The Commonwealth Trust Ltd., Calicut, ... vs The Commissioner Of Income Tax, Kerala ... on 30 July, 1997

Equivalent citations: AIR 1997 SUPREME COURT 3580, 1997 AIR SCW 3687, 1997 TAX. L. R. 934, (1997) 94 TAXMAN 137, 1997 (5) SCALE 551, 1997 (7) SCC 319, (1997) 7 JT 479 (SC), 1997 (7) JT 479, 1998 (1) UPTC 281, (1997) 228 ITR 1, (1997) 140 TAXATION 698, (1997) 5 SCALE 551, (1998) 5 SUPREME 357, (1997) 142 CURTAXREP 214, (1997) 2 KER LT 584

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Bench: S. C. Agrawal, D. P. Wadhwa

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            PETITIONER:
THE COMMONWEALTH TRUST LTD., CALICUT, KERALA

        Vs.

RESPONDENT:
THE COMMISSIONER OF INCOME TAX, KERALA II, ERNAKULAM

DATE OF JUDGMENT:       30/07/1997

BENCH:
S. C. AGRAWAL, D. P. WADHWA




ACT:




HEADNOTE:




JUDGMENT:
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WITH CIVIL APPEAL (N.T.) NO. 2979 OF 1982 J U D G M E N T D.P. Wadhwa, J.

These two appeals by certificate under Section 261 of the Income Tax Act, 1961 (for short `the Act') are directed against the judgment dated November 27, 1981 of the Kerala High Court. The judgment is now reported in (1982) 135 ITR 19 (F.B.). The following two questions were decided by the High Court:

> "1. Whether on the facts and in the circumstances of the case, the Tribunal is right in law in deleting Rs.1,260/- towards house rent under Section 40 (a)(v) of the Income-tax Act, 1961?
>
> 2. Whether on the facts and in the circumstance of the case, the Tribunal was justified in holding that the assessee did not have the right of substituting the market value as on 1.1.54 in respect of depreciable assets?
>
> While the first question was referred at the instance of the revenue, the second question was at the instance of the assessee. Both the question were, however, answered by the High Court in favour of the revenue and against the assessee.
>
> The impugned judgment in so far as it answers the first question has been overruled by this Court in Commissioner of Income Tax, Bombay and others vs. Mafatlal Gangabhai & Co. (P) Ltd. and other (1996) 7 SCC 569. Accordingly the answer to this question has to be given in favour of the assessee and against the revenue.

It is the second question in which arguments were addressed before us. While the revenue gets support from the decisions of the High Courts of Gujarat, Allahabad and Calcutta for upholding the impugned judgment, the assessee gets support from the decision of the Bombay High Court. Gujarat, Allahabad and Calcutta decisions are reported respectively in Rajnagar Vaktapur Ginning, Pressing and Manufacturing Co. Ltd. vs. CIT (1975) 99 ITR 264, CIT vs. Upper Doab Sugar Mills (1979) 116 ITR 240 and India Jute Co. Ltd. vs. CIT (1982) 136 ITR 597. Bombay decision is reported in Goculdas Dossa and Co. and other vs. J.P. Shah and other (1995) 211 ITR 706.

To understand rival contentions we may briefly advert to the facts of the case.

The assessment year is 1971-72, the accounting year being 1970-71. The assessee, a limited company, was possessed of considerable properties at Calicut and Mangalore. It owned these properties right from 1920 onwards. The assessee had been allowed in the previous year. During the period relevant to the assessment year 1971-72 the assesee sold some of these properties on which it had already claimed depreciation. The Calicut Weaving Factory was sold for Rs. 20,000/-, its original value being Rs. 10,000/-. The assessee has incurred an additional expenditure of Rs. 979/- on this property. As noted above depreciation has been allowed on the value of the property in the earlier years. In computing the capital gains the assessee showed a capital loss of Rs. 78/- on the sale of this property. This the assessee did on revaluing the property as on January 1, 1954. The assessee sold its Mangalore building for Rs. 2,25,000/-. Its original cost as adjusted came to Rs. 76,680/-. IN respect of these buildings also depreciation has been claimed and allowed in the previous years. Here again the assessee revalued the building as on January 1, 1954 and on that basis showed the capital gains at Rs. 44, 713/-. The stand taken by the assessee was that it had the option under Section 55(2) (i) of the Act either to adopt the written down value of the building or the value of the building as on January 1, 1954 and it has chosen the latter. the Income Tax Officer, however, took the view that the assessee did not have the right to substitute the value as on January 1, 1954 because the assets were depreciable assets to which Section 50(1) applied which was a special provision in respect of depreciable assets and the provision as contained in Section 55(2)(i) allowing option which was general provision was not applicable in the case of depreciable assets. The Income Tax Officer, therefore, substituted the original value an arrived at a capital gain of Rs. 9021/- in the case of Calicut property and Rs. 1,46,320/- in the case of Mangalore buildings. On appeal filed by the assessee the Appellate Assistant Commissioner agreed with the Income Tax Officer. He was also of the view that the assessee did not have the right to substitute value as on January 1, 1954 in respect of depreciable assets. The assessee then went to the Income Tax Appellate Tribunal and the Appellate Tribunal dismissed the appeal but at the instance of the assessee referred the aforesaid second question for the decision of the High Court. The High Court agreed with the view of the Appellate Tribunal and decided the question in affirmative, in favour of the revenue and against the assessee. On certificate granted by the High Court under Section 261 of the Act this appeal has come before us.

Before we consider the judgments of the High Courts it will be appropriate to set out the relevant provisions of law. These would be Section 32(1)(iii), 41(2) and 43(6) in Part D and Section 45, 48, 49, 50 and 55 in Part E under Chapter IV relating to computation of total income :

> "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 -
>
> (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:
>
> 41(2) Where any building, machinery plant or furniture which is owned by the assessee and which was or has been used for the purpose of business or profession is sold, discarded, demolished or destroyed and the money payable in respect of such building, machinery, plant or furniture, as the case may be, together with the amount of scrap value, if any, exceed the written down value, so much of the excess as does not exceed the difference between the actual cost and the written down value shall be chargeable to income-tax as income of the business or profession of the previous year in which the moneys payable for the building, machinery, plant or furniture became due:
>
> Provided that where the building sold, discarded, demolished or destroyed is a building to which Explanation 5 to Section 43 applies, and the moneys payable in respect of such building, together with amount of scrap value, if any, exceed the actual cost as determined under the Explanation, so much of the excess as does not exceed the difference between the actual cost so determined and the written down value shall be chargeable to income-tax as income of the business or profession of

such previous year.

Explanation.- Where the moneys payable in respect of the building, machinery, plant or furniture referred to in this sub-section become due in a previous year in which the business or profession for the purpose of which the building, machinery, plant or furniture was being used is no longer in existence, the provisions of this sub-section shall apply as if the business or profession is in existence in that previous year."

43 (6) "written down value" means-

(a) in the case of assets, acquired in the previous year, the actual cost to the assessee;

(b) in the case of assets acquired before the previous year, the actual cost to the assessee less all depreciation actually allowed to him under this Act, or under the Indian Income-tax Act, 1922 (XI of 1922), or any Act repealed by that Act, or under any executive orders issued when the Indian Income-tax Act, 1886 (II of 1886), was in force:

Provided that in determining the written down value in respect of building, machinery or plant for the purposes of clause (ii) of sub-

section (1) of section 32, "depreciation actually allowed"

shall not included depreciation allowed under sub-clauses (a), (b) and (c) of clause (vi) of sub- section (2) of section 10 of the Indian Income-tax Act, 1922 (XI of 1922), where such depreciation was not deductible in determining the written down value for the purposes of the said clause (vi).

Explanation

1................................. Explanation 2.................. ....

Explanation 2A........ ....

Explanation

3.................................

"45. Capital gains. - (1) Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as other wise provided in sections 53, 54 and 54B, be chargeable to income-tax under the head "Capital gains", and shall be deemed to be the income of the previous year in which the transfer took place.

48. Mode of computation and deductions.- The income chargeable under the head "Capital gains"

shall be computed by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset of following amounts, namely :-

> (i) expenditure incurred wholly and exclusively in connection with such transfer :
>
> (ii) the cost of acquisition of the capital asset and the cost of any improvement thereto.

49. Cost with reference to certain modes of acquisition. (1) Where the capital asset became the property of the assessee-

(i) on any ******************** assets on the total or partial partition of a Hindu undivided family;

(ii) under a gift or will;

(iii) (a) by succession, inheritance or devolution, or

(b) on any distribution of assets on the dissolution of a firm, body of individuals or other association of person, or

(c) on any distribution of assets on the liquidation of a company, or

(d) under a transfer to a revocable or an irrevocable trust, or

(e) under any such transfer as is referred to in clause (iv) or clause (v) or clause (vi) of Section 47, the cost of acquisition of the asset shall be deemed to be the cost for which the previous owner of the property acquired it, as increased by the cost of any improvement of the assets incurred or borne by the previous owner or the assessee, as the case may be.

Explanation.- In this sub-section the expression "previous owner of the property" in relation to any capital asset owned by an assessee means the last previous owner of the capital asset who acquired it by a mode of acquisition other than that referred to in clause (i) or clause (ii) or clause (iii) of this sub-section.

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(2)    x                                x
x                    x
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50. Special provision for computing cost of acquisition in the case of depreciable assets. - where the capital asset is an asset in respect of which a deduction on account of depreciation has been obtained by the assessee in any previous year either under this Act or under the Indian Income-tax Act, 1922 (XI of 1922), or any Act repealed by that Act, or under executive orders issued when the Indian Income-tax Act, 1886 (II of 1886), was in force, the provisions of Section 48 and 49 shall be subject to the following modifications:-

(1) The written down value, as defined in clause (6) of Section 43, of the asset, as adjusted, shall be taken as the cost of acquisition of the asset.

(2) Where under any provision of Section 49, read with sub-

section (2) of Section 55, the fair market-value of the asset on the 1st day of January, 1954, is to be taken into account at the option of the assessee, then, the cost of acquisition of the asset shall, at the option of the assessee, be the fair market-

value of the asset on the said date, as reduced by the amount of depreciation, if any, allowed to the assessee after the said date, and as adjusted.

55. Meaning of "adjusted", "cost of improvement" and "cost of acquisition". (1) For the purposes of sections 48, 49 and 50, -

(a) "adjusted", in relation to written down value or fair market value, means diminished by any loss deducted or increased by the profit assessed, under the provisions of clause (iii) of sub-section (1), or clause (ii) of sub-section (1A), of section 32 or sub-section (2) or sub-section (2A) of section 41, as the case may be, the computation for this purpose being made with reference to the period commencing from the 1st day of January, 1954, in cases to which clause (2) of section 50 applies;

(b) "cost of any improvement", in relation to capital assets, -

(i) where the capital asset became the property of the previous owner or the assessee before the 1st day of January, 1954, and the fair market value of the asset on that day is taken as the cost of acquisition at the option of the assessee, means all expenditure of a capital nature incurred in making any additions or alternations to the capital asset on or after the said date by the previous owner or the assessee, and

(ii) in any other case, means all expenditure of a capital nature incurred in making any additions or alterations to the capital asset by the assessee after it became his property, and, where the capital asset became the property of the assessee by any of the modes specified in sub-section (1) of section 49, by the previous owner, but does not include any expenditure which is deductible in computing the income chargeable under the head "interest on securities", "Income from house property", "Profits and gains of business or profession", or "Income from other sources", and the expression "improvement" shall be construed accordingly.

(2) For the purposes of Section 48 and 49, "cost of acquisition", in relation to a capital asset, -

(i) where the capital asset became the property of the assessee before the 1st day of January, 1954, means the cost of acquisition of the asset to the assessee or the fair market value of the asset on the 1st day of January, 1954, at the option of the assessee;

(ii) where the capital asset became the property of the assessee by any of the modes specified in sub-section (1) of section 49, and the capital asset became the property of the previous owner before the 1st day of January, 1954, means the cost of the capital asset to the previous owner or the fair market value of the asset on the 1st day of January, 1954, at the option of the assessee;

(iii) where the capital asset became the property of the assessee on the distribution of the capital assets of a company on its liquidation and the assessee has been assessed to income-tax under the head "Capital gains" in respect of that asset under section 46, means the fair market value of the asset on the date of distribution;

(iv) x x x

(v) where the capital asset, being a share or a stock of a company, became the property of the assessee on-

(a) the consolidation and division of all or any of the share capital of the company into shares of larger amount than its existing shares,

(b) the conversion of any shares of the company into stock.

(c) the reconversion of any stock of the company into shares,

(d) the sub-division of any of the share of the company into shares of smaller amount, or

(e) the conversion of one kind of shares of the company into another kind, means the cost of acquisition of the asset calculation, with reference to the cost of acquisition of the shares, or stock from which such asset is derived.

(3) Where the cost for which the previous owner acquired the property cannot be ascertained, the cost of acquisition to the previous owner means the fair market value on the date on which the capital asset become the property of the previous owner."

(Section 32(1-A)(ii) and Section 41(2-A) would not be relevant for our purposes and therefore not reproduced).

We may now consider the judgments of the High Courts referred to during the course of arguments. In R.V. Ginning, Pressing & Mfg. Co. Ltd. vs. C.I.T. (1975) 99 ITR 264 (Gujarat), the assessee company was under liquidation. In the accounting year relevant to the assessment year 1968-69 some of the assets being building and machinery were sold. These assets were purchased before January 1, 1954. The assessee had obtained depreciation on the said assets. The assessee claimed that it should be permitted to substitute the market valuation of the machinery and building as on January 1, 1954 as the cost of acquisition for purposes of computation of capital gains. This was rejected by the revenue authorities. The question before the High Court was whether the assessee was entitled to substitute the value as on January 1, 1954, as the cost of acquisition of the building and machinery. The High Court answered the question in negative in favour of the revenue and against the assessee by holding as under:

> "We have set out the relevant section 48, 49 and 50. On the plain reading of section 50, we think that it is only those assessees who acquired depreciable assets in any one of the modes prescribed under section 49 that have the benefit of option to select either the fair market value of the assets on January 1, 1954, or the cost of acquisition by the previous owner. It is an admitted position that the applicant-company is not an assessee acquiring depreciable assets in any of the modes mentioned in section 49 and clearly, therefore, this case falls within section 50(1) and, therefore, in case of the applicant-company for purposes of computation of capital gains tax adjusted written down value as defined in clause (6) of section 43 of the Act would be the cost of acquisition of the assets."

In CIT vs. Upper Doab Sugar Mills (1979) 116 ITR 240 (Allahabad) during the accounting period relevant to assessment year 1964-65 the assessee sold machinery. The claim of the assessee that it was entitled to exercise the option of treating the fair market value as cost of acquisition was rejected by the ITO. In appeal, however, the assessee's plea. He held that Section 50(2) read with Section 55(2) (ii) of the Act was applicable and these sections gave an option to the assessee to compute capital gains by adopting fair market value of the assets as on January 1, 1954. The revenue went up in appeal to the Appellate Tribunal which upheld the view of the AAC and dismissed the appeal. At the instance of the revenue the Appellate Tribunal referred the question to the Allahabad High Court as to whether in determining the capital gains arising to the assessee, provisions of Section 50(2) and Section 55(2)(ii) were applicable. The court answered the question in the negative in favour of the department and against the assessee. It observed as under:

> "The language used makes it clear that s.50 of the I.T. Act. 1961, applies to cases of depreciable assets, and that the provisions thereof are mandatory. It will prevail over s.55(2) firstly because it expressly modifies the provisions of s.48, and, in the next place, it is a special provision for depreciable assets. S.55, on the other hand, is only a definition section. The definition of "cost of acquisition" given by its sub-s.(2) is only for purposes of ss.48 and 49. S.55(2) does not apply to s.50 and cannot prevail over it. In other words, the cost of acquisition of a depreciable asset is bound to be computed in accordance with s.50, even though the capital asset may also on facts be within the purview of sub-sec. (20 of s.55. If the case of a depreciable assets owned by the assessee from before 1st January, 1954, were to be governed by s.55(2) then there was no occasion or need to enact sub-s.(2) of s.50. Under sub-s.(2) a special provision has been made for capital assets which are covered by s.49 as well as s.55(2), namely, assets indirectly acquired and which were owned by the previous owner from before 1st January, which are owned by the assessee as the original owner sub-s.(1) of s.50 applies, even though the asset may have been owned by the assessee from before 1st January, 1954. In such a case s.50(1) does not contemplate that the assessee can treat the fair market value of the asset as on 1st January, 1954, as the cost of acquisition. The written down value of the asset has to be taken as the cost of acquisition."

In Prime Product Pvt. Ltd. Kanpur vs. CIT (1979) 116 ITR 473 (Allahabad), the High Court took the same view as in Upper Doab Sugar Mills case.

In India Jute Co. Ltd. vs. CIT (1982) 136 ITR 597 (Calcutta), the question before the court was whether the Appellate Tribunal was right in holding that for the computation of the profits under the head "Capital gains" in respect of the depreciable assets which had become the assessee's property before 1st January, 1954 and which were sold by it during the previous year relevant to the assessment year 1962-63, it was not entitled to seek the aid of Section 55(2)(i) of the Act and opt for and substitute their fair market value as on 1st January, 1954, as the cost of acquisition thereof in place of their written down value? The Court answered the question in the affirmative and in favour of the revenue. The court observed that Section 48 dealt with the general mode of the computation and deduction and that heading of Section 50 was significant which provides for "Special provision for computing cost acquisition in the case of depreciable assets". The court then further observed as under:

> "If a special mode is provided then the general meaning given by sub- s.(2) of s.55 could not apply.
>
> Furthermore, this well-settled canon of construction that the definition in a section provided in a certain provision of an Act must be limited to the purpose indicated in that sub-section and it could not extended by construction unless there is a clear implication to that effect. In this case, it is significant that sub-s.(2) of s.55 does not mention that for the purpose of "this chapter" or "this group of sections" the cost of acquisition in relation to the capital assets should be as indicated in the different clauses as indicated in sub-s.(2) of s.55 but limits the purposes of the different clause only to ss.48 and 49 and thereby excluding the operation of "the special provision of computing cost of acquisition of depreciable assets". Where there is a special provision dealing with a particular provision, the special provision must prevail."

In coming to this conclusion, Calcutta High Court followed the decisions of the Allahabad and Gujarat High Courts.

The Kerala High Court Court (F.B) in the judgment (1982) 135 ITR 19 which is in the appeal before us also followed two decisions of the Allahabad High Court mentioned above. The court said that though Section 55(2) gave an option to an assessee to choose one of the two values as the cost of acquisition for the purpose of Section 48, in a case to which Section 50 applied, Section 48 had to be read subject to the modification and, consequently, the option would not be available and that the cost of acquisition would have to be taken in such a case as the written down value as defined in cl.(6) of Section 43. The High Court in the impugned judgement then observed as under:

> "We are not impressed with the contention of the learned counsel for the assessee that since the definition of "cost of acquisition"

in s.55(2) will apply for the purpose of s.48 and this is a case to which s.48 would so apply, s.55(2) must govern despite s.50 of the Act. That would be to render s.50 inoperative. We do not see why we should resort to such a construction. While the option contemplated under s.55(2) of the Act will be available in every case where capital gains is determined in accordance with s.48, that would not be the case where what is applicable is not s.48 as such but s.48 as modified by s.50. The special provision must necessarily operate in such a case so as to render the option under s.55(2) unavailable and also to equate the cost of acquisition in such a case with the written down value as defined in cl.(6) of s.43."

Full Bench of the Bombay High Court has, however, struck a different note. In Goculdas Dossa and Co. and other s vs. J.P. Shah and others (1995) 211 ITR 706, the High Court disagreed with the views of Gujarat, Allahabad, Kerala and Calcutta High Courts and held that the assessee who had purchased a depreciable asset prior to January 1, 1964 (substituted for 1st January, 1954 by Act 29 of 1977 with effect from 1.4.78) was entitled to the option of substituting the fair market value on that date as the cost of acquisition for computing its capital gains. In the Bombay case the assessee had purchased land, building, plant and machinery of a factory much prior to January 1, 1964. The assessee sold the building, land, plant and machinery in the accounting year relevant to the assessment year 1981-82. The assessee had claimed depreciation on building and machinery year after year. In the return of income for the relevant assessment year while working out the long-term capital gains, the assessee substituted the fair market value of land, building and machinery as on January 1, 1964, as the cost of acquisition by exercising the option under Section 55(2). The Income-tax Officer held that the assessee, in view of Section 50, did not have that option since it had acquired the property voluntarily by purchase and not in the circumstance mentioned in Section 49. The Income-tax Officer further held that the written down value of the said depreciable assets as adjusted, along with cost of its improvement would be the correct price for working out the capital gains and on that basis, issued a demand notice under Section 156 of the Act. On appeal by the assessee Commissioner of Income-tax (appeal) upheld the order of the Income-tax Officer. The assessee filed a second appeal before the Appellate Tribunal but since there was a challenge to the validity of Section 50 writ petition was filed in the High Court. The High Court elaborately discussed the relevant provisions of the Act. It disagreed with the views of the other High Courts that Section 50 was a special provision and would, therefore, prevail over the general provisions of Section 55(2). The High Court said both the provisions operated upon different and independent areas and that Section 55(2) was the only source of option while Section 50(2) was not the source of option. It said Section 50 specified that only Section 48 and 49 were subject to the modification mentioned therein and that the option given in Section 55(2) was not made subject to Section 50. The High Court was of the view that it appeared that it was not brought to the notice of courts that the question of the purchaser-assessee being entitled to the option or not had to be determined only on the basis of Section 50(1) read with Section 48 and 55(2) and not Section 50(2) of the Act. It went as to add:

> "No doubt, the assessee purchasing a depreciable asset and an assessee acquiring it otherwise can be said to belong to different classes but we are unable to see what that classification has to do with the object sought to be achieved by the provision, viz., to prevent the assessment of illusory capital gain on account of inflationary conditions and decreasing value of money. It would make no difference whether the capital asset

> which gave rise to the capital gain has been acquired by the assessee either by purchased or by gift. The classification between the depreciable and non-depreciable assets and between these two classes of assessees have no nexus to the object of enactment.
>
> Contrary interpretation has the potentiality of making section 50 irrational and, therefore, violative of article 14 of the Constitution. It is settled legal position that, there has to be an attempt to save a piece of legislation, if possible, by reading it down so as to make it constitutional. No doubt, wordings employed in section 50(2) are clumsy. One way of reading its, is to disregard the reference to section 49 because the right to substitute; the fair market value as the cost of acquisition springs from section 55(2) and not section
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> 49. Such exercise of reading down and modifying the provisions has been undertaken in some cases like Manubhai A. Sheth v. N.D. Nirgudkar (1981) 128 ITR 87 (Bom) and A. Sanyasi Rao v. Government of Andhra Pradesh [1989] 178 ITR 31 (AP). It seems necessary to do so in this case also".

The basic question that involves in the present case is if an assessee, who has acquired capital asset before January 1, 1954 otherwise than by any of the modes mentioned in Section 49 and sold it after January 1, 1954 is also entitled to have the quantum of taxable capital gains computed in the manner provided by clause (i) of sub-section (2) of Section 55 of the Act? High Courts of Gujarat, Allahabad, Calcutta and Kerala have, however, held that this could not be so as Section 50(1) being a special provision for computing cost of acquisition in the case of depreciable assets it would override the general provisions of Section 55(2) which according to these High Courts would be applicable to the cases of non-depreciable assets or depreciable assets where depreciation had not been claimed. Bombay High Court on the other hand has not followed this line of reasoning.

In the present case it is not disputed that it is Section 48 which is applicable and not Section 49. Under Section 48 to compute the income chargeable under the head "Capital gains", the value consideration received on transfer of the capital asset is to be deducted by the expenditure incurred on the transfer and the cost of acquisition of the capital asset and the cost of any improvement thereon. The expenditure that might have been incurred on the transfer of capital asset and the cost of any improvement thereon are not the subject of any controversy in the case before us. Section 49 is not applicable as the capital asset was not acquired by any of the modes mentioned in that section. Coming to Section 50 it states, in so far as it relevant, that when depreciation has been obtained on the capital asset, the provision of Section 48 is subject to the modification that "the written down value, as defined in clause (6) of Section 43 of the asset, as adjusted, shall be taken as the cost of acquisition of the asset". It is the expression "as adjusted" of which meaning has been given in section 55(1)(a) and it is to be applied while considering the applicability of Section 50(1). Under section 55(1)(a) the expression "adjusted" in relation to written down value of fair market value, means diminished by the loss deducted or increased by any profit assessed under the provisions of clause (iii) of sub-section (1) of Section 32 or sub-section (2) of Section 41, as the case may be, and in case to which clause (2) of Section 50 applies the computation for this purpose being made with reference to the period commencing from the 1st day of January, 1954. Significantly the words "as adjusted" have been used in order to avoid the possibility of there been used in order to avoid the possibility of there being a double tax where the question of any terminal (balancing) allowance under Section 32 or balancing charge under Section 41 is involved. Therefore in its application of the expressions "as adjusted" the written down value as ascertained according to sub-section (6) of Section 43 shall be adjusted with either subtraction of the terminal (balancing) allowance or with addition of the amount of balancing charge, if any, allowed out of or taken into the business income. Where the capital asset is sold for less than the written down value the difference or deficiency between the sale price and the written down value is allowed as a deduction in computation of the business profits (Section 32(1)(iii)) which is termed as "balancing (or terminal) allowance" and where the asset is sold for more than the written down values, the sale price being less than the cost, the excess realised over the written down value is charred as business profits (Section 41(2)) and is termed as "balancing charge". Part D of Chapter IV of the Act does not provide for the circumstance when the depreciated asset has been sold for a price which is more than the cost. This considered under the provisions of Part E of Chapter IV dealing under the provisions of Part E of Chapter IV dealing with capital gains and more particularly Section 50 falling under Part E. While now sub-section (1) of Section 55 which uses the expressions "adjusted" and "cost of improvement"

> applies for the purposes of Section 48, 49 and 50, sub- section (2) of Section 55 which uses the expression "cost of acquisition" is for the purpose of Section 48 and 49.
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> In commercial parlance computation of capital gain would mean the actual gains measured by the difference between the sale price and the cost of acquisition. It is the "cost of acquisition" that is required to be determined under the provisions of Section 48, 49, 50 and 55. Both under Section 48 and 49 cost of acquisition will have to be determined and adjusted as provided in Section 50 and 55. Section 55(2) gives an option to both kinds of assessees, that is, those who have purchased the capital asset as well as those who have acquired it by any of the mode mentioned in Section 49 to substitute of the actual cost of acquisition the fair market value of the asset as on January 1, 1954. Section 55(2), however, makes it clear that the option is available only for the purposes of Section 48 and 49 and it is not available for a case falling under Section
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> 50. Though the provisions of Section 55(2) would be available to every kind of capital asset whether the same has enjoyed the depreciation allowance or not whether in the hands of the assessee or the previous owner, the assessee in whose case depreciation allowance has been availed of before the transfer of the capital asset the meaning of "cost of acquisition" as stated in Section 48 and 49 would appear to have been modified in the manner stated in Section 50. Thus, where the assessee has not availed of depreciation allowance in respect of the capital asset Section 50 has no application. In this view of the matter there does not appear to be any conflict between the provisions of Section 50 and 55(2). Section 55(2) would be applicable to all assets depreciable or non-depreciable for the purposes of arriving at the cost of acquisition under Section 48 and 49 but Section 50 carves out a category of those

capital assets which been subjected to grant of depreciation allowance and this section 50 therefore provides a special method for determining the cost of acquisition in such cases. Provision of Section 55(2) is not subject to the provision of Section

50. These are the provisions of Section 50(2) which only are subject to the provisions of Sections 55(2), 48 and 49. Now to sections 48 and 49 the provision of Section 55(2) would apply as modified by those of Section 50. Section 50 is applicable where the assessee has obtained deduction on account of depreciation in respect of the capital asset in question and in that case Section 55(1) also come into operation view of the expression "adjusted" which is defined therein in clause (a) of Section 55(1). The expression "adjusted" is for the proposes of Section 48, 49 and 50. For the purpose of applying Section 55(2), Section 48 and 49 will have to applied as modified by Section 50. It follows, therefore, where the capital asset purchased by the assessee is a depreciable or non depreciable asset, the assessee will have the option for substituting for its actual cost of acquisition its fair market value as on 1.1.54 but where it is a depreciable asset and the assessee has enjoyed depreciable allowance his cost of acquisition shall have to be determined as provided in Section 50.

Viewed from this angle Section 50(1) has no dependence on the provisions of Section 55(2). There is no mention of "fair market value" in Section 50(1) and besides that the adjustments stated there are with reference to the written down value only which has nothing to do with the fair market value. We conclude, therefore, that in the present case where the capital asset is depreciable and the assessee has availed of deduction on account of depreciation the cost of acquisition shall have to be determined in term of the provision of Section 50 read with Section 48. All the High Courts including Bombay High Court are of the view that Section 50(2) does not apply to any capital asset other than that which has been acquired by any of the modes mentioned in Section 49. It does not apply to the case of a person who has himself purchased the asset which has enjoyed the depreciation allowance. To us is appears Section 50 is in absolute terms specially providing for fixing the cost of acquisition in the case of depreciable asset only. It is difficult to accept the view of the Bombay High Court when it brings into operation Article 14 of the Constitution and the judgment proceeds more on the basis of equitable consideration than the clear provision of law. Bombay High Court has even read down and modified the provisions, which would appear to be rather unnecessary. We uphold the views of the Gujarat, Allahabad and Calcutta High Courts and of the Kerala High Court in the impugned judgment. The impugned of the High court whereby question No.2 has been answered in favour of the revenue is, therefore, upheld and the appeal in so far as it relates to question No.2 is accordingly dismissed.

We may also note that since the relevant provisions have been amended with effect from April 1, 1988, the controversy of the like the one raised in the present proceeding does no longer survive.

There will be no order as to costs.