C.I.T., Trivandrum vs M/S Anand Theatres on 12 May, 2000

Equivalent citations: AIR 2000 SUPREME COURT 2356, 2000 (5) SCC 393, 2000 AIR SCW 2487, 2000 TAX. L. R. 728, (2000) 244 ITR 192, (2000) 2 KER LT 101, (2000) 6 JT 407 (SC), 2000 (7) SRJ 90, (2000) 110 TAXMAN 338, 2000 (5) COM LJ 303 SC, 2000 (4) SCALE 741, 2000 (2) LRI 811, (2000) 157 TAXATION 377, (2000) 4 SUPREME 290, (2000) 4 SCALE 741, (2000) 160 CURTAXREP 492

Bench: M.B.Shah, A.P.Misra

PETITIONER:
C.I.T., TRIVANDRUM

Vs.

RESPONDENT:
M/S ANAND THEATRES

DATE OF JUDGMENT: 12/05/2000

BENCH:
M.B.Shah, A.P.Misra

JUDGMENT:

Shah, J.

Leave granted in SLP (Civil) Nos.4373-74 of 1999.

Question involved in these appeals is whether building which is used as a hotel or a cinema theatre can be considered to be apparatus or a tool for running the business so that it can be termed as a plant and depreciation can be allowed accordingly or whether it remains a building wherein either hotel business or business for cinema could be conducted?

The aforesaid question is to be decided in the background of the specific provisions granting depreciation to buildings, machinery and plant under Section 32 of Income Tax Act, 1961 (herein after referred to as the Act). And also to decide whether time has come to have a fresh look at the old precedents and to lay down the law with the changed perceptions keeping in view the provisions of the Act? Further, to what extent are we required to follow and adopt artificial and largely judge-made sense of the word plant, which is given inclusive meaning under Section 43(3) and in context of the Scheme of Section 32?

In this batch of civil appeals, some appeals are filed by the Revenue and some by the assessees. Since the question involved in all these appeals is similar, we would deal with the facts in Civil Appeal No. 4758 of 1998 for convenience. For the assessment year 1986-87 the assessee claimed depreciation at 15% on the theatre building claiming it to be a plant. The assessing officer by order dated 27.9.1988 rejected the claim and allowed depreciation only at 5%. The appeal filed by the assessee before the Commissioner of Income Tax (Appeals), Trivandrum was allowed by order dated 21.7.1989 holding that the theatre building is to be treated as a plant. Being aggrieved, the Revenue filed appeal ITA No.748/Coch/89 before the Income Tax Appellate Tribunal, Cochin Bench, Cochin. It was contended by the Revenue that the theatre building is not a plant and even if it is to be construed as plant only that part of the building housing the auditorium and furniture and fittings found therein should be construed as plant and not the entire building. The Tribunal by order dated 29.9.1994 held that the entire theatre building should be construed as plant for the purposes of granting depreciation and further allowed the claim of assessee for extra shift allowance. Revenue filed Reference Application No.264 of 1994 before Income Tax Appellate Tribunal, Cochin Bench, Cochin requesting the Tribunal to draw up a statement of case and refer the questions, arising out of the order of Tribunal passed in ITA No.748 [Coch]/1989 dated 29.9.1994, for opinion of the High Court of Kerala. After hearing both the sides, the Tribunal referred following questions to the High Court of Kerala.

> (1) Whether on the facts and in the circumstances of the case, the theatre building can be considered as a plant?
>
> (2) Whether on the facts and in the circumstances of the case, the assessee is entitled to higher rate of depreciation on the theatre?

The High Court of Kerala in ITR No.85 of 1996 considered the above questions and after relying upon its earlier decision in CIT, Trivandrum v. M/s Abhilash Theatre, Kottayam answered in favour of the assessee and against the revenue. [Against the decision rendered in Abhilash Theatres case, Civil Appeal No.5198-5199 of 1998 is pending before this Court being disposed of by this judgment] The question considered by the High Court in Abhilash Theatres case (Supra) was whether hotel building and theatre building can be considered as a plants. With regard to the hotel, the Court considered whether hotel building is merely a setting or premises or whether that plays an important role in running the hotel, meaning thereby whether the building is such without which business of hotel cannot be conceived; and if a building is an integral part of hotel business, that is some thing more than merely a place, accommodating some requisites of hotel, then that would partake the character of plant. For this purpose, the High Court considered the decisions in Inland Revenue Commissioners v. Barclay, Curle & Co. Ltd. [(1969) 1 WLR 675] and Scientific Engineering House P. Ltd. v. Commissioner of Income-Tax, A.P. [(1986) 157 ITR 86 SC]. The Court observed that the principle that can be deducted is that if a building is merely a setting or place to accommodate some apparatus, then that will not be held as plant but if a building which does not merely accommodate something or which cannot be regarded merely as a setting or premises, but if that plays an important role in carrying on the business, then that would fall within the inclusive definition of the plant. Thereafter, the Court observed thus: - The hotel building in our opinion, cannot be equated with a residential building, which provides shelter to the people living therein.

Building is essential to run the business of hotel. Without befitting building it is ideal to think of an hotel business. A good hotel requires amenities and a building which is so erected as to fulfill the requisite norms of hotel. A building simply accommodating machinery or other apparatus to run a factory is different from the hotel building, which is specially designed, suiting to the hotel requirements. So specifically erected building cannot be said to be a mere setting or premises. No hotel can function without a suitable building satisfying the norms of hotel.

The Court further observed: - Building and plant are not mutually exclusive. When dry dock a concrete dry structure can be held a plant because the whole dock was used for carrying on the entire operation, we fail to understand why the hotel building specially erected for that purpose, cannot be held as plant. As a specially erected building for hotel is used for carrying on the hotel operation, it must come within the inclusive definition of the plant.

The High Court further considered the case of Scientific Engineering House (P) Ltd. (Supra) and applying the functional test held that the hotel building is a tool of the assessees business. Plant cannot necessarily be confined to an apparatus which is used for mechanical operations or process or is employed in industrial operations. The Court further held that terms building and plant occurring in Section 32(1) are not mutually exclusive and a building depending on its nature and peculiarity can be held as plant. The High Court disagreed with the decisions in C.I.T. v. Lake Palace Hotels & Motels P. Ltd. [(1997) 226 ITR 561 Rajasthan] and CIT v. Damodar Corporation Hotel Pankay, [(1997) 137 ITR 574 Kerala] but agreed with the decision of Karnataka High Court in C.I.T. v. Dr. B. Venkata Rao, [(1991) 202 ITR 302] and the decision of Calcutta High Court in S.P. Jaiswal Estates (P) Ltd. v. CIT, [(1995) 216 ITR 145 Calcutta]. The High Court finally held that the hotel building is plant entitled to depreciation applicable to plant under the rules framed under the Act. Further with regard to the theatre building, the Court referred to the decision of Allahabad High Court in S.K. Tulsi and Sons v. C.I.T. [(1991) 187 ITR 685] and held that what holds good for the hotel building, that equally applies to a theatre building.

Being aggrieved, the Revenue has filed the present appeal by special leave.

VARIOUS RELEVANT DECISIONS RENDERED BY THIS COURT AND THE HIGH COURTS ON THE ISSUE.

(A) DECISIONS OF THIS COURT In CIT, Andhra Prdesh v. Taj Mahal Hotel [(1971) 82 ITR 44 (SC)] this Court considered that the sanitary and pipeline fittings fell within the definition of plant in section 10(5) of the Income Tax Act, 1922 and therefore, the assessee was entitled to development rebate in respect thereof. The Court further held that the fact that the assessee claimed depreciation on the basis that sanitary and pipeline fittings fell under furniture and fittings in Rule 8(2) of the Income Tax Rules 1922 did not detract from this position as the Rules cannot take away what is controlled by the Act or whittle down its effect. After considering the contentions raised by the Revenue, the Court observed as under: - It cannot be denied that the business of a hotelier is carried on by adapting a building or premises in a suitable way to be used as a residential hotel where visitors come and stay and where there is arrangement for meals and other amenities are provided for their comfort and convenience. To have sanitary fittings etc., in a bath room is one of the

essential amenities or conveniences which are normally provided in any good hotel, in the present times. If the partitions in Jarrolds case [(1963) 1 W.L.R. 214] could be treated as having been used for the purpose of the business of the trader, it is incomprehensible how sanitary fittings can be said to have no connection with the business of the hotelier. He can reasonably expect to get more custom and earn large profit by charging higher rates for the use of rooms if the bath rooms have sanitary fittings and similar amenities.

(Emphasis supplied) Thereafter, the Court further held if the dictionary meaning of the word plant were to be taken into consideration on the principle that the literal construction of a statute must be adhered to unless the context renders it plain that such a construction cannot be put on the words in questionthis is what is stated in Websters Third New International Dictionary: Land, buildings, machinery, apparatus and fixtures employed in carrying on trade or other industrial business.

It is, however, unnecessary to dwell more on the dictionary meaning because, looking to the provisions of the Act, we are satisfied that the assets in question were required by the nature of the hotel business which the assessee was carrying on. They were not merely a part of the setting in which hotel business was being carried on.

In Scientific Engineering House P. Ltd. (Supra) this Court considered that the drawings, designs, charts, plans, processing data and other literature comprises in the documentation service as specified in clause (3) constituted a book which fell within the definition of plant in section 43(3) of the Income Tax Act. The Court held that these documents did not perform any mechanical operations or processes, but that cannot militate against their being a plant since they were in a sense the basic tools of the assessees trade having a fairly enduring utility. The Court further held that capital assets acquired by the assessee, namely, the technical know how in the shape of drawings, designs, charts, plans, processing data and other literature falls within the definition of plant and therefore a depreciable asset. The Court also referred to the functional test referred by Lord Guest in Barclays case and observed as under: In other words, the test would be: Does the article fulfil the function of a plant in the assessees trading activity? Is it a tool of his trade with which he carries on his business? If the answer is in the affirmative, it will be a plant.

We would add that the learned counsel for the assessees on 3rd May, 2000 has filed an additional submission pointing out the decision rendered by this Court in CIT v. Dr. B. Venkata Rao, [(2000) 243 ITR 81], wherein this Court dismissing the appeal filed by the revenue held that the nursing home building was specially equipped as a plant for the assessees business. The Court observed: What is to be determined is whether the particular nursing home building was equipped as to enable the assessee to carry on the business of a nursing home therein or whether it is just any premises utilised for that object.

We find from the order of the Tribunal as also the assessment order that the assessees nursing home is equipped to enable the sterilisation of surgical instruments and bandages to be carried on. It is reasonable to assume in the circumstances, particularly having regard to the Tribunals order which states that the sterilisation room covers about 250 sq. ft. that the nursing home is also equipped with an operation theatre. In the circumstance, we think that the finding of the High Court should

be accepted.

This decision is based on the facts found by the Tribunal and the High Court wherein it was held that nursing home was equipped to enable sterilisation of surgical instruments and bandages to be carried on and that room covered 250 sq. fts. and hence was a plant As such, no legal contentions were raised and considered by the Court and the matter is decided solely on the facts as quoted above without any discussion. Hence, this decision would not be of any assistance in determining the question involved.

(B) DECISIONS RENDERED BY THE HIGH COURTS In C.I.T. Lucknow v. Kanodia Cold Storage [(1975) 100 ITR 155] the Allahabad High Court arrived at the conclusion that where a building with insulated walls is used as a freezing chamber, though it is not machinery or part thereof, it is part of the air conditioning plant of the cold storage of the assessee and will be entitled to special depreciation at 15% on its written down value.

In S.K. Tulsi and Sons v. C.I.T. [(1991) 187 ITR 685], the Allahabad High Court arrived at the conclusion that the cinema building constructed and used as a cinema along with its fittings and fixtures and wherein cinema business was carried on constitute a plant.

In C.I.T. v. Hotel Luciya [(1998) 231 ITR 492] the Full Bench of Kerala High Court held that for deciding whether a building is plant or not Court must apply what is called functional tests and further held that hotel building and theatre building are plant within the meaning of Section 43(3) of the Act and accordingly entitled to depreciation as applicable to the plant [Against this decision, Civil Appeal No.15 of 1999 is pending before this Courtbeing disposed of by this judgment] Further, in CIT Patiala II v. Yamuna Cold Storage [(1981) 129 ITR 728], Punjab & Haryana High Court held that the building with insulated walls of the cold storage was a plant and was entitled to depreciation at 15%. Allahabad High Court in Leela Movies v. CIT [191 ITR 113] and Tulsi Theatre v. CIT [(1991) 190 ITR 575] held that the cinema building constitute plant within the meaning of Section 43(3). Andhra Pradesh High Court in CIT v. Warner Hindustan Ltd. [(1991) 117 ITR 15] held that the well dug in the factory by the assessee for the purpose of carrying on its business was a plant within the meaning of Section 43(3) and, therefore, the assessee was entitled to depreciation and development rebate on the cost of digging the well. Bombay High Court in CIT v. Caltax Oil Refinding (India) Ltd. [(1979) 116 ITR 404] held that the fencing round the refinery processing unit constitutes plant and was entitled to depreciation and development rebate. Karnataka High Court in CIT v. Dr. B. Venkatarao [(1993) 202 ITR 303] held that building which was used as nursing home was a plant. Similarly, in CIT, Karnataka v. Woodlands Hotel Pvt. Ltd. [IRTC No.48 & 49 of 1993 dt.16th June, 1997] [Against this decision, Civil Appeals No.4373-74 of 1999 are pending before this Courtbeing disposed of by this judgment] and in CIT v. Hotel Rama Pvt. Ltd. [(1998) 146 CTR 243] held that building in which hotel business is carried on is a plant for the purpose of grant of depreciation. Madras High Court in Additional CIT v. Madras Cement Ltd. [110 ITR 281] held that the special reinforced concrete foundation for the purpose of locating or installing the rotary kiln in the factory would come within the scope of the expression plant and is entitled to development rebate.

In C.I.T. v. Krishna Botttlers P Ltd. [(1989) 175 ITR 154] the Andhra Pradesh High Court held that bottles were essential tools of the trade for it was through them that soft drink was passed on from the assessee to the customers and, therefore, were plant for the purpose of Income-tax. In that case, Court exhaustively considered various decisions including the decisions of the Courts in England and inter alia held that the building or the setting in which the business is carried on cannot be plant; in considering whether a structure is plant or premises, one must look at the finished product and not at the bits and pieces as they arrive from the factory. The fact that a building or part of a building holds the plant in position does not convert the building into plant. A piecemeal approach is not permissible and the entire matter must be considered as a single unit unless of course, the component parts can be treated as separate units having different purposes and the functional test is a decisive test.

In CIT v. Lawly Enterprises (P) Ltd., [1997 (225) ITR 154] the High Court of Patna considered whether the hotel is a plant within the meaning of section 43(3) of the Income-tax Act, 1961 and depreciation at the rate of 15 per cent is admissible to it? The Court observed that a building intended to be used or in fact used earlier as a residential accommodation can be converted any time into a lodge and used for running a hotel business. On the other hand, there are hotels, self-contained in many ways and having a small world of their own; and it is possible that the buildings housing such hotels may have certain special design and features and those buildings may be said to form an integral part of the business of running that hotel and in those cases, the buildings may qualify as plant but that would depend upon the facts of each case.

In S.P. Jaiswal Estates (P) Ltd. v. Commissioner of Income-Tax [(1995) 216 ITR 145], the Calcutta High Court considered similar questions and observed as under: (Page 151}: - the hotel building owned by the assessee and used for the purpose of carrying on its hotel business was an apparatus with which the assessees hotel business was carried on. It cannot be treated as a setting, within which or a canopy under which, the assessee carried on its business. The hotel building is to be treated as plant for the purpose of depreciation allowance under Section 32.

(C) Judgments expressing contrary views: -

In CIT v. Damodar Corporation Hotel Pankay, [(1997) 137 ITR 574] the Kerala High Court held that a hotel in its entirely is not a plant for the purpose of depreciation and observed as under: - a perusal of the said statutory provisions of Section 32- A of the Act would show that the words machinery and plant have been separately with an exclusive character from each other finds place in the concerned enactments of the Section. The statutory provision also of other requirements for entitlement to investment allowance on the count.

In R.C.Chemical Industries v. CIT, New Delhi [(1982) 134 ITR 330 (Delhi)], the Delhi High Court held that the definition of word plant given under Section 43(3) should be given a wide meaning as it is inclusive definition. It held that assessee who constructed a building having atmospheric controls, namely moisture, temperature and provision for filtered air, which were required for manufacturing of saccharine, would not come within the expression plant. It observed that the mere fact that manufacture of saccharine would be better carried on in this type of building would not

convert the building from the setting to the means for carrying on the business. Such a building which is free from atmospheric vagaries might have certain advantages as compared with a normal construction, but it remained the space or shelter where the business of manufacturing saccharine was carried on as opposed to the means.

In Siemens India Ltd. v. CIT, [(1996) 217 ITR 622 (Bombay)] the Court observed that an item would not qualify to be plant even if it satisfied the functional test, if on an application of premises test it is found to be used as or part of the premises or place upon which the business was conducted.

In C.I.T. v. Lake Palace Hotels & Motels P. Ltd. [(1997) 226 ITR 561] the Rajasthan High Court considered similar questions and after perusal of various judgments and dictionary meanings observed that the Legislature has by subsequent amendments made it clear that hotel and cinema premises will fall within the definition of building and summarised various principles emerging from various decisions of different courts as under:- (i) The functional test is a decisive test.

(ii) An item which falls within the category of building cannot be considered to be plant. Buildings with particular specification for atmospheric control like moisture temperature are not plant.

(iii) In order to find out as to whether a particular item is a plant or not, the meaning which is available in the popular sense, i.e., the people conversant with the subject-matter would attribute to it, has to be taken.

(iv) The term plant would include any article or object, fixed or movable, live or dead, used by a businessman for carrying on his business and it is not necessarily confined to any apparatus which is used for mechanical operations or process or is employed in mechanical or industrial business. The article must have some degree of durability.

(v) The building in which the business is carried on cannot be considered to be a plant.

(vi) The item should be used as a tool of the trade with which the business is carried on. For that purpose the operations it performs have to be examined.

On the basis of aforesaid principles, the Court came to the conclusion that: - the building of hotel is a building. Simply because some special fittings or controlling equipments are attached, it will not take it out of the category of building. Even if a particular building falls within the category of plant then it could not be considered to be a plant and will be considered as building because the golden rule of interpretation is that if a particular item is more near to one category, then by stretching it should not be considered to fall in a category which is far off.

The Court further observed: - The building which is used in the business of hotel remains a building inspite of the fact that it is decoratedIf the skeleton of the building without decoration is building then the items by which it is decorated would not change the character of building. The item may, however, be considered as plant subject to its use. The use of the building is as a setting. Building is not used as a tool of the trade. Different rates of depreciation for building have been provided which

also makes the legislative intent clear that the different types of buildings remain as building. The amendment of Section 32(1)(v) has only clarified the legislative intent that the building of hotel is a building, though by amendment a higher rate of deprecation is provided for it. In an industry no production can be normally carried on without a building where the plant and machinery is installed but for that reason the building cannot be considered as plant when there is a separate entry for buildings for purpose of depreciation. Buildings may accommodate plant and machinery or living persons. It remains a building If the building of a five star hotel is a plant there is no reason why the building of an ordinary hotel should be treated differently only on account of the charges for extra facilities. The difference of charges is because of extra service facilities, etc., provided and the role of the building in the two types of hotels remains the same and at the same time even better services are provided in a number of guest houses.

The building which is used for accommodating the cinema-goers remains a building even if specially designed.

If the functional test is applied, it would be found that it accommodates the machinery for exhibition of the film like any other factory where production is carried on and provides the accommodation to the public for viewing the picture and cannot be taken out from the definition of building. The building is not used as a tool of the trade as it is used for accommodating the customers as a setting. In respect of cinema the work is carried on by the projector which displays the film on screen.

The Court lastly held that looking to the common parlance meaning and the specific use of the word building in section 32 of the Act, the building of a hotel is a building and not a plant.

SUBMISSIONS: -

On the basis of the aforesaid judgments, the learned counsel for the revenue as well as assessee have made elaborate submissions. Mr. S. Ganesh, learned senior counsel for the appellant-revenue submitted: (i) Section 32(1) of the Income Tax Act draws a clear line of distinction between a building used for the purpose of business and plant/machinery used for the same purpose. A building though specially designed for use in a particular business does not, therefore, cease to be a building. Every building used for the purpose of a particular business would contain special features which make the building suitable for that particular business use. Further, without the building, the business cannot be carried on. That does not lead to the conclusion that the building becomes plant. Otherwise, every building would become plant and the dividing line between plant and building would get obliterated which is not permissible. (ii) Section 43(3) defines plant in inclusive terms. Each item included in Section 43(3) is movable. Section 43(3) does not, therefore, contemplate immovable property like a building being considered as plant. The ejusdem generis and noscitor a socis principles are relevant in this connection. (iii) Section 32(i)(ii), Section 32-A and the Appendix to the Income Tax Rules speak of plant and machinery being installed and of building being erected. This again brings out the distinction clearly. (iv) Section 32(i)(v) unequivocally provides that a new building used as hotel is regarded as a building for purpose of depreciation. In other words, a building which is specially designed and constructed for use as a hotel is nevertheless a building, for the purpose of depreciation. (v) Section 32(1)(iia) and Section 33(1)(b)(B)(ii) and the Appendix to

the Income Tax Rules speak of plant and machinery installed in premises used as a hotel, thereby clearly, establishing that the hotel premises are not machinery or plant, but are only a building. The same principle would also apply to a theatre building. Section 32(i)(iv) makes it clear that even structures/buildings which are constructed in compliance with the requirements of the Factories Act and Rules are buildings for the purpose of depreciation.

Mr. B.B. Ahuja and Mr. Joseph Vellapally, learned senior counsel for the assessee submitted: (i) From the ratio of the various judgments of this Court and that of the House of Lords and Court of Appeal, it is clear that the words buildings, machinery, plant and furniture in S. 32(1) are not mutually exclusive. It follows that a particular item could fall under both the heads, buildings as well as plant on functional test and the assessee would be entitled to depreciation under the head more beneficial to it. In other words, buildings and structures can also be considered as plant provided they fulfil the functional test, that is, they are part of whole apparatus with which the trade is carried on as opposed to the place or setting where it is carried on. (ii) In the modern era, the theatre building including auditorium, stage projection room etc. are a tool of the trade, the theatre building is an integral part of the operation of theatre business and cannot be said to merely a setting in which the business is carried on. It is their contention that most of the High Courts in India have followed the functional test propounded while determining as to whether a structure is a building or plant. The High Courts have taken the view that structures which forms part of the apparatus with which the business is carried on are not mere settings for the business and hence ought to be considered as plant for the purposes of allowance of depreciation under S.32(1). According to them, on this functional test, a modern theatre building and a hotel building will qualify as a plant. (iii) After the judgments in Kanodia Cold Storage and S.K.Tulsi & Sons cases (supra) following the decision in Taj Mahal Hotels case, the Legislature amended the definition of plant in Section 43(3) of the Act by Finance Act of 1995. The amending section clearly shows that the legislative intent was never to exclude cinema and hotel buildings which satisfy the functional test from the meaning of the word plant. (iv) Use of the word installed or erection has no bearing on the issue. (v) The subject of determination whether a hotel building or a cinema theatre can be held to be a plant is not free from difficulty and it is difficult to draw a clear line for plant or building in some cases. Despite this as legislature or Central Board of Direct Taxes adopted by various has not issued any clarification on the subject, the view High Courts requires to be accepted.They submitted that cinema theatre or a hotel building is to be considered as one unit with all attendant apparatus for running the business and if they are construed as one unit it would be a plant. Secondly, these buildings are to be considered not on their own but in relation to the business carried on by the assessee namely running of hotel or cinema. In support of this contention, the learned counsel heavily relied upon Inland Revenue Commissioners v. Barclay, Curle & Co. Ltd. [(1969) 1 WLR 675also reported in (1970) 76 ITR 62] and other decisions stated above.

Hence, the controversial question for consideration iswhether building used for running hotel or cinema business could be held a plant as provided under Section 43(3) of the Act?

We would first refer to the judgment in Barclay, Curle & Co. case (supra) upon which most of the judgments of the High Courts are based for arriving at the conclusion that building which is used for running the hotel business or cinema theatre would be a plant. In the said case, the House of Lords

considered whether a dry dock constructed by a Company for use of shipbuilders, ship repairers and marine engineers incurring capital expenditure, which comprised the cost of excavating a specially shaped new basin, having direct access to the Clyde and a floor below the level of high tide to enable ships to float in and out could be considered to be a plant for the purpose of trade of the Company within the meaning of Section 279 of the Income Tax Act, 1952. Relevant part of Section 279 as applicable, which was considered, reads thus: - where a person carrying on a trade incurs capital expenditure on the provision of machinery or plant for the purposes of the trade, there shall be made to him, for the year of assessment in the basis period for which the expenditure is incurred, an allowance (in this Chapter referred to as an initial allowance) equal to three tenths of the expenditure.

The matter was decided by the majority view and it was held that the dry dock was a plant. For this purpose, Lord Reid considered the definition of the word plant given by Lindley L.J. in Yarmouth v. France [(1887) 19 Q.B.D.647,658]. This definition reads in its ordinary sense, it includes whatever apparatus is used by a businessman carrying on his business,--not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business. Thereafter it was observed as under: The dry dock was in our view not the mere setting or premises in which ships were repaired. It was different from a factory which housed machinery, for in the operation of the dock, the dock itself played a part in the control of water and enabled the valves, pumps and electricity generator, which were an integral part of its construction, to perform their functions. The dock was not a mere shelter or home but itself played an essential part in the operations which took place in getting a ship into the dock, holding it securely and then returning it to the river."

It was further observed that plant was not defined under the Income Tax Act and thereafter held that every part of this dry dock plays an essential part in getting large vessels into a position where the work on the outside of the hull can begin, and that it is wrong to regard either the concrete or any other part of the dock as a mere setting or part of the premises in which this operation takes place. The whole dock is, I think, the means by which, or the plant with which, the operation is performed.

Lord Guest agreed with the view taken by Lord Reid. In the judgment rendered by him it was observed that in order to decide whether a particular subject is an apparatus it seems obvious that an inquiry is to be made as to what operation it performs.

Lord Hodson disagreed with the above view and observed: The dock as a complete unit contained a large amount of equipment without which the dry dock could not perform its function. This equipment admittedly qualifies for the initial allowance appropriate to expenditure on plant. It includes a dock gate and operating gear, cast iron keel blocks, electrical installation, pipe work installation, pumping installation and other subsidiary equipment, expenditure on which clearly qualifies for initial allowance as having been incurred in paying for machinery or plant.

Further with regard to building it was observed: A building or structure is normally to be regarded in the context of this statute as something more durable than machinery or plant, hence the

differentiation in favour of the less durable. The dock in question, it was found in the case stated, might last for 80-100 years if reasonable and timely repairs were carried out when requisite.

The learned Lord disagreed with the argument based on functional test. He agreed with the reasoning given by Finlay J. in Margrett v. Lowestoft Water & Gas Co. [(1887) 19 T.C. 481] wherein it was inter alia observed that: Clearly, if one takes the case of a factory with machinery inside it, the machinery in all probability would be plant, but equally clearly the factory, the bricks and mortar, would not be plant.

It was finally observed that to regard the dock as apparatus was wrong as it was something quite different from the generally accepted conception of plant.

Lord Upjohn also disagreed with the majority view by observing that too much emphasis on a functional element ought not to have been given. In a modern sophisticated factory purpose built for a particular manufacture without which the factory would be useless, makes the walls of a factory part of the plant and that is not intended. It was further observed that function is no more than an element for deciding whether it is a plant or a building.

We may mention at the stage that even in England House of Lords has repeatedly commented that the word plant is given imprecise application because of the artificial meaning given to it. In Cole Brothers Ltd. v. Phillips (Inspector of Taxes), [(1982 (1) WLR 1450], House of Lords considered the question whether expenditure incurred in electric lighting installation and conduit and cables to socket outlets, constituted expenditure on the provision of plant so as to qualify for capital allowance. For the expression Plant Lord Hailsham observed: ..that the word plant in the relevant sense, although admittedly not a term of art, and therefore part of the general English tongue, is not, in this sense, an ordinary word, but one of imprecise application, and, so far as I can see, has been applied to industrial and commercial equipment in a highly analogical and metaphorical sense, borrowed, unless I am mistaken, from the world of botany.

For this purpose, the Court quoted the words of Buckley L.J. in Benson v. Yard Arm Club Ltd. [(1979) 1 WLR 347, 351]: as a man who speaks English and understands English accurately but not pedantically would interpret it in [the] context, applying it to the particular subject matter in question in the circumstances of the particular case.

The Court further observed:

> To this admirable precept Oliver L.J. [1981] STC 671, 682E in delivering the leading judgment in the Court of Appeal in the instant case, warily, and perhaps wearily, added the cautionary rider that the English speaker must, I think, be assumed to have studied the authorities. These however, as he cautiously admitted in an earlier passage (p.676) cannot be pretended to be at all easy to reconcile, and, as he said in a still earlier passage, at p.675D: it is now beyond doubt that [the word plant] is used in the relevant section in an artificial and largely judge-made sense.

The Court thereafter observed: if plant is to be contrasted with the place in which the business is carried on, the line must be drawn somewhere. There must, therefore, be a criterion (or criteria) by which the courts define the frontier between the two..

But, on the special facts relating to these components carrying electricity, they held that it was an exceptional case where the Commissioners were right in taking each component separately as each was serving a different purpose and held that each of them was not plant.

In Inland Revenue Commissioners v. Scottish & Newcastle Breweries Ltd. [(1982) 1 WLR 322] the question was whether the moneys spent on electrical rewiring, installation of new electric light fittings and of various categories of décor and murals in the hotel was on the provision of plant. Lord Wilberforce observed that: The word plant has frequently been used in fiscal and other legislation. It is one of a fairly large category of words as to which no statutory definition is provided (trade, office, even income are others), so that it is left to the court to interpret them. It naturally happens that as case follows case, and one extension leads to another, the meaning of the word gradually diverges from its natural or dictionary meaning. This is certainly true of plant. No ordinary man, literate or semi- literate, would think that a horse, a swimming pool, moveable partitions, or even a dry-dock was plantyet each of these has been held to be so:

so why not such equally improbable items as murals, or tapestries, or chandeliers?

The House of Lords observed that even the functional test was inconclusive. Therefore, the Court suggested that each case must be resolved by considering carefully the nature of the particular trade being carried on, and the relation of the expenditure to the promotion of the trade. Applying that test the Court held: I do not find it impossible to attribute to Parliament an intention to encourage by fiscal inducement the improvement of hotel amenity.

In the said case, Lord Lowry also considered the case of Benson v. Yard Arm Club Ltd. [(1979) 1 WLR 347 : (1979) 2 All ER 336], in which ship, or floating hulk, used as a restaurant was held not to be plant and observed: the Crown relied on the case because of the fact that the ship was used to create a shipboard feeling, in other words, a certain kind of atmosphere, among the patrons. But the distinction is that the ship, although a chattel, was the place in which the trade was carried on and was therefore the equivalent of the various premises in which the present taxpayer company carry on their trade and not of the apparatus used as an adjunct of the trade carried on in those premises. It was further observed that the dry dock in Barclay Curle & Co. Ltd. (supra) was a structure as well as plant.

RELEVANT PROVISIONS UNDER THE ACT FOR GRANT OF DEPRECIATION Before dealing with the rival contentions, we would refer to the relevant parts of Sections 32 and 43(3) of the Act:

Section 32. Depreciation(1) In respect of depreciation of building, machinery, plant or furniture owned by the assessee and used for the purposes of the business or profession, the following deductions shall, subject to the provisions of section 34, be allowed

(i) in the case of ships other than ships ordinarily plying on inland waters, such percentage on the actual cost thereof to the assessee as may, in any case or class of cases or in respect of any period or periods, be prescribed:

Provided that different percentages may be prescribed for different periods having regard to the date of acquisition of the ship.

(ii) in the case of buildings, machinery, plant or furniture, other than ships covered by clause (I), such percentage on the written down value thereof as may in any case or class of cases be prescribed:

Provided that where the actual cost of any machinery or plant does not exceed seven hundred and fifty rupees, the actual cost thereof shall be allowed as a deduction in respect of the previous year in which such machinery or plant is first put to use by the assessee for the purposes of his business or profession:

Provided further that no deduction shall be allowed under this clause or clause (iii) in respect of any motor- car manufactured outside India, where such motor-car is acquired by the assessee after the 28th day of February, 1975, and is used otherwise than in a business of running it on hire for tourists;

(iia) in the case of any new machinery or plant (other than ships and aircraft) which has been installed after the 31st day of March 1980 but before the 1st day of April, 1985, a further sum equal to one-half of the amount admissible under clause (ii) (exclusive of extra allowance for double or multiple shift working of the machinery or plant and the extra allowance in respect of machinery or plant installed in any premises used as a hotel) in respect of the previous year in which such machinery or plant is installed or, if the machinery or plant is first put to use in the immediately succeeding previous year, then in respect of that previous year:

Provided that no deduction shall be allowed under this clause in respect of

(a) any machinery or plant installed in any office premises or any residential accommodation:

(b) any office appliances or road transport vehicles;

and

(c) any machinery or plant, the whole of the actual cost of which is allowed as a deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head profits and gains of business or profession of any one previous year.

Explanation : For the purpose of this clause,- (a) new machinery or plant shall have the meaning assigned to it in clause (2) of the Explanation below clause (vi) of this sub-section:

(b) residential accommodation includes accommodation in the nature of a guest house but does not include premises used as a hotel;

(iii) in the case of any building, machinery, plant or furniture which is sold, discarded, demolished or destroyed in the previous year (other than the previous year in which it is first brought into use), the amount by which the moneys payable in respect of such building, machinery, plant or furniture, together with the amount of scrap value, if any, fall short of the written down value thereof:

Provided....

Explanation (iv) in the case of any building which has been newly erected after the 31st day of March, 1961, where the building is used solely for the purpose of residence of persons employed in the business and the income of each such person chargeable under the head Salaries is ten thousand rupees or less, or where the building is used solely or mainly for the welfare of such persons as a hospital, creche, school, canteen, library recreational centre, shelter, rest-room or lunch-room, a sum equal to forty percent of the actual cost of the building to the assessee in respect of the previous year of erection of the building; but any such sum shall not be deductible in determining the written down value for the purposes of clause (ii) of sub-section (1);

(v) in the case of any new building, the erection of which is completed after the 31st day of March, 1967, where the building is owned by an Indian company and used by such company as a hotel and such hotel is for the time being approved in this behalf by the Central Government, a sum equal to twenty-five percent of the actual cost of erection of the building to the assessee, in respect of the previous year in which the erection of the building is completed or, if such building is first brought into use as a hotel in the immediately succeeding previous year, then in respect of that previous year; but any such sum shall not be deductible in determining the written down value for the purposes of clause (ii);

(vi) in the case of new ship or a new aircraft acquired after the 31st day of May, 1974, by an assessee engaged in the business of operation of ships or aircraft or in the case of new machinery or plant (other than office appliances or road transport vehicles) installed after that date for the purposes of business of generation or distribution of electricity or any other form of power or of construction, manufacture or production of any one or more of the articles or things specified in items 1 to 24 (both inclusive)

in the list in the Ninth Schedule or in the case of new machinery or plant (other than office appliances or road transport vehicles) installed after that date in a small-scale industrial undertaking for the purposes of business of manufacture or production of any other articles or things, a sum equal to twenty percent of the actual cost of the ship, aircraft, machinery or plant to the assessee, in respect of the previous year in which the ship or aircraft is acquired or the machinery or plant is installed, or if the ship, aircraft, machinery or plant is first put to use in the immediately succeeding previous year, then, in respect of that previous year; but any such sum shall not be deductible in determining the written down value for the purposes of clause (ii):

Provided Provided further that no deduction shall be allowed under this clause in respect of

(a) any machinery or plant installed in any office premises or any residential accommodation including any accommodation in the nature of a guest-house;

(b) (c) Explanation (1A) Where the business or profession is carried on in a building not owned by the assessee but in respect of which the assessee holds a lease or other right of occupancy and any capital expenditure is incurred by the assessee for the purposes of the business or profession after the 31st day of March, 1970, on the construction of any structure or doing of any work in or in relation to, and by way of renovation or extension of, or improvement to, the building, then, in respect of depreciation of such structure or work, the following deductions shall, subject to the provisions of section 34, be allowed

(i) such percentage on the written down value of the structure or work as may in any case or class of cases be prescribed; (ii) Provided Explanation (2)..

Section 43 In sections 28 to 41 and in this section, unless the context otherwise requires (1) (2) (3) Plant includes ships, vehicles, books, scientific apparatus and surgical equipment used for the purposes of the business or profession.

Rule 5 of the Income Tax Rules, 1962 provides for calculation of depreciation at the percentages specified in second column of the Table in Part I of Appendix I to the Rules. Appendix I to Rule 5 is as under: -

TABLE OF RATES AT WHICH DEPRECIATION IS ADMISSIBLE Class of assets Depreciation allowance as %age of-- Remarks (i) actual cost in the case of ocean- going ships;

(ii) written-down value in the case of any other asset. 1 2 3 I.BUILDINGS [(1) General rate 5 Buildings include (2)Special rate in respect of factory building roads, bridges, (excluding offices, godowns, officers and culverts, wells and employees quarters, roads, bridges, culverts, tube-wells] wells and tube-wells] 10 (3) Purely temporary errections such as wood- en structures. 100 (4) In respect of any structure of work in or in relatiion to a building referred to in sub-section (1A) of

section 32,-- (a) where such structure is constructed or such The percentage work is done by way of renovation or specified against sub- improvement to any such building. Items (1,2 or 3], as may be approximate to the class of building in or in relation to which the renovation or improvement is effected.

(b) where the structure is constructed or The percentage specified work is done by way of extension against sub-items [1,2 or 3] to any such building. As would be appropriate if the structure of work constituted a separate building.

II. FURNITURE AND FITTINGS (1) General rate 10 (2) Rate for furniture and fittings used in Hotels, restaurants and boarding houses; 15 Cinema-houses; theatres and III. MACHINERY AND PLANT (not being a ship)

(i)General rate applicable to machinery and plant (not being a ship) for which no special rate has been prescribed under Item (ii) herein below.

(ii) Special rates: 15 C(I) Cinematograph filmsMachinery used in the production and exhibition of cinematograph films (N.E.S.A.)

(a) Recording equipment, reproducing equipment, developing machines, printing machines, synchronisers and studio lights except bulbs. 20 (b) Projecting equipment of film exhibiting concerns.

D.(1) AeroplanesAircraft, Aerial photographic Apparatus (N.E.S.A.) 30 E.(1) AeroplanesAero-engines[N.E.S.A.] 40 F.(2) Cinematograph filmsBulbs of studio lights. 100 IV. SHIPS (1) Ocean going ships 10 (i) Fishing vessels with wooden hull (ii) Dredgers, tugs, barges, survey launches 7 And other similar ships used mainly for Dredging purpose. 5 (iii) Other Ships To be calculated on the actual cost.

(2) Vessels ordinarily operating on Inland waters (i) speed boats 20 (ii) Other vessels 10 Aforesaid clauses of the Section 32 deal with depreciation allowance in respect of assets of the specified description used for the purpose of business or profession. From a careful scrutiny thereof what emerges is: -

(1) The scheme of Section 32 is to provide different rates of depreciation for building, machinery, plant or furniture, ships, buildings used for hotels, aeroplanes and other items mentioned therein. Clause (ii) of Section 32 specifically provides for grant of depreciation for building, machinery, plant or furniture at prescribed percentage on the written down value thereof. The Rates are prescribed under Income Tax Rules.

(2) Under clause (iia) of Section 32(1) specific provision is made for new machinery or plant which has been installed and it provides for additional sum equal to one half of the amount admissible as depreciation under clause

(ii) if the conditions mentioned therein are fulfilled. Further, the proviso carves out an exception to the effect that no deduction shall be allowed in respect of any machinery or plant installed in office premises or any residential accommodation. That means the Legislature has divided building into different categories, namely, (i) buildings used for office premises or (ii) for residential accommodation; or (iii) premises used for other purposes. Meaning to the phrase residential accommodation is also given under the Explanation which includes accommodation in the nature of a guest house and it specifically excludes premises used as a hotel. So, the Legislature has not considered hotel building by itself as a plant. The phrase is premises used as a hotel where machinery or plant is installed.

(3) Under sub-clause (v) of clause (1) of Section 32 specific provision is made for a new building, the erection of which is completed after 31.3.1967, which is used as a hotel. If the conditions mentioned therein are satisfied then for a building which is used for a hotel, a sum equivalent to 25 per cent of the actual cost of the erection of the building is granted as depreciation. Further, the Legislature has considered building as separate from the hotel business and building is not considered as a plant for running the hotel. Therefore, building and the use of such building as a hotel are considered distinct.

(4) All throughout Section 32 for building it is specifically mentioned that whenever it is erected, while for machinery and plant, the words used are whenever it is installed and there is no question of installing building. Section 32(1)(iia) uses the phrase machinery or plant installed in any premises used as a hotel and Section 33(1)(b)(B)(ii) provides in case of machinery or plant is installed for the purposes of business or construction etc. which indicates that plant is to be installed and there is no question of erection.

(5) Under the Rules as quoted above, separate rates are prescribed under the Heading (I) Buildings, and (II) Furniture and fittings, (III) Machinery and Plant and (IV) Ships. These headings have been further sub-divided providing different rates. Like, Building is divided into

(i) building generally, (ii) special rate in respect of factory building and (iii) temporary erections such as wooden structures. In the remarks column (3) it is stated that buildings include roads, bridges, culverts, wells and tube-wells. Furniture and Fittings is also divided into (i) general rate and (ii) rate for furniture and fittings used in hotels, restaurants and boarding houses, cinema house theatres etc. Similarly, Machinery and Plant are under one heading and are divided into two parts(i) general rate applicable to machinery and plant and (ii) special rates, which includes machinery and plant for cinematograph films, recording equipments, reproducing equipments, developing machines, printing machines, synchronisers and studio lights and projecting equipments of film exhibiting concerns. Further, special rates are provided for machinery used in production and exhibition of cinematograph films being (a) recording equipment, reproducing equipment, developing machines, printing machines, editing machines, synchronisers and studio lights except bulbs and (b) projecting equipment of film exhibiting concerns. Further different rates have been provided for machinery for cinematograph films that includes studio lights except bulbs under the heading C(1)(b) and for bulbs of studio lights under the heading F(2).

From the aforesaid discussion, it is apparent that for a building used as a hotel there is a specific provision for granting depreciation allowance at specified rates depending upon fulfillment of the conditions mentioned therein. Hence, there is no question of referring to dictionary meaning of the word plant which may or may not include building, for arriving at a conclusion that building which is specifically designed and constructed as a hotel building would be a plant.

Further, in context of legislative scheme under Section 32 stated above, which provides depreciation at different rates for building, machinery and plant, furniture and fixtures, ships, building used for hospital, aeroplanes, cinematograph films, machinery used in the production and exhibition of cinematograph films, recording equipment, reproducing equipment, developing machines, printing machines, synchronisers and studio lights except bulbs, projecting equipment of film exhibiting concerns, even though the word plant may include building or structure in certain set of circumstances as per the dictionary meaning, but to say that building used for running the business of hotel or a cinema would be plant under the Act appears, on the face of it, to be inconsistent with the aforesaid provisions. Such meaning would be clearly against the legislative intent.

While interpreting the words consumption, raw material and utilised in clause (c) of the Import Control Policy formulated by the Government of India this Court in the case of Dy. Chief Controller of Imports and Exports, New Delhi v. K.T. Kosalram and others, [1970(3) SCC 82] observed thus: - In our opinion dictionary meanings, however helpful in understanding the general sense of the words cannot control where the scheme of the statute or the instrument considered as a whole clearly conveys a somewhat different shade of meaning. It is not always a safe way to construe a statute or a contract by dividing it by a process of etymological dissection and after separating words from their context to give each word some particular definition given by lexicographers and then to reconstruct the instrument upon the basis of these definitions. What particular meaning should be attached to words and phrases in a given instrument is usually to be gathered from the context, the nature of the subject matter, the purpose or the intention of the author and the effect of giving to them one or the other permissible meaning on the object to be achieved. Words are after all used merely as a vehicle to convey the idea of the speaker or the writer and the words have naturally, therefore, to be so construed as to fit in with the idea which emerges on a consideration of the entire context.

(Emphasis added) Applying the said test, we have to gather the meaning of words building and plant in context of Scheme of Section 32 and it is not necessary that we should adopt a judge sense meaning, which is artificial and imprecise in application, given to the word plant in context of different statutory provisions. The Scheme of Section 32 unequivocally leads to the conclusion that building and plant are treated separately for the purpose of grant of depreciation. Higher rate of depreciation is granted to machinery and plant as against the building which has more durability.

In C.I.T. v. Mir Mohammad Ali [(1964) 53 ITR 165] this Court considered the meaning of the word machinery and observed that the word machinery is an ordinary and not a technical word and unless there is something in the context in the Act, the ordinary meaning would prevail. Thereafter, the Court observed: According to the above definition, a diesel engine is clearly machinery. Indeed, rule 8 of the Income-tax Rules treats aero-engines separately from aircraft. It is true that this rule

cannot be used to interpret the clauses in the Act but it does show that components of an aircraft, which are machinery, can be treated separately.

held: - For the words plant and installed the Court Further, when the assessee purchased the diesel engines, they were not plant or part of a plant: because they had not been installed in any vehicle. They were, according to the definition given by the Privy Council, machinery. They were not yet part of a plant, and, according to the Act, 20% of the cost thereof was allowable of the assessee. All the conditions required by the Act are satisfied. If we look at the point of time of purchase and installation, what was purchased and installed was machinery.

Thereafter, the Court considered the meaning of the expression install and held that when an engine is fixed in a vehicle it is installed within the meaning of Section 10(2)(vi) and 10(2)(via) of the Act, 1922. Similarly, in the present case the word plant is given meaning under Section 43(3) to include ships, vehicles, books, scientific apparatus and surgical equipment used for the purposes of the business or profession, but this would not mean that it includes building which is treated separately from machinery and plant. Wider meaning to word plant is given by including specified items mentioned above, that is, it includes ships, vehicles, books etc. In Taj Mahal Hotel (supra) this Court specifically observed that it is well settled that where the definition of the word has not been given it must be construed in its popular sense if it is a word of every day use. The Court also observed that even books have been included in the word plant, therefore, wider meaning should be given so as to include those things which the interpretation clause declares that they shall include. Further, it is to be stated that Section 43 itself provides that unless the context otherwise requires the word plant is to be given wider meaning as stated therein. This wider meaning does not include building. But in any case even for the time being presuming that the judge-made meaning of the word plant includes building in certain set of circumstances, in context of Section 32 such wider meaning cannot be given and plant would not include building in which hotel business is run or a theatre building in which cinema business is carried on. Further, the Court specifically observed that:

> - the business of a hotelier is carried on by adapting a building or premises in a suitable way to be used as a residential hotel where visitors come and stay.
>
> These observations clearly indicate that business of a hotelier is carried on in a building or a premises and building is not an apparatus for running such business. It is a shelter or a home for conduct of such business. Learned counsel also pointed out the decision of the Madras High Court in. CIT v. (1) N. Sathyanathan And Sons P. Ltd. [(2000) 242 ITR 514] wherein the Court observed that in case of Taj Mahal Hotel [(1971) 82 ITR 44] even after noticing the fact that the dictionary definition of plant includes buildings, the court did not proceed to hold that the building in which the hotel was run, and wherein the sanitary fittings were used was itself plant, and on that ground sanitary fittings used in the hotel were part of the plant and emphasised that Section specifically provides buildings used as hotel would indicate hotel building cannot be construed as a plant. We agree with this view of the Madras High Court.

Next, it is to be stated that the judgment in the case of Barclay, Curley & Co. would be of no assistance for holding that a building used for the purpose of a hotel or the theatre used for carrying the business of cinema will be a plant because in the said case majority view was that the dry dock was not the mere setting or the premises in which ships were repaired. It was not mere shelter or home but itself played an essential part in the operations which took place in getting a ship into the dock, holding it securely and then returning it to the river. It was a complete unit by itself, therefore, it was a plant. Against that, for a hotel premises, under the Act, building is not considered to be an apparatus for running the hotel business but is merely a shelter or home or setting in which business is carried out. In our view, same would be the position with regard to a theatre in which cinema business is carried on. Webster Comprehensive Dictionary (International Edition) gives meaning to the word theater that: (1) A building especially adapted to dramatic, operatic, or spectacular representations; playhouse; (2) The theatrical world and everything relating to it; (3) A room or hall arranged with seats that rise as they recede from a platform, especially adapted to lectures, surgical demonstrations, etc.; (4) Any place of semicircular form with seats rising by easy gradations; (5) Any place or region that is the scene of events: a theater of operations in war. This would mean that cinema business can be run in a premises adapted for that purpose which may or may not be specially designed. Further, on the basis of test laid down in the case of Barclay, Curle & Co. Ltd., such building or premises would be the place in which operation of carrying on of business takes place and not that they are means by which the operation is performed. Even the House of Lords in case of Benson (supra) arrived at the conclusion that a ship or a floating hulks used as a restaurant was not a plant, even though the ship was used to create a shipboard feeling and certain kind of atmosphere, among the patrons. In our view such buildings cannot be termed as tools for running business but are mere shelter for carrying on such business activities. Therefore, even functional test, which is followed and which according to us would not be conclusive in all cases, is also not satisfied.

In England also, there are conflicting decisions involving the question whether structure would be a plant or not and it is stated that each case is required to be decided on facts of that case. In Commissioners of Inland Revenue v. Scottish & Newcastle breweries Ltd. (55 Tax Cases 252) (decided by the House of Lords) the Court of Appeal observed that though there is no statutory definition of plant for the purpose of Section 41 of the Finance Act, 1971, from a series of cases decided, following principles emerge to be settled law: (i)Something which is properly to be regarded as part of the setting in which a business is carried on and not as part of the apparatus used for carrying on the business is not plant: see J. Lyons and Co. Ltd. v. Attorney-General {(1944) Ch 287}.

(ii) Something which forms part of the setting of a trade may nevertheless be plant if it is more a part of the apparatus than part of the setting {Jarrold v. John Good & Sons Ltd. [(1963) 1 WLR 214 : 40 TC 681]}.

(iii) The term plant is not apt to cover the permanent structure of a building in which a business is carried on [John Good & Sons Ltds case].

(iv) Something which is a structure or part of a structure may nevertheless be plant, if it fulfills the function of plant in the traders operations.

{Commissioners of Inland Revenue v. Barclay, Curle & Co. Ltd. [1969 SC (HL) 30 : 45 TC 221]}.

(v) Apparatus which has no functional purpose in the commercial process, even if it serves to attract custom, is not plant {Dixon v. Fitchs Garage Ltd. [(1976) 1 WLR 215 : 50 TC 509], in this case the apparatus in question was a canopy constructed over the pumps of a petrol filling station to provide shelter while the commercial process of delivering fuel was carried on}.

In the said case, Lord Stott adopted the distinction made by Shaw L.J. in Benson v. Yard Arm Club Ltd., [(1979) 1 WLR 347, at p. 358 : 53 TC 67 at p.88.] and relied upon following observation:- A characteristic of plant appears to me to be that it is an adjunct to the carrying on of a business and not the essential site or core of the business itself.

Applying the aforesaid characteristic of plant, in our view, building for hotel or cinema cannot be stated to be adjunct, that is to say, (as per the dictionary meaning of the word adjunct) something added to another, or it is in a subordinate, auxiliary or dependent position.

Further, in Wimpy International Ltd. v. Warland and Associated Restaurants Ltd. v. Warland [61 Tax Cases 51], the Court of Appeal dealt with a case where the appellants owned and operated fast food restaurants and expended money on improving and modernising their restaurants i.e. by spending on shop fronts, floor and wall tiles, wall finishes and other non- decorative items which was held by the Special Commissioners as part of setting or premises in which trades were carried on. The appellants contended that all the items were installed to improve the ambience of the restaurant and to attract customers and were thus plant. The Court held that they were not plants. The Court took up each and every item of decoration separately for analysing whether it constituted a plant or not. Like for shop fronts or doors, the Court agreed with the observations of the Chancery Division that none of the shop fronts or doors qualifies as plant by holding that their principal function is to form a necessary part of the premises and doors are needed for ingress and egress. None of the floor or wall titles can be classed as plants. They are chosen so as to create an attractive setting in which customers will be pleased to sit for the short time required to consume a fast food meal, but their function in the trade does not go beyond that. Fox L.J. observed: Considering the facts of this case and various decisions In the light of the authorities the position appears to me to be this. There is a well-established distinction, in general terms, between the premises in which the business is carried on and the plant with which the business is carried on. The premises are not plant. In its simplest form that is illustrated by Lord Lowrys example of the creation of atmosphere in a hotel by beautiful buildings and gardens on the one hand and fine china, glass and other tableware on the other. The latter are plant; the former are not. The former are simply the premises in which the business is conducted.

The distinction, however, needs to be elaborated, for present purposes, by reference to Lord Lowrys further formulation, namely that the fact that different things may perform the same function of creating atmosphere is not relevant: one thing may function as part of the premises and the other as part of the plant. Thus, something which becomes part of the premises instead of merely embellishing them is not plant except in the rare case where the premises are themselves plant.

I do not think that what Oliver L.J. was saying in Cole Brothers is at variance with Lord Lowrys approach. It is proper to consider the function of the item in dispute. But the question is what does it function as? If it functions as part of the premises it is not plant. The fact that the building in which a business is carried on is, by its construction particularly well- suited to the business, or indeed was specially built for that business, does not make it plant. Its suitability is simply the reason why the business is carried on there. But it remains the place in which the business is carried on and is not something with which the business is carried on.

Similarly, Lord Hoffmann J. (Chancery Division) observed: the question is whether it would be more appropriate to describe the item as part of the premises rather than as having retained a separate identity. It seems to me that items such as fixed floor tiles and shop fronts are more naturally to be regarded as part of the housing of the business than as mere embellishments having a separate identity.

In Carr (H.M. Inspector of Taxes) v. Sayer [65 Tax Cases 15], the Chancery Division considered a case where the taxpayers carried on business of providing quarantine kennels and transport services for dogs and cats brought into the United Kingdom from abroad. Quarantine kennels were constructed at their premises. Some of the kennels were movable. The permanent kennels comprised a flat-roofed structure which consisted principally of a series of pens divided from each other by walls and with bars and metal mesh across the front. The Court held that those kennels were not plant; they were purpose-built permanent buildings or structures, used as such, and were the premises in which business was conducted; while they were specifically designed for quarantine purposes, the particular roof and walls were building design features and no more, which did not result in structures being characterised as anything other than buildings or lead to the end result having the character of equipment or apparatus. For this purpose, the Court referred to various principles in context of Section 41(1) of the Finance Act 1971 which is applicable to machinery or plant. In the context of that section, the Court observed that plant carries with it a connotation of equipment or apparatus, either fixed or unfixed. It does not convey a meaning wide enough to include buildings in general. The Court pertinently observed that building would not normally be regarded as a plant, do not cease to be buildings and become plant simply because they are purpose-built for a particular trading activity. Such a distinction would make no sense. Thus the stables of a racehorse trainer are properly to be regarded as buildings and not plant. A hotel building remains a building even when constructed to a luxury specification. Similarly with a hospital for infectious diseases. This might require special layout and other features, but this does not convert the buildings into plant. A purpose-built building, as much as one which is not purpose-built, prima facie is no more than the premises on which the business is conducted.

In Gray v. Seymours Garden Centre [67 Tax Cases 401], the Court of Appeal dealt with a case where assessee expended on the construction of planteria which was a fixed structure designed to maintain plants of many different kinds moved from nurseries, in an environment in which they would remain in good condition until sale. It was designed so that an appropriate mini-climate could be provided in different parts of the planteria suitable for different varieties of plant, and so as to be open to the public who could walk around it and choose from the plants on offer. The Court of appeal held that the true and only reasonable conclusion from the facts found was that planteria was part of the premises in which the business was carried on. It was a structure to which plants were brought which required special treatment. However, the fact that planteria provided the function of nurturing and preserving the plants while they were there could not transform it into something other than part of the premises in which business was carried on; the highest it could be put was that it functioned as a purpose-built structure, but that was not enough to make the structure plant.

Hence, to rely upon Barclay Curle and Co.s case (dealing with dry dock yard) and to hold that hotel building or theatre would be a plant on functional test would be unjustified and unreasonable in the context of Section 32 of the Act which deals with grant of depreciation allowance on building, machinery, plant or furniture and also for extra allowance in case of new machinery or plant installed in premises other than the premises used as office or any residential accommodation and also for new building erected and used as a hotel. As against that, the aforesaid decisions by Courts in England are based upon Section 41 of the Finance Act, 1971 which provide for allowance for capital expenditure incurred on the provisions of machinery or plant for the purposes of the trade and the Courts were only dealing with general meaning of the word plant. Even there, as quoted above, Courts have specifically held that creation of atmosphere in a hotel by beautiful buildings and gardens would not make such buildings as plants. Suitability of such building is simply the reason why the business is carried on there which may flourish, but the premises remains as premises where business is carried on and is not some thing with which business is carried on. In Carr v. Sayer (supra), the Court observed that a hotel building remains a building even when constructed to a luxury specification and also a hospital building for infectious diseases which might require special lay-out and other features was not held to be a plant by observing that a purpose-built building is no more than the premises on which the business is conducted.

Further, there are hotels of all kinds and hotel business can be carried on in all kinds of buildings, may be pucca or kacha constructions. A building intended to be used or in fact used earlier either as a residential accommodation or business purpose can be converted for running hotel business. Section 32 itself contemplates, a hotel business being carried on in a residential accommodation including an accommodation which is in the nature of guest house. On occasions hotel buildings may be constructed with a special design and features so as to attract and accommodate certain class of tourist. Similarly with regard to cinema business, it can be carried on in a specially designed and constructed building and also in other buildings. Still, however, it would be difficult to draw a distinction and differentiate by holding that a building which is specially designed and constructed for running a hotel or cinema would be covered by a plant and other buildings used for the same purpose would not get depreciation as plant, even though such business is carried on in such premises. In our view, the Delhi High Court has in case of R.C. Chemical Industry (supra) rightly observed that mere fact that manufacture of saccharine would be better carried on in a building

having atmospheric controls would not convert the building from the setting to the means for carrying the business. Similarly, Rajasthan High Court also in Lake Palace Hotels and Motels (supra) rightly observed that simply because some special fittings or controlling equipments are attached for the purpose of carrying on hotel business, it will not take it out of the category of building and make it a plant. In our view special fittings or equipments to control atmospheric effects would be plant, but not the building which house such equipments.

Further for running almost all industries or for carrying on any trade or business building is required. On occasions building may be designed and constructed to suite the requirement of a particular industry, trade or business. But that would not make such building a plant. It only shelters running of such business. For each and every business, trade or industry, building is required to carry on such activity. That means building plays some role and in other words, its function is to shelter the business, but it has no other function except in some rare cases such as dry dock where it plays an essential part in the operations which take place in getting a ship into the dock, holding it squarely and then returning it to the river. Building is more durable. If contention of the assessee is accepted, virtually all such buildings would be considered to be a plant and distinction which the legislature has made between the building and machinery or plant would be obliterated.

Learned counsel for the assessee submitted that the words plant and building are not mutually exclusive. Plant may include building in certain set of circumstances and, therefore, applying the functional tests assessee would be entitled to depreciation under the head it is more beneficial to it. He submitted that in the modern era, theatre building and hotel building are integral part of operation for carrying out such business and, therefore, such building should be considered as a plant.

As discussed above, the aforesaid contention cannot be accepted. Firstly, it would be difficult to draw a line between a building which is specifically constructed for the aforesaid purposes and buildings which are used for the aforesaid purposes by converting a residential accommodation or industrial premises for such purposes. Secondly, the depreciation as a general principle represents the diminution in value of capital asset when applied to the purpose of making profit or gain. The object is to get true picture of real income of the business. Hence, it can be inferred that the Legislature never intended to give such benefit of depreciation to a building which is usually more durable than machinery or plant. In CIT, Punjab, J&K, and Himachal Pradesh Patiala v. M/s Alps Theatre, [AIR 1967 SC 1437], Court considered the questionwhether the cost of land is entitled to depreciation under the schedule to the Income-tax Act along with the cost of the building standing thereon? The Court observed (in para 6) thus:- It would be noticed that the word used is depreciation and depreciation means:

> a decrease in value of property through wear, deterioration, or obsolescence; the allowance made for this in book-keeping, accounting, etc. (Websters New Word Dictionary).

In that sense land cannot depreciate. The other words to notice are such buildings. We have noticed that in sub-clause (iv) and (v), building clearly means structures and does not include site.

The Court also held (in para 7 and 8) that: -

One other consideration is important. The whole object of S.10 is to arrive at the asessable income of a business after allowing necessary expenditure and deductions.

Depreciation is allowable as a deduction both according to accountancy principles and according to the Indian Income Tax Act. Why? Because otherwise one would not have a true picture of the real income of the business. But land does not depreciate, and if depreciation was allowed it would give a wrong picture of the true income.

Under the new Act also for the building and machinery or plant depreciation is allowed probably after taking into consideration its life and decrease in the value of the property through wear and tear.

Learned counsel for the assessee vehemently submitted that even though the line between the building and the plant in some cases is absolutely thin yet the legislature or the Central Board of Direct Taxes (Revenue Board) has not clarified the same at any point of time inspite of conflicting judgments of the High Courts on the subject. Learned counsel for the assessee further submitted that even though the legislature was alive to the issue and amended Section 43(3) of the Act by the Finance Act of 1995 by excluding tea bushes and livestock with retrospective effect from 1962, it has not excluded the buildings which are used for running hotel or cinema business. It has not clarified or carried out any amendment in the provision and, therefore, it should be held that interpretation given by the High Courts was accepted by the revenue and the legislature. We do not know that Revenue Board was alive to the said controversy. If that was so, it would have clarified either way and litigations could have been avoided. But that is no ground for accepting interpretation suggested by the learned counsel for the assessees which would be inconsistent with scheme of Section 32.

In the result, it is held that the building used for running of a hotel or carrying on cinema business cannot be held to be a plant because:

(1) The scheme of Section 32, as discussed above, clearly envisages separate depreciation for a building, machinery and plant, furniture and fittings etc.. The word plant is given inclusive meaning under Section 43(3) which nowhere includes buildings. The Rules prescribing the rates of depreciation specifically provide grant of depreciation on buildings, furniture and fittings, machinery and plant and ships. Machinery and plant includes cinematograph films and other items and the building is further given meaning to include roads, bridges, culverts, wells and tube- wells.

(2) In the case of Taj Mahal Hotel (supra), this Court has observed that business of a hotelier is carried on by adopting building or premises in suitable way. Meaning thereby building for a hotel is not apparatus or adjunct for running of a hotel. The Court did not proceed to hold that a building in which the hotel was run was itself a plant, otherwise the Court would not have gone into the question whether the sanitary fittings used in bath room was plant.

(3) For a building used for a hotel, specific provision is made granting additional depreciation under Section 32 (1)(v) of the Act.

(4) Barclay, Curle & Co.s case decided by the House of Lords pertains to a dry dock yard which itself was functioning as a plant, that is to say, structure for the plant was constructed so that dry dock can operate. It operated as an essential part in the operations which took place in getting a ship into the dock, holding it securely and then returning it to the river. The dock as a complete unit contained a large amount of equipment without which the dry dock could not perform its function.

(5) Even in England, Courts have repeatedly held that the meaning to the word plant given in various decisions is artificial and imprecise in application, that is to use the words of Lord Buckley, it is now beyond doubt that the word plant is used in the relevant section in an artificial and largely judge-made sense. Lord Wilberforce commented by stating that no ordinary man, literate or semi-literate, would think that a horse, a swimming pool, moveable partitions, or even a dry-dock was plant.

(6) For the hotel building and hospital in the case of Carr v. Sayer (supra), it has been observed that a hotel building remains a building even when constructed to a luxury specification and similarly, a hospital building for infectious diseases which might require a special layout and other features also remains a premises and is not plant. It is to be added that all these decisions are based upon the interpretation of the phrase machinery or plant under Section 41 of the Finance Act, 1971 which was applicable and there appears no such distinction for grant of allowance on different heads as provided under Section 32 of the Income Tax Act.

(7) To differentiate a building for grant of additional depreciation by holding it to be a plant in one case where the building is specially designed and constructed with some special features to attract the customers and a building not so constructed but used for the same purpose, namely, as a hotel or theatre would be unreasonable.

Hence, the question is answered in favour of the revenue and against the assessee by holding that building which is used as a hotel or a cinema theatre cannot be given depreciation as plant.

Accordingly, the Civil Appeal Nos. 55-57 of 2000 filed by the assessee and Civil Appeals Nos. 4758, 5198-99, 5391 of 1998, 15, 2784-86, 2787, 3690 of 1999 and Civil Appeal Nos._____ of 2000 @ S.L.P.(C) Nos.4373-74 of 1999 filed by the Revenue are disposed of, but in the circumstances of

the case, without costs.

.....J. (A. P. MISRA) New Delhi; .J. May 12, 2000. (M.B. SHAH) In Civil Appeal Nos. 241, 242-243, 244, 245, 246-48 of 1999, the learned counsel for the respondents-assessee has filed additional written submissions on 4.5.2000 stating that additional question is involved in these matters and it is required to be heard. Accordingly, in these appeals, we fix the hearing of the said question in the Month of August 2000. If a counsel finds that any other additional question which was raised and decided by filing proper the High Court is left out, he may draw the attention by application within four weeks from today.

Ordered accordingly.