Escorts Limited And Anr. Etc. Etc vs Union Of India And Ors on 22 October, 1992

Equivalent citations: AIR 1993 SUPREME COURT 1325, 1993 (1) SCC 249, 1993 AIR SCW 404, 1993 TAX. L. R. 162, 1992 ( ) JT (SUPP) 619, (1993) 1 COMLJ 349, (1993) 112 TAXATION 105, (1992) 108 CURTAXREP 275, (1993) 199 ITR 43

Bench: S. Ranganathan, V. Ramaswami, B.P Jeevan Reddy

PETITIONER:
ESCORTS LIMITED AND ANR. ETC. ETC.

Vs.

RESPONDENT:
UNION OF INDIA AND ORS.

DATE OF JUDGMENT22/10/1992

BENCH:
[S. RANGANATHAN, V. RAMASWAMI AND B.P JEEVAN REDDY, JJ.]

ACT:
Income Tax Act, 1922/Income Tax Act, 1961:
Sections 10 (2) (vi) and (xiv) /32 (1) (ii), 35 (1) (iv), 35 (2) (iv), 43 (1), Explanation-Depreciation-Scientific Research-Deductions in computing business income-Depreciation allowance in respect of the asset as also allowance in respect of expenditure incurred on the Scientific Research-Whether permissible-Retrospective amendment of Section 35(2)- Whether violative of Articles 14,19 (1) (g) and 300-A of the Constitution-Whether imposed unreasonable and oppressive burden on the assesse-Nature and effect of amendment-Position before and after the amendment-Explained.
Constitution of India, 1950:
Articles 14,19 (1) (g) and 300-A-Retrospective amendment of Section 35 (2) of the Income Tax Act, 1961-Whether violative of-completion of pending assessments and also reopening or rectification of completed assess ments of earlier years in cases where double benefit was granted-Whether unreasonable and imposed oppressive burden on assessee.
Statute Law-Retrospective operation-Amended provision given retrospective effect-Whether open to challenge as imposing oppressive burden-Whether new obligation created

under new provision.

HEADNOTE:

Section 32 (1) (ii) of the Income Tax Act, 1961 provided for depreciation, while computing business income for purpose of income tax. It was allowed at a percentage of the written down value of certain capital assets employed in the business. Section 35(1) provided for the deduction of four types of expenditure on scientific research and the deduction provided under 35 (1) (iv) was to the effect that in respect of any expenditure of a capital nature on scientific research related to the business carried on by the assessee, such deduction as may be admissible under the provisions of sub-section (2). Sub-Section (2) provided that, for the purposes of clause (iv) of sub-section (1), one-fifth of the capital expenditure incurred in any previous year should be deducted for that previous year; and the balance of the expenditure should be deducted in equal instalments in each of the four immediately succeeding previous years. It further provided in clauses (iv) and (v) that where a deduction was allowed for any previous year under this section in respect of expenditure represented wholly or partly by an asset, no deduction should be allowed under clauses (i), (ii) and (iii) of sub-section (1) of section 32 for the same previous year in respect of that asset; and where the asset mentioned in clause (ii) was used in the business after it ceased to be used for scientific research related to that business, depreciation should be admissible under clauses (i), (ii) and (iii) of sub-section (1) of Section 32.

Explanation 1 to Section 43(1) also provided that where an asset was used in business after it ceased to be used for scientific research related to that business and a deduction had to be made under clause (i), clause (ii) or clause (iii) or sub-section (1) or sub-section (1A) of Section 32 in respect of that asset, the actual cost of the asset to the assessee, as reduced by the amount of any deduction allowed under clause (iv) of sub-section (1) of Section 35.

The provisions of Section 32(1) (ii) and Section 35(2) (1) (iv) and (v) read with Explanation 1 to Section 43(1) virtually repeated the provisions contained in Section 10(2) (vi) and 10(2) (xiv) of the 1922 Act.

In 1968, there was an amendment in the provisions of Section 35(2). The effect of the amendment was that the entire amount of capital expenditure incurred in relation to scientific research was allowed as a deduction in one year, instead of being spread over a period of five years as was the position earlier.

Thereafter, the Finance Act, 1980 made an amendment with retrospective effect from 1.4.1962, i.e. from the date of commencement of Act of 1961 which provided under clause

(iv) of Section 35(2), that where a deduction was allowed for any previous year under this section in respect of expenditure represented wholly or partly by an asset, no deduction should be allowed under clauses (i), (ii) and (iii) of sub-section (1) of Section 32, for the same or any other previous year in respect of that asset.

In the Writ Petitions filed before this Court on behalf of the asses sees it was contended that the allowances in respect of depreciation on the one hand and of capital expenditure on scientific research on the other are two totally different and independent heads of allowances; one was a notional allowance to provide for the wear and tear of a capital asset employed in the business as the years rolled by; and the other was an allowance for actual expenditure of a capital nature granted to give fillip to new industrial innovations and development of indigenous know-how and techniques by proper planning on research and development by various business houses; and therefore there was nothing wrong in construing the statute as providing cumulatively for both types of deductions in respect of the same capital asset; that both the types of allowances were permissible under the statute except to the extent limited by clauses (iv) and (v) of Section 35 of the Act/Clauses (d) and (e) of the proviso to Section 10(2) (xiv) of the 1922 Act; that this interpretation of the statutory provisions was very clear. patent and unambiguous; that the retrospective amendment of the provision would impose unexpected and impossible burden on them over the years, jeopardise their solvency and lay them open to action by creditors and financial institutions and such an onerous burden was unreasonable and oppressive and the provision imposing such a burden violated the fundamental rights of the assessees under Articles 14 and 19(1) (g) of the Constitution that retrospective provisions may be permissible even in taxing statutes in certain special circumstances such as in the case of provisions clarifying the impact of a statute provision curing defective legislations in the light of the judicial decisions and the like but if the legislature chose to impose a totally new burden which was not at all in contemplation earlier and proceeded to give full retrospective effect thereto such an attempt should be struck down as unreasonable and discriminatory. that the amendment was not in the nature of a statutory clarification of an ambiguity but a totally new and fresh imposition sought to be unjustifiably given retrospective effect and that the statute did not intend one deduction to preclude other.

On behalf of the Revenue it was contended that the deduction provided by Section 35 (1) (iv) was in the alternative to the deduction provided by clauses (i) (ii) and (iii) of sub-section (1) and sub-section (1A) of Section 32; if one was availed of the other was not available not only during the year or years in which the deduction under

Section 35(1) (iv) was availed of but permanently; for the reason that if both were allowed to be availed of; it amounted to grant of 200% deduction viz., 100% under Section 35(1) (iv) and another 100% under sub-sections (1) and (1A) of Section 32, and this was totally outside the contemplation of the Act.

Dismissing the writ petitions, this Court,

HELD: Per Ranganathan J. (For himself and Ramaswami, J.)

1.1. There is a fundamental, though unwritten, axiom that no legislature could have at all intended a double deduction in regard to the same business outgoing; if it is intended it will be clearly expressed. In other words, in the absence of clear statutory indication to the contrary, the statute should not be read so as to permit an assessee two deductions both under Section 10(2) (vi) and section 10(2) (xiv) under the 1922 Act or under Section 32 (i) (ii) and 35(2) (iv) of the 1961 Act - qua the same expenditure. The use of the words "in respect of the same previous year" in clause (d) of the proviso to Section 10(2) (xiv) of the 1922 Act and Section 35 (2) (iv) of the 1961 Act is not a contra-indication which permits a disallowance of depreciation only in the previous years in which the other allowance is actually allowed. The purpose of the words above referred to is totally different. That the two allowances cannot be and are not intended to be granted in respect of the same asset or expenditure, can be easily seen from the limitation imposed by these words. Where the capital asset is one of the nature specified, the assessee can get only one of the two allowances in question but not both. For determining which of the two allowances should be granted - that which the assessee chooses or that which the assessing officer might prefer, it is necessary for the statute to define this and this is what has been done by the rider in clause (d) of the proviso to Section 10(2) (xiv) of the 1922 Act Section 35(2) (iv) of the 1961 Act. It mandates that the asssessee should, in such a case, be granted the special allowance for scientific research and not the routine and annual one for depreciation. Clause (d) of the proviso to Section 10(2) (xiv) of the 1922 Act and Section 30(2)(iv) of the 1961 Act thus fall into place as an appropriate and necessary provision. The provision contained in clause (e) of the proviso to Section 10(2) (xiv) of the 1922 Act, re-enacted in Explanation to Section 43(1) of the 1961 Act, also reinforces this line of approach. Therefore, it is not correct to say that the allowances under the two provisions are by nature unconnected with, and indpendent of, each other. [171-D-H; 172-A-E]

1.2. Under the provisions of the statute as they stood earlier, the assessees could not have claimed continued grant of depreciation after the expiry of five previous years before the 1968 amendment and after the expiry of the first year after the 1968 amendment, even though the entire

cost of the capital asset in question had been allowed to be written off completely against the business profits of those five previous years or one previous year as the case may be. It is impossible to conceive of the legislature having envisaged a double deduction in respect of the same expenditure even though it is true that the two heads of deduction do not completely overlap and there is some difference in the rationale of the two deductions under consideration. The last few words of the English statute, viz., "assets for any year of assessment during any part of which they were used by the person carrying on the trade for scientific research related to the trade" show that there is really no difference between the English and Indian Acts; the former also in terms prohibits depreciation only so long as the assets are used for scientific research. [169-F-H; 171-B, C]

1.3. In the circumstances, it is clear that, even before the 1980- amendment, the Act did not permit a deduction for depreciation in respect of the cost of a capital asset acquired for purposes of scientific research to the extent such cost has been written off under Section 10(2) (xiv) of the 1922 Act/35(1) & (2) of the 1961 Act. Prior to 1968, such assets qualified for an allowance of one-fifth of the cost of the asset in five previous years starting with that of its acquisition and during these years the assessee could not get any depreciation in relation thereto. In respect of assets acquired in previous year relevant to assessment year 1968-69 and thereafter, their cost was written off in the previous year of acquisition and no depreciation would be allowed in that year. This is clear from the statute. Equally, it is not envisaged, that depreciation could be allowed on them thereafter and also that it could be allowed starting with the original cost of the asset despite its user for scientific research and the allowances made under the 'scientific research' clause. There was no difficult at all in the interpretation of the provisions. The mere fact that a baseless claim was raised by some over-enthusiastic assessees who sought a double allowance or that such claim may perhaps have been accepted by some authorities is not sufficient to attribute any ambiguity or doubt as to the true scope of the provisions as they stood earlier. [173-E-H; 174-A]

C.I.T. v. Indian Telephone Industries Ltd., (1980) 126 I.T.R. 528 and C.l.T. v. Hico Products, (1991) 187 I.T.R. 517, overruled.

Lohia Machines limited V. Union of India, (1985) 152 I.T.R. 308 S.C.; Alkali & Chemical Corporation of India Ltd, v. C.l.T., (1986) 161 I.T.R. 820 Cal.; C.l.T v. Indian Explosive Ltd., (1992) 192 I.T.R. 144 Cal.; C.I.T v. International Instruments P. Ltd., (1983) 144 I.T.R. 936 Kar. and Warner Hindustan Ltd. v. C.l.T., (1988) 171 I.T.R. 224 A.P., referred to.

1.4. The assessees may have some possible case only if

the earlier statutory provisions can be said to have been unambiguously in favour of the assessee and the 1980 amendment had radically altered the provisions to cast a new and substantial burden on the assessee with retrospective effect but there is no ambiguity. The 1980 amendment has effected no change at all in the provisions except to set out more clearly and categorically what the provision said even earlier. Thus, even without the amendment, the assessees cannot claim the depreciation allowance in question. Even if it is assumed that there was an ambiguity or doubt as to interpretation, that was retrospectively clarified by the legislature. Therefore, the validity of the amendment cannot be challenged. This is indeed beyond all doubt. [174-C-G]

Rai Ramkrishna v. State of Bihar, [1964] 1 S.C.R. 897;Asst. Commissioner of Urban Land Tax v. Buckingham & Carnatic Co. Ltd., [1970] 1 S.C.R. 268; Krishnamurthi & Co. v. State of Madras, [1973] 2 S.C.R. 54; Hira Lal Rattan Lal v. Sales Tax Officer and Anr., (1973) 31 S.T.C. 178 and Shiv Dutt Rai Fateh Chand v. Union of India, (1984) 148 I.T.R. 644, referred to.

Per Jeevan, Reddy, J. (Concurring)

1.1. A double deduction cannot be a matter of inference; it must be provided for in clear and express language, regard having to its serious impact on the revenues of the State. If the Legislature/Parliament wanted to provide for more than 100% deduction they would have said so, as they done in cases where they have provided for what is called "weighted deduction", vide Section 35(B)of the Act of 1961. It is not possible to agree that while introducing clause (xiv) in sub-section (2) of Section 10 of the 1922 Act consequent on the introduction of Section 20(4) in the U.K. finance Act, 1944, the Indian Legislature as also the Parliament made a conscious departure from the English Amendment with the idea of providing an additional incentive over and above the deduction on account of depreciation, to induce the Indian assessees to invest more in scientific research.

1.2. The underlying reason in clause (iv) of Section 35(2) of Act of 1961 providing that during the years or year in which the assessee avails of the deduction under Section 35(1) (iv) he should not avail of the deduction on account of depreciation provided by clauses (i), (ii) and (iii) of sub- section (1) and sub-section (1A) of Section 32 is to ensure that the assessee does not get double deduction for example, where the asset was acquired prior to April 1, 1957, the deduction under Section 35(1) (iv) would be allowed in five consecutive years. If during the very five previous years, depreciation under the aforementioned provisions is also allowed, the assessee would obtain, at the end of five years, a double depreciation i.e., 100% under Section 35 and almost 100% under Section 32. (In many cases, the rate of depreciation under Section 32 is 20% or

even higher). If such a course was barred by clause (iv) during the initial five years, it would not be reasonable to say that same thing can be achieved by claiming the deduction after the expiry of five years. If both the deductions are in the alternative, as indicated by clause (iv), they must be understood as being in the alternative and not consecutive. It would be a rather curious thing to say (in the case of an asset acquired prior to April 1, 1967) that Parliament barred claim for depreciation under Section 32 even in the first year when only 20% of the cost of the asset is allowed as deduction under Section 35(1) (iv), it barred it in the second, third and fourth years, when the deduction had reached 40, 60 and 80 per cent but permitted it be claimed after the fifth year, by which year the entire 100% cost was allowed as a deduction. No express provision was necessary to say what is so obvious. The position after April 1. 1967 is no different. That the aforesaid view is the correct one is indicated by Explanation (1) to clause (1) of Section 43 [the corresponding provision in the 1922 Act being sub-clause (e) of clause (xiv) of Section 10(2) of 1922 Act].
[177-H; 178-A-E]
13. The amendment of Section 35(2) in 1980 is merely clarificatory in nature. It makes explicit what was implicit in the provisions. question of its constitutionality, therefore, does not arise. Though purporting to be retrospective, it does not take away any rights which had legally vested in the assessees. [180-B]
Commissioner of Income Tax v. Hico Products Pvt. Ltd, (1991) 187 I.T.R 517, overruled.
1.4. None of the assessments relating to any of the assessment years in question has become final. They are pending at one or the other stage and in one or the other forum. Since the amendment under challenge merely makes explicit which was implicit in the unamended clause, there is no question of any right vesting in the assessee and its being taken away. [180-H; 181-A]

JUDGMENT:

ORIGINAL JURISDICTION: Writ Petition No. 90 of 1981 etc. etc, (Under Article 32 of the Constitution of India). Dr. Devi Prasad Pal, Dinesh Vyas, P.H. Parekh, B.N. Aggarwal, A.S. Rao, Ravinder Narain, S. Ganesh, A.K. Verma, Amrita Mitra, Ms. Priya Hingorani, S. Sukumaran, Ms. Amrita Mitra, Ms. S.Bagga, Krishan Kumar, Bhaskar Pradhan, Ms. Poonam Madan, Ms. Gauri Advani, S. Pathak, B. Lal, B.P. Aggarwal, Ms. Geetanjali Mohan, P.K. Mukherjee and S.C. Patel for the Petitioners.

S.C. Manchanda, B.B. Ahuja, Manoj Arora, S. Rajappa and Ms. A. Subhashini for the Respondents.

The Judgment of the Court was delivered by RANGANATHAN, J. The seeds of the present controversy were sown as early as in 1946. It is unfortunate that this matter should be coming up before this Court for its consideration nearly five decades later, though it must be pointed out that the issue in its present form is the outcome of an amendment made by the Finance (No.2) Act, 1980 (hereinafter referred to as 'the 1980 Act') to the Income Tax Act, 1961* (hereinafter referred to as 'the 1961 Act'). It is also a curious co-incidence that the 1980 Act effected two amendments in the 1961 Act with retrospective effect and the validity of both these provisions have been challenged before the courts. The first was the controversy with regard to the retrospective amendment of s.80-J which was settled by this Court by its decision in Lohia Machines Limited v. Union of India, (1985) 152 I.T.R. 308 (SC). It is the second amendment to the provisions contained in section 35(2) of the 1961 Act that has given rise to the present controversy between the parties.

The question is really one of interpretation of two important provisions relating to the computation of business income for purposes of income tax. We may start with the provisions of the Indian lncome Tax Act, 1922 (hereinafter referred to as the '1922 Act'). The computation of business income for purposes of income tax was done in accordance with the provisions of section 10 of the said Act. In the process of making such computation, the Act provided for two important deductions (among others), in respect of the capital assets employed in the business. The first was the deduction under clause (vi) of Section 10(2) of an allowance in respect of the depreciation of building, machinery, plant or furniture being the property of the assessee and used for the purposes of the business, at a prescribed percentage of the written down value of such assets. This allowance is calculated, in respect of the year of acquisition of the property, at a percentage of its actual cost to the assessee and in subsequent years at a graduated scale on the basis of the actual cost less the depreciation allowances granted in the preceding years. In strict principle, this is an allowance of capital nature but it is now well settled that the allowance of depreciation has to be taken into account in order to ascertain the true profits of a business and, therefore, an assessee is permitted to deduct, in the computation of the business income year after year, the prescribed percentage of the value of the assets used for the purposes of business. The second allowance was not there in the 1922 Act originally and was introduced by the Income- tax (Amendment) Act, 1946. The introduction was of certain allowances in respect of expenditure on. "scientific research related to the business", an expression which was defined in a fairly comprehensive manner by the statute. Three types of allowances were permitted in respect of this category of expenditure of which we are here concerned with only one. This provision was contained in clause (xiv) of S.10(2) which permitted a deduction.

> "in respect of any expenditure of a capital nature on scientific research related to the business, an allowance for each of the Five consecutive previous year.
>
> beginning with the year in which the expenditure was incurred, or where the expenditure was incurred prior to the commencement of the business, for each of the five consecutive previous years beginning with the year in which the business was commenced, equal 2to one-fifth of such expenditure:

Provided that no allowance shall be made for any expenditure incurred more than three years before the commencement of the business: A Provided further that-

XXX XXX XXX

(d) where a deduction is allowed for any previous year under this clause in respect of expenditure represented wholly or partly by any asset, no deduction shall be allowed under clause (vi) or clause

(vii) for the same previous year in respect of that asset;

(e) where an asset is used in the business after it ceases to be used for scientific research related to that business, and a claim for an allowance under clause (vi) or clause (vii) is made in respect of that asset, the actual cost to the assessee of the asset shall be treated as reduced by the amount of any deductions allowed under this clause;"

A cursory and conjoint reading of section 10(2) (vi) and section 10(2) (xiv) suggests that where an assessee incurs expenditure of a capital nature on scientific research related to the business and the expenditure results in the acquisition of an asset, the assessee can claim, under clause (vi), a deduction of the specified percentage of the written down value of the asset and under clause

(xiv) he can ask for a deduction, in five consecutive years, of the expenditure he has incurred on the acquisition of the asset. For this purpose, we are assuming that an asset used for scientific research related to the business is also ipso facto an asset used for the purpose of business. There has been some debate before us as to whether this is always so but we need not enter into that controversy for the purposes of the present case.

It will at once be seen that, if these two provisions are applied simultaneously, it would result in granting an assessee a double allowance in respect of the same expenditure - one of the entire amount over a period of 5 years and the other a percentage of the expenditure over a number . consecutive years at a graded scale as already mentioned. The question at once leaps to the mind as to whether it could have been the intention of the legislature to permit both these deductions simultaneously to an assessee. The provisions of clauses (d) and (e) of the proviso to S.10(2) (xiv) contain a clue to answer this question. More about it later.

We next turn to the provisions of 1961 Act. The topic of depreciation is dealt with by section 32. Section 32(1)

(ii) provides for depreciation. As under the 1922 Act, it is allowed at a percentage of the written down value of certain capital assets employed in the bussiness. The topic of scientific research expenditure is dealt with by section 35. Section 35(1) provides for the deduction of four types of

expenditure on scientific research and what we are concerned with is the deduction provided under section 35(1)

(iv), which is to the following effect:

> (iv) in respect of any expenditure of a capital nature on scientific research related to the business carried on by the assessee, such deduction as may be admissible under the provisions of sub-

section (2)."

Sub-section (2) provides that, for the purposes of clause (iv)of sub-section (1), one-fifth of the capital expenditure incurred in any previous year shall be deducted for that previous year; and the balance of the expenditure shall be deducted in equal instalments in each of the four immediately succeeding previous years. There is an explanation which is not relevant for our present purposes. Reading S.35(2) further, it provides in clauses (iv) and (v) as follows:

> "(iv) where a deduction is allowed for any previous year under this section in respect of expenditure represented wholly or partly by an asset, no deduction shall be allowed under clauses (i), (ii) and
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> (iii) of sub-section (1) of section 32 for the same previous year in respect of that asset;
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> (v) where the asset mentioned in clause (ii) is used in the business after it ceases to be used for scientific research related to that business, depreciation shall be admissible under clauses (i), (ii) and (iii) of sub-section(1) of section 32."

Reference must also be made to Explanation 1 to s. 43(1) in this context. It read as follows at the relevant time:

> "Explanation: Where an asset is used in business after it ceases to be used for scientific research related to that business and a deduction has to be made under clause (i), clause (ii) or clause
>
> (iii) of sub-section (I) or sub-

section (1A) of section 32 in respect of that asset, the actual cost of the asset to the assessee, as reduced by the amount of any deduction allowed under clause (iv) of sub-section (1) of section 35 or under any corresponding provision of the Indian Income-tax Act, 1922 (11 of 1922)."

From the above it will be seen that the provisions of Section 32(1) (ii) and Section 35(2) (i) (iv) and (v) read with Explanation 1 to s.43(1) virtually repeat the provisions contained in Section 10(2) (vi) and 10(2)(xiv) of the 1922 Act, so that the question earlier posed still loomed in the background of 1961 Act.

In 1968 there was an amendment in the provisions of Section 35(2). The sub-section was amended to read as follows:

> "(2) For the purposes of clause
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> (iv) of sub-section (1),-
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> (i) in a case where such capital expenditure is incurred before the 1st day of April, 1967, one-fifth of the capital expenditure incurred in any previous year shall be deducted for that previous year;

and the balance of the expenditure shall be deducted in equal instalments for each of the four immediately succeeding previous years;

(i-a) in a case where such capital expenditure is incurred after the 31st day of March, 1967, the whole of such capital expenditure incurred in any previous year shall be deducted for that previous year."

The effect of this amendment was only to provided that the entire amount of capital expenditure incurred in relation to scientific research was allowed as a deduction in one year instead of being spread over a period of five years as was the position earlier. This amendment does not touch the controversy in issue before us and it has no solution to offer to our present difficulty.

The provisions of Section 10(2) (vi) and (xiv) of the old Act had been administered between 1946 and 1962 and the provisions of Section 32 and 35 of the 1961 Act have been administered since 1962. The question whether an assessee can simultaneously claim an allowance or deduction in respect of the same expenditure once under Section 32 and again in Section 35 must have cropped up in some cases and does appear that such a double claim was put forward in some cases. The contention on behalf of the assessees was that the allowances in respect of depreciation on the one hand and in respect of capital expenditure on scientific research on the other are two totally different and independent heads of allowances. one is a notional allowance to provide for the wear and tear of a capital asset employed in the business as the years roll by; the other is an allowance for actual expenditure of a capital nature granted, on the eve of our country's independence, in order to give fillip to new industrial innovations and the development of indigenous know-how and techniques by proper planning on research and development by various business houses. It is therefore suggested that there is nothing absurd in construing the statutes act as providing cumulatively for both types of deductions in respect of the same capital asset. The only limitations on this right are the two placed by the statute itself. The first limitation, contained in clause (d) of the proviso to Section 10(2) (xiv) and s.35(2) (iv) is that both the deductions cannot be claimed "for the same previous year" in respect of the same capital asset. The second limitation is found in clause (e) of the proviso to Section 10(2) (xiv) and s.35(2) (v) which say that if a capital asset used for scientific research ceases to be so used but is thereafter brought into a business for use therein, the actual cost for purposes of granting depreciation in respect of the asset thereafter should be taken as the amount of its original cost reduced by the amount of deductions allowed under Section 10(2) (xiv) or s.35(2). In other words, the contention of the assessee was and is that both the types of allowances are

permissible under the statute except to the extent limited by clauses (d) and (e) of the proviso to Section 10(2) (xiv) of the 1922 Act and reproduced in clauses (iv) and (v) of Section 35(2) of the 1961 Act.

Before us it is claimed on behalf of the assessee that this interpretation of the statutory provisions is very clear, patent and unambiguous. It is alleged that despite this, some Income-tax Officers started disallowing the claim of depreciation in respect of such capital assets even in previous years during which no deduction was claimed or allowed under Section 10(2) (xiv) or Section 35(2), contrary to the clear language of clause (d) of s.10(2) (xiv) and s.35(2) (iv). These Of orders were reversed on appeal either by the Appellate Commissioner or by the Tribunal. It was suggested that these decisions were almost unanimously in favour of the assessee but the department persisted in pursuing the matter upto the stage of the High Court. Only one reference on this topic came up before the High Courts and is reflected in the decision of the Karnataka High Court, reported as CIT v. Indian Telephone Industries Ltd., (1980) 126 I.T.R. 528. This was a reference of the year 1977 made at the instance of the Commissioner of Income Tax and the Commissioner of Income Tax lost this reference. The High (Sourt re-affirmed the position contended for by the assessee as the one and only possible interpretation of the statutory provisions. It is, therefore, contended that there was, and could have been, no doubt that an assessee was entitled to claim depreciation allowance in respect of such assets in respect of previous years other than those in which an allowance had been allowed under the other head. We shall revert later to this aspect of the matter.

At this stage, the Finance (No.2) Act, 1980 intervened. It amended section 35(2) (iv) to read as follows:

> "(iv) where a deduction is allowed for any previous year under this section in respect of expenditure represented wholly or partly by an asset, no deduction shall be allowed under clauses (i), (ii) and (iii) of sub-section (1) of section 32 for the same or any other previous year in respect of that asset."

(Emphasis added) The Finance Act made this amendment retrospective w.e.f. 1.4.62, that is, the date of the commencement of the 1961 Act. This amendment is undoubtedly far-reaching in its effect. It will result in completion of the pending assessments of several years on the footing of the new provision. It will also involve re-opening or rectification of completed assessments of earlier years, to the extent permissible under the provisions of sections 148 and 154, in cases where assessees had been granted "double allowance"

> accepting their contention at the time of the original assessments. The effect will be not for one assessment year but for a number of assessment years in succession. Painting a very grim picture of the consequences of giving full retrospective effect to the amendment, the assessees say that it will impose unexpected and impossible burden on them over the years. jeopardise their solvency and lay them open to action by creditor and financial institutions. Such an onerous burden, it is said. is unreasonable and oppressive and the provision imposing such burden violates the fundamental rights of the assessees under Articles 14 and 19(1) (g) of the Constitution

of India. It is on this plea that, even though assessments and appeals are pending in several of these cases, the petitioners chose to approach this Court by way of writ petitions under Article 32 of the Constitution. These are mostly writ petitions of the year 1981 and are now coming up for hearing after a period of 10 years.

Learned counsel for the assessees do not contest the competence of the legislature to enact the impugned provision, nor do they dispute the right of the legislature to give retrospective effect to statutory provisions. The contention only is that retrospective provisions may be permissible even in taxing statutes in certain special circumstances such as in the case of provisions clarifying the impact of a statute, provisions curing defective legislations in the light of the judicial decisions and the like. They, however, say that if the legislature chooses to impose a totally new burden, which was not at all in contemplation earlier and proceeds to give full retrospective effect thereto, such an attempt should be struck down as unreasonable and discriminatory. The principal questions, therefore, for our consideration are:

1) Were the earlier statutory provisions capable of only one interpretation, namely, that placed by the assessees or was there any ambiguity in relation thereto ? (2) If there was some doubt or ambiguity about the earlier legislation, and the 1980 Act clarified the position by a retrospective amendment, would it offend the provisions of the Constitution ?

(3) If, on the other hand, the earlier provision was very clear and capable of only one interpretation, as placed by the assessee, was the legislature within its rights in amending the provision retrospectively w.e.f. 1.4.62 and thus imposing an unreasonable tax burden on the assessees?

Taking up the first of the three questions, it has to be considered from two angles, one factual and the other, legal. An attempt was made on behalf of the petitioners to project an image as if the interpretation sought to be placed by the department on pre-1980 provisions to disallow depreciation on such assets was so far-fetched that it never received the approval of the higher appellate authorities.

It was suggested that the appeals by assessees against the disallowance invariably succeeded and it was the Department that had to move the High Court on reference, the first of which references came up before the Karnataka High Court in C.l.T. v. Indian Telephone Industries (1980) 126 I.T.R. 548 and was answered against the Department. On the basis of such allegations the petitioners attempted to make out that the Department's interpretation was patently untenable and that the 1980 amendment is not in the nature of a statutory clarification of an ambiguity but a totally new and fresh imposition sought to be unjustifiably given retrospective effect.

But, as Shri B.B. Ahuja has pointed out on the basis of the averments of the petitioner in one of the cases, viz., W.P.1153/81, the impression sought to be created by the petitioners does not accord with the correct facts. The position in the case is available only as it stood at the time when the writ

petition and the counter affidavit were filed and subsequent developments are not known. Nevertheless, the picture that emerges is this. In that case, the Income-tax Officer (I.T.O.) is said to have allowed depreciation on assets used for scientific research, for the assessment year 1969-70, though this is denied by the department. The claim was perhaps disallowed by the I.T.O. for the assessment year 1970-71, but it was allowed by the Allahabad Bench of the Income-tax Appellate Tribunal (I.T.A.T.) by its order dated 30.8.76. For the assessment year 1971-72, the I.T.O. disallowed the depreciation. The Appellate Assistant Commissioner (A.A.C.) allowed it. The department appealed to the Delhi Bench of the I.T.A.T. which accepted the department's plea by its order dated 13.8.79 placing reliance on the decision of a Special Bench of the I.T.A.T. It has been stated that the assessee filed an application for reference to the High Court which was pending when the writ petition was filed. For the assessment years 1972-73 to 1974-75, the assessments are pending as a stay order had been obtained for reasons which are not known. For the assessment years 1975-76 and 1976-77, the assessee claimed depreciation on a number of items of scientific research assets. The I.T.O. "allowed" the claims subject to the rider that "there is no provision to give deduction of more than 100% of the expenditure by way of depreciation". The assessee appealed to Commissioner of Income-tax (Appeals) who disallowed the claim. For 1977-78, the l.T.O. disallowed the claim and the C.l.T. dismissed the assessee's appeals. For assessment years 1978-79 to 1980-81, the assessments are stated to be pending. The above facts are sufficient to show that, atleast after 1.4.1968, - there is no information before us as to the position between 1.4.1946 and 31.3.1968 - the Department has been putting forward its objections on the issue and that the same was the subject matter of controversy at various appellate stages, some decided in favour of, and some against, the assessee. A Special Bench of the l.T.A.T. had indeed decided the issue against the assessee. In this background, it is not correct to say that the position was crystal clear and that, save for a few ITOs who took a biassed view, the authorities were all agreed that the Department's stand was untenable. Some of the reported decisions also show that there was a live controversy and that references have been made to the High Court both at the instances or the assessees [see Alkali & Chemical Corporation of India Ltd. v. C.l.T. (1986) 161 I.T.R. 820 (Cal.), and C.I.T. v. Indian Explosives Ltd., (1992) 192 I.T.R. 144 (Cal.)], as well as at the instance of the Revenue [see, C.I.T. v. International Instruments P. Ltd., (1983) 144 I.T.R. 936 (Kar.); C.I.T. v. Mahindra Sintered Products Ltd. (1986) 161 I.T.R. 692 (Bom.) and Warner Hindustan Ltd. v. CIT, (1988) 171 I.T.R. 224 (A.P.)]. The petitioner's contention that, under the pre-amended provisions, depreciation on such assets was recognised allround as clearly allowable is therefore rejected. We have dealt with this aspect only to meet an aspect that was urged. What is really important is the true and correct interpretation of those provisions, not what someone thought of it then and to this aspect we shall now turn.

The second aspect of the First of the three questions posed earlier for our consideration is the legal or interpretational aspect of the provisions as they stood prior to the 1980 Amendment. Under the provisions of the statute as they stood earlier, could the assessees have claimed continued grant of depreciation after the expiry of five previous years before the 1968 amendment and after the expiry or the first year after the 1968 amendment, even though the entire cost of the capital asset in question had been allowed to be written off completely against the business profits of those five previous years or one previous year as the case may be? We think the answer to this question must emphatically be in the negative. In our view, it is impossible to conceive of the legislature having envisaged a double deduction in respect of the same expenditure, even though it is true that the two

heads of deduction do not completely overlap and there is some difference in the rationale of the two deductions under consideration. On behalf of the assessees reliance is placed on the following circumstances to support a contention that the statute did not intend one deduction to preclude the other :

> (i) lt is pointed out that s.10(2) (xiv) of the 1922 Act, was inserted in 1946 consequent on the insertion of a corresponding provision in the United Kingdom. That provision, viz. s.20(4) of the U.K. Finance Act, 1944 read thus :
>
> (4) Where a deduction is allowed for any year under this or the last preceding section in respect of expenditure represented wholly or partly by any assets, no deduction shall be allowed under any provisions of the Income-tax Act other than this part of this Act in respect of wear and tear, obsolescence, depreciation or exceptional depreciation of these assets for any year of assessment during any part of which they are used by the person carrying on the trade for scientific research related to the trade. "

(emphasis supplied) The Indian provision, it is said, has made a deliberate departure from the said provision and limited the bar of depreciation only to those previous years during which a deduction is allowed under S.10(2) (xiv);

(ii) When the Income-tax Bill, 1961 was under the consideration of the Law Commission, the provisions of S.10(2) (vi) and (xiv) were carefully reviewed. But changes were made and the provisions of the new Act in this regard were drafted in pari materia with those of the old Act ;

(iii) The language used in clause (d) of the proviso to S.10(2) (xiv) and S.35(2) (iv) again is significantly different from the language used in various other provisions of the Act which, in like contexts of possible double allowances, emphatically rule out deductions in respect of the same expense or exemptions in respect of the same income under two different provisions for the same or even any other assessment year : See, for example, Sections 20(2) 35B(2), 35C(2), 35CC(4), 35CCA(3), 35CCB(3), 35D(b), 35E(8), 80GGA(4), 80HH(9A), 80HHA(7) and 80HHB(S); and

(iv) When the relevant provisions say that depreciation shall not be allowed in certain previous years, it permits a disallowance only in those previous years and means, by necessary implication, that it shall be allowed in other years, if otherwise eligible on the language of the provision for depreciation.

There is an apparent plausibility about these arguments, particularly in the context of the alleged departure in the language used by S.10(2)(xiv) from that employed in S.20 of the U.K. Finance Act, 1944. We may, however, point out that the last few underlined words of the English statute show that there is really no difference between the English and Indian Acts; the former also in terms prohibits depreciation only so long as the assets are used for scientific research. In our opinion, the other provisions of the Act to which reference has been made - some of which were inserted after the present controversy started - are not helpful and we have to construe the real scope of the provisions

with which we are concerned. We think that all misconception will vanish and all the provisions will fall into place, if we hear in mind a fundamental, through unwritten, axiom that no legislature could have at all intended a double deduction in regard to the same business outgoing, and if it is intended it will be clearly expressed. In other words, in the absence of clear statutory indication to the contrary, the statute should not be read so as to permit an assessee two deductions both under S.10(2) (vi) and S.10(2) (xiv) under the 1922 Act or under S.32(1)(ii) and 35(2)(iv) of the 1922 Act - qua the same expenditure. Is then the use of the words "in respect of the same previous year" in clause (d) of the proviso to S.10(2) (xiv) of the 1922 Act and S. 35(2) (iv) of the 1961 Act a contra-indication which permits a disallowance of depreciation only in the previous years in which the other allowance is actually allowed. We think the answer is an emphatic `no' and that the purpose of the words above referred to is totally different. If, as contended for by the assessees, there can be no objection in principle to allowances being made under both the provisions as their nature and purpose are different, then the interdict disallowing a double deduction will be meaningless even in respect of the previous years for which deduction is allowed under S.10(2) (xiv) /S.35 in respect of the same asset. If that were the correct principle, The assessee should logically be entitled to deduction by way of depreciation for all previous years including those for which allowance have been granted under the provision relating to scientific research. The statute does not permit this. The restriction imposed would, therefore, be illogical and unjustified on the basis suggested by the assessees. On the other hand, if we accept the principle we have outlined earlier viz. that, there is a basic legislative scheme, unspoken but clearly underlying the Act, that two allowances cannot be, and are not intended to be, granted in respect of the same asset or expenditure, one will easily see the necessity for the limitation imposed by the quoted words. For, in this view, where the capital asset is one of the nature specified, the assessee can get only one of the two allowances in question but not both. Then the question would arise and might create a difficulty : in that event, which not the two allowance should the assessee be granted - that which the assessee chooses or that which the assessing officer might prefer? It is necessary for the statute to define this and this is what has been done by the rider in clause (d) of the proviso to S.10 (2) (xiv)/S.35(2) (iv). It mandates that the assessee should, in such a case, be granted the special allowance for scientific research and not the routine and annual one for depreciation. Clause (d) of the proviso to S.10(2) (xiv) and S.30(2) (iv) thus fall into place as an appropriate and necessary provision. The provision contained in clause (e) of the proviso to S.10(2) (xiv) of the 1922 Act, re-enacted in Explanation, to S.43 (1) of the 1961 Act, also reinforces this line of approach. It provides that the extent of capital expenditure written off under the second of the above headings (whether it be]00% under the post-1968 provision or 20%, 40%, 60%, 80% or 100% under the pre-1968 provision) has to be pro-tanto deducted in ascertaining the actual cost for purposes of depreciation. This provision militates, in our view, against the petitioners, contention that the allowances under the two provisions are by nature unconnected with, and independent of, each other. Its effect is this. Suppose a person uses an asset for scientific research for sometime and then brings it into his business for other use later, he would be thereafter entitled to depreciation thereon only on the actual cost less deduction allowed under S.10 (2) (xiv)/S.35. However, if the asset continues to be used in scientific research related to the business, he would be entitled to get depreciation on its full cost after the first few previous years during which allowance is granted under those provisions. This seems to be anomalous but Shri Ganesh says that there is no anomaly because this is a provision intended to act as a disincentive to persons who purport to purchase assets for scientific research

but withdraw it from such use soon after. Granted that this is so, still the deduction of the allowances given on scientific research assets for computing depreciation is consistent only with the principle stated by us that they are deductions basically of the same nature intended to enable the assessee to write off certain items of capital expenditure against his business profits. We may add that the report of the Chocksi Committee, on the basis of which the 1980-amendment was effected only echoed the same view when it said in para 3.29 of its report :

> "3.29 Our attention has also been drawn to certain anomalous situations in the matter of allowance of depreciation. In certain cases where a full deduction has been allowed in relation to a capital asset under other sections (as for example, section 35 which permits a deduction in respect of capital expenditure for scientific research), the taxpayers have contended that such deduction is independent of the allowance by way of depreciation. In our view, the intention of the legislature is not to allow a double deduction (of 200%) in respect of the same asset, once under section 35 and, again, by way of depreciation under section 32. If and to the extent that there is any anomaly or contrary view possible on a construction of section 35, we recommend that the law should be clarified to provide that no depreciation under section 32 shall be allowable in respect of capital expenditure for scientific research qualifying for deduction under section 35."

For the reasons discussed above, we are of the view that, even before the 1980-amendment, the Act did not permit a deduction for depreciation in respect of the cost of a capital asset acquired for purposes of scientific research to the extent such cost has been written off under S.10(2) (xiv)/35 (1) & (2). Prior to 1968, such assets qualified for an allowance of one-fifth of the cost of the asset in five previous years starting with that of its acquisition and during these years the assessee could not get any depreciation in relation thereto. In respect of assets acquired in previous year relevant to assessment year 1968-69 and thereafter, their cost was written off in the previous year of acquisition and no depreciation could be allowed in that year. This is clear from the statute. Equally, it is not envisaged, and indeed, it would be meaningless to say, that depreciation could be allowed on them thereafter with a further absurdity that it could be allowed starting with the original cost of the asset despite its user for scientific research and the allowances made under the 'scientific research' clause. In our view, there was no difficulty at all in the interpretation of the provisions. The mere fact that a baseless claim was raised by some over-enthusiastic assessees who sought a double allowance or that such claim may perhaps have been accepted by some authorities is not sufficient to attribute any ambiguity or doubt as to the true scope of the provisions as they stood earlier. We are, for the reasons discussed above, unable to approve of the cryptic view expressed by the Karnataka High Court in C.I.T. v. Indian Telephone Industries Ltd., (1980) 126 I.T.R. 548 or the view taken by the Bombay High Court in C.I.T. v. Hico Products, (1991) 187 I.T.R. 517.

In view of the answer given by us to the first question posed by us, there is no need to answer the second and third questions since, even without the amendment, the assessees cannot claim the depreciation allowance in question. The second question can arise only if it is assumed that there was an ambiguity or doubt as to interpretation that was retrospectively clarified by the legislature. But it is common ground before us that, even on this hypothesis, the validity of the amendment

cannot be challenged. This is indeed beyond all doubt: See Rai Ramkrishna v. State of Bihar, [1964] 1 S.C.R. 897; Asst Commissioner of Urban Land Tax v. Buckingham & Carnatic Co. Ltd., [1970] 1 S.C.R. 268; Krishnamurthi & Co. v. State of Madras, [1973] 2 S.C.R. 54; Hira Lal Rattan Lal v. Sales Tax Officer and Another, (1973) 31 S.T.C. 178 and Shiv Dutt Rai Fateh Chand v. Union of India, (1984) 148 I.T.R. 644. Even the Bombay decision inC.l.T. v. Hico Products, (1991) 187 I.T.R. 517 on which the assessees heavily rely, concedes, in our opinion rightly, this position. The assessees may have some possible case only if the earlier statutory provisions can be said to have been unambiguously in favour of the assessee and the 1980 amendment had radically altered the provisions to cast a new and substantial burden on the assessee with retrospective effect. It is this third alternative, reflected by the third question posed by us, that was success fully urged before the High Court by the assessees. But we are unable to accept this argument or conclusion. In our view, the first question has to be answered by saying that the pre-1980 provisions were capable of only one interpretation but that was as urged on behalf of the Revenue. The 1980-amendment has effected no change at all in the provision except to set out more clearly and categorically what the provision said even earlier. In this view, the second and third questions earlier posed do not arise.

For the reasons discussed above, these Writ Petitions are dismissed. We, however, make no order as to costs.

B.P JEEVAN REDDY, J. I agree with my learned brother Ran- ganathan, J. that these writ petitions should fall. Having regard to the nature and significance of the question raised herein, however, I felt impelled to say a few words.

The challenge in this batch of writ petitions is to the retrospective operation given to the amended clause (iv) of sub-section (2) of Section 35 of Income Tax Act, 1961, by the Finance (No.2) Act, 1980. The said Finance Act added the words "or any other" in the said clause and gave it retrospective effect from April 1, 1962. As amended, clause

(iv) reads as follows:

> "(iv) - where a deduction is allowed for any previous year under this section in respect of expenditure represented wholly or partly by an asset, no deduction shall be allowed under clause (ii) or sub-section (1) of section 32 for the same or any other previous year in respect of that asset."

Learned Counsel for the petitioners-assessees contended that the retrospective effect given to the said amendment has the effect of taking away the rights vested in the assessees by the unamended provisions, making them liable to pay huge amounts by way of tax. Such payment, if enforced, has the effect of debilitating the assessees, industries beyond recall. It is submitted that the retrospectivity given to the said amendment is violative of the petitioners fundamental rights guaranteed by Articles 19(1) (g) and 14 besides the guarantee in Article 300A.

In the year 1946, clause (xiv) among other clauses was introduced in sub-section (2) of Section 10 of the Indian Income-tax Act, 1922. It provided, for the first time, that even expenditure of a capital

nature laid out on scientific research related to the business of the assessee shall be allowed to be deducted. The deduction was hundred per cent spread over a period of five consecutive previous years commencing from the previous year on which the expenditure was incurred. Sub-clause (d) of clause (xiv) provided at the same time that "where a deduction is allowed for any previous year under this clause in respect of expenditure represented wholly or partly by any asset, no deduction shall be allowed under clause(vi) or clause (vii) for the same previous year in respect of that asset." The effect of sub-clause (d) was that if an assessee claimed and was allowed a deduction in respect of expenditure of a capital nature on scientific research, - and where such expenditure took the shape of an asset, which in the normal course would be entitled to deduction on account of depreciation under clauses (vi) and (vii) of Section 10(2) - no depreciation would be allowed in respect of that asset in those respective previous years. In other words, during the period of five previous years the assessee was allowed the deduction under clause (xiv) of sub-section (2) of section 10, claim for depreciation under clauses (vi) an/or (vii) of the same sub-section was excluded.

In the Income-tax Act, 1961, a similar provision was made in section 35. Clause (iv) of sub-section (1) of section 35 provided for deduction of expenditure of a capital nature incurred on scientific research related to the business carried on by the assessee. Sub-section (2) of Section 35 set out the manner in which and the terms subject to which the deduction was to be allowed. As enacted in 1961, sub-section (2) provided, - as was done by clause

(xiv) of Section 10(2) of the 1922 Act - that the said deduction shall be allowed in equal measure in five consecutive previous years, commencing from the previous year in which the expenditure was incurred. In the year 1967, however, sub-section (2) was amended, providing for full deduction of the expenditure in the very previous year in which such expenditure was incurred. Clause (iv) of sub section (2), however, remained unchanged. Clause (iv) declares that where a deduction is allowed for any previous year under the said section in respect of expenditure represented wholly or partly by an asset, no deduction shall be allowed under clauses (i), (ii) and (iii) of sub-section (I) or under sub-section (1A) of section 32 for the same previous year in respect of that asset. Thus, the position obtaining under the 1922 Act and the previous Act is the same, with the difference that if such expenditure is incurred after April 1, 1967, hundred per cent deduction was granted in the very previous year in which the asset (representing the capital expenditure of the nature mentioned in clause (iv) of sub-section (1) of Section 35) is acquired.

The Revenue says that the deduction provided by Section 35(1) (iv) is in the alternative to the deduction provided by clauses (i), (ii) and (iii) of sub-section (1) and sub- section (1A) of Section 32. If one is availed of, the other is not available, not only during the year or years in which the deduction under Section 35(1) (iv) is availed of, but permanently. The reason, according to them, is obvious: if both are allowed to be availed of, it amounts to grant of 200% deduction viz., 100% under Section-35 (1) (iv) and another 100% under sub-sections (1) and (1A) of Section 32. This is totally outside the contemplation of the Act, they say. On the other hand, the case of the asssessees is that the bar created by clause (iv) of sub-section (2) applies only to that previous year or those previous years during which the said expenditure is allowed as a deduction. That is the express language of the clause. The bar does not extend beyond the year or years in which the deduction under Section 35(1) (iv) is availed. There is no reason - more so in a taxing enactment - to extend the said bar

beyond the limit prescribed by the statute. They say, if the intention of the Parliament was to bar the claim of depreciation in respect of such asset for all time to come, nothing was easier than to say so in clear words, as was done by sub section (4), of section 20 of U.K. Finance Act, 1944. It is pointed out that clause (xiv) of sub-section (2) of section 10 was introduced in the Indian Income-tax Act within two years of the introduction of a similar provision in the English Act, evidently inspired by the Amendment in the English Act. But while incorporating the said provision, a conscious, departure was made by the Indian Legislature, say the assessees. Having regard to the scant investment in scientific research in India, it is submitted, the legislature must have thought it necessary to provide an additional inducement over and above the deduction on account of depreciation. Considerations of equity have no place in the interpretation of a taxing enactments, they say further.

I find it difficult to agree with the reasoning of the assessees. Acceding to it would amount to placing an unreasonable interpretation upon the relevant provisions and to negating the intention of Parliament. I find it difficult to agree that the Indian Legislature - as also the Parliament made a conscious departure from the English Amendment with the idea of providing an additional benefit to induce the Indian assessees to invest more in scientific research. I find the argument rather convoluted. If the intention of the Legislature/Parliament was to provide more than 100% deduction, they would have said so, as they have done in cases where they provided for what is called weighted deduction'. (For example, See Section 35(B) of 1961 Act). A double deduction cannot be a matter of inference, it must be provided for in clear and express language. regard having to its unusual nature and its serious impact on the Revenues of the State. Now, what does clause (iv) of Section 35(2) say? It says that during the years or the year in which the assessee avails of the deduction under Section 35(1) (iv) he shall not avail of the deduction on account of depreciation provided by clauses (i), (ii) and (iii) of sub-section (1) and sub-section (1A) of Section 32. What could be the underlying reason? It is obviously to ensure that the assessee doesn't get double deduction. Take a case where the asset was acquired prior to April 1,1957. The deduction under Section 35(1) (iv) would be allowed in five consecutive years. If during the very five previous years, depreciation under the aforementioned provisions is also allowed, the assessee would obtain, at the end of five years, a double depreciation i.e., 100% under Section 35 and almost 100% under Section 32. (It may be noted that in many cases, the rate of depreciation under Section 32 is 20% or even higher). If such a course was barred by clause (iv) during the initial five years, would it be reasonable to say that same thing can be achieved by claiming the deduction after the expiry of five years? If both the deductions are in the alternative, as indicated by clause (iv), they must be understood as being in the alternative and not consecutive. It would be a rather curious thing to say (in the case of an asset acquired prior to April 1, 1967) that Parliament barred claim for depreciation under Section 32 even in the first year when only 20% of the cost of the asset is allowed as deduction under Section 35(1) (iv), it barred it in the second, third and fourth years, when the deduction has reached 40, 60 and 80 per cent, but permitted it be claimed after the fifth year, by which year the entire 100% cost was allowed as a deduction. No express provision was necessary to say what is so obvious. The position after April 1, 1967 is no different.

That the aforesaid view is the correct one is indicated by Explanation (1) to clause (1) of section 43 [the corresponding provision in the 1922 Act being sub-clause (e) of clause (xiv) of Section 10(2)].

Clause (1) of section 43 defines the expression `actual cost'. Explanation (1) appended , to the definition says "Where an asset is used in the business after it ceases to be used for scientific research related to that business and a deduction has to be made under clause (ii) of sub-section (1) of section 32 in respect of that asset, the actual cost of the asset to the assessee shall be the actual cost to the assessee as reduced by the amount of any deduction allowed under clause (iv) of sub-section (1) of section 35 or under any corresponding provision of the Indian Income-tax Act, 1922 (11 of 1922)." Now what does this mean? Take a case where the asset of a like nature acquired prior to April 1, 1967 is diverted to other purposes after the expiry of two previous years; the `actual cost' of the asset to the assessee in such a case would be 60% of the original cost. And if it is diverted after five years, it would be nil which means that the assessee cannot claim any depreciation on it at all. Counsel for the assessee explains this provision to say that it was meant to prevent diversion of such an asset from scientific research to assessee's business purposes. The explanation does not stand scrutiny. The fallacy in the explanation can be demonstrated by taking the very same illustration, where the asset is acquired prior to April 1, 1967. Suppose, such an asset is diverted after first two previous years, its `actual cost' to the assessee would be 60% of the original cost, which alone would qualify for deduction under Section 32(1) and (1A). The remaining 40% would not. This 40% goes without earning any depreciation. Why is it so, if the assessees are right in saying what they do. According to their reasoning, this 40% too should qualify for depreciation. The fallacy in their argument would become clearer, if the diversion is at the end of the fifth year.

That the Parliament never intended to provide for a double deduction is also the opinion of the Direct Tax Law Committee. In its interim report, (December, 1977) the Committee (popularly known as 'Choksi Committee') had this to say in para 3.29 of its report:

> "3.29.- Our attention has also been drawn to certain anomalous situations in the matter of allowance of depreciation. In certain cases where a full deduction has been allowed in relation to a capital asset under other sections (as for example, section 35 which permits a deduction in respect of capital expenditure for scientific research), the tax payers have contended that such deduction is independent of the allowance by way of depreciation. In our view, the intention of the legislature is not to allow a double deduction (of 20%) in respect of the same asset, once under section 35 and, again, by way of depreciation under section 32. If and to the extent that there is any anomaly or contrary view possible on a construction of section 35, we recommend that the law should be clarified to provide that no depreciation under section 32 shall be allowable in respect of capital expenditure for scientificresearch qualifying for deduction under section 35."

lt is evidently on the basis of this recommendation that clause (iv) of sub-section (2) of section 35 was amended to make express what was implicit in it. The amendment introduced the words "or any other" in the said clause. After amendment, clause (iv) of section 35 (2) reads as follows: "where a deduction is allowed for any previous year under this section in respect of expenditure represented wholly or partly by an asset, no deduction shall be allowed under clause (ii) of sub-section (1) of section 32 for the same or any other previous year in respect of that asset." In our opinion the said amendment is merely clarificatory in nature. It makes explicit what was implicit in the provisions.

Question of its constitutionality, therefore, does not arise. Though purporting to be retrospective, it does not take away any rights which had legally vested in the assessees.

The Bombay High Court has struck down the said amendment of clause (iv) in Commissioner of Income Tax v. Hico Products Pvt. Ltd., 187 I.T.R. 517. The approach of the Bombay High Court is at variance with ours. It has practically accepted the line of reasoning put forward by the assessees which has not commended to us. Among other reasons, the High Court was impressed by the difference in the language employed in Section 10(2)(xiv)(d) and the one employed in Section 20 (4) of the U.K.Finance Act, which reads as follows:

> "(4) Where a deduction is allowed for any year under this or the last preceding section in respect of expenditure represented wholly or partly by any assets, no deduction shall be allowed under any provisions of the Income-tax Act other than this part of this Act in respect of wear and tear, absolescence, depreciation or exceptional depreciation of these assets for any year of assessment during any part of which they are used by the person carrying on the trade for scientific research related to the trade."

It is apparent that the scheme and structure of the English provision is different than ours, as has been demonstrated by my learned brother G Ranganathan, J.

So far as the arguments of taking away of vested rights is concerned, it is evident from the facts stated in the writ petition 1153/81 - which was treated as representative of the facts and contentions in all the writ petitions and with reference to which facts were arguments addressed itself that none of the assessments relating to any of the assessment years concerned herein has become final. They are pending at one or the other stage and in one or the other forum. I need not dilate upon this aspect inasmuch as the impugned amendment merely makes explicit what was implicit in the unamended clause, as explained hereinabove. In such a situation, the argument of any right vesting in the assessees is misplaced.

The writ petitions accordingly fail and are dismissed. No costs.

N.P.V. Petitions dismissed.