Before Rajendra Nath Mittal, J.

GANESH STEEL INDUSTRIES,—*Petitioner*

versus

INCOME TAX OFFICER and others,—*Respondents.*

Civil Writ No. 4488 of 1978

May 7, 1980.

Income Tax Act (XLIII of 1961)—Sections 80-J and 295—Income Tax Rules, 1962—Rule 19-A (3)—Words 'capital employed' in section 80-J—Whether include borrowed capital—Rule 19-A (3) excluding benefit of deductions of borrowed moneys and debts—Such rule—Whether ultra vires *section 80-J.*

Held, that from a reading of section 80-J of the Income Tax Act, 1961, it is evident that tax holiday is to be given to an industrial undertaking on the capital employed therein. The words 'capital employed' have not been defined in the Act. It is an established principle of interpretation of statutes that the words used in a statute must be taken in their legal or popular sense. Capital employed in an industrial undertaking in popular sense cannot mean the difference between the total capital and borrowed capital. On the other hand, it will include the total investment in the industrial undertaking whether it is by the proprietor from his own resources or from the borrowings raised from others. The borrowed capital is used for running an industrial undertaking in the same way in which the other capital is used. The purpose for enacting the aforesaid provision is to encourage persons to set up industries. If the aforesaid words are interpreted so as not to include the borrowed capital, the whole purpose of the legislation will be frustrated. As such, 'capital employed' in an industrial undertaking includes borrowed capital.

(Para 6)

Held, that it is true that section 80-J authorises the Board to frame rules for computation of the capital employed. Rules under section 295 can be framed for the purpose of carrying out the purposes of the Act. The computation of capital, however, should mean the accepted methods of computing capital employed. It could never be the intention of the Legislature that only affluent persons who invested money from their own resources, would be entitled to take benefit of section 80-J and not the others who did so by raising loans. The 'computation' will, therefore, include computations as prescribed in sub-rule (2) of rule 19-A but not as prescribed by sub-rule (3). Sub-rule (3) of rule 19-A could not be framed under section 295 read with section 80-J of the Act and therefore, it is *ultra vires* section 80-J.

(Para 8)

Petition under Articles 226 and 227 of the Constitution of India praying that the records of the case be called and, the petitioner be granted the following reliefs:—

(a) *The order of the Commissioner of Income Tax, Annexure "P-3" be set aside;*

(b) *The deduction of Rs. 56,659 be allowed under section 80-J of the Income Tax Act as against Rs. 15,840 which has been allowed in the order of assessment annexure "P-1".*

(c) *Declare Rule 19-A(3) as ultra vires of sections 80-J and 295 of the Income Tax Act; and/or*

(d) *Grant any other relief to which the petitioner may be entitled in the facts & circumstances of the case.*

It is further prayed that the filing of the certified copies of the annexures and, service of notice be dispensed with.

Bhagirath Dass & Co., Advocates, *for the Petitioner.*

D. N. Awasthy, Advocate, *for the Respondent.*

JUDGMENT

Rajendra Nath Mittal, J.

(1) This order will dispose of Civil Writ Petition Nos. 4488 and 4489 of 1978 which contain same questions of law. The facts in the judgment are being given from Civil Writ Petition No. 4488 of 1978.

(2) Briefly, the facts are that the petitioner is a partnership firm and is carrying on the business of manufacture of Saria Patti at Gobindgarh. It was established in the year 1972. It is registered under the Income Tax Act, 1961 (hereinafter referred to as the Act). Its accounting year starts from April 1 to March 31 of the subsequent year The assessment year in the present case is 1975-76 for which the relevant previous year is 1974-75.

(3) The petitioner filed a return for the above-said assessment year on July 30, 1975, declaring an income of Rs. 1,00,740 but did not

take into account the provisions of Section 80-J of the Act. Consequently, a revised return was filed by it on October 25, 1975, declaring an income of Rs. 84,900 by taking into consideration Rule 19-A (3) of the Income Tax Rules (hereinafter referred to as the Rules), according to which from the aggregate of the amounts as ascertained under sub-rule (2) could be deducted the aggregate of the amounts, as on the first day of the computation period, of borrowed money and debts owned by an assessee. The Income Tax Officer in pursuance of the revised return, allowed deduction of Rs. 15,840 as claimed by it under section 80-J of the Act.

(4) It is alleged that later the petitioner was advised that Rule 19-A (3) was *ultra vires* of section 80-J of the Act, as the rule making authority under section 295 of the Act could not frame the rule. Consequently, a revision petition was filed by it before the Commissioner of Income Tax-respondent No. 2. He, however, after hearing the petitioner, dismissed the revision petition,—*vide* order dated August 28, 1978 (copy annexure P. 3). The petitioner has challenged the aforesaid order *inter alia* on the ground that Rule 19-A (3) of the Rules is *ultra vires* section 80-J of the Act.

(5) The only question that arises for determination in the present case is whether Rule 19-A (3) is *ultra vires* section 80-J of the Act. In order to determine the question, it will be necessary to read section 80-J of the Act and Rule 19-A of the Rules which are as follows:—

> "80J. (1) Where the gross total income of an assessee includes any profits and gains derived from an industrial undertaking or a ship or the business of a hotel, to which this section applies, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, *a deduction from such profits and gains* (reduced by the deduction, if any, admissible to the assessee under section 80HH) *of so much of the amount thereof as does not exceed the amount calculated at the rate of six per cent per annum on the capital employed in the industrial undertaking* or ship or business of the hotel, as the case may be, *computed in the prescribed manner* in respect of the previous year

(the amount calculated as aforesaid being hereafter, in this section, referred to as the relevant amount of capital employed during the previous year) ....."

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

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

(i) in the case of assets entitled to depreciation their written down value ;

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

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

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

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

(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 owed by the assessee (including amounts due towards any liability in respect of tax) .....".

(6) From a reading of section 80J, it is evident that tax holiday is to be given to an industrial undertaking on the capital employed therein. The words 'capital employed' have not been defined in the Act. It is an established principle of interpretation of statutes that the words used in a statute, if not defined, must be taken in their legal or popular sense. Capital employed in an industrial undertaking in popular sense cannot mean the difference between the total capital and borrowed capital. On the other hand, it will include the total investment in the industrial undertaking whether it is by the proprietor from his own resources or from the borrowings raised from others. The borrowed capital is used for running an industrial undertaking in the same way in which the other capital is used. The purpose for enacting the aforesaid provision is to encourage persons to set up industries. If the aforesaid words are interpreted so as not to include the borrowed capital, the whole purpose of the legislation is frustrated. It is an established principle of law that when there is difficulty in interpreting statutes its primary and essential purpose and intention of the Legislature may be taken into consideration. I am, therefore, of the view, that in order to determine capital of an industrial undertaking under section 80J, the borrowed capital cannot be excluded.

(7) An argument has been raised by the learned counsel for the respondents that according to section 80J, the capital employed is to be computed in the prescribed manner. He argues that under section 295 read with section 80J of the Act, the Board can frame rules as to how the capital is to be computed. He vehemently argues that sub-rule (3) of rule 19-A has been framed under the aforesaid provision and cannot be struck down on the ground that it is *ultra vires* section 80J.

(8) No doubt, it is true that section 80J authorises the Board to frame rules for computation of the capital employed. Rules under section 295 can be framed for the purpose of carrying out the purpose of the Act. The computation of capital, however, should mean the accepted methods of computing capital employed. It could never be the intention of the Legislature that only affluent persons who invested money from their own resources, would be entitled to take benefit of section 80J and not the others who did so by raising loans. The 'computation' will therefore,

include computations as prescribed in sub-rule (2) of rule 19-A, but not as prescribed by sub-rule (3). If interpretation as given by Mr. Awasthy is accepted, it will mean that uncanalised powers are available to the Board, to make rules. This can never be accepted. After taking into consideration all the aforesaid reasoning, I am of the opinion that sub-rule (3) of rule 19-A could not be framed under section 295 read with section 80J and therefore, it is *ultra vires* section 80J.

(9) In the aforesaid view, I am fortified by the observations in *Century Enka Ltd* v. *Income-tax Officer, "D" Ward, Companies Dist. I, Calcutta and others* (1). It is held in it by a learned Judge of Calcutta High Court that there is no warrant for restricting the computation of capital in the manner laid down in the rule and in so far as rule 19A (3) does so, it is violative of the authority given under section 80J and is not carrying out the purpose of the Act. It is further observed that, therefore, rule 19A (3) in so far it directs exclusion of borrowed capital, except from the approved sources, is *ultra vires*, being the power of the rule-making authority. Same view was taken in *Madras Industrial Linings Ltd.* v. *Income-Tax Officer, Companies Circle* 1(6), *Madras and others*, (2). The relevant observations of the Division Bench are as follows:—

> "There is no reason to give the expression "capital employed" in section 80J of the Income-tax Act, 1961, a meaning different from what it means in ordinary parlance, namely, the amounts that have become capital in the business. The capital can be that which a company possessed, namely, share capital, or other moneys belonging to the company which may also be moneys borrowed by the company. The plain meaning of section 80J is that if the borrowed money, which becomes the money of the company, had been employed by the company as capital, that amount will become "capital employed" for the purpose of the section. The main object behind the section is that newly started concerns should be able to establish themselves and the same

(1) (1977) 107 I.T.R. 909.
(2) (1977) 110 I.T.R. 256.

benefit that is available to concerns that do not have to borrow will have to be given to those concerns that have need to borrow. There is no justification whatever for giving to the words "capital employed" occurring in section 80J a meaning which would take out of its ambit the companies which are indigent and not able to finance their needs by their own resources. The reasonable meaning that has to be attributed to the words "computed in the prescribed manner" occurring in the section would be that the computation must be in such manner as provided in the Rules, the manner being one of the well known methods of computing capital employed. Sub-rule (3) of rule 10-A does not prescribe any manner of computation of the capital employed but is a provision which enables deduction being made from the capital employed of certain amounts specified. The section does not warrant any such rule being made nor does it confer any power on the rule-making authority to make any such provision. The framing of such a rule is not for carrying out the purposes of the Act and no rule-making authority can amend the provisions of the Act. Therefore, sub-rule (3) of rule 19A should not be relied on for the purpose of computing the "capital employed" under section 80J of the Act."

(10) Kanga and Palkhiwala in their well known treatise, the Law and Practice of Income Tax, 7th Edition, interpreted the aforesaid provisions, after noticing the above-said two cases, and observed as follows :

"The Board has the power to frame rules to give effect to the legislative intent but not to defeat it by an artificial mode of capital computation where the resultant sum is wholly unrelated to the real capital employed during the relevant year. In the absence of a statutory definition, the expression "capital employed" may be taken in its legal sense, or its dictionary meaning, or its popular or commercial sense. But in none of these senses can the true capital employed exclude all borrowed money or ignore the reality of the funds used during

the entire year except its first day. Parliament could not have possibly intended to favour the affluent assessees who are able to employ their own capital and to discriminate against the indigent who have to borrow funds to finance their undertaking.

(11) The learned counsel for the respondents made reference to *Commissioner of Income-Tax, A.P.* v. *Warner Hindustan Ltd.* (3); and *Karimtharuvi Tea Estates Ltd. and another* v. *State of Kerala and others* (4). Suffice it to say that both the cases are distinguishable and the learned counsel cannot derive any benefit therefrom.

(12) No other argument has been raised in the other case.

(13) For the aforesaid reasons, I accept the writ petitions, declare rule 19-A (3) *ultra vires* section 80J of the Income Tax Act, quash the impugned orders of the Commissioner and direct him to allow the deductions to the petitioners taking into consideration the obervations made above. No order as to costs.

H. S. B.

Before J. V. Gupta, J.

RAMEL DASS,—*Appellant*

versus

DHARAM SINGH and others,—*Respondents.*

Regular Second Appeal No. 2909 *of* 1979.

May 9, 1980.

Code of Civil Procedure (V *of* 1908)—*Section* 100—*Two separate second appeals filed against one judgment by persons having common interest and defence—One appeal dismissed in limine by the High Court—Second of such appeals—Whether also liable to be dismissed on this short ground.*

(3) (1979) 117 I.T.R. 68.
(4) (1963) 48 I.T.R. 83.