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answered accordingly. There will in the circumstances of the case be no order as to costs.

D. K. MAHAJAN, J.—I agree.

B.R.T.

INCOME TAX REFERENCE

Before Daya Krishan Mahajan and S. K. Kapur, J.

M/S REGAL THEATRE, NEW DELHI,—*Applicants*

versus

THE COMMISSIONER OF INCOME TAX, NEW DELHI,—

Respondent.

Income Tax Reference No. 3-D of 1961

1965

March, 8th.

Income-tax Act (XI of 1922)—S. 10—Lessee of cinema panelling the walls to hide ugly spots—Expenses incurred—Whether revenue or capital expenditure.

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some places and there were also some ugly spots thereon. The assessee, in order to cover up these cracks and ugly spots, panelled the lounge, the stair-case and the restaurant. In the lounge, the booking offices, the visitors' stand and a place for refreshment are housed. The cost of panelling came to Rs. 18,640. Out of this amount Rs. 7,340 was on account of replacement and Rs. 11,300 was on account of decoration expenses. The assessee claimed deduction of these amounts under section 10(2)(xv) on the ground that this expenditure had been incurred for the purposes of the business and was in the nature of 'revenue expenditure'. The Income-tax Officer disallowed both these items for the following reasons :—

"(a) Penalling of walls amounted to nothing else but putting on fixture and any expenditure incurred on fixture was a capital expenditure.

(b) The cinema building was on lease. If the assessee failed to get the renewal of lease then he had the option to remove the fixture and sell it in

ORDER

MAHAJAN, J.—The Income-tax Appellate Tribunal (Delhi Bench) has referred the following question of law for our decision under section 66(1) of the Indian Income-tax, Act 1922 :— Mahajan, J.

> "Whether the expenditure of Rs. 16,323 incurred by the assessee for putting up wooden panels in the lounge and on the stair-case and the restaurant was expenditure of a capital nature."
>
> * * * * *

The dispute relates to the assessment year 1956-57.

The assessee is the lessee of the cinema building known as 'Regal Theatre' in Connaught Circus, New Delhi. The lease-deed was executed on the 14th July, 1949 and was duly registered under the Indian Registration Act. Only three clauses of the lease-deed have some relevancy and, therefore, they are set out below :—

> "6. That the lessee shall not make any additions or alterations whatsoever to the premises and shall not sublet the premises or any part thereof without the consent in writing of the lessor obtained previous to the subletting.
>
> * * * * *
>
> 8. That the lessee will keep the premises in good and healthy condition and at the expiry of the lease or sooner determination thereof, the lessee will deliver possession of the premises with all furniture, fixture, fittings, heating and cooling plants etc. in the same good order and condition in which they received them, fair wear and tear alone excepted.
>
> 9. That the lessor shall carry out annual white and colour washing and repairs to the building hereby demised, when necessary."

The building was leased with all furniture, fixture, fittings, heating and cooling plants, the bar and residential suites attached to it along with new installations of cinema machines, projectors, fans and various other electrical appliances for a period of 10 years from the date of the registration of the deed. The walls of the lounge had cracks at

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some places and there were also some ugly spots thereon. The assessee, in order to cover up these cracks and ugly spots, panelled the lounge, the stair-case and the restaurant. In the lounge, the booking offices, the visitors' stand and a place for refreshment are housed. The cost of panelling came to Rs. 18,640. Out of this amount Rs. 7,340 was on account of replacement and Rs. 11,300 was on account of decoration expenses. The assessee claimed deduction of these amounts under section 10(2)(xv) on the ground that this expenditure had been incurred for the purposes of the business and was in the nature of 'revenue expenditure'. The Income-tax Officer disallowed both these items for the following reasons :—

"(a) Penalling of walls amounted to nothing else but putting on fixture and any expenditure incurred on fixture was a capital expenditure.

(b) The cinema building was on lease. If the assessee failed to get the renewal of lease then he had the option to remove the fixture and sell it in the market.

(c) According to the lease-deed all the repairs were to be done by the lessor and so the lessee should have claimed the same from the lessor."

Against this decision, an appeal was taken by the assessee to the Appellate Assistant Commissioner of Income-tax. The Appellate Assistant Commissioner allowed the appeal and held that out of the two items already referred to, an amount of Rs. 350 out of the first item and an amount of Rs. 1,427 out of the second item related to petty repairs and were definitely 'revenue expenditure' and had to be allowed as such. With regard to the remaining amount of Rs. 16,323 which had been spent for the panelling of the front varandah, corners and restaurant, it was ovserved that the same was incurred by the assessee in view of commercial expediency and was necessary for the show business. It was also further held that this panelling was by fixing a thin layer of teak ply-wood to the walls and did not form a permanent fixture to the building. The premises were available to the assessee for the present upto 1959 and, therefore, it could not be held that the expense

involved was of a 'capital nature'. The aforesaid conclusion was arrived at by the Appellate Assistant Commissioner after finding the following facts :—

"(1) That this panelling was to be done in order to conceal the ugly patches which had appeared on the walls and which gave a bad look to the approaches of the cinema hall.

(2) The previous history of the case shows that some major expenses were incurred by the assessee in 1951 by panelling the main hall in order to conceal the cracks which had appeared in the walls. This major expense incurred in panelling of the walls "was not allowed by the Income-tax Officer as a revenue expense but the assessee was successful in agitating this point before the Income-tax Appellate Tribunal. The Tribunal held that the panelling was done not only to conceal the cracks which were appearing in the walls but also for the purpose of decoration of the cinema hall.

(3) Although under lease-deed all the repairs were to be undertaken by the landlord; yet in actual practice in New Delhi, the landlords are not inclined to undertake any major repairs. It pays the landlord now-a-days to get the property vacated from the old tenants because it enables them to rent out the property at exorbitant rent to the new tenants. Because of the scarcity of accommodation in New Delhi, no landlord cares to comply with the request of the tenants for doing major repairs. It is also quite evident that in the earlier years also, the 'landlord' refused to undertake major repairs and the assessee had to undergo the major repairs himself.

(4) According to the lease deed, the lease of this building will be over in 1959. Under this lease-deed, the assessee "had to remove the fixture from the walls. The fixtures being of thin plywood are stuck to the walls and would be of little value, if they are removed from the walls

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after the lease period. I have personally seen the fixture in the premises of the assessee and agree with him that if the fixture are removed at the end of the lease period, the assessee would not be able to re-install them in the same condition in different premises and the scrap value of this fixture after removal would be negligible.

(5) The panelling has been done this year to conceal the ugly patches which appeared on the walls due to dampness. This dampness is a recurring feature of the building. In the line of assessee's business the customers would not tolerate ugly patches on the walls. In view of the competition in New Delhi, the assessee had to keep his premises in a perfect order. He could have carried on a regular decoration on the walls by plastering them and repainting them. Instead the assessee found that his interest would be better served by panelling the walls because this would serve the purpose of hiding the ugly patches and cracks and also as decoration for the walls. The building did not belong to the assessee. The "fixture affixed to the building did not bring in fact any durable asset and, therefore, the Income-tax Officer was not correct in holding that the expense involved was a capital expense."

An appeal was preferred by the Income-tax Officer against the decision of the Appellate Assistant Commissioner to the Income-tax Appellate Tribunal. The Appellate Tribunal reversed the decision of the Appellate Assistant Commissioner and restored that of the Income-tax Officer. The relevant part of the Tribunal's order is as follows:—

"In the present case, the assessee instead of undertaking a permanent reconstruction of the walls has achieved the same object by putting up wooden panels. The wooden panels were put up on the walls so that the hall may appeal to be a very decent one and may appear attractive to the customers. The purpose for which the wooden panels were put by the assessee was undoubtedly business purpose, but the expenditure was incurred for bringing into existence an

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asset of an enduring nature. The permanent decoration of the wall which was effected by the assessee was certainly a capital asset and the expenditure incurred by the assessee was, therefore, of a capital nature. The Appellate Assistant Commissioner, in our opinion, erred while holding that the expenditure was "of a revenue nature. In this view of the matter, the entire expenditure claimed by the assessee will have to be disallowed."

The short question that we are called upon to determine in this reference is whether the aforesaid expenditure is a 'capital expenditure' or 'revenue expenditure'. The contention of the assessee is that it is 'revenue expenditure', while that of the department is that it is 'capital expenditure'.

Lot of literature has grown round the question what is 'capital expenditure' and what is 'revenue expenditure'. This question, whenever it has arisen, has ultimately been decided on the facts and circumstances of each individual case. Various learned Judges have, at times, made an attempt to give some sort of a working definition for the solution of this vexed question; but no complete or satisfactory definition has, so far, been evolved. I may, at this stage, for the sake of convenience, quote in extenso from the judgment of Chief Justice Shelat in *Jansatta Karyalaya* v, *Commissioner of Income-tax, Gujrat* (1), where the various tests laid down by Judges from time to time have been tabulated :—

'Bowen L. J. in *City of London Contract Corporation* v. *Styles* (2), explained the difference between the two types of expenditure by observing that the expenditure in the acquisition of the concern would be capital expenditure and the expenditure in carrying on the concern would be revenue expenditure. Commenting on this dictum, Lord Dunedin in *Vallambrosa Rubber Co. Ltd.* Vs. *Farmer* (3), thought that the dictum laid down by Bowen L.J. was not absolute, final or

(1) (1964) 54, I.T.R., 792.
(2) (1887) 2, Tax cas. 239.
(3) (1910) 5, Tax cas. 529.

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determinative. He believed that it was not a bad criterion of what was capital expenditure as against what was income expenditure to say that capital expenditure was a thing that was going to be spent once and for all, and income expenditure was a thing that was going to recur every year. Rowlatt J. in *Ounsworth* v. *Vickers Limited* (4), observed that the real test was between the expenditure which was made to meet a continuous demand for expenditure as opposed to an expenditure which was made once and for all. He suggested, however, another view-point and that was whether the particular expenditure could be put against any particular work or whether it was to be regarded as an enduring expenditure to serve the business as a whole. The famous dictum of Viscount Cave L.C. in *British Insulated and Helsby Cables Ltd.* v. *Atherton* (5), that 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 the enduring benefit of a trade, there was 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 to capital. *In John Smith & Son* v. *Moore* (6), Lord Haldane suggested yet another test, and that was the test of fixed and circulating capital. That test was also accepted by Lord Hanworth in *Anglo-Persian Oil Co. Ltd. v. Dale* (7). The test, however, of fixed or circulating capital was not accepted by Lord Macmillan in *Van Den Bergh, Ltd.* v. *Clark* (8). *In Tata Hydro-Electric Agencies Limited* v. *Commissioner of Income-tax* (9), the Privy Council observed that what was money wholly and exclusively laid out for the purposes of the trade was a question which

(4) (1915) 6 Tax cas. 671.
(5) (1925) 10 Tax cas. 155.
(6) (1920) 12 Tax. Cas. 266.
(7) (1932) 1 K.B. 124.
(8) (1935) A.C. 431=3 I.T.R. (Eng. Cas.) 17.
(9) (1937) L.R. 64 I.A. 215=(1937) 5 I.T. 202 (P.C.).

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must be determined upon the principles of ordinary commercial trading. It was necessary, accordingly, to attend to the true nature of the expenditure, and to ask oneself the question, was it a part of the company's working expenses? Was it expenditure laid out as part of the process of profit-earning? The distinction there made was between the acquisition of an income-earning asset and the process of the earning of the income. The expenditure in the acquisition of that asset was a capital expenditure and the expenditure in the process of the earning of the profits was revenue expenditure. A similar 'view was also expressed by Dixon J. in *Sun Newspapers Limited and Associated Newspapers Limited* v. *Federal Commissioner of Taxation* (10), where the learned Judge observed as follows:—

> But in spite of the entirely different forms, material and immaterial, in which it may be expressed, such sources of income contain or consist in what has been called a 'profit-yielding subject,' the phrase of Lord Black-burn in *United Collieries Limited,* v. *Inland Revenue Commissioners* (11). As general conceptions it may not be difficult to distinguish between the profit-yielding subject and the process of operating it. In the same way expenditure and outlay upon establishing, replacing and enlarging the profit-yielding subject may in a general way appear to be of a nature entirely different from the continual flow of working expenses which are or ought to be supplied continually out of the returns or revenue. The latter can be considered estimated and determined only in relation to a period or interval of time, the former as at a point of time, for the one concerns the instrument for earning profits and the other the continuous process of its use of employment for that purpose."

So far as the present case is concerned, the Tribunal came to the conclusion that the purpose of the wooden panels was undoubtedly business purpose. Thereafter, the

(10) (1938) 61 C.L.R. 337, 360.
(11) (1930) S.C. 215, 220=(1929) 12 Tax. Cas. 1248.

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Tribunal proceeded to hold the expenses incurred in connection with the wooden panels as an expenditure of capital nature, because, the expenditure was incurred for bringing into existence an asset of an enduring nature. It may be observed in passing that the Tribunal has come to this conclusion without setting aside the following findings of fact arrived at by the Appellate Assistant Commissioner of Income-tax :—

> "That the lease was upto 1959. The assessee had to remove the fixtures from the walls on the termination of the lease. The fixtures being of thin ply-wood are stuck to the walls and would be of little value if they are removed from the walls arter the lease period. I have personally seen the fixtures in the premises of the assessee and agree with him that if the fixtures are removed at the end of the lease period, the assessee would not be able to re-instal them in the same condition in different premises and the scrap value of this fixture after removal would be negligible."

We are also constrained to observe that the observation of the Tribunal that the wooden panels were put by the assessee to avoid reconstruction of the walls, is also unjustified. The assessee could not reconstruct the walls in view of the terms of the lease. The reconstruction of a part of the building was within the powers of the landlord, as was also the case in the matter of repairs. The assessee had to carry on his business the business being show business and in order to attract customers, the cinema house had to be kept in certain presentable condition, particularly in keeping with its locality and the clientele. It was essential to keep the building in a tip-top condition. To achieve this object, which is certainly a business object vis-a-vis the assessee, he had to incur the expense, in connection with the wooden panels and this expense, in the very nature of things, cannot be said to be an expense of a capital nature, particularly, when the assessee's lease was for a short duration and the life of the panels was not such as could be treated as an asset of an enduring nature, for at the end of the lease, the assessee could remove the same, and on the admitted facts, the wooden panels on removal will not be of much value. It was not disputed before us that if the assessee had whitewashed the building, it would be a 'revenue expenditure' and so also, if he had replastered the walls and applied plastic emulsion to the walls. How does

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the nature of the expense change when, to achieve the same object and also for the same purpose, the wooden panels are fixed. We can see no distinction in putting the wooden panels in a different category than painting the walls with a cheap material or an expensive one.

There is no direct case bearing on the subject which could be said to be on all-fours with the present case. But there are certain decisions which have been cited before us which, by way of analogy, offer some assistance. Reference in this connection, may usefully be made to the decision of this Court in *The Commissioner of Income-tax, Punjab, Jammu and Kashmir and Himachal Pradesh, Simla* v. *The Sheikhupura Transport Company Limited, Jullundur* (12), the decision of Nagpur High Court in *R. B. Bansilal Abir Chand Spinning and Weaving Mills* v. *Commissioner of Income-tax, Madhya Pradesh* (13) and the decision of the Allahabad High Court in *Re-Hindustan Commercial Bank Limited* (14). These decisions have been merely referred to by way of illustration. In fact, all of them proceeded on their own peculiar facts.

On the facts and in the circumstances of the present case, we are clearly of the view that the expense incurred by the assessee in fixing the wooden panels is an expense of a 'revenue nature' and is not an expense of a 'capital nature.' In our view, the Appellate Assistant Commissioner had come to a correct decision and the Tribunal has gone wrong in reversing his well-considered decision. The question referred to us is answered in the negative. However, there will be no order as to costs of this reference.

Kapur, J.

S. K. KAPUR, J.—I agree.

B.R.T.

APPELLATE CIVIL

Before S. K. Kapur, J.

DIALI RAM,—*Appellant.*

versus

MAMLESHWAR PERSHAD AND ANOTHER,—*Respondents.*

Regular Second Appeal No. 36-D of 1962.

1965

March, 9th.

Delhi Land Reforms Act (VIII of 1954) as amended by Delhi Land Reforms (Amendment) Act (IV of 1959)—Whether colourable Legislation—Ss. 13 and 185—Delhi Land Reforms Rules (1954)—Rules 6-A and 8(4)—Legislature conferring Bhumidari rights on

(12) I.L.R. (1961) 1 Punj. 261=1961 P.L.R. 1.
(13) (1957) 31 I.T.R. 427.
(14) (1952) 21 I.T.R. 353.