoting industrial growth of the country is called for and if the Legislature feels that in the situation prevailing in the country such incentive should be provided it will be again for the Legislature to decide what kind of incentive and in what form and to what extent the same should be provided and to pass appropriate legislation in this regard. The Parliament would have been legally competent to withdraw the entire relief under s. 80J and to abrogate the said section in its entirely, if the Parliament had considerd such withdrawal to be necessary. The Parliament is equally competent to increase or reduce the quantum of relief intended to be given under this section. In providing that relief intended under s. 80J would be allowed only to owner's own capital and to any borrowed capital, there can be no infringement of Art. 14. He enterprenuer or businessman can claim as a matter of right that relief by way of incentive should be provided to new undertakings to be set up by him. The Parliament provides for such relief in pursuance of a policy and policy may change from time to time in view of the situation prevailing from time to time. The Parliament may legitimately feel that borrowing by bu inessmen may not be sncouraged and persons should be encouraged to bring their own money for setting up new undertakings and Parliament may provide for appropriate relief by way of incentive to the owne's capital employed to the exclusion of borrowed capital in the setting up of any new industrial undertaking. It is not for this Court to sit in judgment over the wisdom of the Parliament in the framing of the its policy. The discr mination in the matter of granting relief to own capital to the exclusion of borrowed capital in pursuance of a policy cannot be said to be violative of Art. 14, as the two classes of capital, though forming a part of the total capital of the undertaking, are distinct and they stand on a different footing. A classification between these two classes of capital for encouraging investment of own capital in setting up new industrial undertaking, cannot be held to be unreasonable and unjustified. [769H; 770A-G]

8. The mere existence of an invalid rule without any challenge for any length of time does not effect the question of validity of the rule and cannot render a rule otherwise invalid to be valid only on the ground that the rule had remained in existence without any challenge for a number of years.[765F]

A *Proprietary Articles Trade Associatian* v. *Attorney General for Canada*, [1931] A.C. 310 ; *Campbell College Belfast (Governors)* v. *Commissioner of Valuation for Northern Ireland* [1964] 1 W.L.R. 912 ; and *Kerala State Electricity Board* v. *Indian Aluminium Ltd.*, [1976] 1 S.C.R. 552; relied on.

9. The other impugned provision of the rule, presribing that capital employed should be computed on the basis of the capital employed on the first day of the year, must on the proper construction of the section be also B held to be invalid. The section clearly provides that the deduction to be allowed is to be computed in the prescribed manner in respect of the previous year relevant to the assessment year. The deduction to be allowed is on the profits and gains of the undertaking earned in the relevant year in respect of the previous year relevant to the assessment year. Profits and gains which are to be taken into account are the profits and gains earned in the relevant year and the year must necersarily mean and include the whole C of the year and not some days or months of the year. The capital employed for earning the profits and gains during the whole year must necessarily be the capital which is entitled to the benefit of the section. Capital employed on the 1st day of the year does not produce the profits of the entire relevant year, unless the very same amount of capital remains employed throughout the year. It does not usually happen and in any event it may not happen. Therefore, by prescribing the 1st day of the year to be date of computation of the capital employed, the capital employed during the whole year is D sought to be denied by the rule the benefit to which it is entitled under the section. This provision, therefore, is clearly contrary to and inconsistent with the specific provision of the statute, as by fixing the 1st day of the year to be the date of computation of the capital employed for the year, the rule-making authority is seeking to deny the benefit conferred by the statute. [767D-G]

10. The power and competence of the Parliament to amend any statutory provision with retrospective effect cannot be doubted. Any retrospective amendment to be valid must, however, be reasonable and not arbitrary and must not be violative of any of the fundamental rights guaranteed under the Constitution. The mere fact that any statutory provision has been amended with retrospective effect does not by itself make the amendment unreasonable. Unreasonableness or arbitrariness of any such amendment with retrospective effect has necessarily to be judged on the merits of F the amendment in the light of the facts and circumstances under which such amendment is made. In considering the question as to whether the legislative power to amend a provision with retrospective operation has been reasonably exercised or not, it becomes relevant to enquire as to how the retrospective effect of the amendment operates. [776H ; 777A-C]

11. A Valdidating Act validating any fiscal provision with retrospective operation is usually held not to be unreasonable or arbitrary. In G the case of any Validating Act, the intention of the Legislature is generally made sufficiently clear in the section or in the Act which is declared invalid on account of some flaw or defect which is within the competence of the Parliament to rectify. There is in effect and substance no imposition of any new tax for the earlier years by virtue of retrospective operation and the retrospective operation merely validates the levy already imposed and possibly collected. This is done in public interest for properly regulating

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the fiscal structure and to relieve the Government of any financial burden by way of refund or taxes collected for enabling the State to implement its budget. Validating Acts stand on different footing. [778A-C] A

12. By the present amendment the Parliament is seeking to validate not any provision of the statute declared invalid because of any flaw or defect, as there was none, but is seeking to validate an invalid rule which had sought to deprive the assessee of the benefit which the Parliament had clearly bestowed on the assessee by the section. [781G] B

13. The withdrawal with retrospective effect by amendment of any financial benefit or relief granted by a fiscal statute must ordinarily be held to be unreasonable and arbitrary. Such withdrawal makes a mockery of a beneficial statutory provision and leads to chaos and confusion. Such withdrawal in effect results in the imposition of a levy at a future date for past years for which there was no such levy in the relevant years. The imposition of any fresh tax with retrospective effect for years for which there was no such levy is bound to operate unduly harshly on every assessee who is entitled to arrange and normally arranges his financial affairs on the basis of the law as it exists. Such retrospective taxation imposes an unjust and unwarranted accumulated burden on the assessee for no fault on his part and the assessee has to face unnecessarily without any just reason very serious financial and other problems. Imposition of any tax with retrospective effect for years for which no such tax was there, cannot also be considered to be just and reasonable from the point of view of revenue. The years for which levy is sought to be imposed with retrospective effect had already passed and there cannot be any proper justification for imposition of any fresh tax for those years. Such retrospective taxation is likely to disturb and unsettle the settled position ; and because of such imposition of retrospective levy for the years for which there was no such levy, assessments for those years which might already have been completed and concluded will get upset. If the State is in need of more funds, the State instead of seeking to levy any tax with retrospective effect can always take appropriate steps to collect any larger amount so required by imposition of higher taxes or by other appropriate methods. [781H ; 782A-E] C D

Epari Chinna Krishna Moorthy, proprietor Epari Chinna Moorthy and Sons, Berhampur, Orissa v. *State of Orissa*, [1964] 7 S.C.R. 185 ; *Rai Ram Krishna & Ors*, v. *State of Bihar* [1964] 1 S.C.R, 897 ; *Jawaharlal* v. *State of Rajasthan & Ors*, [1966] 1 S.C.R. 890 ; *Assistant Commissioner of Urban Land Tax* v. *The Buckingham & Carnatic Co. Ltd.*, [1970] 1 S.C.R. 268 ; *M/s Krishnamurthi & Co. Etc.* v. *State of Madras & Anr.*, [1973] 2 S.C.R. 54 and *Hira Lal Rattan Lal etc. etc.* v. *State of A.P. & Anr, etc. etc.*, [1973] 2 S.C.R 502 and *State of Gujarat* v. *Ramanalal Kashake Lal Soni*, [1983] 2 S.C.C. 33. E

14. To establish arbitrariness or unreasonableness it is not necessary to prove that the undertaking of the assessee will be completely crippled and will have to be closed down in consequence of the withdrawal of the relief with retrospective effect. The operation of the retrospective amendment is bound to have reasonable possibility of the business of the assessee being adversely affected and seriously prejudiced. In the absence of any justifiable ground and any serious prejudice to the interest of Revenue, retrospective amendment establishes unreasonableness and arbitrariness. The retrospective amendment, therefore, is violative of Art. 19(1)(g) of the Constitution. [781C-D] F G

15. There is no reason as to why there should be any difficulty in computing the relief and in proceeding to complete the assessment by granting the relief legally available to assessee under s. 80J even after the invalid part of the rule had been struck down. Parliament had also not considered it necessary to effect this amendment earlier inspite of the decisions of the High Courts, although the Parliament had introduced other amendments into this section. [781G-H] H

ORIGINAL JURISDICTION : Writ Petition Nos. 4509, 4542-43 etc. of 1980 (Under Article 32 of the Constitution of India)

N.A. Palkhivala, B.K. Mohanti, Ram Panjwani, T.A. Ramachandran, D. Pal, A.K. Sen, M.M. Abdul Khader and G.C. Sharma, Dinesh Vyas. T.M. Munim, S.P. Metha, Ramesh Divan, Srinivasmurthi, Harish N. Salve, Homi Raina, J.B. Dadachanji, Ravinder Narain, O.C. Mathur, Mrs. A.K. Verma T.M. Ansari, Miss Rainu Walia, D.N. Mishra, S. Sukmaran, P.K. Ram, H.M. Ditia, Aditya Narain, Ashok Sagar, Vijay Panjwani, Raj Panjwani, S.K. Bagga, H.K. Puri, C.S.S. Rao, Lalit Kumar Gupta, Subhash Dutta, Vimal Dave Mrs. Janaki Ramachandran, P.H. Parekh, Ashok K. Gupta A.V. Rangam M.K. Gark, Dalveer Bhandari, B. Parthasarthi, Praveeen Kumar, Anil Kumar Sharma, Ashok Mathur, R.P. Garg, S.K. Bansal, P.K. Mukherjee, Dr. V. Gouri Shanker, K.L. Hathi, Manoj Arora, D.K. Chhaya, Mrs. Hemantike Wahi, N. Sudhakaran, K.N. Bhatt, V.K. Verma, M. L. Lahoty, Hrishikesh Roy, Nassem Ahmed, S.K. Jain, M.M. Kshatriya, M. Seal. D.N. Gupta, H.P. Ranian, A.B. Rohtagi : C.S. Aggarwal, B.V. Desai, M.L. Verma, M.R K. Pillai, B.D. Sharma, Kailash Vasdev, O.P. Vaish, Santosh K. Aggarwal, P.K. Bhindria, A,K. Sanghi, Ravinder Bana, Miss Meera Bhatia, S.K. Dholakia, V.H. Garpule, S.K. Gambhir, S C. Patel, Sarwa Mitter, K.H. Kaji, M.N. Shroff, M.C. Dhingra, T.P. Sundrajan, B.B. Tawkley, K.K. Jain, S.K. Gupta, P. Dayal, A.D. Sanger : Anoop Sharma, R.S. Sharma, Lalit Bhasin, Rankesh Sahni, Vineet Kumar, Miss Arshi Singh, A. Subba Rao B.R. Aggarwala, R.C. Pandey, Miss V. Menon, Santosh Chatterjee, Altaf Ahmad and A.K. Panda, for the appearing Petitioners.

K. Parasaran, Attorney General and *Miss A. Subhashini* for the Respondents.

The following Judgments were delivered

BHAGWATI, J. These writ petitions raise an interesting question of law relating to the interpretation of Section 80 J of the Income Tax Act, 1961, and on the basis of certain interpretation, they challenge the validity of Rule 19A of the Income Tax Rules, 1962 and also call in question the constitutionality of the retrospective amendment made in Section 80 J. by Finance (No. 2) Act, 1980. The questions arising in these writ petitions are of considerable importance since they involve revenue aggregating to crores of rupees and they have been argued at great length on both sides.

A The principal controversy between the parties turns on the true interpretation of Section 80 J. of the Income Tax Act, 1961 and hence we may begin our discussion of the issues arising in the writ petitions by examining the language of that Section. But before we do so, we may usefully refer to the genesis of the provision enacted in Section 80 J. and the transformation it has undergone from time to time over the years. It is in fact necessary to trace the historical evolution of this provision in order to arrive at its true interpretation for, as observed by Cardozo, J. in *Duparquet Hual* v. *Evans*(1) in questions relating to construction, "history is a teacher that is not to be ignored." The first time that a provision of this kind was introduced in the Indian Income Tax Act, 1922 was by the Taxation Laws (Amendment) Ordinance 1949 when Section 15C was added in that Act with effect from 31st March 1949. Sub-section (1) of Section 15C exempted a part of the profits and gains of a new industrial undertaking from tax and this provision as originally enacted was in the following terms ;

> "15C (1) Same 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 to which this section applies as do not exceed six per cent. per annum on the capital employed in the undertaking, computed in accordance with such rules as may be made in this behalf by the Central Board of Revenue."

The Central Board of Revenue in exercise of the powers conferred under sub-section (1) of Section 59 of the Indian Income Tax Act 1922 issued a Notification dated 15th October 1949 making the Indian Income Tax (Computation of Capital of Industrial Undertakings) Rules 1949 for computation of capital employed in the industrial undertaking as envisaged in sub-section (1) of Section 15C. Rule 3 of these Rules in so far as material provided *inter alia* as follows :

> "Rule 3 (1) For the purpose of Section 15C of the Act, the capital employed in an undertaking to which the said section applies shall be taken to be—
>
> (a) in the case of assets acquired by purchase and entitled to depreciation—

(1) 297 US 216

(i) if they have been acquired before the computation period, the written-down value on the commencing date of the said period ;

(ii) if they have been acquired on or after the commencing date of the computation period, their average cost during the said period ;

(b) in the case of assets acquired by purchase and not entitled to depreciation—

(i) If they have been acquired before the computation period, their actual cost to the assessee ;

(ii) if they have been acquired on or after the commencing date of the computation period, their average cost during the said period ;

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

(d) in the case of any other assets the value of the assets when they became assets of the business provided that if any such asset has been acquired within the computation period, only the average of such value shall be taken in the same manner as average cost is to be computed.

(2) Where the price of any assets has been satisfied otherwise than in cash, the then value of the consideration actually given for the asset shall be treated as the price at which the asset was acquired.

(3) Any borrowed money and debt due by the person carrying on the business shall be deducted and in particular there shall be deducted any debts incurred in respect of the business for income-tax and super-tax or business profits tax or for advance payments due under any provision of the Indian Income Tax Act, 1922, or for any sum payable in relation to business profits tax under section 13 of the Business Profits Tax Act, 1947 (XXI of 1947) :"

The process of computation of "capital employed in the undertaking" according to this Rule consisted of two steps ; one of addition of the value of assets of the industrial undertaking arrived at on the basis of different formulae according to the nature and the date of purchase of the assets and the other, of deduction of "any borrowed money and debt due by the person carrying on the business".

A The significant point is that borrowed monies and debts due from the assessee were excluded in computation of "capital employed in the undertaking" by reason of sub-rule (3) of this Rule.

The Taxation Laws (Amendment) Ordinance 1949 was replaced
B by the Taxation Laws (Extension to Merged States and Amendment) Act 1949 which came into force on 31st December 1949 and by Section 13 of this Act, Section 15 C was continued and though some minor modifications were made, sub-section (1) which granted the exemption remained unchanged. Sub-sections (2), (4) and (6) suffered some minor changes and, as reenacted, these sub-sections read as
C follows :

" (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
D new business of building, machinery or plant used in a business which was being carried on before the 1st day of April, 1948 ;

(ii) has begun or begins to manufacture or produce articles in any Province in India at any time within a period of
E three years from the 1st day of April, 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 more than fifty persons ; and

(iv) involves the use of electrical energy or any other form of energy which is mechanically transmitted and is not directly generated by human agency :

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

(5) The provisions of this section shall apply to the assessments for the years commencing on the 1st day of April, 1949, and ending on the 31st day of March,
H 1954."

It is significant to note that though the Indian Income Tax (Computation of Capital of Industrial Undertakings) Rules 1949 provided for exclusion for borrowed monies and debts due from the assessee in computing the capital employed in the undertaking, the Legislature, when it reenacted Section 15C by Section 13 of the Taxation Laws (Extension to Merged States and Amendment) Act 1949 did not choose to make any change in this position but continued the same Rules under sub-section (2) of Section 34 the Taxation Laws (Extension to Merged States and Amendment) Act 1949. The Legislature thus gave its approval to exclusion of borrowed monies and debts in computation of capital employed in the undertaking and also made it clear that the word 'computed' has been used by it in this context in the sense of involving inclusion as well as exclusion of items which might be regarded as part of the capital employed in the undertaking.

Thereafter from time to time changes were made in Section 15C by various Finance Acts but these changes were not substantial of and they merely extended from time to time the period of production for eligibility from initial 3 years to 18 years by suitable amendments in clause (ii) of sub-section (2) and brought the business of hotel also within the purview of the exemption and laid down the conditions for grant of such exemption. We are not concerned with these changes so far as the present writ petitions are concerned and hence we need not refer to them in detail. Suffice it to state that the basic structure of Section 15C remained the same and so did the Indian Income Tax (Computation of Capital of Industrial Undertaking) Rules 1949. The result was that throughout the period from 31st March 1949 when Section 15C was introduced in the Indian Income Tax Act 1922 upto the time that the Indian Income Tax Act 1922 remained in force, borrowed monies and debts due from the assessee were excluded in computing the capital employed in the undertaking for the purpose of determining the quantum of the exemption eligible under Section 15C.

Then came the Income Tax Act 1961 which repealed the Indian Income Tax Act 1922. Section 15C of the Indian Income Tax Act 1922 was recast as Section 84 in the Income Tax Act 1961. Sub-section (1) of Section 84 granted the same exemption in respect of a portion of the profits and gains derived from any industrial undertaking or hotel to which that Section applied as did sub-section (1) of Section 15C but a slight change was made namely, that the profits or gains eligible for exemption were now to be calculated at "six per

A cent per annum on the capital employed in the undertaking or hotel computed in the *prescribed manner*" (underlining is ours). The word 'prescribed' according to the definition in sub-section (33) of Section 2 meant prescribed by Rules made under the Act and in exercise of the powers conferred under Section 295, the Central Board of Revenue made the Income Tax Rules 1962 which contained *inter alia* Rule 19 prescribing as to how the capital employed in an undertaking or a hotel shall be computed for the purposes of Section 84. Sub-rules (1), (3) and (6) of Rule 19 read *inter alia* as follows :

"19 (1) For the purpose of section 84, the capital employed in an undertaking or a hotel to which the said section applies shall be taken to be—

(a) in the case of assets acquired by purchase and entitled to depreciation—

(i) if they have been acquired before the computation period, their written down value on the commencing date of the said period ;

(ii) if they have been acquired on or after the commencing date of the computation period, their average cost during the said period ;

(b) in the case of assets acquired by purchase and not entitled to depreciation—

(i) if they have been acquired before the computation period, their actual cost to the assessee ;

(ii) if they have been acquired on or after the commencing date of the computation period, their average cost during the said period ;

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

(d) in the case of any other assets, the value of the assets when they became assets of the business :

Provided that if any such asset has been acquired within the computation period, only the average of such value shall be taken in the same manner as average cost is to be computed.

(3) Any borrowed money and debt due by the person carrying on the business shall be deducted and in particular there shall be deducted any debts incurred in respect

of the business for tax (including advance tax) due under any provision of Act:

(6) In this rule—

(i) "average cost" in relation to any asset means such proportion of the actual cost thereof ast he number of days of the computation period during which such asset is used in the business bears to the total number of the days comprised in the said period ;

(ii) "computation period" means the period for which the profits and gains of the undertaking or hotal are computed under sections 28 to 43A;

(iii) "depreciation" means the allowance admissible under clause (i) or clause (ii) or clause (iv) of sub-section (1) of section 32;

(iv) "written-down-value" means the written-down-value computed under sub-section (6) of section 43 as if for the words "previousy ear" the words "computation period" were substituted."

Theere were also several other changes made in Section 15C of the Indian Income Tax Act 1922 while recasting it as section 84 but thees changes are not material for the purpose of the present writ petitions and they need not therefore detain us.

It will thus be seen that even under Section 84 of the Income Tax Act 1961 the same position prevailed as before in regard to exclusion of borrowed monies and debts in computing regard to exclusion of borrowed monies and debts in computing the capital employed in an undertaking or a hotel for the purpose of determining the quantum of exempted profits under that Section. This position continued un-interrupted until Section 84 was replaced by Section 80J with effect from 1st April 1968 by Finance (No 2) Act 1967. Sub-section (1) of Section 80J brought about a material change in the provision as it stood in sub-section (1) of Section 84. We shall have occasion to examine the implications of this change when we deal with the arguments advanced on behalf of the parties, but for the time being it would be sufficient if we indicate this change by reproducing sub-section (1) of Section 80J as under :

"80 (J) (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 from 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 under Section 80H and Section 80-1) 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.'

It may be noticed that under sub-section (1) of Section 80J the benefit of the exemption was extended additionally to profits derived from a ship and so far as the quantum of exemption wos concerned. the formula adopted for calculating it was "six per cent per annum on the capital employed in the industrial undertaking or ship or business of the hotal as the case may be. computed in the prescribed manner in respect of the previous year reievant to the assessment year". The new words introduced were "in respect of the previous year relevant to the assessment year" Sub-section (2) of Section 80J said down the period for which the exemption shall be allowable and sub-section (3) provided that any deficiency in the benefit of the exemption arissing on account of the profits and gains being less than the relevant amount of capital employed during the previous year shall be cgrried forward and allowed as a straight deduction in computing the total income of the assessee for the subsequent years subject to the proviso that in no case shall the neficiency or any part thereof be carried forward beyond the seventh assessment year as reckoned from the end of the initial assessment year. Sub-section (4) enacted certain conditions which must be fulfiled before an industrial undertaking could qualify for the benefit of me exemption and once of the benefit the conditions was that the industrial undertaking should not have been formed "by the transfer to a new business of a building machinery or plant previously used for any purpose." But sub-section (6) provided by way of an exception that where in the case of an industrial undertaking, any building, machinery or platn or any part thereof previously used for any purpose is transferred to a new business and the total value of the building, machinery or plant

or part so transferred does not exceed 20% of the total value of the building, machinery or plant used in the business, then the condition set out in sub-section (4) 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 uudertaking, So far as the applicability of Section 80J to profits derived from a ship was concerned, sub-section (5) laid down several conditions which were required to be fulfilled before the benefit of the exemption could be made available in case of profits derived from the ship.

Since the profits derived from an industrial undertaking or a ship or the bnsiness of a hotel were eligible for exemption only to the extent of 6% per annum of the capital employed in the industrial undertaking or ship or business of a hotel computed in the prescribed manner in respect of the previous year reievant to the assessment year, the Central Board or Revenue made Rule 19A prescribing the manner in which the capital employed in the industrial undertaking, ship or business of the hotel should be computed for the purpose of Section 80J Rule 19A made material alterations in the texture of Rule 19 and since a considerable part of the controversy between the parties has turned on the validity of this Rule, it would be desirable to set out its releaant portions in extenso :

"19.A. Computation of capital employed in an industrial undertaking or a ship or the business of a hotel for the purposes of section 80J—

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

( ) 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 acutal cost to the assessee ;

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(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 B 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.

(3) From the aggregate of the amounts as ascertained C 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 due by the assessee (including amounts due towards any liability in respect of tax), not being—

D (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 agreeE ment 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 F 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 G the State Financial Corporations Act, 1951 (LXIII of 1951) ;

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

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

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

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

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(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.

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

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Two changes immediately become noticeable. One is that where as under the Indian Income Tax (Computation of Capital of Industrial Undertakings Rules 1949 and Rule 19, the average costs of assets acquired by purchase on or after the commencing date of the computation period was required to be taken into account in computation the capital employed in the industrial undertaking or hotel, a deliberate departure was made from this formula and under Rule 19A, assets acquired on or after the commencement of the computation period were to be left-out of account and only the amounts representing the value of the assets as on the first day of the computation period were to enter into the computation of the capital employed in the industrial undertaking or the business of a hotel. The other change made was that though under the Indian Income Tax (Computation of Capital of Industrial Undertakings) Rules 1949 and Rule 19, all borrowed monies and debts due from the assessee were required to be deducted in computing the 'capital employed' in the industrial undertaking or a hotel a certain amount of liberalisation was introduced under Rule 19A, providing that "monies borrowed from an approved source for the creation of a capital asset in India, if the agreement under which such monies are borrowed provides for the repayment thereof during a period of not less than seven years" shall not be liable to be deducted but shall be taken into account in computing or the business of a hotel for the purpose of Section 80J. The result was that from and after Ist April

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A 1968, when Rule 19A came into force, borrowings from an approved source repayable in not less than seven years started for the first time to be taken into account in computation of the capital employed in the industrial undertaking or the business of a hotel, through other categories of borrowed monies and debts due from the assesseee continued to remain excluded from such computation. These two changes appear to have been made in view of the Interim Report on Rationalisation and Simplification of Direct Taxation Laws by Shri S. Bhoothalingam, where a recommendation was made that instead of the formula which was being followed upto 31st March, 1968, it would be desirable to simplify the procedure for computation of capital "by basing it on owned capital and long term borrowings as at the beginning of the year, ignoring the fresh introduction of capital in the course of the year."

This state of affairs continued until Ist April 1971 when the Finance (No. 2) Act 1971 came into force. While introducing the Bill which ultimately culminated in the Finance (No. 2) Act 1971, the Finance Minister made a policy statement on the floor of the House in the following terms :

> "At present, in the case of new industrial undertakings, ships and approved hotels, profits upto 6 per cent of the capital employed are entitled to tax exemption for a period of five years. Since debentures and long-term borrowings do not in any manner represent risk capital and interest thereon is in any case deducted, it was generosity on the part of the Government to extend the tax holiday provision even to such constituents of capital. I now propose that in calculating the limit of 6 per cent of the capital for purposes of tax-exemption, debentures and long-term borrowings will be excluded.
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> This single measure will provide the exchequer with Rs. 10 crores during the current year ; the yield for a full year will be of the order of Rs. 14 crores."

This policy statement was implemented by the Central Board of Revenue by amending Sub-Rule (3) of Rule 19A so that after the amendment Sub-Rule (3) read as follows :

> "(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."

The consequence of this amendment was that the position as it prevailed prior to the enactment of Rule 19A was again restored and all borrowed moneys and debts due by the assessee as on the first day of the computation period became deductible in computing the capital employed in the industrial undertaking or the business of a hotel for the purpose of Section 80J. This amendment came into force with effect from Ist April, 1972.

But a serious controversy was sparked off by this amendment of Rule 19A. Though right from 1st April 1949 upto 31st March 1968, for a period of almost 19 years, all borrowed monies and debts owed by the assessee were excluded in computing the capital employed in the industrial undertaking or the business of a hotel, no challenge was preferred against the validity of the Indian Income Tax (Computation of Capital of Industrial Undertakings) Rules, 1949 and Rule 19 which provided for such exclusion and no assessee disputed the computation of the capital employed in the industrial undertaking or the business of a hotel made on the basis of such exclusion. It was only when the liberalisation made under Rule 19A by inclusion of long term borrowings (repayable in not less than seven years) in computation of the capital employed which liberalisation was introduced from 1st April 1968—was withdrawn with effect from 1st April 1972 that some assessees raised a contention for the first time that on a true construction of sub-section (1) of Section 80 J, the capital employed in the industrial undertaking or the business of a hotel would include long term borrowings since according to plain natural construction of the words used, they were part of the 'capital employed' and Rule 19A sub-rule (3) in so far as it excluded long term borrowings from the computation of the capital employed was, therefore ultra vires sub-section (1) of Sec. 80J and despite sub-rule (3) of Rule 19A, long term borrowings were liable to be taken into account in computing the 'capital employed' in the industrial undertaking or the business of a hotel. This contention was raised for the first time before the Bombay Bench of the Income Tax Appellate Tribunal in M/*s. Alim Chand Topan Das* v. *I.T.O.* and the Bombay Bench of the Tribunal by an order dated 24th July 1973 accepted this contention and held that sub-rule (3) of Rule 19A was in conflict with sub-section (1) of Section 80J and hence it was liable to be ignored in computing the capital employed in the industrial undertaking or the business of a hotel. This decision was however, reconsidered by a

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Special Bench of the Tribunal in *M/s. Emco Transformers Limiied* v. *I,T.O* and the Special Bench by an order dated 26th September 1974 over-ruled this decision and held that there was no conflict at all between sub-rule (3) of Rule 19A and sub-section (1) of Section 80J and all borrowings including long term borrowings owing from the B assessee were liable to be excluded in computing the capital employed in the Industrial undertaking or the business of a hotel. However, soon thereafter, the Calcutta High Court held in *Century Enca Limited* v. *I.TO.*, 107 ITR 123 that sub-rule (3) of Rule 19A in so far as it directed exclusion of borrowed capital except from an approC ved source (this was obviously a case governed by the unamended Rule 19A) was ultra vires sub-section (1) of Section 80J and long term borowings from any source being part of capital employed were liable to be taken into account in computing the capital employed in the industrial undertaking or the business of a hotel. The same view was taken by the Madras High Court in Madras Industrial Linings Limited v. I.T.O. 110 ITR 256 and the Allahabad High Court also D in three decisions namely *CIT* v. *U.P.Hotel and Restaurant Limited* 123 ITR 626, *Kota Box Manufacturing Company* v. *I. T. O* v. 123 ITR 63: and *Rampur Distillery and Chemical Limited v. CIT 140* ITR 725 adopted the same view. The same view also prevailed with the Punjab and Haryana High Court in *Ganesh Steel Industries* v. *I.T.O.* 126 ITR 258 and the Andhra Pradesh High Court in Warner *Hindustan Limited* v. *I.T.O.* 134 ITR 158. The Madhya Pradesh E High Court however took a different view and held that sub-rule (3) of Rule 19A was not in conflict with sub-section (1) of Section 80J and all borrowings including long term borrowings were liable to be excluded in computing the capital employed in the industrial undertaking or the business of a hotel. Vide *cts CIT* v. *Anand Bihari Steel and Wire Products* 133 ITR 365 and *CIT* v. *K.N. Oil Industries* F 134 ITR 651. The controversy in regard to the exclusion of long term borrowings thus gave rise to a conflict of opinion amongst the different High Courts. There was also another provision in Rule 19A in respect of which fault was found by some of the High Courts and that was the provision which required that the 'capital employed' should be computed as on the first day of the computation period. The Calcutta High Court in *Century Enca Limited* v. *I.T.O.* ITR 909 took G the view that what Section 80J Sub-section (1) required was computation of capital in respect of the previous year and not as on the first day of the previous year and therefore Rule 19A, in so far as it provided that the computation of capital should be made as on the first H day of computation period, was ultra vires sub-section (1) of Section

80J. This view was also adopted by one or two other High Courts. Since some High Courts took the view that Rule 19A was ultra vires sub-section (1) of Section 80J in so far as it provided for exclusion of long term borrowings and computation of the 'capital employed' to be made as on the first day of the computation period and in the opinion of the Government, this view was erroneous and did not correctly reflect the intention of Parliament as evinced clearly by the legislative history of this provision, Parliament, with a view to avoiding confusion and uncertainty which would prevail in the state of the law until a final pronouncement was made on these two issues by the Supreme Court, introduced an amendment in Section 80J by the Finance (No 2) Act, 1980 While moving the Finance (No. 2) Bill 1980, the Finance Minister said in the course of his speech in the Rajya Sabha on 24th July, 1980 ;

> "I have received many representations on the amendment proposed to be made in section 80J of the Income-tax Act with effect from the 1st April, 1972... ..The capital employed for this purpose is calculated in accordance with the provisions made in the Income-tax Rules and excludes borrowed capital. Some High Courts have taken the view that the provision in the rule is ultra vires the provision in Section 80J and that borrowed capital should also be included in capital base for the purpose of computing the tax holiday profits. The Bill seeks to transfer the provision of the rule to section 80J retrospectively from 1st April, 1972. In several representations, it has been urged that the proposed change should not be made retrospectively. In my reply to the General Debate on the Budget, I had explained that the provision in the Bill seeks merely to give effect to the manifest intention of Parliament. I have again given anxious thought to this question and I am convinced that both on considerations of law and equity there is absolutely no case for modification of the provisions in the Bill. Section 80J specifically provides that the capital employed will be computed for the purpose of determining the tax holiday profits in accordance with the rules and the rules clearly lay down that the borrowed capital will be excluded from the capital base for this purpose. Tax holiday provisions have been on the statute book in one form or the other right from 1949. Up till 1968, the basis for calculating the capital

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employed in an industrial undertaking was set out in the rules which provided for exclusion of borrowed capital for the purpose and this position was never doubted. Although in 1968, the rules were amended to provide for the inclusion of certain specified long-term borrowings in the capital base, *status quo ante* was restored with effect from 1-4-1972. As I have already stated in the House, the then Finance Minister
B Shri Y.B. Chavan, had, in his Budget speech for the year 1971-72, unequivocally stated that he proposed to exclude the borrowed capital from the capital base for the purpose of determining the tax holiday profits. It is thus obvious that the intention has always been that borrowed capital should not form part of the capital employed for the purpose of determining the tax holiday profits. I am, therefore satisfied
C that no change in this regard is called for."

The Finance Bill (No. 2) of 1980 ultimately culminated in the Finance (No. 2) Act 1980 and by this Act, Section 80J was amended and sub-section (1A) was introduced with retrospective effect from 1st April, 1972. The newly introduced sub-section (1A) was in the same terms as Rule 19A, so that the manner of computation of the
D 'capital employed' in an industrial undertaking or the business of a hotel or a ship remained the same but it was now set out in sub-section (1A) instead of Rule 19A. The words "computed in the prescribed manner" which occurred in sub-section (1) of Section 80J were also substituted by the words "computed in the manner specified in sub-section (1A)" with retrospective effect from the
E same date, namely, 1st April 1972.

Mr Palkkiwala, learned advocate appearing on behalf of the petitioners in some of the Writ Petitions pointed out that the expression "capital employed.....in respect of the previous year" has two dimensions, namely, dimension of quantum and
F dimension of time. So far as regards the dimension of quantum, Mr. Palkhiwala urged that the expression "capital employed" in its legal as well as in its popular of commercial sense must, in any view of the matter, include long term borrowings and working capital and on a fair and liberal view, it would also include short term
G borrowings but he was content with submitting that in any event long term borrowings must be held to be included in the "capital employed". He pointed out that under the Companies Act 1956 a loan repayable after one year or more from the date of the balance
H sheet would be a long term loan and it must be held to be part of

the 'capital employed'. He also contended that even assuming there was any ambiguity in the expression 'capital employed' it must necessarily include long term borrowings in the context of Section 80J because Parliament could not have possibly intended to favour affluent assessees who are able to employ their own capital and to discriminate against indingent assessees who have to borrow funds to finance their undertakings. It was also urged by Mr. Palkhiwala in regard to the dimension of time, that the concept of 'capital employed' during or in respect of the previous year is a concept which must compel attention to the reality of the funds used during the whole year and not merely on any one single day such as the first day of the computation period. The argument of Mr. Palkhiwala based on this premise was that Rule 19A was ultra vires sub-section (1) of Section 80J to the extent that it prescribed a mode of computation of the 'capital employed' in terms that excluded all borrowed capital and also provided for computation of the 'capital employed' only on the first day of computation peiod and ignored all additional capital employed during the rest of the computation period. Rule 19A, contended Mr. Palkhiwala, was invalid in these two respects, since it derogated from the full operative effect of the provisions of Section 80J and arbitrarily abridged the scope of the exemption under that Section by excluding what was clearly part of the 'capital employed' and ignoring the 'capital employed' throughout the computation period except on the first day. The conclusion pressed by Mr. Palkhiwala on the basis of this argument was that long term borrowings were, in any event, liable to be taken into account in computing the 'capital employed' and such computation could not be made as on the first day of the computation period but was required to take into account additional capital which might be employed during the computation period. So far as the amended sub-section (1A) introduced in Section 80J was concerned, Mr. Palkhiwala submitted that this amendment made with retrospective effect from 1st April 1972 was unconstitutional. as being violative of Articles 14 and 19(1)(g) of the Constitution. We need not set out here the specific grounds on which the amended sub-section (1A) was assailed by Mr. Palkhiwala as offending Articles 14 and 19(1)(g), since on the view we are taking in regard to the validity of Rule 19A, it is not necessary for as to examine these grounds urged by Mr. Palkhiwala.

The learned counsel appearing on behalf of the petitioners in the other Writ Petitions re-iterated the same grounds with only this

A difference that according to Dr. Devi Pal, learned counsel appearing on behalf of the petitioners in one of the Writ petitions, the 'capital employed' would include not only long-term borrowings as submitted by Mr. Palkhiwala but also short term borrowings so that all borrowed monies and not just long term borrowings were liable to be taken B into account in computing the 'capital employed'. Dr. Gauri Shankar appearing on behalf of the petitioners in writ petition No. 6188 of 1980 also submitted a separate set of written arguments on the same lines and supported the main theseis of Mr. Palkhiwala.

C These arguments advanced on behalf of the petitioners were sought to be refuted by the learned Attorney General appearing on behalf of the respondents. The learned Attorney General contended that the expression 'capital employed' was neither a term of art nor an expression with a definite fixed connotation and it meant different things in different contexts. It did not necessarily include long-term D borrowings and sub-rule (3) of Rule 19A excluding long-term borrowings from the computation of the, capital employed' could not therefore be said to be in conflict with sub-section (1) of Section 80J. It was also urged by the learned Attorney General in the alternative that, in any event, for calculating the relief under sub-section (1) of Section 80J, the stipulated rate of percentage was to be applied not just to the 'capital employed' without any further qualification but E to the 'capital employed.....computed in the prescribed manner". The manner of computation was left to be prescribed by Rules to be made by the Central Board of Revenue and according to the learned Attorney General, computation involved exclusion as well as inclusion of items which might be regarded as forming part of the 'capital employed' and sub-rule (3) which was an integral part of F the process of computation laid down in Rule 19A did not therefore derogate from the provisions of sub-section (1) of Section 80J and was within the mandate of that section. The learned Attorney General repelled the contention of Mr. Palkhiwala that if sub-section (1) of Section 80J were read as conferring power on the Central Board of Revenue to exclude from the computation of the 'capital employed' G any item or items as it thinks fit without any guidelines being provided by the statute in that behalf, such power would be unfettered and unguided and would suffer from the vice of excessive delegation. The learned Attorney General pointed out that sub-section (1) of Section 80J being a provision in a taxing statute, it had necessarily to be left to the Central Board of Revenue to decide, having regard H to changing economic circumstances, what should from time to time

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be taken to be 'capital employed' for the purpose of calculating the relief allowable under sub-section (1) of Section 80J and moreover the Rules made by the Central Board of Revenue in that behalf were required to be placed before each House of Parliament for its approval and there was, therefore no excessive delegation involved in sub-section (1) of Section 80J leaving it to the Central Board of Revenue to prescribe how the 'capital employed' should be computed and what items should be included and what items excluded. It was also submitted by the learned Attorney General that the words used in sub-section (1) of Section 80J in regard to the computation of the 'capital employed' were not 'capital employed during the previous year' but 'capital employed .....*in respect of* the previous year." The words 'in respect of the previous year' were deliberately introduced in sub-section (1) of Section 80J when that Section came to be enacted with the result that the 'capital employed' that was required to be computed for the purpose of Section 80J was the 'capital employed *in respect of* the previous year' Rule 19A was therefore, according to the learned Attorney General, not in conflict with sub-section (1) of Section 80J when it provided that the 'capital employed' *in respect of* the previous year shall be computed as on the first day of the previous year. The learned Attorney General pointed out that if rule 19A was valid in its entirety as contended for by him, no question of constitutional validity of the newly introduced sub-section (1A) could possibly arise because what sub-section (1A) did was merely to reproduce Rule 19A *ipsissima verba* with effect from 1st April, 1972 and it was clarificatory in nature. The learned Attorney General also contended in the alternative that even if Rule 19A was inva' d in both respects as submitted by Mr. Palkhiwala and the other learned counsel appearing on behalf of the petitioners, the new sub-section (1A) introduced in Section 80J with retrospective effect from 1st April, 1972 did not violate any of the fundamental rights under Article 14 and 19(1)(g) and was not unconstitutional or void.

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These rival contentions raise interesting questions of law relating to the interpretation of sub-section (1) of Section 80J and the validity of Rule 19A. Now there can be no doubt that if the attack against the validity of Rule 19A cannot be sustained and Rule 19A is held to be valid in its entirety, it would be unnecessary to examine the grounds of challenge urged on behalf of the petitioners against the constitutional validity of the newly enacted sub-section (1A), because in that event, sub-section (1A) would be merely enacting in statutory form the provisions in regard to computation of

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A the 'capital employed' which were in force until then in the form of rule 19A and the enactment of sub-section (1A) by way of amendment would be simply clarificatory in nature. The principal question which therefore arises for consideration is as to whether Rule 19A could be said to be in conformity with the mandate of sub-section B (1) of Section 80 J in so far as it is provided for exclusion of all borrowed monies including long term borrowings from computation of the 'capital employed' and enacted that computation of the 'capital employed' should be made as on the first day of the computation period. The answer to this question depends on the true interpretation of the language employed in sub-section (1) of Section 80J. But before we proceed to consider this question of inter- C pretation, it is necessary to point out that at least so far as exclusion of all borrowed monies including long term borrowings from computation of the 'capital employed' is concerned, the position which prevailed right from 1st April 1949 to 31st March 1968 for a period of 19 years was that all borrowed monies due from the assessee were D excluded in computing the 'capital employed' and no one challenged such exclusion as being in conflict with either Section 15C or Section 84. It is undoubtedly true that merely because for a long period of 19 years, the validity of the exclusion of borrowed monies in computing the 'capital employed' was not challenged, that cannot be a ground for negativing such challenge if it is otherwise well E founded. It is settled law that acquiescence in an earlier exercise of rule-making power which was beyond the jurisdiction of the rule making authority cannot make such exercise of rule making power or a similar exercise of rule making power at a subsequent date, valid. If a rule made by a rule making authority is outside the scope of its power, it is void and it is not at all relevant that its validity F has not been questioned for a long period of time: if a rule is void, it remains void whether it has been acquiescest in or not. Vide *Proprietary Articles Trade Associations* v. *A. G. of Canada* [1931] A. C. 310: *A. G. for Australia* v. *Queen* 95 C.L.R. 529. But when we are pointing out that for a period of 19 years the exclusion of G borrowed monies from computation of the 'capital employed' was not challenged by any assessee and the validity of the Indian Income Tax (Computation of Capital of Industrial Undertakings) Rules 1949 and Rule 19 was not at any time assailed on the ground that they derogated from the provisions of Section 15C or Section 84, it is not for the purpose of supporting any plea of acquiescence but for the purpose of indicating that both the assessees as well as the Revenue proceeded on the basis that on a true interpretation of the language H of Sections 15C and 84, it was within the competence of the Central

Board of Revenue to exclude borrowed monies in computing the 'capital employed'. Not only the assessees and the Revenue but Parliament also approved of this interpretation of sections 15C and 84 and posited the validity of the Indian Income Tax (Computation of Capital of Industrial Undertakings) Rule 1949 and Rule 19 which provided for exclusion of borrowed monies in computing the 'capital employed' for the purpose of giving relief under these Sections. Though the Indian Income Tax (Computation of Capital of Industrial Undertakings) Rule 1949 provided in so many terms that borrowed monies shall be deducted in computing the 'capital' employed' for the purpose of Section 15C as originally introduced in the Indian Income Tax Act 1922, Parliament when it re-enacted Section 15C by the Taxation Laws (Extension to Merged States and Amendment) Act 1949, did not seek to make any change in the Indian Income Tax (Computation of Capital of Industrial Undertakings) Rules 1949 but continued the same Rules providing for exclusion of borrowed monies. Parliament clearly proceeded on the hypothesis that the Indian Income Tax (Computation of Capital of Industrial Undertakings) Rules 1949 in so far as they provided for exclusion of borrowed monies in computation of the 'capital employed' were within the mandate of Section 15C and placed its seal of approval on such exclusion of borrowed monies in computing the 'capital employed' for the purpose of Section 15C. The Indian Income Tax (Computation of Capital of Industrial Undertakings) Rules 1949 thereafter continued in force until 1st April 1962 when the Indian Income Tax Act 1961 came to be enacted and the Income Tax Rules 1962 were made. During this period Section 15C was amended several times but though Parliament knew full well that the Indian Income Tax (Computation of Capital of Industrial Undertakings) Rules 1949 provided for exclusion of borrowed monies in computation of the 'capital employed'. Parliament did not make any change in the statute with a view to clarifying that borrowed monies were not intended to be excluded. Even when the Income Tax Act 1961 was enacted, Parliament continued to use the same language in Section 84 as it did in Section 15C and did not make any change in the language with a view to indicating that the Indian Income Tax (Computation of Capital of Industrial Undertakings) Rules 1949 which had been made under Section 15C did not correctly reflect the intention of Parliament. If Parliament thought that the Indian Income Tax (Computation of Capital of Industrial Undertaking) Rules 1949 in so far as they provided for exclusion of borrowed monies were not in conformity with its intention, Parliament could

A have easily made specific provision indicating its intention in the clearest terms when it enacted Section 84 in the Income Tax Act 1961. Even after the enactment of Section 84, when Rule 19 was made with a view to giving effect to Section 84, that Rule again excluded borrowed monies from computation of the 'capital employed'. B It is interesting to note that though the Income Tax Rules 1962 which included Rule 19 were laid before each House of Parliament soon after they were made as required by Section 296 of the Income Tax Act, 1961, neither House of Parliament expressed its disapproval of Rule 19 or made any modification in it and both Houses of Parliament thus gave their approval to Rule 19 knowing full well—and this C presumption must be made in favour of members of each House—that that Rule provided for exclusion of borrowed monies in computation of the 'capital employed'. We may make it clear that when we make this comment, we should not be understood to say that even if a Rule purporting to be made under a statute is outside the authority conferred by the statute, It would still be valid and have the force of law if it D is placed before each House of Parliament and is not disapproved by either Hous. But what we wish to point out is that by not disapproving of Rule 19, Parliament accepted the validity of the assumption that exclusion of borrwed monies in computation of the 'capital employed' was permissible under the terms of Section 84 and E clearly indicated that such exclusion of borrowed monies had its approval. Even after Section 84 was enacted and Rule 19 was made, there were several amendments made in Section 84 from time to time but on none of those occasions was any opportunity taken by Parliament to set at naught what had been done by Rule 19 by way of exclusion of borrowed monies, assuming that Parliament did not F approve of it. The result was that the exclusion of borrowed monies in computation of the 'capital employed' continued and that was plainly and indubitably in accord with the intention of Parliament. But when Section 80J replaced Section 84 and Rule 19A was made with a view to giving effect to Section 80J, a change was deliberately brought about and long term borrowings from approved sources were brought into G computation of the 'capital employed'. This change was, however, short lived and with effect from 1st April, 1972 the original position was restored. The Finance Minister mad it clear by way of a preface in his Budget Speech that he proposed to exclude debentures and long term borrowings in computation the 'capital employed' and in accordance with this statement Rule 19A was amended so as to exclude all borrowed monies. The amending Rule was laid before each House of Parliament and there was no dissent or disapproval. It is not H possible to believe that despite the statement of the Finance Minister

on the floor of the House and the placing of the amending Rule before each House, Parliament was not aware as to what the amended Rule 19A provided. Parliament must be presumed to have known that Rule 19A was amended in accordance with the statement of the Finance Minister and the amended Rule 19A provided for exclusion of borrowed monies in computing the 'capital employed' and yet Parliament if it thought that such exclusion was contrary to its true intent, did not take any steps to rectify the position. Then again, while moving Finance (No. 2) Bill 1980, the Finance Minister stated on the floor of the House that the intention of Parliament has always been to exclude borrowed monies in computing the 'capital employed' and therefore Section 80J was sought to be amended by incorporating Rule 19A in Section with retrospective effect. This legislative history traced by us clearly shows beyond doubt that Parliament throughout, save in respect of the period from 1st April 1968 to 31st March, 1972, approved of exclusion of borrowed monies in computing the 'capital employed' as being in conformity with its intention and regarded such exclusion as being within the terms of Section 15C or Section 84 or Section 80J as the case may be.

Now we turn to consider the language of sub-section (1) of section 80J and while doing so, we may point out that so far as this question is concerned, there is no material difference between the language of sub-section (1) of Section 80J and the language of its predecessor Sections, namely, Section 15C sub-section (1) and Section 84 sub-section (1). The words used in Sub-section (1) of Section 80J are "capital employed.....computed in the prescribed manner". The statutory rate of percentage for the purpose of calculating the relief allowable under sub-section (1) of Section 80J is to be applied not just to the 'capital employed' but to the "capital employed..... computed in the prescribed manner". We shall presently consider the effect of the qualifying words "computed in the prescribed manner", but before we do that, we must first examine the true meaning and import of the expression 'capital employed', for it is on this expression used in the Section that the strongest reliance was placed by Mr. Palkhiwala and the entire argument advanced by him rested. Mr. Palkhiwala and the other learned counsel following upon him strongly contended that the expression 'capital employed' according to its commonly accepted meaning as also according to the connotation it has acquired in commercial usage and accountancy practice, would necessarily includes, at the least, long term borrowings and the Central Board of Revenue cannot under the guise of making a rule for computation of the 'capital employed', exclude

long term borrowings which constitute an essential part of the 'capital employed'. That would be clearly derogating from the provisions of Sub-section (1) of Section 80J and would be totally impermissible. Now this contention would have had some force if the premise on which it is based were well-founded. But we are unable to agree with Mr. Palkhiwala and the other learned counsel supporting him that 'capital employed', either in its legal sense or in commercial parlance of accountancy practice, necessarily and always includes long term borrowings.

Mr. Palkhiwala relied upon passages from various text books on Business Management and Accountancy in support of his plea that 'capital employed' must necessarily include long term borrowings. One of the text-books on which reliance was placed by Mr. Palkhiwala was "The Internal Finance of Industrial Undertakings" by T.G. Rose where it is stated that "the total money in the business at any moment or the 'total capital employed' is to be found in the figure recorded at the foot of the assets columu in the balance-sheet, less any fictitious assets". This passage equates 'total capital employed' with the total money in the business at any moment. It is significant to note that the reference here is not just to 'capital employed' but to 'total capital employed'. Moreover this expression has been used in the context of performance evaluation through profit resource ratio and this is made amply clear by a passage which occurs subsequently in the same text book where it is observed that the "question of whether the T.C. is owned or borrowed is immaterial for this control figure. The Company is employing so much capital in its trading, and therefore that capital must turn over, through sales, to an extent sufficient to provide a proper return on that capital." Mr. Palkhiwala also cited an extract from "Terminology of Cost Accountancy" published by The Institute of Cost and Works Accountants, U K. (October 1967) where the expression 'capital employed' is explained but we fail to see how this explanation can assist the argument of Mr. Palkhiwala, because according to this explanation the expression 'capital employed' can mean any one of the following three things : 'Total Capital Employed' which may include loans or 'Total Shareholders' Capital Employed' or 'Total Equity Capital Employed'. 'Then, reliance was placed on certaion passage from "The Director's Guide to Accounting and Finance" by M.G. Wright dealing with the profitability ratio. The author points out in this passage that the "principal ratio that measures profitability is the return on 'capital employed'. This is a ratio which

measures output to resource-use—in this case profit earned to the capital required to earn that profit" and then, in this context proceeds to add that 'capital employed' is generally accepted to mean the total of all the long term funds employed, that is, all shareholders' funds plus long term borrowings. The long term borrowings are regarded as forming part of the 'capital employed' because the object is to measure the profitability with reference to the total funds invested in the undertaking. This passage does not, in our opinion, lay down that the expression 'capital employed' must necessarily and in all contetxs include long-term borrowings. Mr. Palkhiwala also relied on certain Balance Sheets given in "Modern Published Accounts" by R.S. Waldron and E.H D. Sambridge which undoubtedly treat long-term borrowings as part of 'capital employed'. But it may be noted that this is done for determining the profitability ratio by measuring profit as a percentage of Operating Capital Emloyed and interestingly, the expression 'capital employed'. according to these Balance Sheets, also includes short-term borrowings. Mr. Palkhiwala also relied on "Inter-Firm Comparison of Financial Performance" by the Bombay Textile Research Association and "Dictionary of Business and Management" by K.C. Parekh where 'capital employed' is defined to mean the total of share capital, reserves and long-term borrowings. But again it may be noted that this definition is for the purpose of evaluating financial performance and efficiency of management, the true measure of which can be ascertained by taking the ratio of profit earned to the total funds employed in the business. Then reliance was placed on "Principles and Practice of Management Accountancy" by J.L.Brown, "Financial Manager's Job" by Elizabeth Marting and Robert E. Finley and "Glossary of Management Accounting Terms" by the Institute of Cost & Works Accounting of India, where the expression 'capital employed' is understood to mean share capital, retained profits and long-term borrowings. But it may be pointed out that in these textbooks also, the expression 'capital employed' has been used in the context of efficiency of business which is naturally measurable by considering what is the profit derived from deployment of the total funds in the business and since long term borrowings are also deployed in the business, the profitability of the undertaking cannot be evaluated without taking into account such long term borrowings which have gone in the earning of the profit. It is significant to note that even in "Principles and Practice of Management Accountancy" by J.L. Brown there is a highly revealing statement that in regard to 'capital employed', "there is a good deal of controversy among accountants over which items should be included". We may then

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refer to another text-book relied on by Mr. Palkhiwala, namely, "Finance For the Non-Accountant" by L E. Rockley. The passage from this text-book cited by Mr. Palkhiwala far from helping his argument, militates against it, for it concedes in so many terms that "the expression 'capital employed' does have several possible interpretation" and proceeds to add that 'capital employed' is frequently referred to as the total assets possessed by the concern and shown in its balance sheets, no deductions being made for any liabilities but "such is not all of the possible combinations leading to an assessment of the capital employed by any Company." It is no doubt true that there are observations in "Principles and Practice of Management" by E.F.L. Brech as also in Table 2 annexed to Information Note No. 10 on "Return on Capital Employed" prepared by All India Management Association which support the Plea of Mr. Palkhiwala that 'capital employed' includes funds received from loan creditors but again it must be remembered that this meaning is given to the expression 'capital employed' in the context of evaluation of performance and profitability by determining whether the concern has earned a satisfactory annual profit, having regard to the expected return on the total funds employed in the business.

The balance sheets of some Companies were produced before us by Mr. Palkhiwala with a view to showing that even according to accountancy practice, long term borrowings are included in 'capital employed' but we do not think that these balance sheets assist the argument of Mr. Palkhiwala, for all these balance sheets are for years subsequent to the arising of the present controversy and in most of these balance sheets, the words variously used are "Total Funds Employed", "Source of Funds", "Funds Employed" and "Net Assets Employed" and they do not therefore throw any particular light on the question before us. In fact, in the balance sheet of Somany Pilkingtons Ltd. for the year ending 30th June 1978 produced by the learned Attorney General on behalf of the Revenue, the description of the heading given is "Capital Employed and Borrowings" which shows that there is no uniform practice of treating long-term borrowings as part of 'capital employed' in accountancy practice. Mr. Palkhiwala also relied on certain extracts from Carter's "Advanced Accounts" and Spicer and Pegler's "Book keeping and Accounts" but these extracts do not more than show that in certain contexts the expression 'capital employed' would include long term borrowings.

Now the learned Attorney General appearing on behalf of the Revenue did not dispute proposition that in a given context the expression 'capital employed' may include long term borrowings. But his contention was that this expression has no fixed definite connotation which would necessarily include long term borrowings and that in a given situation, it may include long term borrowings or it may not. The meaning and content of the expression 'capital employed' would, contended the learned Attorney General, depend upon the context and the circumstances in which it is used. The learned Attorney General pointed out, and in our opinion rightly, that the various passages relied on by Mr. Palkhiwala in support of his contention dealt mostly with business management and profitability and in those passages, the expression 'capital employed' was used in the context of business efficiency and performance evaluation with a view to measuring profitability by determining the capital output ratio and that is the reason why it was said in those passages that 'capital employed' would include long term borrowings. We agree with the Learned Attorney General that the expression capital employed' has a variable meaning depending on the context in which it occurs and the purpose for which it is used. There are a number of text-book authorities which support this view in regard to the scope and ambit of the expression 'capital employed'. Even J. Batty in his book on "Management Accountancy"-a book strongly relied on by Mr. Palkhiwala-has observed that "there is no generally accepted definition of the two essential terms (1) Capital Employed and (2) Profit". He then proceeds to observe "Capital employed is used to describe the investment made in a business. As noticed earlier, there is no generally accepted definition of the term. Some accountants think of one thing, whereas others think of another. One definition may include certain assets and the other exclude them altogether. Another definition may consider ordinary share capital, thus measuring how much is actually invested by shareholders." He points out three possible definitions of 'capital employed', namely, (1) Gross Capital Employed, (2) Net Capital Employed and (3) Proprietors' Net Capital Employed. So also Members' Handbook of the Institute of Chartered Accountants in England and Wales affirms that the expression 'capital employed' means different things according to the purpose for which it is used and points out that there are various methods of computing 'capital employed' and classifies 'capital employed' into three categories, namely, (1) Share capital and reserves; (2) Equity capital and reserves; and (3) total capital employed which would include debentures and other long term liabilities. To the same effect we find observation in "Framework of Accountancy"

A by C.C. Magee where it is said "There are several possible definitions of the term 'capital employed'.....The new worth of the business.....comprises.....the original capital contribution together with retained profit.. From the view point of ownership *the net worth capital employed in the business* and it is on the basis of this B figure that ownership will judge the success or failure of management." Of course, while making this statement it is conceded by the author that "a view is taken by some that capital employed should be defined as net worth plus long term loans" but the author maintains that "the effective capital, or capital employed in a business.....or the net worth.....is always Rule to the original C capital plus retained profit less any loss that may have been incurred.' So also in Business Accounting I by B. E. Elliott the expression 'capital employed' is used in more senses than one and it is pointed out that the income used to calculate the rate of return must be appropriate to the capital employed to generate that income. Carter in his book on "Advanced Accounts" (5th Edn. by Douglas Garbutt) D utters a warning against describing a borrowing, whether long-term or short, term as capital. He says; "Money borrowed by means of ordinary loans, mortgages, debentures, bonds etc. is frequently spoken of as Loan Capital. Most accountants, however. consider it loose to describe such a *liability* as *capital*." We find that Palmer also in his 'Company Law' disapproves of the expression Loan E Capital and emphatically state that this phrase, though frequently used in business circles, is in the eyes of a lawyer a contradiction in terms, because it is difficult to see how a debet can ever be regarded as capital. In fact, the looseness of the expression 'capital' is emphasised also by Gower in his "Principles of Modern Company Law" where F he states that "Unhappily capital is a word of many different applications and even in the legal, economic and accounting senses with which we are concerned, it is used loosely and to describe different concepts at different times although its users do not always recognise the fact." It will thus be seen that there is no unanimity amongst accountants and lawyers in regard to the question whether 'capital G employed' necessarily includes long term borrowings. It is significant to note that even the High Courts have differed in regard to the true meaning and content of the expression 'capital employed', the High Court of Madhya Pradesh taking one view and some of the other High Courts taking another view. There can be no doubt that the expression 'capital employed' is susceptible of more than one H interpretation and it may include long term borrowings or it may

not, depending on the context and the circumstances in which it is used. There is even doubt amongst lawyers and accountants whether short term borrowings can be regarded as forming part of the 'capital employed'. Some balance sheets show short term borrowings as forming part of the 'capital employed' while others do not and even amongst counsel appearing before us though Mr. Palkhiwala conceded that short term borrowings would not form part of the 'capital empoloyed', Dr. Devi Pal vehemently contended to the contrary. It is obvious that the expression 'capital employed' is not a term of art nor is it an expression having a fixed connotation or meaning but it is susceptible of varied meanings, including or excluding short term borrowings or long term borrowings, whether or all categories or of any particular category or category or categories depending on its environmental context. It is therefore not possible to accept the contention of Mr. Palkhivala and the learned counsel supporting him that the expression 'capital employed' has a fixed definite connotation which necessarily and in all cases includes long term borrowings and it was therefore not competent to the Central Board of Revenue to truncate the full width and amplitude of the expression 'capital employed' by making Rule 19A sub-rule (3) excluding long term borrowings in computation of the 'capital employed'.

It is interesting to note that even during the period from 1st April 1968 to 31st March 1972 when Rule 19A sub-rule (3) stood unamended, it is only borrowings from an approved source repayable within not less than 7 years which were includible in computation of the 'capital employed' and not all long term borrowings. If the contention of Mr. Palkhivala were correct that all long term borrowings invariably and in all cases formed part of the 'capital employed' and were liable to be included in the computation, the unamended sub-rule (3) of Rule 19A in so far as it excluded long term borrowings, other than those from an approved source and repayable within not less than 7 years, would be invalid as being in derogation of the provisions of Section 80J sub-section (1). But the validity of the unamended sub-rule (3) of Rule 19A was at no time challenged on behalf of the assessees and Mr. Palkhivala and the learned counsel supporting him did not seem to contend that the unamended sub-rule (3) of Rule 19A was invalid. Once it is conceded that the Central Board of Revenue was within its authority in including certain categories of long term borrowings and excluding certain other categories in computation of the 'capital employed', it must follow

as a necessary corollary that the Central Board of Revenue could equally, without exceeding the authority conferred upon it, exclude all long term borrowings to which ever category they might belong.

It is because the expression 'capital employed' has a variable meaning that it has been enacted by the Legislature that, for the purpose of calculating the relief allowable under Section 80J sub-section (1), the statutory percentage must be applied to the 'capital employed *as computed in the prescribed manner*. How the 'capital employed' shall be computed is left to be prescribed by the Central Board of Revenue by making Rule or Rules under Section 295 of the Income Tax Act, 1961. The process of computation would involve both inclusion and exclusion of items which may possibly be regarded as falling within the expression 'capital employed'. The Central Board of Revenue may include some items and exclude some others while prescribing the manner of computation of the 'capital employed'. This is the sense in which the word 'computed' has been consistently used by the Legislature while enacting legislation of this kind. Turning to the earliest legislation where the word 'computed' has been used in relation to the 'capital employed', we find that in the Excess Profits Tax Act, 1940 for determining the standard profits, the statutory percentage was required to be applied to the average amount of capital employed as *computed* in accordance with the Second Schedule and the Second Schedule provided for inclusion of certain items and exclusion of certain others including borrowed monies and debts. The Legislature clearly, in this statute, regarded exclusion of borrowed monies and debts as implicit in the process of computation of the 'capital employed' or to put it differently, according to legislative usage, computation of 'capital employed' could legitimately involve as part of the process, exclusion of items such as borrowed monies and debts. So also in the Business Profits Tax Act 1941 and the Super Tax Profits Tax Act 1953 the word 'computed' was used in the same sense as involving in the process of computation of the 'capital employed', exclusion of borrowed monies and debts. Similarly in the Companies (Profits) Sur Tax Act 1964 also, the word 'computed' has been used in the same sense. Of course it may be pointed out that in this statute the word 'computed' has been used in relation to the 'capital of the company' and not in relation to the 'capital employed' but that would make no difference, because what we are concerned with here is the sense in which the word 'computed' has been used and whether it

involves the process of exclusion as well as inclusion and on that point, the Act analogically throws considerable light. The statutory deduction which must be made from the chargeable profits for the purpose of determining the charge of Sur Tax under this statute is defined to mean "an amount equivalent to ten per cent of the capital of the company as computed in accordance with the provisions of the Second Schedule" and the Second Schedule after its amendment by Finance Act 66 of 1976 does not provide for inclusion of borrowed monies and dabts in computation of the capital of the company though it provides for inclusion of the paid up share capital and reserves. It will thus be seen that there is legislative history behind the use of the word 'computed' in relation to the 'capital employed and it has been legislatively recognised as involving, as part of the process of computation, both inclusion as well as exclusion of items which may otherwise be regarded as forming part of the 'capital employed'. It is in the context of this background and not by way of a virgin attempt that the word 'computed' has been used by the Legislature in relation to the 'capital employed' in Section 80J sub-section (1).

It may be noted that even in the Income Tax Act, 1961 the word 'computed' has been consistently used in relation to 'income' in the sense of involving both inclusion and exclusion of items of income. Section 2 clause (45) defines 'total income' to mean the total amount of income referred to in Section 5 "computed in the manner laid down in this Act." Now, if we look at the provisions in the Income Tax Act, 1961, which lay down the manner of computation of the total income, it would be clear that the process of computation of total income involves both inclusion and exclusion of various items of income. Section 10 provides that in computing the total income of a previous year of any person, any income falling within any of the clauses of that section shall not be included in the total income, though such income which is required to be excluded is undoubtedly income and therefore part of total income according to the plain natural connotation of that expression. But it is required to be excluded in determining the charge of tax because 'total income' is defined as total amount of income, "computed in the manner laid down in the Act".

The same position obtains also in regard to Section 11 and it excludes certain categories of income in computation of the total income. Then, we may refer to Section 29 which provides that the

A income from profits and gains of business and profession shall be computed in accordance with the provisions contained in Sections 30 to 43A. These Section provide for inclusion and exclusion of various items in computing the total income. Sections 80A to 80VV also provide for deductions to be made in computing the total income and under sections such as 80HH, 80JJ and 80 0, even an item which indisputably forms part of income of an assessee, is required to be excluded in computing the total income chargeable to tax. No one has ever argued and indeed it is impossible even to conceive of such an argument, that when Section 2 clause (45) defines total income as the total amount of income computed in accordance with the provisions of the Act, what is indubitably part of income cannot be excluded in the computation. However, the argument of Mr. Palkhivala was that in the case of definition of 'total income' the exclusion of items of income in the process of computation is provided for by the Legislature itself and is not purported to be done by any rule making authority. The Legislature, stated Mr. Palkhivala, can cut down the width and amplitude of the expression "total amount of income" by expressly providing that particular item or items shall be excluded in the computing of the total amount of income, but the rule making authority cannot do so, because by doing so, it would be derogating from the provisions of the statute. Now we have already pointed out that since the expression 'capital employed' has a variable meaning which in a given case may or may not include borrowed monies, the Central Board of Revenue, could, in exercise of its rule making power, exclude borrowed monies in computation of the 'capital employed' and in doing so it would not in any way be acting contrary to the mandate of the statute. But the point which we wish to emphasise here, while referring to the definition of 'total income' in Section 2 clause (45), is that the word 'computed' has been used by the Legislature as comprehending within its scope not only inclusion but also exclusion of certain items of income which are admittedly and without doubt, part of the income of the assessee. We find that even in some of the sub-sections of Section 80J the word 'computed' has been used in the same sense as involving both inclusion. and exclusion. The second proviso to sub-section (4) of Section 80J provides that where any building or part thereof previously used for any purpose is transferred to the business of the industrial undertaking, the value of the building or part so transferred shall not be taken into account in computing the 'capital employed' in the industrial undertaking. So also Explanation 2 to the same sub-section enacts in so many terms that in a case falling within its scope

and ambit, "the total valne of the machinery or plant or part so transferred shall not be taken into account in computing the 'capital employed in the industrial undertaking." Then again, the Explanation to sub-section (6) of Section 80J makes a similar provision for exclusion of "total value of the building machinery or plant or part so transferred" in computing the 'capital employed' in the case of business of a hotel. It will thus be seen that, even according to these provisions in Section 80J, the process of computation of the 'capital employed' can legitimately exclude item or items which are plainly and indubitably part of the 'capital employed'. Of course the exclusion enacted by these provisions is made by the Legislature and not by the rule making authority, but again, if we may emphasise, the point is not whether an exclusion is made by the Legislature or by the rule making authority but whether such exclusion is implicit in the process of computation so as to be comprised in it. And on this point not only the provisions of the Excess Profits Tax Act, 1940, the Business Profits Tax Act, 1947 'the Super Profits Tax Act, 1963 and the Companies (Profits) Sur Tax Act, 1964 but also the various provisions of the Income Tax, Act, 1961 referred to by us, clearly indicate that the word 'computed' has been used by the Legislature in sub-section (1) Section 80J as involving not only inclusion but also exclusion of items which may otherwise be regarded as falling within the expression 'capital employed'. It is left by the Legislature to the Central Board of Revenue as rule making authority to prescribe the manner in which the 'capital employed' shall be computed and in so prescribing, the Central board of Revenue may include or exclude items which may be regarded as forming part of the 'capital employed',

Mr. Palkhivala, however, contended, relying on the expression "computed in the perscribed manner", that what is left by the Legislature to the Central Board of Revenue is merely to prescribe the manner in which the 'capital employed' shall be computed and 'manner' can only mean mode in which the computation has to be made and under the guise of prescribing the mode of computation, the Central Board of Revenue cannot, to use the words of Mr. Palkhivala, "encroach upon the substance of the statutory subject matter" or "remould the substance of the capital employed". Mr. Palkhivala in support of this contention relied on the meaning of the word 'manner' given in various dictionaries and also referred to various decisions including the decision of the Privy Council in *Utah*

Construction v. *Pataky*(1) and the decision of this Court in *Sales Tax Officer* v. *K.I. Abraham*(2). But we do not think there is any substance in this contention of Mr. Palkhivala. When the Central Board of Revenue prescribes by making rule or rules what items shall be included and what items excluded in computation of the 'capital employed', there can be no doubt that, according to the plain grammatical meaning of the words used, what the Central Board of Revenue does is to prescribe the manner or mode of computation of the 'capital employed' by laying down as to how the 'capital employed' shall be computed and that would be clearly within the rule making authority conferred upon the Central Board of Revenue. The entire premise of the argument of Mr. Palkhivala was that by excluding long term borrowings from the computation of the 'capital employed', the Central Board of Revenue would be encroaching upon or remoulding the substance of the 'capital employed' but, as we have already pointed out, the expression 'capital employed' has a variable meaning which may or may not include long-term borrowings and therefore, if the Central Board of Revenue makes rule or rules providing for exclusion of long-term borrowings in computation of the 'capital employed', there can be no question of encroaching upon or remoulding the substance of the 'capital employed'. That would be clearly within the authority of the Central Board of Revenue to prescribe the manner or mode of computation of the 'capital employed'. The conclusion must therefore inevitably follow that even if long-term borrowings could be said to form part of 'capital employed'—and indeed as pointed by us, they can in a given context form part of the 'capital employed'—it was competent to the Central Board of Revenue in exercise of its rule making power to prescribe that, in computing the 'capital employed', borrowed monies and debts shall be excluded.

It may be pointed out that the Central Board of Revenue in making sub-rule (3) of Rule 19A had earlier precedents for it and did not write on a clean slate. The earliest precedent was the Excess Profits Tax Act 1940, where as pointed out above, an express enactment was made in Second Schedule providing for exclusion of borrowed monies and debts in computing the average amount of 'capital employed' for the purpose of determining the standard profits. The same scheme was replicated in the Business Profits Tax Act 1947

(1) [1965] 3 All E.R. 650.
(2) [1967] 3 S.C.R. 518.

where again an express provision was made in the Second Schedule to that Act that the capital of the company shall consists of "its paid up share capital of the company shall consist of "its paid up share capital and its reserves", thus excluding borrowed monies and debts. Similarly under the Super Profits Tax Act 1963 also a specific provision was enacted in the Second Schedule to that Act that the capita of the company shall be computed on the basis of its paid up capital plus reserves so that, in consequence, borrowed monies and debts shall be excluded in computation of the capital of the company. What the Central Board of Revenue did in enacting sub-rule (3) of Rule 19A was to follow the precedent set in these three statutes and to make a similar provision excluding borrowed monies and debts in computation of the 'capital employed'. The Central Board of Revenue could not in the circumstances be said to have acted arbitrarily or whimsically or in an irrational or unusual manner in enacting sub-rule (3) of Rule 19A as alleged by Mr. Palkhivala.

It may be noted that under all the above three statutes namely the Excess Profits Tax Act 1940, the Business Profits Act 1947 and the Super Profits Act 1963, interest on borrowed monies and debts was deductible in computing the profiits and gains of the business and it appears that it was in consequence of this provision for deduction of interest in computation of the profis and gains of the business that borrowed monies and debts were excluded in computation of the 'capital employed' or the capital of the company, as the case may be. This becomes abundantly clear if we consider the provisions of another statute enacted by the Legislature, namely, the Companies (Profits) Surtax Act 1964. This Act has undergone several amendments from time to time and is still in force. It imposes a special tax on the profits of certain companies and in Section 4 it provides that there shall be charged on every company for every assessment year commencing on and from 1st April 1964 a tax called Surtax in respect of so much of its chargeable profits of the previons year as exceed the statutory deduction at the rate or rates specified in the Third Schedule. The expression 'chargeable profits' is defined in sub-section (5) of Section 2 to mean the total income of an assessee computed under Income Tax Act 1961 for any previous year and adjusted in accordance with the provisions of the First Schedule. The definition of "statutory deduction" is to be found in sub-section (8) of Section 2 where it is defined as "an amount equal to ten per cent of the capital of the company as computed in accordance with the provisions of the Second Schedule or an amount of two hundred thousands rupees

which ever is greater". The First Schedule lays down the rules for computing the chargeable profits and prior to the amendment of the Act by Finance Act 66 of 1976, Rule 3 of the First Schedule provided that the net amount of income calculated in accordance with Rule 2 shall be increased *inter alia* by "the amount of any interest payable by the company in respect of debentures referred to in Clause (iv) or monies referred to in Clause (v) of Rule 1 of the Second Schedule for the previous year relevant to the assessment year allowed as a deduction in computing its total income". The Second Schedule sets out the Rules for computing the capital of a company and Rule 1 as it stood prior to the amendment provided that the capital of a company shall be the aggregate of the amounts, as on the first day of the previous year relevant to the assessment year, of its paid up share capital and reserves as set out in clauses (i) to (iii) and of :

"(iv) the debentures, if any, issued by it to the public :

Provided that according to the terms and conditions of issue of such debentures, they are not redeemable before the expiry of a period of seven years from the date of issue thereof ; and

(v) any moneys borowed by it from Government or the Industrial Finance Corporation of India or the Industrial Credit and Investment Corporation of India or any other financial institution which the Central Government may notify in this behalf in the Official Gazette or any banking institution (not being a financial institution notified as aforesaid) or any person in a country ouside India :

Provided that such moneys are borrowed for the creation of a capital asset in India and the agreement under which such moneys are borrowed provides for the repayment thereof during a period of not less than seven years."

Thus it will be seen that when the amounts of the debentures and long term borrowings from approved sources were included in computation of the capital of a company, the amount of interest payable by the company in respect of such debentures and long term borrowings was required to be added back to the total income for the purpose of arriving at the chargeable profits liable to sur-tax. But by Section 29 of Finance Act 66 of 1976 Clauses (iv) and (v) of Rule 1

of the Second Schedule were deleted with the result that the endebtures, if any, issued by a company as also long term borrowings from a proved sources were no longer includible and were consequently excluded in computing the capital of the company. It is significant to note that when this exclusion of debentures and long term borrowings from approved sources was made, Rule 3 of the First Schedule was also simultaneously amended by Section 29 of Finance Act 66 of 1976 and the provision for adding back the amount of interest payable by the company in respect of debentures and long term borrowings from approved sources was deleted It is obvious from this amendment of the Companies (Profits) Surtax Act 1964 as also from the provisions in the earlier three statutes that the consistent practice adopted by the Legislature over the years has been-and this practice reflects the legislative intent and will that whenever interest payable on borrowed monies is either not deducted or if deducted is added back in computing the total income, such borrowed monies are included in computation of the 'capital employed' or capital of the company and similarly when interest payable on borrowed monies is deducted in computing the total income is not added back, such borrowed monies are excluded in computation of the 'capital employed' or capital of the company. Here in the present case, so far as sub-section (1) of Section 80 J is concerned, interest payable on borrowed monies is deductible in computing the total income of the assessee and is not required to be added back and hence it is quite consistent with the practice adopted and recognised by the Legislature in these various statutes, to exclude long term borrowings in computation of the 'capital employed', for the purpose of allowing relief under sub-section (1) of Section 80J.

Mr. Palkhivala, however, contended that there was a vital distinction between the Excess Profits Tax Act 1940, Business Profits Tax Act 1947, Super Profits Tax Act 1963 and Companies (Profits) Surtax Act 1964 on the one hand and sub-section (1) of Section 80J on the other, in that the object of each of the four statutes above referred to was the exact opposite of that of sub-section (1) of Section 80 J. These four statutes, urged Mr. Palkhivala, aimed at levying additional tax over and above income tax in respect of excess profits or supper profits made by a company and since super profits or excess profits are profits in excess of a fair return on the owner's capital staked in the business, each of the four statutes, for determing the excess profits or super profits, provided specifically that, the

A abatement from the profits shall be calculated by reference only to the assessees own capital without taking into account any borrowed monies and debts Mr. Palkhivala contended that since the legislative intent was to give abatement from the profits only by reference to the assessees own capital the abatement was rightly calculated by refe-
B rence only to the paid up capital and reserves, though in the case of the Companies (Profits) Surtax Act 1964 as it stood prior to its amendment by Finance Act 66 of 1976, the Legislature chose to be more liberal and allowed even debentures and long term borrowings from certain approved sources to be taken into account in computing the capital of the company, But, said Mr. Palkhivala, the position
C is entirely different under sub-section (1) of Section 80J because the principal object of this statutory provision is to offer tax incentive and it could not have been intended by the Legislature that the tax incentive should be limited only to statutory percentage of the assessee's own capital and not take into account 'borrowed capital'. This
D contention of Mr. Palkhivala, plausible though it may seem, is totally unfounded Mr. Palkhivala, in our opinion, is trying to make a distinction which does not exist, and we must reject his contention based on such supposed distinction.

E It is no doubt true that the object of the Excess Profits Tax Act 1940, Business Profits Act 1947, Super Profits Tax Act 1963 and the Companies (Profits) Sur Tax Act 1964 is different from that of sub-section (1) of Section 80J in that the four statutes belonging to the former group seek to tax excesss profits or super profits while the statutory provision in the latter group seeks to offer tax incentive by
F exempting a certain portion of the profits. But so far as the question of computation of the 'capital employed' is concerned, we are unable to see any distinction between the above-mentioned four statutes on the one hand and sub-section (1) of Section 80J on the other. In the case of the former what are sougnt to be taxed are the excess profits over what may be regarded as fair return on 'capital employed' and
G in the case of the latter also, it is the fair return on 'capital employed' that is sought to be exempted from tax. Though the object of the two sets of provisions is different, the concept of fair return on 'capital employed' lies at the base of both sets of provisions. If for the purpose of determining the excess profits liable to the charge of additional tax under any of the afore-mentioned four statutes, fair return is calculated on the owner's capital employed in the undertaking excluding the borrowed monies, there is nothing irrational or unusual
H in the Central Board of Revenue providing that for computing the

fair return on the 'capital employed' which is to be exempted from tax under sub-section (1) of Section 80J, the owner's capital alone should be taken into account and borrowed monies should be excluded. Even in regard to the provisions of the abovementioned four statutes, an argument could well be advanced that borrowed monies are as much part of capital employed in the undertaking as the owner's capital and when monies are borrowed on payment of interest by way of hire charges, they become part of the owner's capital originally brought in by the owner and there is no reason why capital partaking of the samd characteristics as the fair return should not be allowed on it. This has precisely been the argument advanced on behalf of the assessees in support of their contention that 'capital employed' must include borrowed monies in sub-section (1) of Section 80J But this argument has not prevailed with the Legislature in the enactment of any of the above-mentioned four statutes and despite this argument the Legislature has chosen to exclude borrowed monies in computing the 'capital employed' or the capital of the company for determining what should be regarded as fair return, so that profits in excess of such fair return may be subjected to additional tax. The Central Board of Revenue cannot therefore be accused of any irrationality or whimsicality in providing that fair return on the 'capital employed' eligible for exemption under sub-section 1) of Section 80J should be calculated by applying the statutory percentage to the owner's capital, that is, the paid up share capital and reserves without taking into account long term borrowings or for the matter of that, any borrowed monies and debts. We cannot appreciate the contention of Mr. Palkhivala that when the Legislature was offering a tax incentive it could not have intended that the tax incentive should be measureable by reference only to the owner's capital and that borrowed capital should be left out of account, because that would, in the submission of Mr. Palkhivala, result in favouring the affluent assessees who are able to employ their own capital and discriminate against the indigent who have to borrow funds to finance their undertakings. Having regard to the legislative parctice and usage referred to by us, it is obvious that if the Legislature intended that the capital employed' must include long term borrowings, the Legislature would not have used the flexible expression 'capital employed' but would have expressed itself unambiguously by providing that the 'capital employed' shall include long term borrowings. It is clear from the language used by the section that the Legislature proceeded on the basis that the expression 'capital employed' has no fixed definite meaning including or excluding long term borrowings and deliberately chose to leave it to the Central Board of Revenue to prescribe

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how the 'capital employed' shall be computed or in other words, what items shall be included and what items excluded in computing the 'capital employed' and by incorporating Rule 19A with retrospective effect in Section 80J by the Finance (No. 2) Act 1980, the Legislature clearly expressed its approval of the manner of computation of the 'capital employed' prescribed by the Central Board of Revenue by making sub-rule (3) of Rule 19A. The consequence of this interpretation would undoubtedly be that the assessees would get relief only with reference to their own capital and not with reference to any monies which might have been borrowed by them for employment in the undertaking but that is a matter of policy which clearly falls within the province of the Executive and the Courts are not concerned with it. It is obvious that the Central Board of Revenue intended—and having regard to the retrospective amendment of Section 80J by Finance Act (No. 2) of 1980 that must also be taken to be the intention of the legislature—that the assessees should be given relief only with reference to their own capital and not with reference to any borrowed monies, presumably because the object of giving relief was to encourage assessees to bring out their own monies for starting new industrial undertakings and the intention was not that the assessees should be given relief with reference to monies which did not belong to them but which were borrowed from financial institutions and other parties and which would have to be repaid.

Mr. Palkhivala then contended that if sub-section (1) of Section 80J were construed as leaving it to the Central Board of Revenue to prescribe what items shall be included and what items excluded in computation of the 'capital employed' it would be vulnerable to attack on the ground of excessive delegation of legislative power and would consequently be void. We do not think there is any substance in this contention, for there is in the present case no question of excessive delegation of legislative power. The essential legislative policy of allowing relief to an assessee who starts a new industrial undertaking or business of a hotel and declaring the period for which such relief shall be granted, is laid down by the Legislature itself in the various sub-sections of Section 80J and all that is left to the Central Board of Revenue to prescribe is the manner of computation of the 'capital employed' with reference to which the quantum of the relief is to be calculated. It is only the details relating to the working of the exempting provision contained in Section 80J which are left by the Legislature to be determined by the Central Board of Revenue. This

is clearly permissible without offending the inhibition against excessive delegation of legislative power. It must be remembered that Section 80J enacts an exemption in a taxing statute and a certain margin of latitude is always allowed to the Executive in working out the details of exemption in a such taxing statute. It was laid down by this Court as far as back as 1959 in *Pt Banaarsi Dass Bhanot* v. *State of Madhy a Pradesh*(1).

> "Now, the authorities are clear that 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."

So also in *Sitaram Bishambardas and Ors.* v. *State of U.P. and Ors.*(2) this Court upheld the validity of Section 3D (1) of the U.P. Sales Tax Act 1948 which authorised the levy of a tax on the turnover of first purchases made by dealer or through a dealer acting as a purchasing agent, in respect of such goods or class of goods and at such rates, subject to a maximum, as may from time to time be notified by the State Government and Hegde, J. speaking on behalf of the Court observed :

> "It is true that the power to fix the rate of a tax is a legislative power but if the legislature lays down the legislative policy and provides the necessary guidelines, that power can be delegated to the executive. Though a tax is levied primarily for the purpose of gathering revenue, in selecting the objects to be taxed and in determining the rate of tax, various economic and social aspects, such as the availability of the goods, administrative convenience, the extent of evasion, the impact of tax levied on the various sections of the society etc. have to be considered. In a modern society taxation is an instrument of planning. It can be used to achieve the economic and social goals of the State For that reason the power to tax must be a flexible power. It must be capable of being modulated to meet the exigencies of the situation. In a Cabinet form of Government, the executive

(1) [1959] S.C.R. 427.
(2) [1972] 2 S.C.R. 141.

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is expected to reflect the views of the legislatures. In fact in most mattters it gives the lead to the legisatlure. However, much one might deplore the "New Depotism" of the executive, the very complexity of the modern society and the demand it makes on its Government have set in motion
B forces which ha e made it absolutely necessary for the legislatures to entrust more and more powers to the Executive. Text book doctrines evolved in the 19th century have become out of date. Present position as regards delegation of legislative power may not be ideal, but in the absence of any better alternative, there is no escape from it. The legisla-
C tures have neither the time, nor the required detailed information nor even the mobility to deal in detail with the innumerable problems arising time and again. In certain matters they can only lay down the policy and guidelines in as clear a manner as possible."

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The validity of Section 3D of the U.P. Sales Tax Act 1948 was again challenged before this Court in *Hiralal Ratan Lal* v. *State of U.P. and Anr* (1) the same ground that it suffered from the vice of legislative power and again, the challenge was negatived by this Court with the following observations :

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"The only remaining contention is that the delegation made to the executive under s. 3D is an excessive delegation. It is true that the legislature cannot delegate its legislative function, to any other body. But subject to that
F qualification, it is permissible for the legislature to delegate the power to select the persons on whom the tax is to be levied or the goods or the transactions on which the tax is to be levied. In the Act, under s. 3 the legislature has sought to impose multi-point tax on all sales and purchases. After having done that it has given power to the executive,
G a high authority and which is presumed to command the majority support in the legislature; to select for special treatment dealings in certain class of goods. In the very nature of things, it is impossible for the legislature to ennumerate goods, dealings in which Sales. Tax or Purchase tax should be imposed. It is also impossible for the legislature to select the goods which should be subjected to

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(1) [1973] 2 S.C.R. 502.

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a single point sales or purchase tax. Before making such selections several aspects such as the impact of the levy on the society, economic consequences and the administrative convenience will have to be considered. These factors may change from time to time. Hence in the very nature of things, these details have got to be left to the executive." B

The principles laid down in these observations from the decided cases clearly govern the present case and conclusively repel the contention or Mr. Palkhivala that if sub-section (1) of Section 80J were construed in the manner suggested by the learned Attorney General on behalf of the Revenue, it would be rendered void on the ground C of excessive delegation of legislative power. The Legislature having laid down the legislative policy of giving relief to an assessee who is starting a new industrial unpertaking or the business of a hotel, had necessarily to leave it to the Central Board of Revenue to determine what should be the amount of capital employed that should be required to be taken into that account for the purpose of determining D the quantum of the relief allowable under the Section. What should be the quantum of the relief allowable to the assessee would necessarily depend upon diverse factors such as the impact of relief on the industry as a whole, the response of the industry to the grant of the relief, the adequacy or inadequacy of the relief granted in promoting the growth of new industrial undertakings, the state of the economy E prevailing at the time, whether it is buoyant or depressed and administrative convenience. These are factors which may change from time to time and hence in the very nature of things, the working out of the mode of computation of the 'capital employed' for the purpose of determining the quantum of the relief must necessarily be left to F the Central Board of Revenue which would be best in a position to consider what should be the quantum of the relief necessary to be given by way of tax incentive in order to promote setting up of new industrial undertakings and hotels and for that purpose, what amount of the 'capital employed' should form the basis for computation of such relief. G

Moreover, it may be noticed that under Section 296 of the Income Tax 1961 every Rule made under the Act is required to be laid before each House of Parliament so that both Houses of Parliament have an opportunity of knowing what the rule is and considering whether any modification should be made in the rule or the rule should not be made or issued and if both Houses agree in making any modification in the rule or both Houses agree that the H

A Rule should not be made or issued, then the Rule would thereafter have effect only in such modified form or have no effect at all, as the case may be. Parliament has thus not parted with its control over the rule making authority and it exercises strict vigilance and control over the rule making power exercised by the Central Board of Revenue. This is a strong circumstance which militates B against the argument based on excessive delegation of legislative power. This view receives considerable support from the decision of the Privy Council in *Powell* v. *Appollo Candle Company Limited*(1) where the Judicial Committee, while negativing the challenge to the constitutionality of Section 133 of the Customs Regulation Act of C 1879 which conferred power on the Governor to impose tax on certain articles of import, observed as follows:

> "It is argued that the tax in question has been imposed by the Governor and not by the Legislature who alone had power to impose it. But the duties levied under the Order-in D Council are really levied by the authority of the Act under which the Order is issued. The Legislature has not parted with its perfect control over the Governor, and has the power, of course, at any moment, of withdrawing or altering the power which they have entrusted to him. In these circumstances, their Lordships are of opinion that the judgment E of the Supreme Court was wrong in declaring Section 133 of the Customs Regulation Act of 1879 to be beyond the power of the Legislature.

The same approach was adopted by this Court in *D. S. Grewal* F v. *State of Punjab*(2) where upholding the validity of Section 3 of the All India Services Act 1951 which was challenged on the ground of excessive delegation of legislative power, Wanchoo, J. speaking on behalf of the Court said:

> "Further, by s. 3 the Central Government was given G the power to frame rules in future which may have the effect of adding to, altering, varying or amending the rules accepted under s.4 as binding. Seaing that the rules would govern the all-India services common to the Central Government and the State Government provision was made by s.3 that rules should be framed only after consulting the State

(1) [1885] 10 A.C. 282.

H (2) [1959] Supp. 1 S.C.R. 792.

> Governments. At the same time Parliament took care to see that these rules were laid on the table of Parliament for fourteen days before they were to come into force and they were subject to modification, whether by way of repeal or amendment on a motion made by Parliament during the session in which they are so laid. This makes it perfectly clear that Parliament has in no way abdicated its authority, but is keeping strict vigilance and control over its delegate.

It will thus be seen that there is no question of excessive delegation of legislative power in the present case and, even on the view as to interpretation taken by us, sub-section (1) of Section 80J cannot be assailed as unconstitutional on the ground of excessive delegation of legislative power. We must therefore hold that sub-rule (3) of Rule 19A in so far as it provided for exclusion of borrowed monies and debts and particularly long-term borrowings in computation of the 'capital employed' could not be said to be outside the rule making authority conferred on the Central Board of Revenue under sub-section (1) of Section 80J and was a perfectly valid piece of subordinate legislation.

That takes us to the second point urged by Mr. Palkhivala relating to the dimension of time in regard to the expression 'capital employed'. The argument of Mr. Palkhivala was that the concept of 'capital employed' in respect of the previous year is a concept which compels attention to the reality of the capital used during the whole year and not merely on the first day of the computation period and therefore Rule 19A in so far as it provided for computation of the 'capital employed' as on the first day of the computation period was *ultra vires* the rule making authority of the Central Board of Revenue under sub-section (1) of Section. 80J This argument of Mr. Palkhivala is also unsustainable and must be rejected. It may be noted that when sub-section (1) of Section 80J speaks of 'capital employed' in an industrial undertaking or business of a hotel, it does not refer to 'capital employed' *during* the previous year but it uses the expression 'capital employed' *in respect of the previous year*, There is a vital difference between the expression "during the previous year" and the expression "in connection with the previous year". The argument of Mr. Palkhivala would have had great force if the reference in sub-section (1) of Section 80J would have been to 'capital employed' *during* the previous year. Then it could have been contended with considerable plausibility that the 'capital employed'

A cannot be computed as on the first day of the preivous year, but it should be taken to be the average amount of 'capital employed' during the previous year. But the expression used by the Legislature in sub-section (1) of Section 80J being "capital employed..... computed in the prescribed manner in respect of the previous year", the B computation has to be in respect of the previous year and it need not take into account the average amount of 'capital employed' *during* the previous year but it can legitimately take the first day of the previous year as the point of time at which the 'capital employed' must be computed. The 'capital employed' so computed would clearly fall within the expression "capital employed.....computed C in the prescribed manner in respect of the previous year". Mr. Palkhivala relied on the description given in the parenthetical portion at the end of sub-section (1) of Section 80J which describes the amount calculated by applying the statutory rate of six per cent to the 'capital employed' computed in the prescribed manner in respect of the previous year as "the relevant amount of capital employed D during the previous year", but that is merely a description given to the amount calculated as provided in the main part of sub-section (1) of Section 80J and in the main part, we find the words "in respect of the previous year" and not "during the previous year". It may be pointed out that the words "in respect of the previous year" were E introduced for the first time when Section 80J came to be enacted as a result of the Report of Shri S. Boothalingam, where he recommended that the prevailing "base for the calculation of profits. nemely, average 'capital employed' in the business during each year" was complicated and difficult to establish and it was therefore desirable to adopt the basis of computation of the 'capital employed' F as "at the beginning of the year but ignoring the fresh introduction of capital in the course of the year". It was following upon the introduction of the words "in respect of the previous year" in sub-section (1) of Section 80J that Rule 19A was made providing for computation of the 'capital employed' as on the first day of the computation period. Moreover, if we refer to the definition of G 'statutory deduction' in sub-section (8) of Section 2 and Rule 1 of the Second Schedule of the Companies (profits) Surtax Act 1964, it would be apparent that, according to the Legislature, the process of computation of the capital of the company includes also the specification of the point of time as on which the capital of the company shall be computed. Therefore, even if the words "in respect of the previous year" were absent, it would have been competent to the Central Board of Revenue as the rule making authority to H provide for the computation of the 'capital employed as on the

first day of the computation period, as was done by the Legislature in the case of the Companies (Profits) Surtax Act 1964. The words "in respect of the previous year" are facilitative of the computation of the 'capital employed' being prescribed as on the first day of the computation period. We cannot therefore accept the contention of Mr. Palkhivala that Rule 19A in so far as it provided for computation of the 'capital employed' as on the first day of the computation period was outside the rule making authority of the Central Board of Revenue under sub-section (1) of Section 80J.

We are therefore of the view that Rule 19A in so far as it excluded borrowed monies and dabts in computation of the 'capital employed' and provided for computation of the 'capital employed' as on the first day of the computation period was not *ultra vires* Section 80J and was a perfectly valid rule within the rule making authority conferred upon the Central Board of Revenue. So also, for the same reasons, Rule 9A in so far as it provided that 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 monies borrowed or dabts incurred in acquiring that ship must be held to be valid as being within the rule making authority of the Central Board of Revenue. Since, on the view taken by us, Rule 19A did not suffer from any infirmity and was valid in its entirity, Finance Act (No.2) of 1980 in so far as it amended Section 80J by incorporating Rule 19A in the Section with retrospective effect from 1st April 1972, was merely clarificatory in nature and must accordingly be held to be valid.

The writ petitions will therefore stand dismissed but having regard to the importance of the questions involved in the writ petitions, we think it would be fair and just to direct each party to bear its own costs of the writ petitions.

A.N. SEN, J. I have had the benefit of reading the judgment prepared by my learned brother Bhagwati, J. I regret I cannot pursuade myself to agree.

The material facts have been fully stated in the judgment of my learned brother. My learned brother in his judgment has set out all the relevant provisions of the Income Tax Act and the Income Tax Rules. He has also traced the legislative history of S.80J of the

A Income Tax Act, 1961 and has noted the various amendments effected to that section from time to time. It does not, therefore, become necessary to reproduce the same at any length in my judgment.

The two questions which fall for determination are :-

B (1) Whether rule 19A of the Income-Tax Act Rules insofar as the said rule excludes borrowed capital and fixes the first day of the year in the matter of computation of capital employed for the purpose of relief under section 80J is valid.

C (2) Whether the amendment introduced in S. 80J by the Finance (No.2) Act of 1980 incorporating in the section the provisions of the rule in relation to the exclusion of borrowed capital and the fixing of the first day of the year for the purpose of computation of the capital employed for granting relief under S. 80J with retrospective affect from Ist April, 1972 is valid ?

The material provisions of Rule 19A read as follows:-

(1) For the purposes of S. 80J, the capital employed in an industrial undertaking or the business of a hotel shall E 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 F 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 G 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 other-wise then by purchase and not entitled to depreciation, the value of the assets when they became assets of the H business;

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(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. B

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. C

Explanation 2: The value of any building, machinery or plant or any part there of as is referred to in cl. (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. D

Explanation 3: Where the cost of 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. E

(3) From the aggregate of the amount 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 due by the assessee (including amount due towards any liability in respect of tax) F

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Rule 19A forms a part of the Income-Tax Rules 1962 which have been framed by virtue of the authority conferred under section 295 of the Income-tax Act 1961. Section 295 lays down :

"(1) The Board may subject to the control of the Central Government, by notification in the Gazette of India, make rules for the whole or any part of India for carrying out the purposes of this Act; H

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(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters:-

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It may be noted that the matters mentioned in sub-section (2)
B do not refer to section 80J of the Act

The relevant provisions of S. 80J as it stood prior to the impugned amendment by the Finance Act 2 of 1980 material for the purpose of the present proceedings may be set out :

C

"(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 com-
D puting 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 under section 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 indus-
E trial 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).....

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(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
G 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.

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

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(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 machinery or plant previously used for any purpose; B

(iii) it manufactures or produced articles, or operates one or more cold storage plant or 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 (thirty-three years) next following the Ist day of April, 1948, or such further period as the Central Government may, by notification in the official Gazette, specify with reference to any particular industrial undertaking; C

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(iv) in a case where the industrial undertaking manufactures or produces articles, the undertaking 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 : E

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 S. 33B, in the circumstances and within the period specified in that section; F

Provided further that, where any building or any part thereof previously used for any purpose is transferred to the business of the industrial undertaking, the value of the building or part so transferred shall not be taken into account in computing the capital employed in the industrial undertaking: G

Provided also that in the case of an industrial undertaking which manufactures or produces any articles spacified in the list in the Eleventh Schedule, the provisions of clause (iii) shall have effect as if for the words 'thirty-three years', the word 'thirty-one years' had been substituted." H

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I propose to take up first the question of the validity of the Rule. I consider this will be the proper course to adopt If the Rule is held to be valid, the question of the amendment with retrospective effect may not require any consideration at all. If, on the other hand, the Rule is held to be invalid, the question of the validity of
B the amendment assumes vital importance. The invalidity of the Rule, on the basis of the arguments advanced, may also have a bearing in deciding the validity or otherwise of the amendment.

The rule must be held to be valid, if the rule is found to be in conformity with and consistent with the section. If, however, the
C rule is found to be inconsistent with and contrary to the provisions of the section, the rule has to be pronounced invalid.

Whether the rule is in conformity with and is consistent with the section or whether the rule is inconsistent with and contrary to the provisions of the section, must necessarily be determined on
D a proper interpretation of the section.

Principles of construction of any statute or any statutory provision are well-settled. The purpose of interpretation of any statute is to gather the true intention of the Legislature. It is well-
E settled that "if the words of a statue are clear and unambiguous, they themselves indicate what must be taken to have been the intention of Parliament and there is no need to look elsewhere to discover their intention or their meaning". (See Halsbury's Laws of England, 4th Edn. Vol. 44 at P. 522). When the words of a statue are clear, plain or unambiguous, it becomes the duty of the Court
F to expound those words in their natural and ordinary sense, as the words used themselves best declare the intent of the Legislature. If on a fair reading of a section, the words used appear to be plain and unambiguous and are reasonably susceptible to one meaning only, Courts must give effect to that meaning, unless such a meaning makes a non-sense of the section or leads to *absurdity*. The Court is
G not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used. In *Emperor* v. *Banoari Lal Sarma*,(1) Viscount Simon, L.C. observed at P.55:-

"Again and again, this Board has insisted that in enacted words we are not concerned with the policy involved

H (1) A.I.R. 1945 P.C. 48.

construing or with the results, injurious or otherwise, which may follow from giving effect to the language used".

In *Kanti Lal Sur* v. *Paramnidhi Sadhukhan*,(1) this Court at P. 910 held:-

> "If the words used are capable of one construction only, then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act".

If, however, the words of a statute are not clear and are ambiguous; different considerations may apply in interpreting the provisions for gathering the true intention of the law-giver. It is stated in Halsbury's Laws of England, 4th Edn. Vol. 44, in para 858 at P. 523, as follows :

> "If the words of a statute are ambiguous, the intention of Parliament must be sougth first in the statute itself, then in other legislation and contemperaneous circumstances and finally in the general rules laid down long ago, and often approved namely, by ascertaining (1) what was the common law before the making of the Act; (2) what was the mischief and defect for which the common law did not provide; (3) what remedy Parliament resolved and appointed to cure the disease of the commonwealth, and (4) the true reason of the remedy".

As on a fair reading of S. 80J, I am satisfied that the section is sufficiently clear and the language used therein suffers from no ambiguity, it does not become necessary for me in the instant case to consider at length the principles of interpretation which are required to be observed in construing an ambiguous statute.

The material provisions of S. 80J of the Income-tax Act, prior to the impugned amendment by the Finance Act, 1980, have been earlier set out. The relevant provisions of the said section provide that where the gross total income of an assessee includes profits and gains derived from an industrial undertaking or ship or the business of a hotel to which the section applies, there shall, in accordance with and subject to the provisions of the section, be allowed in

(1) A.I.R. 1957 S.C. 907.

computing total income of the assessee, a deduction from such profits and gains (reduced by the deduction, if any, admissible to the assessee under S. 80HH or S. 80HHA) of so much of the amount thereof as does not exceed an amount calculated @ 6% 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 manner prescribed in respect of the previous year relevant to the assessment year (the amount calculated aforesaid being hereinafter, in thi connection referred to as the relevant amount of capital employed during the previous year).

For qualifying for relief under this section, an assessee must derive profits and gains from an industrial undertaking or ship or the business of a hotel to which the section must be applicable. It is not in dispute that the assessees who have approached the Court have derived profits and gains from industrial undertaking set up by them and they qualify for relief under this section.

A plain reading of the section with reference to the language used therein clearly postulates that relief as contemplated in the section is to be allowed on the capital employed in the undertaking in the previous year, producing the profits and gains of the undertaking in the previous year. An undertaking might have had capital which might not have been employed in the undertaking in previous year for earning profits and gains which were earned in the previous year. Such capital, though forming part of the capital of the undertaking, will not be entitled to the benefit of the relief under this section. Relief is contemplated only on the capital which was employed in the undertaking in the previous year and which produced in the previous year the profits and gains of the undertaking which were included in the total income of the assessee in the previous year. Relief under this section for the undertaking is clearly intended on the capital employed in the undertaking which produced the profits and gains of the undertaking in the previous year. This intention is made manifestly clear, as relief has to be granted on the basis of the profits and gains earned by the undertaking in the previous year by virtue of employment of capital in the undertaking in the previous year. The capital employed in the undertaking which qualifies for relief under this Section clearly refers to and must necessarily be the capital employed in the undertaking in the previous year for the purpose of earning the profits. If the capital employed in the undertaking is own capital, such capital qualifies for relief. If capital employed is borrowed capital, such capital will equally

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qualify for relief. If capital employed consists of assessee's own capital and also his borrowed capital, the capital so employed, assessee's own and borrowed, will both qualify for the relief. The capital employed in the undertaking in the previous year which qualifies for relief under this section has to be computed in the B manner prescribed. There is nothing in the section to suggest or indicate that in prescribing the manner of computation of the capital employed in the undertaking for the purpose of relief, any part of the capital which was employed in the undertaking for producing the profits and gains can be excluded. If the Legislature had any such intention for excluding any part of the capital employed in the C undertaking producing profits and gains of the undertaking, the Legislature would have and could have easily made suitable provisions. The Legislature must be presumed to have known that the capital employed in an undertaking may consist of and, in fact, does consist of assessee's own capital and also capital borrowed by D the assessee. It is common knowledge that most of the undertakings carry on their activities with borrowed capital in addition to own capital employed in the undertakings. Inspite of the knowledge of the Legislature that undertakings are carried on with borrowed capital, the Legislature in its wisdom has in this section mentioned capital employed in the undertaking for earning profits and gains of E the undertaking without making any distinction between own capital and borrowed capital and has provided for relief in respect of the capital employed in the undertaking on the basis of profits and gains of the undertaking earned by virtue of employment of such capital. It is not disputed and cannot be disputed that profits and gains of the undertaking to be ultimately included in the total income of the F assessee are produced by the capital, whether assessee's own or borrowed, employed in the undertaking in the relevant year and while computing profits and gains of the undertaking the borrowed capital is as important as the assessee's own capital and both play the same role in earning the profits and gains of the undertaking. It is the G capital employed in the undertaking which qualifies for relief under this section. irrespective of the nature and source of the capital employed in the undertaking. It is, however, to be emphasised that the capital to qualify for relief under this section, whether borrowed or own, must be employed in the undertaking in the previous year for earning profits and gains and any capital of the undertaking, borrowed or assessee's own which remains idle and is not employed in the undertaking for earning profits and gains dose not qualify for H any relief under this section.

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Sub-section 4 of S. 80J lays down the conditions which have to be fulfilled by an undertaking to qualify for the relief granted under this section. Even in this sub-section there is no indication that any undertaking set up with borrowed capital or with capital part of this section. An industrial undertaking which satisfies all the conditions laid down in sub-section 4 will undoubtedly be entitled to the benefits of S. 80J. An undertaking with borrowed capital can also very well satisfy the conditions of sub-section (4) and qualify for the relief, as there is nothing in this sub-section which prevents an undertaking set up with wholly or partly borrowed capital from fulfilling the conditions laid down in the sub-section 4. An undertaking satisfying all the conditions in sub-section (4) and thereby qualifying for relief if, however, set up with borrowed capital, will be denied the relief to which the undertaking in terms of the clear provisions of the section is justly entitled, morely on the ground that the rule prescribed for computing the relief excludes the borrowed capital in the computation of the capital employed for the purpose of granting the relief under this section. In other words, an industrial undertaking qualifying for the relief under S. 80J by virtue of the clear and unambiguous provisions made in the section will be denied the relief because of the rule, as on computation on the basis of the rule excluding borrowed capital, no relief will be available. As the sub-section in clear and unequivocal terms provides that S. 80J will apply to such an undertaking, the benefit intended to be given to the undertaking under this section cannot be denied to such an undertaking by any rule which will clearly have the effect of negativing the clear and unambiguous statutory provisions.

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The argument of Mr. Palkhivala that the expression 'capital employed' is a term of art and is usually understood in business parlance and commercial circles and also in commercial accountancy in the sense that it includes not only owner's capital but also borrowed capital, particularly if the borrowing is on a long term basis, to my mind, has considerable force. It may be true that in different context and particularly in the context of return of capital, capital employed may not include borrowed capital. Unless the content otherwise requires and except in the case of return of capital, the expression 'capital employed' in its ordinary sense is understood to include borrowed capital. It refers to the capital, whatever may be the source, which is employed in any undertaking or venture for carrying on the business for the purpose of earning the profits and gains.

In the instant case, the words 'capital employed' have to be understood and interpreted in the context the said words have been used in S. 80J. It is quite clear from the text of the section that the words capital employed have been used in the context of the capital which has been employed in the under-taking for producing profits and gains of the undertaking in the relevant year. If borrowed capital is also employed in the undertaking, capital employed necessarily and clearly includes such borrowed capital which has been employed in the undertaking and which has contributed to the profits and gains of the undertaking. To my mind, therefore, on a proper interpretation, section 80J is clear language postulates that capital employed in the undertaking includes own capital and also borrowed capital employed in the undertaking in the relevant year and the section plainly and unequivocally makes this intention of the Parliament manifestly clear.

As the Section is clear and unambiguous it is indeed not proper and necessary to refer to any other consideration for its construction. It may, however, be pointed out that this interpretation not only makes perfect sense but also clearly promotes the object for which this section was incorporated. To my mind, the object of S. 80J which indeed replaces the earlier section 84 which came in place of S. 15C of the earlier Income-Tax Act, is to give impetus and encouragement to the setting up of new industrial undertaking by offering tax incentives or tax reliefs. The object clearly is to encourage persons to set up new industrial undertakings for rapid industrialisation of the country by offering incentives in respect of undertakings covered by this section by way of grant of tax relief on the capital employed in such undertakings.

In the case of *Textile Machinery Corporation* v. *Commissioner of Income-tax, West Bengal*,(1) this Court while considering the object of a similar provision in S. 15C observed at page 202:-

> "The principal object of section 15C is to encourage setting up of new industrial undertaking 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 there in. This section was insertedin the Act in 1949 by section 13 of the Taxation Laws (Extension to

(1) (1977) 107 I.T.R. 195.

A 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, nemely, 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
B 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
C years in 1953. 7 years in 1954, 13 years in 1956 and 18 years in 1968. The incentive introduced in 1949 has been thus stopped up ever since and the only object is that which we have already mentioned."

In the case of *Rajapopalayan Mills Ltd.* v. *Commissioner of*
D *Income Tax Madras*,(1) this Court had also held at page 783 :

"The law of income-tax in a modern society is intended to achieve various social and economic objectives. It is often used as an instrument for accelerating economic growth
E and development. S. 15C is a provision introduced in the Indian I.T. Act, 1922, with a view to carrying out this objective and it is calculated to encourage setting up of new industrial undertakings in the country."

The rapid industrialisation of the country for economic growth
F in the larger interests of the country is the main object of this section which seeks to afford an incentive or tax relief to new industrial undertakings which satisfy the requirements of the section.

To my mind, the argument of the learned Attorney General that the provision contained in the Section requiring 'the capital
G employed to be computed in the manner prescribed' authorises the rule making authority to include or to exclude borrowed capital at its discretion by making appropriate provision in the rules as to exclusion of a part of the capital employed for computation of capital employed for the purpose of granting relief under the section is clearly untenable. The section only enjoins that capital employed is to be computed in the manner to be prescribed and the

H (1) (1976) 115 ITR 777.

manner of computation of the capital employed only authorises the rule making authority to deal with the details regarding computation of capital employed for carrying out the provisions of the section and the provision regarding the manner of computation does not empower or authorise the rule making authority to lay down which part of the capital employed or how much of it will have to be included or excluded and to what extent, if any: The question whether there should be any such exclusion or inclusion in the matter of consideration of the grant of relief, is essentially a matter of policy for the Legislature to decide and is not a matter for the rule making authority to prescribe. The power of the rule making authosity in terms of the provision contained in section 295 of the Income-tax Act which confers such power is limited to the framing of rules for carrying out the purposes of the Act. The rule making authority is not competent to prescribe any rule which will be in the nature of a substantive provision of the Act itself and more particularly, which will be in conflict with the substantive provision of the section itself and which will in any way defeat or frustrate the purpose for which any provision in the Act has been enacted. In the instant case I am clearly of the opinion on a construction of S. 80J that the said section unequivocally and in clear terms provides that capital employed for earning the profits of the undertaking is the capital which is entitled to the benefit of the relief. The exclusion of borrowed capital by the rule making authority in the rules prescribed for computation of the relief under S. 80J is inconsistent with and derogatory to the provisions of the statute. The said rule not only fails to carry out the purpose of the said section but in fact tends to defeat the same and the rule runs clearly contrary to the provisions of the statute. The rule excluding borrowed capital must, therefore, be held to be bad and invalid.

The argument of Mr. Palkhivala that any such rule framed by the rule making authority including or excluding any part of the capital employed in the undertaking in the absence of any guideline will also be clearly beyond the power of the rule making authority, to my mind. is sound. In the section itself or in any other provision of the Act it does not appear that there is any provision laying down any guideline which may entitle the rule making authority to exclude any part of the capital employed, whether it is borrowed capital or own capital. No such provision or guideline is there in the Act. To my mind, there could not possibly be any such provision or guideline in the Act, as the section itself clearly provides that the entire amount of capital employed for earning the profits will qualify for

A the relief. If it be held that the rule making authority enjoys and such power of excluding any part of the capital employed in the undertaking because of the provision in the section regarding "computation of capital employed in the manner prescribed" it must necessarily be held that the rule making authority enjoys the power
B of framing a rule contrary to the provision of the section. It must further be held that the rule making authority at its discretion enjoys the power to exclude the whole or part of owner's capital and also the whole or part of the borrowed capital. This interpretation will mean that uncanalised power will be available with the rule making authority which at its discretion and in the absence of any
C guideline will be entitled to exclude any or every part of the capital employed even to an excent of rendering the section itself nugatory. This interpretation will have the effect of justifying a delegation of power to the rule making authority to an extent which cannot be permitted. I have no hesitation in coming to the conclusion that the rule making authority does not enjoy any such power or jurisdiction.
D No such power or jurisdiction in the absence of specific provision and clear guideline in the Act could be delegated to the rule making authority.

In the case of *Sales Tax Officer* v. *K.S. Abraham*(1) this Court had the occasion to construe the meaning of the phrase "in the
E prescribed manner" occuring in S. 84 of the Central Sales-Tax Act, 1956. In dealing with the vires of rule 6 of the Central Sales Tax (Kerela) Rules, 1967 in so far as the said rule purported to prescribe a time limit within which the declaration was to be filed by the registered dealer, this Court held,—

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> "In our opinion, the phrase 'in the prescribed manner' occurring in S. 8 (4) of the Act only confers power on the rule making authority to prescribe a rule stating what particulars are to be mentioned in the prescribed form, the nature and value of the goods sold, the parties to whom
> G they are sold, and to which authority the form is to be furnished. But the phrase 'in the prescribed manner' in S. 8 (4) does not take in the time element. In other words, the section does not authorise the rule-making authority to prescribe a time-limit within which the declaration is to be filed by the registered dealer. The view that we have taken is supported by the language of S. 13 (4) (g) of the Act

H (1) [1967] 3 S.C.R. 518.

which states that the State Government may make rules for 'the time within which, the manner in which and the authorities to whom any change in the ownership of any business or in the name, place or nature of any business carried on by any dealer shall be furnished.' This makes it clear that the Legislature was conscious of the fact that the expression 'in the manner' would denote only the mode in which an act was to be done, and if any time limit was to be prescribed for the doing of the act, specific words such as 'the time within which' were also necessary to be put in the statue.

The Privy Council in the case of *Utah Construction & Engineering Pvt. Ltd. and Anr.* v. *Pataky*,(1) observed at pages 653-654:

"Their lordships now pass to S. 22 (2) (g) (iv) and (v). Sub-paragraph (iv) empowers the Governor to make regulations "relating to the manner of carrying out....axcavation work'. The relevant portion of reg. 98 provides 'Every drive and tunnel shall be securely protected and made safe for persons employed therein'. The expression 'manner of carrying out' the work plainly envisages a system of working, and does not in their lordships view justify a regulation imposing an absolute duty of protecting the drive and tunnel or an absolute duty of ensuring the safety of persons employed in the drive or tunnal. The relevent portion of reg. 98 does not prescribe the manner of doing the work. Sub-paragraph (iv) therefore cannot in their lordships opinion empower the making of the relevant portion of reg. 98."

The proposition that the rule making authority does not have any power to encroach upon any substantive provision in the statute appears to be beyond dispute. By virtue of S.295 (1) of the Income-tax Act, the rule making authority is empowered to make rules for carrying out the purposes of the Act and sub-section 2 which specifically refers that such rules may provide for all or any of the matters mentioned in the said subsection does not make any reference to S. 80J. In prescribing the manner of computation of capital employed, the rule making authority, in the absence of specific provision in the section itself or in the absence of any statutory provision, cannot exclude any

(1) [1965] 3 All. E R. 650.

part of the capital employed in the undertaking at its discretion under the guise of the process of prescribing the manner of computation.

The argument of the learned Attornney General that as an undertaking which employs borrowed capital gets relief because in calculating the profits and gains the interest paid on the borrowed capital is taken into account, the rule making authority in prescribing the manner of computation of capital employed is entitled to exclude borrowed capital to avoid grant of double relief to the undertaking, is without any merit. Interest paid on borrowed capital by any dnuertaking, whether it is an undertaking within the meaning of S.80J or not, is taken into account as business expenditure in calculating the profits and gains of any undertaking. It is the prescribed mode of calculating the profits and gains of every undrtaking and is no special benefit for any undertaking: and, undoubtedly it affords no incentive of special relief to a new undertaking which has necessarily to satisfy the required conditions laid down in S 80J for being entitiled to the relief intended to be granted to an undertaking which comes within the purview of S.80J. In any event, such inclusion or exclusion on any consideration will be a matter of policy to be determined by the Legislature and not a matter for the rule making authority to lay down in prescribing the mode of computation.

The decision of the Calcutta High Court in the case of *Century Enka Ltd.* v. *I.T.O.*,(1) the decision of the Madras High Court in the case of *Madras Industrial Linings Ltd.* v. *I.T.O.*(2), the decision of the Allahabad High Court in *Kota Box Manufacturing Co.* v. *I.T.O.*(3) the decision of the Punjab and Haryana Hige Court in the case of *Ganesh Steel Industries* v. *I.T.O.*(4), the desision of the Andhra Pradesh High Court in the case of *Warner Hindustan Lld.* v. *I.T.O.*(5) holding the rule to the extent it excludes borrowed capital in the computation of capital employed for the purpose of granting relief under section 80J to be invalid, are correct and I have no hesitation in upholding these decisions. The contrary view expressed by the Madhya Pradesh High Court in the case of *Commissoiner of Income Tax, M.P. II* v. *Anand Bahri Steel and Wire Products*(6) must necessarily be held to be erroneous.

(1) [1977] 107 ITR 123.
(2) [1977] 110 ITR 256.
(3) [1980] 123 ITR 638.
(4) [1980] 126 ITR 258.
(5) [1982] 134 ITR. 158.
(6) [1982] 133 ITR 365.

It may be noticed that the Madhya Pradesh High Court proceeded to hold the rule to be valid mainly on the ground that this rule has been in existence for a long time under S.15C of the earlier Act which subsequently came to be replaced by S.80J and the Parliament must have been aware at the time of enacting S.80J of the existence of the rule framed by the rule making authority which held the field for a long period without any challenge. The decision proceeds on the basis that the Parliament must have, therefore, accepted the interpretation put by the rule making authority at the time the Parliament enacted S 80J. This decision does not take into consideration the fact that the interpretation put by the rule making authority has not been the same all throughout and has undergone changes from time to time and the rule making authority has in certain years also permitted certain classes of borrowed capital to be taken into account in computation of capital employed for the purpose of relief. The decision of the Madhya Pradesh High Court does not also take into consideration the question whether the rule seeking to include or exclude borrowed capital at the discretion of the rule making authority in the absence of any statutory provision or guideline, becomes bad on account of unjustified excessive delegation of authority. This decision of the Madhya Pradesh High Court has not proceeded to construe S.80J correctly to gather the true intention of the Parliament before deciding the question as to whether the rule excluding borrowed capital is consistent with the intention of Parliament clearly expressed in S.80J.

In my opinion, the mere existence of an invalid rule without any challenge for any length of time does not affect the question of validity of the rule and cannot render a rule otherwise invalid to be valid only on the ground that the rule had remained in existence without any challenge for a number of years. In the case of *Proprietary Articles Trade Association* v. *Attorney General for Canada*(1), the Judicial Committee while considering the vires of a statute namely, Combines Investigation Act R.S. Can. 1927, c. 26 passed by the Parliament of Canada observed at p. 317 :—

> "Both the Act and the section have a legislative history, which is relevant to the discussion. Their Lordships entertain no doubt that time alone will not validate an Act which when challenged is found to be ultra vires ; nor will a history of a gradual series of advances till this boundary is finally crossed avail to protect the ultimate encroachment."

In the case of *Campbell College Belfast* (*Governors*) v. *Commis-*

(1) [1931] A.C. 310.

sioner of Valuation for Northern Ireland(1), the House of Lords while considering the validity of payment of rates by fee paying public school in Northern Ireland which has continued for over 132 years despite the terms of s. 2 of the Valuation (Ireland) Act Amendment Act, 1954, held at p. 941 to 942 :—

> "My Lords, for my part I am quite unable to apply that principle to a statute although it was passed over 100 years ago, but its language is plain and unambiguous and it was not misconstrued until the decision in the Alexandra College case 60 years later. True it is that fee paying schools did always pay rates in accordance with section 2, but until 1914 that was not because it was assumed that section 2 was controlled by the proviso, and that charitable purposes bore a limited meaning. It may have been that it was thought that if some of the pupils were free paying, section 16 of the Act of 1852 was not satisfied. That argument is now untenable and, as Black L.J. pointed out at an early part of his judgment, Campbell College is clearly for this purpose a charitable institute. My Lords, in these circumstances I can attach no weight whatever to this long unquestioned payment when construing section 2. To my mind, this doctrine can have no application to the circumstances of this case.

It is also well-settled that even if the rules have been laid before the Parliament and there is a resolution of the Parliament approving the rules, the validity of the rules has to be declared by the Court and the Court can declare any rule placed before the Parliament and approved by the Parliament to be ultra vires the Act and invalid. In the case of *Kerala State Electricity Board.* v. *Indian Aluminium*(2)., this Court held at p.576 :—

> "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 the 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

(1) [1964] 1 W.L.R. 912.
(2) [1976] 1 S.C.R. 552.

if 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. We are, therefore, of opinion that 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 po ver provided in the statute."

The other impugned provision of the rule, prescribing that capital employed should be computed on the basis of the capital employed on the first day of the year, must on a proper construction of the section be also held to be invalid. The section clearly provides that the deduction to be allowed is to be computed in the prescribed manner in respect of the previous year relevant to the assessment year. The deduction to be allowed is on the profits and gains of the undertaking earned in the releavant year in respect of the previous year relevant to the assessment year. Profits and gains which are to be taken into account are the profits and gains earned in the relevant year and the year must necessarily mean and include the whole of the year and not some days or months of the year. The capital employed for earning the profits and gains during the whole year must necessarily be the capital which is entitled to the benefit of the section. Capital employed on the Ist day of the year does not produce the profits of the entire relevant year, unless the very same amount of capital remains employed throughout the year. It does not usually happen and in any event it may not happen. Therefore, by prescribing the 1st day of the year to be the date of computation of the capital employed, the capital employed during the whole year is sought to be denied by the rule the benefit to which it is entitled under the section. This provision, therefore, is clearly contrary to and inconsistent with the specific provision of the statute, as by fixing the 1st day of the year to be the date of computation of the capital employed for the year, the rule making authority is seeking to deny the benefit conferred by the statute.

Andhra Pradesh High Court in the case of *Warner Hindustan*

Ltd. and Anr. v. *Income-tax Officer and Ors.* (supra) in dealing with this question has referred to the decision of the Calcutta High Court in *Century Enka Ltd.* v. *Income-tax Officer* (supra) on this very point and in agreement with the decisions of the Calcutta High Court, the Andhra Pradesh High Court held at p. 195 :—

> "As observed by a learned Judge of the Calcutta High Court in *Century Enka Ltd.* v. *Income tax Officer*(1),the main consideration upon which this question has to be resolved is (p. 132), 'whether having regard to the purpose for which provisions 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. 80 J 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 antitled to the full benefit, an assesses 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 enterpreneure to establish new industrial undertakings and pave the way for rapid industrial growth in the country then the 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".

The Calcutta High Court and Andhra Pradesh High Court have both held this part of the rule fixing the first day of the year for computing the capital employed for the purpose of granting relief under S. 80J to be invalid. I find no difficulty in upholding the decision of the Calcutta High Court and of the Andhra Pradesh High Court on this question.

I know proceed to consider the other question about the validity of the amendment of section 80J introduced by the Finance

(1) [1977] 107 I.T.R. 123.

Act 2 of 1980. By the amendment the provisions contained in the rule excluding borrowed capital and fixing the first day of the year for computation of capital employed for the purpose of relief under S. 80J have been incorporated in the section itself with retrospective effect from 1.4.72.

On behalf of some of the assessees the amendment both with regard to its prospective and retrospective operation has been challenged. Dr. D. Pal, supported by other learned counsel, addressed us mainly on the aspect of prospective operation, while supplementing and supporting the submissions of Mr. Palkhivala on the aspect of retrospective operation. Mr. Palkhivala who has been the principal spokesman for the assessees, confined his challenge to the validity of the amendment mainly to the retrospective part, although he made it clear that he was not conceding the validity of the prospective operation.

I propose to consider the submission of Dr. Pal in the first instance. If the submission of Dr. Pal that the entire amendment is invalid is accepted, the submission of Mr. Palkhivala that the amendment in so far as it is made retrospective is also bad must necessarily succeed.

Dr. Pal has argued that the amendment seeks to make an nvidious distinction between own capital and borrowed capital in the matter of granting relief under this section. It is the argument of Dr. Pal that having regard to the object of the section which is to promote new industries and to give relief on the basis of the capital employed in such new industries by way of incentive, distinction between own capital and borrowed capital is wholly irrelevant and does not have any nexus with the object sought to be achieved and this distinction between own capital and borrowed capital in the matter of computation of capital employed in the undertaking for the purpose of granting relief results in unjustified discrimination and is therefore violative of Art. 14 of the Constitution. To my mind, there is no merit in the submission of Dr. Pal. It is entirely a matter for the Parliament to decide whether any relief by way of incentive should be allowed and if so to what extent and in what manner. There is no obligation on the part of the Parliament to make any provision for granting relief to promote new industries. The Legislature in its wisdom may decide to grant relief and may equally decide not to grant any relief. It is essentially for the Legislature to decide as to whether any incentive for promoting industrial growth of the country is called for and if the Legislature feels that in the

A situation prevailing in the country such incentive should be provided it will be again for the Legislature to decide what kind of incentive and in what form and to what extent the same should be provided and to pass appropriate legislation in this regard. The Parliament would have been legally competent to withdraw the entire relief under section B 80J and to abrogate the said section in its entirety, if the Parliament had considered such withdrawal to be necessary. The Parliament is equally competent to increase or reduce the quantum of relief intended to be given under this section. In providing that relief intended under S. 80J would be allowed only to owner's own capital and not to any borrowed capital, there can be no infringement of Art. 14. No entrepre- C nuer or businessman can claim as a matter of right that relief by way of incentive should be provided to new undertakings to be set up by him. The Parliament provides for such relief in pursuance of a policy and policy may change from time to time in view of the situation prevailing from time to time. The Parliament may legitimately feel that borrowing by businessman may not be encouraged and persons should be encouraged to bring their own money for setting up new undertakings and Parliament may provide for appropriate relief by way of incentive D to the owner's capital employed to the exclusion of borrowed capital in the setting up of any new industrial undertaking. Whether it is prodent to do so is essentially a matter for the Parliament in its wisdom to decide. It is not for this Court to sit in judgment over E the wisdom of the Parliament in the framing of its policy. The discrimination in the matter of granting relief to own capital to the exclusion of borrowed capital in pursuance of a policy cannot be said to be violative of Art. 14, as the two classes of capital, though forming a part of the total capital of the undertaking, are distinct and they stand on a different footing. A classification between these F two classes of capital for encouraging investment of own capital in setting up new industrial undertakings, cannot be held to be unreasonable and unjustified. The contention of Dr. Pal that the amendment in discriminating between borrowed capital and owner's own capital in the enjoyment of relief under section 80J infringes Art. 14, must G therefore, be rejected. Very properly in challenging the validity of the amendment in so far as it operates prospectively, no grievance in regard to violation of Art. 19 of the Constitution has been made.

I now pass on to the question of the validity of the amendment with retrospective effect from 1.4 1972.

It has been contedned by the learned counsel for the assessees that the retrospective operation of the provision is unreasonable, H arbitrary and violative of Arts. 14 and 19 of the Constitution. The

main argument is that the withdrawal of relief granted by the statute before the present amendment and lawfully enjoyed by the assessee during all these years and thereby imposing on the assessee an unjust, unmerited and accumulated huge financial liability, cannot be considered to be reasonable; and such imposition of accumulated liability will seriously affect the financial stability of the undertakings and will further create various other difficulties which may be almost impossible for the assessees to overcome. It has been argued that the present amendment has not been necessitated as a result of any provision of the statute being declared ultra vires for any lacuna in the statutory provision and there is no question of any liability being foisted on the Government of refunding any large sun of money collected as tax from the assessees on account of any statutory provision imposing any levy being declared invalid or unconstitutional. It is submitted that in view of the unequivocal provision of the statute granting relief to borrowed capital which was sought to be negated and denied by an invalid rule which has been struck down, the assessees are legitimately entitled to the relief and they have rightly and justifiably arranged their affairs on the basis of the law as it stood. The existence of an invalid rule and the pendency of appeals in this Court against the judgment of the various High Courts declaring the rule to be invalid cannot be considered to be relevant factors, particularly when the statutory provision is clear, for guiding the assessee who has to carry on its normal trading activities, in arranging its affairs. The submission is that the withdrawal or relief lawfully granted and properly enjoyed by the assessees after this long lapse of time, when no serious prejudice is caused or is likely to be caused to the public exchequer and on the other hand a heavy unwarranted financial burden alongwith other difficulties and problems are created for the assessee, cannot be said to be in public interest and must be held to be unreasonable, arbitrary and violative of Art. 14 and 19 of the Constitution.

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The learned Attorney General has submitted that retrospective operation of the provision does not suffer from any infirmity and is not arbitrary or unreasonable nor is it violative of Art. 14 and 19 of the Constitution. He argues that prior to rule 19—A being considered by some of the tribunals and by various High Courts, the said rule excluding borrowed capital in the matter of computation of relief and fixing the 1st day of the year as the relevant date for the computation of relief has remained in force for a number of years. It is his argument that after the said rule had been struck down, the validity of the decisions has been challenged and was pending appeal in this Court; and the appeal was pending at the time when the present

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A amendment came to be enacted in 1980. The Learned Attorney General contends that as rule 19—A excluding borrowed capital and fixing the first day of the year as the date for computation of relief had remained in force for a number of years and as the decision striking down the rule is now pending appeal, the assessees were not justified in arranging their affairs on the basis of the said rule being B invalid and as prudent men of business they should have so arranged their affairs as to cover every contingency and particularly the contingency of the validity of the rule being upheld by this Court. The Learned Attorney General has submitted that the amendment has been introduced before the decision of this Court in the pending C appeals, as the Parliament wanted to clarify the position in the interest of all concerned and more so in the interest of the assessees to enable the undertakings which qualified for relief under S. 80J to enjoy the benefit intended to be conferred by the Section. It is the submission of the Learned Attorney General that in the absence of any valid rule prescribing the manner of computation of relief to D which the assessee may be entitled under S. 80J, the benefit cannot be computed and, therefore, no benefit contemplated under S. 80J may be at all available to the assessees. He submits that if the rule is held to be valid by this Court in these appeals, the arguments of the assessee that the assessee has arranged its affairs on the basis of invalidity of the rule will be of no avail; and he further submits that if the invalidity is upheld by this Court in these appeals, the E assessee in the absence of any valid rule prescribing the manner of computation of the relief will not be entitled to the benefit of any relief under the section. It is his submisson that in these circumstances the Parliament with the object of seeing that the assessee who is entitled to any relief under S. 80J is not denied such relief over these years for lack of provision of a suitable rule prescribing the manner of computation of such relief, has amended the section itself with F retrospective effect from 1972 in the interest of the assessees themselves. It is the submission of the Attorney General that as the amendment with retrospective effect has been made essentially in the interest of the assessees to enable them to enjoy the relief intended to be given under S. 80J, the retrospective effect of the amendment G cannot be said to be unreasonable or arbitrary and the retrospective amendment dose not violate either Art. 14 or 19 of the Constitution, even if the retrospective effect may operate harshly on some assessees.

Before considering the arguments advanced on behalf of the parties, I propose at this stage to refer to some of the decisions cited H from the Bar on this aspect.

In the case of *Epari Chinna Krishna Moorthy, Proprietor Epari Chinna Moorty and Sons, Berhampur Orissa* v. *State of Orissa*,(1) it was observed at p. 191:—

> "Mr. Sastri also argued that the retrospective operation of the impugned section should be struck down as unconstitutional, because it imposes an unreasonable restriction on the petitioners' fundamental right under Art. 19 (1) (g). It is true that in considering the question as to whether legislative power to pass an Act retrospectively has been reasonably exercised or not, it is relevant to enquire how the retrospective operation operates. But it would be difficult to accept the argument that because the retrospective operation may operate harshly in some cases., therefore, the legislation itself is invalid. Besides, in the present case, the retrospective operation dose not spread over a very long period either. Incidentally, it is not clear from the racord that the petitioners did not recover sales tax from their customers when they sold the gold ornaments to them".

In the case of *Rai Ram Krishna & Ors.* v. *State of Bihar*(2). this Court observed at pp. 914-917:—

> "Mr. Setalvad contends that since it is not disputed that the retrospective operation of a taxing statute is a relevant fact to consider in determining its reasonableness, it may not be unfair to suggest that if the retrospective operation covers a long period like ten years, it should be held to impose a restriction which is unreasonable and as such, must be struck down as being unconstitutional. In support of this plea, Mr. Setalvad has referred us to the observations made by Sutherland. 'Tax Statute,' says Sutherland, 'may be retrospective if the legislature clearly so intends. If the retrospective feature of a law is arbitrary and burdensome, the statute will not be sustained. The reasonableness of each retrospective tax statute will depend on the circumstances of each case. A statute retroactively imposing a tax on income earned between the adoption of an amendment making income taxestes legal and the passage of the income tax Act is not unreasonable. Likewise an Income tax not retroactive beyond the year of its passage is clearly valid. The longest

(1) [1964 7] S.C.R. 185.
(2) [1964] 1 S.C.R. 897.

A period of retroactivity yet sustained has been three years. In general, income taxes are valid although retroactive, if they affect prior but recent transaction.' Basing himself on these observations Mr. Setalvad contends that since the period covered by the retroactive operation of the Act is between April 1, 1950 and september 25, 1961, it should be held that the restrictions imposed by such retroactive operation are unreasonable, and so, the Act should be struck down in regard to its retrospective operation. We do not think that such a mechanical test can be applied in determining the validity of the retrospective operation of the Act. It is conceivable that cases may arise in which the retrospective operation of a taxing or other statute may introduce such an element of unreasonableness that the restrictions imposedby it may be open to serious challenge as unconstitutional, but the test of the length of time covered by the retrospective operation cannot, by itself, necessarily be a decisive test. We may have a statute whose retrospective operation covers a comparatively short period and yet it is possible that the nature of the restriction imposed by it may be of such a character as to introduce a serious infirmity in the retrospective operation. On the other hand we may get cases where the period covered by the retrospective operation of the statute, though long, will not introduce any such infirmity. Take the case of a Validating Act. If a statute passed by the legislature is challenged in proceedings before a Court, and the challenge is ultimately sustained and the statute is struck down, it is not unlikely that the judicial proceedings may occupy a fairly long period and the legislature may well decide to await the final decision in the said proceedings before it uses its legislative power to cure the alleged infirmity in the earlier Act. In such a case, if after the final judicial verdict is pronounced in the matter the legislature passes a validating Act, it may well cover a long period taken by the judicial proceedings in Court and yet it would be inappropriate to hold that because the retrospective operation covers a long period, therefore, the restriction imposed by it is unreasonable. That is why we think the test of the length of time covered by the retrospective operation cannot by itself be treated as a decisive test".

It the case of *Jawaharlal* v. *State of Rajasthan & Ors.*(1) this Court held at p. 905:—

(1) [1966] 1 S.C.R. 890.

"We have already stated that the power to make laws involves the power to make them effective prospectively as well as retrospectively, and tax laws are no exception to this rule. So it would be idle to contend that merely because a taxing statute purports to operat retrospectively, the retrospective operation *per se* involves contravention of the fundamental right of the citizen taxed under Art. 19(1)(f) or (g). It is true that cases may conceivably occur where the Court may have to consider the question as to whether excessive retrospective operation prescribed by a taxing statute amounts to the contravention of the citizens' fundamental right; and in dealing with such a question, the Court may have to take into account all the relevant and surrounding facts and circumstances in relation to the taxation".

In the case of *Assistant Commissioner of Urban Land Tax* v. *The Buckingham & Carnatic Co. Ltd.*[1] etc. it was observed at P.287:—

"It is contended on behalf of the petitioners that the retrospective operation of the law from 1st July, 1963 would make it unreasonable. We are unable to accept the argument of the petitioners as correct. It is not right to say as a general proposition that the imposition of tax with retrospective effect *per se* renders the law unconstitutional. In applying the test of reasonableness to a taxing statute it is of course a relevant consideration that the tax is being enforced with retrospective effect but that is not conclusive in itseif".

In the case of *M/s. Krishnamurthi & Co. Etc.* v. *State of Madras & Anr.*[2] this Court observed at P. 61:—

"The object of such an enactment is to remove and rectify the defeat in phraseology or lacuna of other nature and also to validate the proceedings, including realisation of tax, which have taken place in pursuance of the earlier enactment which has been found by the Court to be vitiated by an infirmity. Such an amending and validating Act in the very nature of things has a retrospective operation. Its aim is to effectuate and carry out the object for which the earlier principal Act had been enacted. Such an amending

(1) [1970] 1 S.C.R. 268.
(2) [1973] 2 S.C.R. 54.

A and validating Act to make 'small repairs' is a permissible mode of legislation and is frequently resorted to in fiscal enactments."

Similar observations have been made by this Court in the case of *Hira Lal Rattan Lal etc. etc.* v. *State of U.P. & Anr. etc*(1) at p. 511:—

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> "A feable attempt was made to show that the retrospective levy made under the Act is violative of Art. 19(1) (f) and (g). But we see no substance in that contention. As seen earlier, the amendment of the Act was necessitated because of the legislature's failure to bring out clearly in the principal Act its intention to separate the processed or spilit pulses from the unsplit or unprocessed pulses. Further the retrospective amendment became necessary as otherwise the State would have to refund large sum of money".

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In the case of *State of Gujarat* v. *Ramanalal Keshave Lal Soni*(2), this Court observed at p. 62:—

> "The Legislature is undoubtedly competent to legislate with retrospective effect to take away or impair any vested right acquired under existing laws but since the laws are made under a written Constitution, and have to conform to do's and don'ts of the Constitution; neither prospective nor retrospective laws can be made so as to contravene fundamental rights. The law must satisfy the requirements of the Constitution today taking into account the accrued or acquired rights of the parties today. The law cannot say 20 years ago the parties had no rights, therefore, the requirements of the Constitution will be satisfied if the law is dated back by 20 years. We are concerned with today's rights and not yesterday's. A legislature cannot legislate today with reference to a situation that obtained 20 years ago and ignore the march of events and the constitutional rights accrued in the course of the 20 years. That would be most arbitrary, unreasouable and a negation of history".

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The power and competence of the Parliament to amend any

(1) [1973] 2 S.C.R. 502.

H (2) [1983] 2 S.C.C. 33.

statutory provision with retrospective effect cannot be doubted. Any retrospective amendment to be valid must, however, be reasonable and not arbitrary and must not be violative of any of the fundamental rights guaranteed under the Constitution. The mere fact that any statutory provision has been amended with retrospective effect does not by itself make the amendment unreasonable. Unreasonableness or arbitrariness of any such amendment with retrospective effect has necessarily to be judged on the merits of the amendment in the light of the facts and circumstances under which such amendment is made. In considering the question as to whether the legislative power to amend a provision with retrospective operation has been reasonably exercised or not, it becomes relevant to enquire as to how the retrospective effect of the amendment operates.

In the large interest of administration and for promotion of public interest and welfare of the country power has been conferred by the Constitution on the Parliament to mobilize resources and to levy tax. In view of the complexity of fiscal adjustment of diverse elements the Parliament necessarily enjoys a very wide discretion in the matter of fiscal legislation. To meet various expenses for proper administration, maintenance of defence and security, for promoting peace and prosperity and for development of social, economic and all round growth of the country, the Government must have resource and sufficient funds at its disposal. Suitable provisions have necessarily to be made for raising the revenue and for proper realisation of funds to be collected to meet such expenses. Appropriate legislations including various fiscal laws are enacted for this purpose. Imposition of any tax by the Parliament is therefore considered to be made in public interest. It may so happen that any provision of any enactment imposing a particular levy may be challenged in Court and may be challenged successfully ; and the particular levy may, for some reason or other, be held to be constitutionally invalid. If any particular provision of any statute imposing any tax which has been or is being collected, is struck down as unconstitutional, the financial arrangement of the State may become upset and the Government which might have already collected and even utilised the tax, may be called upon to refund taxes so collected. If such a situation arises the economy of the State may get unbalanced and difficulties may arise for meeting the various commitments and obligations. Under such circumstances a Validating Act may be passed and is often enacted to remove the infirmities which might have led to the invalidation of the provision imposing the levy. Validating Acts for meeting such situations have necessarily to be passed with retrospective operation so that the fiscal arrangement of the State and its financial commitments

A may not in any way be in jeopardy and the State may be relieved of the liability of refunding any tax already collected. A validating Act validating any fiscal provision with retrospective operation is usually held not to be unreasonable or arbitrary. In the case of any Validating Act, the intention of the legislature is generally made sufficiently clear in the section or in the Act which is declared invalid on account B of some flaw or defect which is within the competence of the Parliament to rectify. Such Validating Acts, it may be observed, do not in fact have the effect of imposing a fresh tax with retrospective effect and they only legalise the levy already imposed. There is in effect and substance no imposition of any new tax for the earlier years by virtue of the retrospective operation and the retrospective operation merely C validates the levy already imposed and possibly collected. The present amendment has been necessitated not as a result of any part of S. 80J being declared invalid. There was no lacuna or defect in section 80J prior to the impugned amendment and the section which was perfectly valid granted relief in clear and unambiguous language to D the assessee in respect of capital employed, whether assesees's own or borrowed, in an undertaking which qualified for relief under the section. The rule making authority by framing an invalid rule sought to deny the assessee the benefit of the relief lawfully and validly granted by the section. The rule was contrary to the clear provisions of the statute and the invalid rule has been rightly struck down. By the present amendment the Parliament is seeking to validate not any pro- E vision of the State declared invalid because of any flaw or defect, as there was none, but is seeking to validate an invalid rule which had sought to deprive the assessee of the benefit which the Parliament had clearly bestowed on the assessee by the section. The effect of the present amendment by seeking to incorporate the provisons of the rule declared invalid in the section itself is to withdraw with retrospective F effect the relief which had been earlier granted by the Parliament in so far as the relief extends to borrowed capital employed in the undertaking and thereby to impose on the assessee a burden of tax which was not there for all these years. As a matter of policy it may be open to the Parliament to withdraw the relief granted to borrowed capital by an amendment with prospective effect consequent on any such amendment. To withdraw with retrospective effect the benefit of G relief unequivocally granted by the section to an assessee who qualified for such relief and was lawfully entitled to enjoy the benefit of such relief and has in fact in many cases enjoyed the benefit for all these years, prior to the present amendment with retrospective effect, cannot, in my opinion, be said to on any just and valid grounds and cannot be considered to be reasonable. If any fiscal statute grants H relief to any assessee and the assessee enjoys the benefit of that relief,

as the assessee is legally entitled under the statute, the withdrawal of the relief validly and unequivocally granted and enjoyed by any assessee must necessarily in the absence of proper grounds be held to be unreasonable and arbitrary. The relief granted under section 80J before the present amendment was not merely a promise on the part of the Government relying on which the assessee might have set up new undertakings, but it was in the nature of a statutory right conferred on any assessee might have set up new undertakings, but it was in the nature of a statutory right conferred on any assessee who qualified for such relief under the section. The withdrawal with retrospective effect of any relief granted by a valid statutory provision to an assessee, depriving the assessee of the benefit of the relief vested in the assessee, stands on a footing entirely different from the footing which may necessiate the passing of a Validating Act seeking to validate any statutory provision declared unconstitutional. When Parliament passes an amendment validating any provision which might have been declared invalid for some defect or lacuna, the Parliament seeks to enforce its intention which was already there by removing the defect or lacuna. The Parliament indeed seems to remedy the situation created as a result of the statutory provision being declared invalid. As I have earlier observed, this is done in public interest for properly regulating the fiscal structure and to relieve the Government of any financial burden by way of refund of taxes collected for enabling the State to implement its budget by proper collection of revenue expected to be realised. When the Parliament in any fiscal statute proposes to grant any relief to any assessee the Parliament must be presumed to do so in public interest. In the instant case section 80J granted relief for the purpose of promoting the industrial growth of the country by affording incentive for the setting up of new undertakings. As a matter of policy again the Parliament may withdraw such relief or any part thereof or modify the nature, extent and kind of relief, if Parliament may withdraw such relief or any part thereof or modify the nature, extent and kind of relief, if Parliament in its wisdom may consider any such action necessary and proper and any such act done by the Parliament must also be regarded to have been done in public interest. However, the withdrawal or modification with retrospective effect of the relief properly granted by the statute to an assessee which the assessee has lawfully enjoyed or is entitled to enjoy as his vested statutory right depriving the assessee of the vested statutory right, has the effect of imposing a levy with retrospective effect for the years for which there was no such levy and cannot, unless there be strong and exceptional circumstances justifiying such withdrawal or modification, be held to be reasonable or in public interest. This kind of retrospective amendment, seeking to defeat an accrued statutory right

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is likely to affect the sanctity of any statuory provision and may create a state of confusion. The only circumstance which appears to have led to the present retrospective amendment is the existence of the invalid rule. The existence of any invalid rule seeking to deny an assessee a benefit clearly and unequivocally granted to an assessee by the Legislature, lawfully and properly enjoyed or to be impugned amendment in 1980 the relief granted by S. 80J had been in force and had been legitimately available to the assessee. In view of the clear provision made in the statute by Parliament itself the Parliamant must be presumed to have been aware that the relief as contemplated under S. 80J was available to the assessee and the assessee had been enjoying and were entitled to enjoy the benefit of the said relief. The Parliament must have and in any event must be presumed to have arranged the financial affairs of the State on the footing that the relief allowed to an assessee under S. 80J was being enjoyed and would be enjoyed by the assessee In view of the clear provision of the statute which must be held to manifest the true intention of the Parliament it will be idle to contend that Parliament could have intended that the relief so granted would not be available to the assessees who would be liable to pay a larger amount of tax. The years for which relief had remained in force had already passed out. It does not appear that as a result of the relief enjoyed by the assessee, the financial position of the State for all these years, had been or could be in any way affected. The facts and circumstances also do not indicate that there will be any heavy burden on the State to sound taxes collected which may upset the economy of the State. It appears that in the majority of the cases, the assessees have succeeded and they have been assessed after being allowed the relief and under S. 80J in respect of the borrowed capital also.

On the other hand it is quite clear that if the relief granted is to be withdrawn with retrospective operation from 1972 the assessees who have enjoyed the relief for all those years will have to face a very grave situation. The effect of the withdrawal of the relief with retrospective operation will be to impose on the assessee a huge accumulated financial burden for no fault of the assessee and this is bound to create a serious financial problem for the assessee. Apart from the heavy financial burden which is likely to upset the economy of the undertaking, the assessee will have to face other serious problems. On the basis that the relief was legitimately and legally available to the assessee, the assessee had proceeded to act and to arrange its affairs. If the relief granted is now permitted to be withdrawn with retrospective operation, the assessee may be found guilty of violation provisions of other statutes and may be visited with panel consequen-

ces. This position cannot be and is not disputed by the learned Attorney General who has, however, argued that taking into consideration the peculiar facts and circumstances, penal provisions may not be enforced. This argument does not impress me. The assessee has, in any event, to run the risk and for no fault on his part has to place itself at the mercy of the authorities for facing consequences of violation of statutory provisions, which but for the introduction of retrospective amendment, would not have been voilated by the assessee.

To establish arbitrariness or unreasonableness it does not become necessary to prove that the undertaking of the assessee will be completely crippled and will have to be closed down in consequence of the withdrawal of the relief with restrospective effect. There cannot be any doubt about the real possibility of very serious prejudice being caused to the assessee for no fault of the assessee. In my opinion, the possibility of very grave drejudice to the assessee by the withdrawal of the relief with retrospective effect, in the absence of any justifiable ground and any serious prejudice to the interest of revenue, establishes unreasonableness and arbitrariness of the retrospective amendment is bound to have very serious effect on the assessee and there is reasonable possibility of the business of the assessee being adversely affected and seriously prejudiced. The retrospective amendment, therefore, is also violative of Art- 19 (1) (g) of the Constitution.

The argument of the Attorney General that the amendment had to be made with retrospective effect in the interest of the assessee, as otherwise, the assessee would not be entitled to the benefit of therelief intended to be given under the section because there will be no valid rule for computing the relief, to my mind, is clearly untenable. I see no reason as to why there should be any difficulty in the computation of relief if the invalid part of the rule is struck down. It may be noted that the rule in so far it excludes borrowed capital and fixes the first day of the year for computation of the relief had been struck down by various High Courts years ago and the assessing authorities have found no difficulty in computing the relief and in proceeding to complete the assessment by granting the relief legally available to to assessee under S. 80J even after the invalid part of the rule had been struck down. It may also be noted that the Parliament had also not considered it necessary to effect this amendment earlier inspite of the decisions of the High Courts, althongh the Parliament had introduced other amendments into this section.

Before concluding I wish to emphasise that the withdrawal with retrospective effect by amendment of any financial benefit or

relief granted by a fiscal statute must ordinarily be held to be unreasonable and arbitrary. Such withdrawal makes a mockery of beneficial statutory provision and leads to chaos and confusion. Such withdrawal in effect results in the imposition of a levy at a future date for past years for which there was no such levy in the relevant years. The imposition of any fresh tax with retrospective effect for years for which there was no such levy is entitled to arrange and normally arranges his financial affairs on the basis of the law as it exists. Such retrospective taxation imposes an unjust and unwarranted accumulated burden on the assessee for no fault on his part and the assessee has to face unnecessarily without any just reason very serious financial and other problems. Imposition of any tax with retrospective effect for years for which no such tax was there, cannot also be considered to be just and reasonable from the point of view of revenue. The years for which levy is sought to be imposed with retrospective effect hed already passed and there cannot be any proper justification for imposition of any fresh tax for those years. Such retrospective taxation is likely to disturb and unsettle the settled position ; and because of such imposition of retrospective levy for the years for which there was no such levy, assessments for those years which might already have been completed and concluded will get upset. If the State is in need of more funds, the State instead of seeking to levy any tax with retrospective effect can always take appropriate steps to collect any larger amount so required by imposition of higher taxes or by other appropriate methods. I have already observed that Validating Acts which seek to validate the levy of any tax with retrospective effect do not in effect impose any fresh tax with retrospective effect and Validating Acts stand on an entirely different footing. I, therefore, hold that the impugned amendment in so far as it is sought to be made retrospective with effect from the 1st day of April 1972 is invalid and unconstitutional, though the amendment in so far as it operates prospectively is valid.

In the result I dismiss the appeals filed by the Union of India against the decisions of the High Courts declaring Rule 19-A to be invalid in so far as the said rule excludes borrowed capital and fixes the first day of the year for computation of the relief to be granted to an assessee under S.80J. I set aside the judgment of the Madhya Pradesh High Court which upholds the validity of the Rule and I allow the apeal of the assessee against the judgment of the Madhya Pradesh High Court. I hold and declare that Rule 19—A is so far as it seeks to exclude the borrowed capital and fixes the first day of the year for the computation of relief under S. 80J is invalid and unconstitutional and the same has to be struck down and has been struck down

by the various High Courts. I hold and declare that the impugned amendment of 1980 incorporating the provision of the invalid rule 19-A in the section itself, excluding the borrowed capital and fixing the first day of the year for computation of the relief under S. 80J is valid in its prospective operation from the date of the amendment and is unconstitutional and invalid insofar as the said amendment is sought to brought into operation retrospectively with effect from 1st April 1972. Accordingly, I allow the writ petitions challenging the validity of the amendment only to the extent of its retrospective operation and I dismiss the writ petitions in so far as the amendment in its entirety is sought to be challenged. I prospose to make no order as to costs.

In view of the majority decision, all the writ petitions are dismissed and both the parties to bear their own costs.

A.P.J. *Petitions dismissed*