INCOME-TAX REFERENCE.

Before Shamsher Bahadur and R. S. Narula, JJ.

DALMIA DADRI CEMENT, LTD.,—*Petitioner.*

versus

THE COMMISSIONER, OF INCOME-TAX,—*Respondent.*

Income-Tax Reference No. 61 of 1965

March 6, 1969.

Income-Tax Act (XI of 1922)—*Section* 10(2) (*XV*)—*Assessee Company having Managing Agency for a fixed term—Pre-mature termination of the agency on payment of a lump sum amount as compensation—Payment of such amount—Whether in the nature of revenue or a Capital expenditure—Such payment—Whether a permissible deduction in the hands of the assessee company.*

Held, that concepts of Capital and revenue expenditure are not defined anywhere in Income Tax Act, 1922. When decisions are made by the assessee companies regarding the pre-mature termination of Managing Agency for fixed term on payment of lump sum amount under the pressure of economic or managerial crisis of the moment and not by way of planned policy for laying the foundation or the basis of future economic prosperity, the money paid by a company in lumpsum as compensation for loss of agency, whereby the company relieves itself of future annual payments of commission chargeable to revenue accounts, is properly deductable as revenue expenditure. But where the assessee company is neither faced with any immediate or present danger to be averted, nor any financial problem confronts the company for terminating the managing agency, the payment of lump sum amount results in an enduring benefit from the economic point of view for the assessee company. The company compounds a consolidated claim of the managing agents whose services are terminated. If the agreement which is being terminated is assignable and no successor managing agents are appointed, there is brought into existence a clear advantage of enduring nature, an advantage indistinguishable from material or fixed asset for the assessee company. In such cases the payment of lump-sum amount as compensation for the pre-mature termination by an assessee company of its managing agency of a fixed term is a capital expenditure and is not a permissible deduction under section 10(2) (xv) of Income-tax Act, 1922, in the hands of the assessee company.

(Paras 8, 10, 17 & 24)

Case referred under sub-section 1 *of Section* 66 *of the Indian Income-Tax Act,* 1922, *by the Income-Tax Appellate Tribunal (Delhi Bench 'A') to this Court for opinion on the following question. (Regarding Assessment year* 1953-54).

"*Whether, on the facts and in the circumstances of the case, the payment of Rs.* 6 *lakh was not a permissible deduction under section* 10(2) (*xv*) *of the Income-tax Act,* 1922, *in the hands of the assessee company.*"

G. C. SHARMA, AND N. N. GOSWAMY, ADVOCATES, for the Petitioner.

D. N. AWASTHY, AND B. S. GUPTA, ADVOCATES, for the Respondent.

JUDGMENT

SHAMSHER BAHADUR, J.—This is an income-tax reference to this Court under sub-section (1) of section 66 of the Indian Income-tax Act, 1922, hereinafter called the Act, at the instance of the assessee company, Dalmia Dadri Cement Limited, hereinafter also called the Company.

(2) Right from 26th May, 1938, when the assessee Company was registered, it appointed Dalmia Jain and Company as its managing agents for a period of thirty years on a remuneration of Rs. 1,000 per month besides ten per cent commission on net yearly profits of the Company. The managing agents had the power to assign its rights under this agreement to any private or public limited company subject to certain restrictions with which we are not concerned. Disputes between the Company and the managing agents were to be settled by reference to arbitration. Subsequently on 14th August, 1941, Dalmia Jain and Company (Jind State) Limited, were appointed managing agents instead of Dalmia Jain and Company under the same terms and conditions for the residue of the thirty years' term expiring on 25th May, 1968.

(3) The Board of Directors of the Company decided on 14th November, 1952, to terminate the managing agency agreement and a resolution was passed to this effect by the extraordinary general meeting of the share-holders on 2nd December, 1952. The managing agents, after receiving the resolution on 3rd December, 1952, wrote back that the resolution constituted a breach of the contract of the managing agency and lodged a claim for Rs. 8,87,800 as compensation, out of which Rs. 8,22,168-13-3 was for premature termination of the agreement which was to subsist for another 15 years and 178 days, the amount being calculated at 6½ times the average commission earned during the past three years. The comparatively small balance of Rs. 65,687-10-9 was claimed as compensation for loss of monthly remuneration of Rs. 1,000 for a period of 6½ years. The Board of Directors of the Company, which met to consider the situation on 9th December, 1952, authorised Shri S. K. Sanghi a

Director, to settle the claim with the managing agency and he recommended for acceptance by the Board of a sum of Rs. 6,00,000 at which the matter could be settled. The Board approved this suggestion of Shri Sanghi on 12th December, 1952, and in pursuance of another resolution passed by the extraordinary general meeting of the Company on 30th December, 1952, the sum of Rs. 6,00,000 was actually paid to the managing agency the same day. In course of time the question arose with respect to the assessment year 1953-54 whether the sum of Rs. 6,00,000 fell under clause (xv) of sub-section (2) of section 10 of the Act dealing with allowances which are to be deducted in computation of profits, this being—

> "(xv) Any expenditure not being an allowance of the nature described in any of the clauses (i) to (xiv) inclusive and not being in the nature of capital expenditure or personal expenses of the assessee laid out or expended wholly and exclusively for the purpose of such business, profession or vocation."

The case of the assessee Company is and always has been that the sum of Rs. 6,00,000 was expended for the purposes of business and not being 'in the nature of capital expenditure' was deductible as a normal trading expenditure.

(4) The Income-tax Officer held that there was an essential unity of interest between Seth Ram Kishan Dalmia who held the control of the assessee Campany as also of the managing agency having in it 4,900 out of 5,000 shares and that the payment of Rs. 6,00,000 did not represent a *bona fide* transaction for the carrying of the business of the Company. The whole affair, according to the Income-tax Officer, was so hastily planned as to give an odour of the pre-planned camouflage'. The sum of Rs. 6,00,000 paid to the managing agents was a sort of solatium not admissible as a revenue business expenditure. That the managing agents went into liquidation on 27th April, 1953, soon after the receipt of Rs. 6,00,000 was a pointer in the same direction in the opinion of the assessing authority, which accordingly disallowed the claim of the Company.

(5) The appellate Assistant Commissioner took a different view of the transaction and taking into account the substantial

profits for the three years preceding 1952 and the financial sacrifice involved in foregoing sixteen years' commission, found that the sum of Rs. 6,00,000 was a revenue expenditure deductible under section 10(2)(xv) of the Act. In a further appeal to the appellate Tribunal the finding with regard to the *bona fide* nature of the transaction reached by the appellate Assistant Commissioner was affirmed, although a strong challenge was offered to it on behalf of the Revenue. After a detailed examination of the attack the Tribunal reached the following conclusion—

> "In the circumstances we hold that this expenditure was incurred wholly and exclusively for the purpose of the business of the company and answer the first issue against the Revenue."

In reaching the result that the settlement by payment of Rs. 6,00,000 was for business consideration and commercial expediency, the Tribunal took into reckoning the amount which the Company was saving by permanently getting rid of the managing agents. It is common ground that no managing agent was appointed in place of the managing agents whose agency was terminated in 1952.

(6) With regard to the second issue whether the payment of Rs. 6,00,000 to the managing agents was 'in the nature of capital expenditure', the Tribunal considered that the advantage which the Company had gained was of such an enduring nature that it amounted to capital expenditure.

(7) The order of the Tribunal passed on 1st November, 1962, is sought to be challenged in this reference which, according to the statement of the case submitted by the Tribunal, raises the following question for our opinion—

> "Whether, on the facts and in the circumstances of the case, the payment of Rs. 6 lakh was not a permissible deduction under section 10(2)(xv) of the Income-tax Act, 1922, in the hands of the assessee company."

The frame of the question manifestly places at large again the question of fact about the nature of the transaction. It has been strenuously contended by Mr. G. C. Sharma in his very able and forceful argument that the High Court is not entitled to enter into this controversy again. The soundness of the contention of Mr.

Sharma is reinforced by two recent decisions of the Supreme Court. *In Commissioner of Income-tax, Bombay North* v. *Chandulal Keshavlal and Company* (1) it was held that the appellate Tribunal having found that a certain item is deductible for reasons of commercial expediency under section 10(2) (xv) of the Act such a decision of the fact finding Tribunal if based on evidence must be sustained. As observed by the Supreme Court, it is a question of fact in every case whether the expenditure was expended wholly and exclusively for the purpose of the trade or business of the assessee. The later decision of the Supreme Court on this aspect of the case is *Commissioner of Income-tax, Bombay City* v. *Greaves Cotton and Company Limited* (2) where it was observed that the question whether a certain expenditure was laid out or expended wholly or exclusively for the purposes of the assessee's business is a question which involves, in the first place, the ascertainment of facts by the appellate Tribunal and, in the second place, the application of the correct principle of law to the facts so found. The question, therefore, is a mixed question of fact and law. That case also related to the termination of a managing agency and the compensation paid in lieu of it. The Supreme Court held that the question whether the termination of the managing agency agreement by the assessee company was not a *bona fide* one and was done for an oblique or improper purpose was essentially a question of fact and the High Court had no jurisdiction to embark upon a re-appraisal of the evidence before the appellate Tribunal and interfere with the finding of fact that the termination of the managing agency agreement was not a *bona fide* transaction. No doubt the Supreme Court in that case upset the judgment of the High Court, but it is to be borne in mind that the reference was made in that case at the instance of the Commissioner of Incom-tax. In the present case, we are satisfied that the conclusion reached by the appellate Tribunal is based on evidence and further that the Revenue never having asked for a reference to challenge the validity of the finding, the question of fact cannot be agitated at this stage. The surviving question in the reference is one which has so often arisen in Courts relating to the line of delimitation between capital and revenue expenditure and on which elaborate arguments have been addressed by counsel for both the sides at great length.

(1) (1960) 38 I.T.R. 601.
(2) (1968) 68 I.T.R. 200.

(8) The concepts of capital and revenue expenditure are not defined anywhere in the statute, but there is no dearth of guidelines indicated by eminent Judges in reported decisions both in England and in India. I can do no better than to make a mention at the outset to the observations made by Lord Macnaghten in *Dovev* v. *John Cory* (3), at page 488—

> "I do not think it desirable for any tribunal to do that which Parliament has been abstained from doing—that is, to formulate precise rules for the guidance or embarrassment of businessmen in the conduct of business affairs. There never has been, and I think there never will be, much difficulty in dealing with any particular case on its own facts and circumstances, and, speaking for myself, I rather doubt the wisdom of attempting to do more."

(9) The question for determination arises in two sets of situations. It happens sometime that a tax-payer claims a certain item of disbursement to be included amongst the admissible deductions in computing his profits. The question in such cases, as in the present one, is whether the expenditure is of a capital or revenue nature. The Revenue takes up the position in such cases that the expenditure is of a capital nature. In the other set of cases, it is the recipient assessee who asserts that the item is of a capital nature and thus not assessable to income-tax. Naturally, the Revenue takes up the position that the item constitutes a revenue receipt. The principles to govern whether the payment received is in the nature of a capital or a revenue receipt or whether the expenditure incurred is of a capital or revenue nature are common. As stated by Kanga and Palkhivala in 'The Law and Practice of Income-Tax'—Sixth Edition (Volume I)—at page 434—

> "Generally speaking, the criteria which are invoked in distinguishing between capital receipts and income receipts and income receipts will also serve to distinguish between capital disbursements and revenue disbursements."

(10) There are a number of criteria or tests which have been adopted by Courts, but the ones which are most widely and usually adopted are contained in two English decisions and provide a good guide so far as the case in point is concerned. Lord Dunedin as President of the Scottish Court of Session said this in the case of

(3) 1901 A.C. 477.

Vallambrosa Rubber Company Limited v. *Farmer (Surveyor or Taxes)* (4), at page 536—

> "Now, I do not say that this consideration is absolutely final or determinative, but in a rough way I think it is not a bad criterion of what is capital expenditure as against what is income expenditure to say that capital expenditure is a thing that is going to be spent once and for all, and income expenditure is a thing that is going to recur every year."

Looked in the perspective of this criterion, it seems that the payment of Rs. 6,00,000 by way of lump sum would amount to a capital expenditure. However, it is now generally understood that the payment in lump sum is an immaterial consideration in answering this vexed question. As is said, there is no magic in the distinction between a lump sum and a periodic sum. A lump sum payment may be a revenue expenditure when it represents the computation of a series of annual revenue rent payment and a recurring periodic payment may be capital expenditure when it represents the payment of instalments of a capital sum.

(11) The second test is furnished by a decision of the House of Lords in *British Insulated and Belsby Cables Limited* v. *Atherton* (5). The assessee company in that case under its powers established a pension fund for its clerical and technical salaried staff. Both the beneficiaries and the company made contributions to this fund. A sum of £ 31,784 out of current profits was set aside by the Company for this fund and was claimed as admissible deduction in computing its profits for the relevant assessment year. In rejecting the claim Viscount Cave L.C. stated at page 213 thus—

> 'But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but no capital."

(5) 1926 A.C. 205.
(4) 5 T.C. 529.

Thus an addition was made to the criterion which has been adopted by Lord Dunedin in *Vallambrosa's case* (4). Besides the payment being made not only once and for all, the expenditure had to bring into existence an asset or an advantage for the enduring benefit of a trade. In the opinion of Lord Cave, the payment in the pension fund by the company was in the nature of a capital expenditure as it brought about a situation which led to a satisfied and efficient staff, an advantage of enduring nature. Lord Atkinson, who concurred with the majority opinion, said at page 222—

> "If the word 'asset', as used in this connection, be confined to something material—and I do not think it well can be so confined—then I am inclined to agee............that, if the existence of this pension fund results in making the staff of the company more contended and less inclined to change their service and, therefore, on the whole, more efficient, these results when secured would amount to an 'asset' of the company's business."

The argument on behalf of the assessee company relies for its principal support on a decision by Rowlatt, J., affirmed by the Court of appeal, in *Anglo-Persian Oil Company Limited* v. *Dale* (6). The appellant Anglo-Persian Oil Company executed a managing agency agreement for the sale of oil and petroleum in Persia and the East. The agents were to manage the principal's business and use their best endeavours to promote their interests and were to receive in lieu of their services a series of commissions which as the business of the company developed grew into a very large sum. An arrangement was reached between the company and the managing agents, who still had many years to run, for the termination of their services for lump sum payment of £ 300,000. The commission which was actually being earned, had reached the neighbourhood of about £ 100,000. The agents were to go into voluntary liquidation and the company was to take over the employees of the agents so far as those employees cared to come to them, but the agents did not agree to put any pressure upon the employees to come. A sum of £ 300,000 paid by the company was sought to be deduced from the computation of profits and Rowlatt, J., held that Lord Cave in the test mentioned above meant that the benefit that endures should be in such a way that fixed capital endures. The 'gloss', if I may say so, of Rowlatt, J.

(6) 16 T.C. 253.

to the test of Lord Cave received approval of the Court of Appeal. Lawrence, L.J., said at page 269—

"It is not open to doubt that under ordinary circumstances where a trader, in order to effect a saving in his working expenses, dispenses with the services of a particular agent or servant and makes a payment for the cancellation of the agency or service agrement, such as payment is properly chargeable to revenue; it does not involve any addition to or withdrawal from fixed capital; it is purely a working expense."

While admitting that the change in the method of carrying on the company's business in Persia had, in fact, resulted in a more economical and efficient working of the company's trade, the Lord Justice said that though in that sense it had proved to be advantageous to the company's business, 'it cannot be said that the expenditure in bringing about such a change has created an advantage for the enduring benefit of the company's trade'. Lord Justice Romer endorsed the view of the trial Judge in these words—

"I agree with Mr. Justice Rowlatt that by 'enduring' is meant 'enduring in the way that fixed capital endures'...........It is made with a view to acquiring an asset that may be turned over in the course of trade at a comparatively early date. Nor, of course, need the advantage be of a positive character. The advantage may consist in the getting rid of an item of fixed capital that is of an onerous character... ....I can find no indication that any enduring advantage to the company's trade from capital point of view was being sought, nor was it suggested that any such advantage would be gained in fact."

(12) Reliance is also placed by Mr. Sharma on the English decision of a Court of appeal in *G. Scanmell and Nephew Limited* v. *Rowles* (7), where Sir Wildfrid Greene M. R. has discussed the test from the point of view of the expenditure being made out of fixed and circulating capital, a test which is not of universal application and is peculiarly unsuitable to the case in point.

(7) 22 T.C. 479.

(13) Lord Radcliffe in the Privy Council decision in *Commissioner of Taxes* v. *Nohanga Consolidated Copper Mines Ltd* (8), has described the phrases 'enduring benefit' or 'capital structure' as purely descriptive rather than definitive. As stated in Kanga's commentary on 'The Law and Practice of Income-Tax'—Sixth Edition (Vol. I)—at page 438—

> "The words 'permanent' and 'enduring' are only relative terms and not synonymous with perpetual or everlasting. They merely indicate that the asset or right acquired must have enough durability to justify its being treated as a capital asset. What that degree of durability or permanence should be, depends upon the facts of each case."

The expeiditure incurred in the case in point will by any standards pass the test of durability to entitle it to be ranked as one incurred for the enduring benefit of the assessee-company.

(14) Mention may also be made of two other English cases, though these were not cited at the Bar. The words "money wholly and exclusively laid out and expended for the purposes of the trade", which are not dissimilar to the language employed in our statute [Section 10(2)(xv)], have been construed to mean by the highest Tribunal in England as a disbursement or expense wholly and exclusively laid out or expended for the purposes of the assessee's trade. Lord Davey in *Strong and Company of Romsey Ltd.* v. *Woodifield* (9), at page 453, said with regard to damages, which had been levied for the fall of a chimney on the assessee, to be expenses which could not be deducted and observed thus—

> "I think that the payment of these damages was not money expended 'for the purpose of the trade'. These words...... ......appear to me to mean for the purpose of enabling a a person to carry on and earn profits in the trade, etc......... It is not enough that the disbursement is made in the course of, or arises out of, or is connected with the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits."

Lord Loreburn, L.C., in the same case said that the loss sustained by the assessee was not really incidental to its trade and therefore could

(8) 1965 (58) I.T.C. 241.
(9) 1906 A.C. 448.

not be deducted. Deductible losses must be such as are connected with in the sense that they are really incidental to the trade itself".

(15) In another House of Lords decision *Smith's Potato Estates Ltd.* v. *Bolland (Inspector of Taxes)* (10) Lord Porter, speaking for the majority in connection with an expenditure which had been incurred by the assessee for contesting the amount of assessment before the Income-tax authorities, observed at pages 521 and 523—

> "Such expenditure is incurred directly for tax purposes and for nothing else, though it may indirectly affect both the amount available for distribution to the proprietors of the business and that proper to be put to reserve......" Such an expenditure "in order to determine the correct amount of income-tax or excess profits tax as the case may be and not in order to earn gain, even though that phrase be given a broad significance" cannot be regarded as a revenue expenditure.

(16) Similar words which fall for construction in the case before us are in respect of an expenditure which, in order to qualify for deduction, should have been expended "wholly and conclusively for the purpose of such business, profession or vocation."

(17) Mr. Sharma then invited our attention to a group of Indian cases on this subject commencing with *Anglo-Persian Oil Company (India) Limited* v. *Commissioner of Income-tax* (11) in which it was held by Rankin, C. J., and Buckland, J. that money paid by a company in lump sum as compensation for loss of agency where by the company relieved itself of future annual payments of commission chargeable to revenue account is properly deductible as expenditure incurred for purposes of earning such profits or gains. It was pointed out by the Bench that an expenditure to qualify itself for deduction need not have been incurred for gaining profit or gains in the year of account. In another Bench decision by Costello and Lort-Williams, JJ., in re: *Imperial Chemical Industries (India) Limited* (12), it was held that the sum of Rs. 30,000 paid by way of instalments of Rs. 500 per month for a period of five years by the assessee company to the managing agency as compensation for less of the agency business was

(10) 1948 A.C. 508.
(11) (1933) 1 I.T.R. 129.
(12) (1935) 3 I.T.R. 21.

in the nature of revenue expeiditure under section 10(2)(ix) of the Act inasmuch as the assessees were not "nurturing or protecting a new business or purchasing anything in the nature of goodwill but only securing advantages for their undertaking and facilities for future operations and inasmuch as the payment was made out of the circulating capital and did not result in any new asset or addition to the fixed capital of the assessees". Though the Bench referred to the decision of the House of Lords in *Atherton's case* (5), the decision seems to have based on the authority of *Dale's case* (6).

(18) The next set of cases referred by the learned counsel arose out of the situation created in the wake of the independence of the country in 1947. Companies owned substantially or exclusively by Europeans passed to Indian hands for pragmatic considerations of expediency, and compensation had to be paid to the retiring managing directors or managing agencies of the companies. In all these cases, it was held that such payments were in the nature of revenue expenditure. In *P. Orr and Sons* v. *Commissioner of Income-tax. Madras* (13), the assessee claimed the amount of Rs. 1,25,000 as an allowable deduction under section 10(2)(xv) of the Act paid as compensation to terminate the managing agency agreement. The sum so paid represented a commission paid to the managing agents for the last three years ending 31st March, 1948. It was held by Rajagopalan and Balakrishna Ayyar, JJ., that the payment of Rs. 1,25,000 was made to secure the termination of the managing agency and its attendant recurring annual liability to the company and was not intended to bring in any capital asset, nor did it result in the acquisition of any capital asset and was not, therefore, an item of capital expenditure. The Bench further held that judged by the test of business expediency the amount was expended wholly and exclusively for the business of the assessee company. *Likewise in F. E. Dinshaw Limited* v. *Commissioner of Income-tax* (14), the assesee company paid a sum of Rs. 1,00,000 as compensation for terminating the assignment of a Director and it was held that the amount so paid being reasonable was for the purpose of making profits. It was emphasised by S. T. Desai and K. T. Desai, JJ., that the matter had to be viewed in the light of principles of commercial trading and commercial expediency. The expenditure must be germane to the business of the assessee and not something which is *de hors* the business.

(13) (1959) 35 I.T.R. 556.
(14) (1959) 36 I.T.R. 114.

(19) In *Greaves Cotton and Company Limited* v. *Commissioner of Income-tax* (15), it was held by Tambe and V. S. Desai, JJ., that the termination of the managing agency agreement before the expiry of its period by the managed company with a view to getting rid of its recurring liability in the matter of payment of managing agency commission and/or taking over the management by its board of directors would be a transaction in the ordinary course of its business in order indirectly to facilitate the carrying on of its business. The expenditure was found to be wholly and exclusively laid out for purposes of business. In appeal, however, this judgment was upset by the Supreme Court in *Commissioner of Income-tax, Bombay City* v. *Greves Cotton and Company Ltd.* (2), and the case was remanded to the Tribunal for a fuller consideration of the matter.

(20) Lastly, in the case of *Commissioner of Income-tax* v. *Turner Morrison and Company Private Limited* (16), Banerjee and K. L. Roy. JJ., of the Calcutta High Court held that in a case where the assessee company had terminated the services of some of its senior European employees before the period of contract with them had expired with a view to reduce administration costs and also to accelerate the promotion of the junior employees and paid them lump sum compensation, the expenditure was allowable to be deducted as it was in the interest of the assessee's business and wholly and exclusively laid for the purpose of its business.

(21) We now come to the two Supreme Court decisions on the point. In *Assam Bengal Cement Company Limited* v. *Commissioner of Income-tax* (17) Mr. Justice Bhagwati in discussing the line of demarcation between capital and revenue expenditure has discussed the entire case law. The assessee company in that case had acquired from the Government of Assam lease of limestone quarries in the Khasi and Jaintia Hills for the purpose of carrying on the manufacture of cement from 1st November, 1938, for a period of twenty years. Heavy and substantial amounts of lease-money became payable in the first five years amounting to Rs. 40,000. This sum the assessee company sought to deduct in the accounting years 1944-45 and 1945-46 under the provisions of section 10(2)(xv) of the Act.

(15) (1963) 58 I.T.R. 111.
(16) (1968) 68 I.T.R. 147.
(17) (1955) 27 I.T.R. 34.

Payments were made in the first five years of the lease and for the remaining tenure of the lease the assessee company did not have to make these payments. It was held by the High Court that the amount so paid was not deductible as revenue expenditure under section 10(2)(xv) of the Act and this was affirmed in the Supreme Court. Mr. Justice Bhagwati, speaking for the Court, observed at page 47—

> "The period of 5 years over which the payments were spread did not make any difference to the nature of the acquisition. It was nonetheless an acquisition of an advantage of an enduring nature which enured for the benefit of the whole of the business for the full period of the lease unless terminated by the lessor by notice as prescribed in the last part of the clause. This again was the acquisition of an asset or advantage of an enduring nature for the whole of the business."

The asset which, in the opinion of the Supreme Court, the company had acquired in consideration of this recurring payment, was in the nature of capital asset of enduring benefit. The various tests in English cases, to which reference has been made, were fully discussed in this judgment and that of Lord Cave in *Atherton's case* (5), was found most appropriate.

(22) The other Supreme Court decision on which reliance is placed in the judgment of the Income-tax Tribunal is *Godrej and Company* v. *Commissioner of Income-tax* (18). Here, an unusually large commission of twenty per cent was being paid to the assessee company as the managing agent of Godrej Soaps Limited under an agreement of October, 1928, which was substituted by another one of December, 1933. As the business of the managed company developed and expanded, its directors and shareholders found that the assessee firm of managing agents was being paid at too high a rate and negotiations were started for a modification of this agreement. In pursuance of this modified agreement, a sum of Rs. 7,50,000 was paid as compensation to the assessee firm for releasing the managed company from the onerous term as to remuneration contained in the agreement of the managing agency. It fell to be determined whether the receipt of Rs. 7,50,000 by the managing agents was in the nature

(18) (1958) 37 I.T.R. 381.

of capital or revenue receipt. Chief Justice Das, speaking for the Court, observed at page 385 thus—

> "There can be no doubt that by paying this sum of Rs. 7,50,000 the managed company has secured for itself a release from the assessee firm for the rest of the period of managing agency covered by the principal agreement. *Prima facie*, this release from liability to pay a higher remuneration for over 17 years must be an advantage gained by the managed company for the benefit of its business and the immunity thus obtained by the managed company may well be regarded as the acquisition of an asset of enduring value by means of a capital outlay which will be a capital expenditure according to the test laid down by Visscount Cave, L. C., in *Atherton* v. *British Insulted and Helsby Cables Ltd*: referred to in the judgment of this Court in *Assam, Bengal Cement Company Ltd.,* v. *Commissioner of Income-tax*."

In the conclusion the learned Chief Justice, after a discussion of the authorities, observed thus—

> "In the light of those decisions the sum of Rs. 7, 50, 000 was paid and received not to make up the difference between the higher remuneration and the reduced remuneration but was in reality paid and received as compensation for releasing the company from the onerous terms as to remuneration as it was in terms expressed to be. In other words, so far as the managed company was concerned, it was paid for securing immunity from the liability to pay higher remuneration to the assessee firm for the rest of the term of the managing agency and, therefore, a capital expenditure and so far as the assessee firm was concerned, it was received as compensation for the deterioration or injury to the managing agency by reason of the release of its rights to get higher remuneration and, therefore, a capital receipt within the decisions of this Court in the earlier cases referred to above."

It is true, that the assessee firm in *Godrej's case* (18). was the recipient of Rs. 7,50,000 and it was found that in its hands it was a revenue receipt assessable to income-tax. Mr. Sharma while conceding that the observation of the learned Chief Justice with regard to the nature of this expenditure in the case of the managed company, goes against the result contended for by him, it has to be disregarded.

to his submission, because the expression of opinion is merely *obiter*, the Supreme Court not being concerned with the assessment of the managed company at all. We do not see our way to accede to this suggestion of the learned counsel. The entire case law including the test laid down in *Atherton's case* (5), has been fully discussed and also the decision of the Supreme Court in *Assam Bengal Cement Company's case* (17). The conclusion reached is in categorical language that payment of Rs. 7,50,000 made by the managed company to the managing company was in the nature of a cpital expenditure. This was not a conclusion which was unrelated to the facts of the case. In determining whether the recipient firm of managing agents had received Rs. 7,50,000 as a capital or a revenue receipt their Lordships of the Supreme Court also determined the nature of the expenditure in the hands of the managed company. An argument was raised before the Supreme Court that the sum of Rs. 7,50,000 represented capital expenditure incurred by the managed company. it should be a capital receipt in the hands of the assessee firm, for the intrinsic characteristics of capital sums and revenue items respectively are essentially the same for receipts as for expenditure. This contention was repelled and it is plain that the observations made by the Supreme Court with regard to the nature of expenditure in the hands of the managed company were not in the nature of *obiter*, but had direct relationship to the contentions raised before their Lordships.

(23) A somewhat similar argument was raised in a Privy Council decision in *Ralli Estates Ltd.* v. *Commissioner of Income-tax* (19), in respect of revenue expenditure and revenue receipt. Delivering the judgment of the Board, Lord Denning had no difficulty in repelling the contention with these words at page 335—

> "Payments which are income receipts in the hands of the recipient are not necessarily revenue expenditure in the hands of the payer."

And the Board accordingly proceeded to deal with the question whether the payments in question were expenses wholly and exclusively incurred in the production of the income of the payer.

(24) The authorities cited in support of the assessee's case, broadly speaking, were concerned with *ad hoc* solutions or decisions made

(19) (1961) 1 W.L.R. 329.

under the pressure of economic or managerial crisis of the moment and not by way of planned policy for laying the foundation or the basis of future economic prosperity. The assessees, in all these cases, had to reach decisions, no doubt, of far-reaching importance as matters of immediate and pressing interest. What we find in the present case is that the assessee company was not faced with any immediate or present danger to be averted, neither any financial problem confronted the Board of Directors for terminating the managing agency agreement nor was any economic difficulty to be surmounted by adopting this course. Plainly. the Directors compounded a consolidated claim of the managing agents whose services were terminated apparently without any cause and a sum of Rs. 6,00,000 was paid for this purpose which, undoubtedly, resulted in an enduring benefit, from the economic point of view, for the assessee company. Considering that the agreement which was being terminated was assignable and no managing agents were appointed to succeed in place of Dalmia Jain and Company, there was brought into existence a clear advantage of an enduring nature, an advantage of an enduring nature, an advantage indistinguishable from a material or fixed asset for the assessee company. In this view of the matter we think that the assessee's contention must fail and we will accordingly answer the question in favour of the Revenue and against the assessee. In the circumstances, we make no order as to costs.

R. S. Narula, J.—I agree.

K.S.K.

APPELLATE CIVIL

Before Mehar Singh, C.J., and Ranjit Singh Sarkaria, J.

MATU RAM,—*Appellant.*

versus

KISHAN PARSHAD AND OTHERS,—*Respondents.*

Letters Patent Appeal No. 300 of 1965

March 1 1969.

Displaced Persons (Compensation and Rehabilitation) Act (XLIV of 1954)—Sections 12(2), 14(2) and 19—Displaced Persons (Compensation and Rehabilitation) Rules (1955)—Rule 102—Lease rights for a term of years—Whether an "encumbrance" as used in sections 12(2) and 14(2).