The Commissioner Of Income-Tax, Madras vs K. T. M. T. M. Abdul Kayoom on 23 November, 1961

Equivalent citations: 1962 AIR 680, 1962 SCR SUPL. (1) 518

Author: S.K. Das

Bench: S.K. Das, J.L. Kapur, M. Hidayatullah

PETITIONER:
THE COMMISSIONER OF INCOME-TAX, MADRAS

Vs.

RESPONDENT:
K. T. M. T. M. ABDUL KAYOOM

DATE OF JUDGMENT:
23/11/1961

BENCH:
DAS, S.K.
BENCH:
DAS, S.K.
KAPUR, J.L.
HIDAYATULLAH, M.

CITATION:
1962 AIR 680 1962 SCR Supl. (1) 518
CITATOR INFO :
D 1966 SC1564 (7,9,11)
D 1968 SC 745 (6)
RF 1972 SC1634 (10)
RF 1973 SC 15 (5)
R 1991 SC 227 (7,10,11)

ACT:
Income Tax-Capital Expenditure-Dealer in conch shells-Lease money paid for gathering shells from sea-Nature of expenditure-Income-tax Act, 1922(11 of 1922), s.10 (2)(xy).

HEADNOTE:
The assessee firm carried on the business in purchase and sale of conch shells. It obtained a lease for 3 years for gathering specified types of shells from the sea along the coastline abutting

on the South Arcot District. It sought to deduct the amount paid as lease money from its profits from business on the ground that this was an expenditure not of a capital nature but wholly and exclusively laid out for the purpose of business. under s. 10(2)(xy) of the Income Tax Act.
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Held, (per kapur and Hidayatullah, JJ., Das, J. dissenting) that the expenditure was capital expenditure and could not be deducted from the profits. The business of the assessee was buying and selling shells but when it took the lease it went in for a new speculative business of fishing for shells. The amount paid for reserving the vast coastline for future fishing was not price paid for obtaining the stock in trade i.e. shells with which assessee did his business. The amount was paid to obtain an enduring asset in the shape of an exclusive right to fish and the payment was not related to the shells.

Mohanlal Hargovind v. Commissioner of Income-tax, C. P. & Berar, (1949) 17 I. T. R. 473(P. C.), distinguished

Pringle Industries Ltd., Secunderabad v. Commissioner of Income-tax, Hyderabad, [1960] 3 S. C. R. 681, applied.

Per Das, J.-The expenditure was not capital expenditure and was deductible from the profits. It was not an expenditure for the acquisition of property or of rights of a permanent character, the possession of which was necessary for carrying on of the assessee's trade By this lease the assessee acquired its stocks-in-trade rather than a source or enduring asset for producing the stock-in-trade.

Mohanlal Hargovind v. Commissioner of Income-tax, C. P. & Berar (1949) 17 I. T. R. 473(P. C.), applied.

Pringle Industries Ltd., Secunderabad v. Commissioner of Income-tax, Hyderabad, [1960] 3 S.C.R. 681, distinguished.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Review Petition No. 16 of 1960.

Petition for Review of this court's Judgment and order dated April 26, 1960, in Civil Appeal No. 64 of 1956.

A. V. Viswanatha Sastri, R. Ganapathy Iyer and Gopalkrishnan, for the petitioners.

K. N. Rajagopala Sastri, and P. D. Menon, for respondent.

1961. November 23. Das, J., delivered his own Judgment. The Judgment of Kapur and Hidayatullah, JJ. was delivered by Hidayatullah, J.

S. K. DAS, J.-I had taken a view different from that of my learned brethren when this appeal was heard along with Pringle Industries Ltd., Secunderabad v. The Commissioner of Income-tax, Hyderabad (1), and that view was expressed in a very short judgment dated April 26, 1960.

Now, we have had the advantage of hearing a very full argument with regard to the facts of the appeal, and I for myself have had the further advantage and privilege of reading the judgment which my learned brother Hidayatullah, J., is proposing to deliver in this appeal. I have very carefully considered the question again with reference to the facts relating thereto and, much to my regret, have come to the conclusion that I must adhere to the opinion which I expressed earlier. My view is that the facts of this case are indistinguishable from the facts on which the decision of the Privy Council in Mohanlal Hargovind v. Commissioner of Income-tax, C.P. and Berar(2) was rendered, and on the principles laid down by this court in Assam Bengal cement Co., Ltd. v. The Commissioner of Income-tax, West Bengal (3), it must be held that the expenditure of Rs. 6111/-in this case was on revenue account and the respondent firm was entitled to the allowance which it claimed.

The short facts are these. The respondent firm carried on a business in the purchase and sale of conch shells (called chanks). It used to acquire the stock of conch shells (1)by purchase from the Fisheries purchase from the Fisheries Department of the Government of Madras and (3) by fishing for and gathering such shells from the sea. It disposed of the stock so acquired at Calcutta, the different between the cost price and selling price less expenses being its profit made in business. On November 9 1945 it took on lease from the Director of Industries and Commerce, Madras, the exclusive right. liberty and authority to fish for, take and carry away "chank" shells in the sea off the coast line of the South Arcot District including the French Kuppama of Pondicherry. The boundary of the area within which the right could be exercised was given in a schedule to the lease. The lease was for a period of three years from July 1, 1944 to June 30 1947 on a consideration of an yearly rent of s. 6111/- to be paid in advance. Clause 3 of the lease contained the material terms there of and may be set out in full.

> "3. The lesser hereby convenants with the lesson as follows:-
>
> (i) To pay the rent on the day and in manner aforesaid.
>
> (ii) To deliver to the Assistant Director of Pearl and Chank Fisheries, Tuticorn all Velampuri shells that may be obtained by the lessee upon payment of their value as determined by the Assistant Director.
>
> (iii) To collect chanks caught in nets and by means of diving as well. In the process of such collection of shells not to fish chank shells less than 2/1/4 inches in diameter and if any chank shells less than 2/1/4 inches in diameter be brought inadvertently to

shore, to return at once alive to the sea all such undersized shells.

(iv) Not at any time hereafter to transfer or underlet or part with possession of this grant or the rights and privileges hereby granted or any part thereof without the written consent of the lessor.

(v) At the end or sooner determination of the term hereby created peaceably and quietly to yield to the lesson the rights and privileges hereby granted, and

(vi) To report to the Assistant Director of Pearl and Chank Fisheries (South), Tuticorn the actual number of shells kept unsold in different stations after the expiry of the lease period.

For the assessment year 1946-47, the respondent firm submitted a return of its income to the Income-tax Officer, Karaikudi Circle, showing its income from sale of chanks purchased from divers at Rs. 7194/- by sale of chanks purchased from Government Department at Rs. 23, 588/- and Rs. 2819/- by sale of chanks gathered by themselves (through divers) after deducting Rs. 6111/- being the rent paid to Government under the contract referred to above. It sought to deduct Rs. 6111/- from its profits from business on the ground that this was an expenditure not of a capital nature but wholly and exclusively laid out for the purpose of business under s. 10(2)(xv) of the Income-tax Act. This claim was disallowed by the Income-tax Officer and on appeal by the Appellate Assistant Commissioner. On further appeal to the Appellate Tribunal the respondent firm contended that the decision of the Privy Council in Mohanlal Hargovind v. Commissioner of Income-tax(1)applied to this case inasmuch as the payment was to secure the stockin-trade for its business. The Appellate Tribunal was of the opinion that the Privy Council decision covered the case, but felt itself bound by the decision of the Full Bench of the Madras High Court in K. T. M. T. M. Abdul Kayum Hussain Sahib v. Commissioner of Income-tax, Madras (2). The Tribunal acceded to the demand for a reference to the High Court, and accordingly referred the following question to the High Court for its decision.

"Whether on the facts and circumstances of the case the payment of the sum of Rs. 6111/- made by the assessee under the terms of the agreement entered into with the Director of Industries and Commerce, Madras on 9th November, 1945 was not an item of revenue expenditure incurred in the course of carrying on the business of the assessee and, therefore, allowable under the provisions of section 10 of the Indian Income-tax Act?"

The reference first came before a Division Bench and was then referred to a Full Bench. By its judgment dated April 2, 1953 the Full Bench answered the question in favour of the respondent firm. On a certificate of fitness granted by the High Court the Commissioner of Income-tax, Madras, brought the present appeal to this Court.

In Assam Bengal Cement Co., Ltd. v. The Commissioner of Income-tax (3), this Court referred to the decision in Benarsidas Jagannath. In re.(4) and accepted the following broad principles for the

purpose of discriminating between a capital and a revenue expenditure.

(1) The outlay is deemed to be capital when it is made for the initiation of a business, for extension of a business, or for a substantial replacement of equipment [See Commissioners of Inland Revenue v. Granite City Steamship Company Ltd.(1)]. Such expenditure is regarded as on capital account, for it is incurred not in earning profits but in setting the profit-earning machinery in motion. In my opinion this test does not apply in the present case where no profit- earning machinery was set in motion.

(2) Expenditure may be treated as properly attributable to capital when it 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. [See Atherton v. British Insulated and Helsby Cables Ltd. (2)]. In elucidation of this principle it has been laid down in several decisions that by "enduring" is meant "enduring in the way that fixed capital endures" and it does not connote a benefit that endures in the sense that for a good number of years it relieves the assessee of a revenue payment. In Robert Addie & Sons Collieries Ltd. v. Commissioners of Inland Revenue (3) Lord Clyde formulated the same test in these words:

> "What is 'money wholly and exclusively laid out for the purposes of the trade' in a question which must be determined upon the principles of ordinary commercial trading. It is necessary accordingly to attend to the true nature of the expenditure, and to ask one's self the question, is it a part of the Company's working expenses?-is it expenditure laid out as part of the process of profit- earning?-or, on the other hand, is it a capital outlay?-is it expenditure necessary for the acquisition of property or of rights of a permanent character, the possession of which is a condition of carryin on its trade at all?"

This test was adverted to by the Privy Council in Tata Hydro-Electric Agencies Ltd. v. Commissioner of Income tax(1).In my opinion the application of this test makes it at once clear that the sum of Rs. 6111/- which the respondent firm spent was expenditure laid out as part of the process of profit-earning; it was not a capital outlay, that is, expenditure necessary for the acquisition of property or of rights of a permanent character, the possession of which was a condition of carrying on its trade. Under the contract in question the respondent firm did not acquire any right to immovable property. It acquired no right in the bed of the sea or in the sea. The only right conferred on the respondent firm was the right to fish for, gather and carry away conch shells (in motion under the surface of the sea) of a specified type and size. The respondent firm was under an obligation to return to the sea conch shells less than 2 1/2 inches in diameter. The business of the respondent firm consisted in buying and selling conch shells. No manufacturing process was involved in it. Therefore, the stock- in-trade of the respondent firm was conch shells. It secured this stock-in-trade in many different ways, by purchase from divers, by purchase from Government and private parties, and also by gathering conch shells under the contract in question. In my opinion, the contract into which the respondent firm entered was merely for securing its stock-in-trade. It is indeed true that in considering whether an item of expenditure is of a capital or a revenue nature, one must consider the nature of the concern, the ordinary course of business usually adopted in that concern, and the object with which the expense is incurred. The true nature of the transaction must

be collected from the entire document with reference to all the relevant facts and circumstances. Having regard to the nature of the respondent firm's business and the course adopted by it for carrying it on, it appears to me to be rather far-fetched to hold that by the contract in question the respondent firm acquired property or right of a permanent character, the possession of which was a condition of carrying on its trade. To me it seems that the better view, in a business sense, is that the respondent firm merely acquired by means of the contract its stock-in-trade, rather than a source or enduring asset for producing the stock-in-trade.

It was argued before us, as it was argued in the High Court, that what was acquired in the present case was the means of obtaining the stock- in-trade for the business rather than the stock- in-trade itself. I am unable to accept this argument as correct. The contract entered into by the respondent firm was wholly and exclusively for the purpose of obtaining conch shells, which were its stock-in-trade. As I have stated earlier, the contract granted no interest in the sea, sea bed, or sea water etc. It was simply a contract giving the grantee the right to pick and carry away conch shells of a specified type and size which of course implied the right to appropriate them as its own property. In my opinion, in a case of this nature no distinction can be drawn in a business sense between the right of picking and carrying away conch shells and the actual buying of them. It is not unusual for businessmen to secure, by means of a contract, a supply of raw materials or of goods which form their stock-in-trade, extending over several years for the payment of a lump sum down. Even if the conch shells were stored in a godown and the respondent firm was given a right to go and fetch them and so reduce them into its ownership, it could scarcely have been suggested that the price paid was capital expenditure. I may explain what I have in mind by giving a simple illustration. Take the case of a fisher may who sells fish. Fish is his stock-in- trade. He man buy the fish he requires from other persons; or he may obtain the supply of fish he requires by catching the fish of a specified size and type in particular water over a short period under a contract entered into by him and take them away. I do not think that in a business sense any distinction can be made between the two means of obtaining the stock-in-trade. Both really amount to securing the stock-in-trade rather than acquiring an enduring asset or a permanent right for producing the stock-in-trade. And a business man, like the fisher man in the illustration given above, would indeed be surprised to learn that buying of fish for his business is revenue expenditure whereas catching fish in particular water under a contract entered into by him for the purpose of obtaining his stock-in-trade on payment of a lump sum down, is capital expenditure.

(3) The test whether for the purpose of the expenditure, any capital was withdrawn, or, in other words, whether the object of incurring the expenditure was to employ what was taken in as capital of the business does not arise in the present case and need not be considered.

No different principles were laid down by my learned brethren in their decision in Pringle Industries Ltd. v. Commissioner of Income-tax(1) and so far as that case is concerned, their decision must hold the field. The difficulty and difference of opinion that arise now relate to the application of those principles to the facts of the present case.

One is reminded in this case of what Lord Macmillan said in Tata Hydro-Electric Agencies Ltd. v. Commissioner of Income-tax(2) at page 209:

> "Their Lordships recognise and the decided cases show how difficult it is to discriminate between expenditure which is and expenditure which is not, incurred solely for the purpose of earning profits or gains."

Lord Greene (Master of the Rolls) expressed himself more strongly and adverting to the distinction between capital and income, said:

> "There have been many cases where this matter of capital or income has been debated. There have been many cases which fall upon the borderline: indeed, in many cases it is almost true to say that the spin of a coin would decide the matter almost as satisfactorily as an attempt to find reasons."

[Vide Commissioners of Inland Revenue v. British Salmson Aero Engines Ltd.(1)].

Perhaps, the case before us is not as bad as the cases which the Master of the Rolls had in mind when he made the above observations. It is, however, a truism that each case must turn upon its own facts. Nevertheless the decisions are useful as illustrations of some relevant general principles. The nearest illustration that we can get is the decision of the Privy Council in Mohanlal Hargovind v. Commissioner of Income- tax(2). That decision was binding on the Indian Courts at the time when it was given and as I think that it is still good law and is indistinguishable from the present case, I offer no apology for referring to it in great detail. The facts of that case were these. The assessees there carried on a business at several places as manufacturers and vendors of country-made cigarettes known as bidis. These cigarettes were composed of tobacoo rolled in leaves of a tree known as tendu leaves, which were obtained by the assessees by entering into a number of short term contracts with the Government and other owners of forests. Under the contracts, in consideration of a certain sum payable by instalments, the assessees were granted the exclusive right to pick and carry away the tendu leaves from the forest area described. The assesees were allowed to coppice small tendu plants a few months in advance to obtain good leaves and to pollard tendu trees a few months in advance to obtain better and bigger leaves. The picking of the leaves however had to start at once or practically at once and to proceed continuously. On these essential facts, the Privy Council held that the contracts were entered into by the assessees wholly and exclusively for the purpose of supplying themselves with one of the raw materials of their business, that they granted no interest in land, or in the trees or plants, that under them it was the tendu leaves and nothing but the tendu leaves that were acquired, that the right to pick the leaves or to go on to the land for the purpose was merely ancillary to the real purpose of the contracts and if not expressed would be implied by law in the sale of a growing crop, and that therefore the expenditure incurred in acquiring the raw material was in a business sense an expenditure on revenue account and not on capital, just as much as if the tendu leaves had been bought in a shop. I can find no distinction which would make any difference between the facts of that case and the facts of the present case. Let me compare the essential facts of these two cases and see whether there is any difference.

(1) Two of the contracts were taken as typical of the rest by the Privy Council. One contract was for the period from September 5, 1939 to June 30, 1941 and the other was for the period from October 1, 1938 to June 30, 1941. Thus one of the contracts was for a period of about two years and the other

contract for a period of about three years.

In the case under our consideration the period of the contract is three years. Indeed, there is no vital difference between the periods in the two cases.

(2) In the case before us the contract area is described in a schedule. In the two contracts which were under consideration by the Privy Council the contract area was also indicated in a schedule. The boundaries of the forests in which tendu leaves could be plucked were delimited by the schedule. Same is the case with the contract before us. The contract area in which conch shells of a specified type and size can be picked and gathered is described in a schedule. Such description does not mean that the assessee gets any right other than the right to gather conch shells. In the Privy Council case the assessees were granted no interest in land or in the trees or plants; it was the tendu leaves and nothing but the tendu leaves that were acquired. In the case before us no interest was given in the sea bed or in the sea water or in any of the products thereof. Conch shells of a specified type and size and nothing but such conch shells were acquired by the contract. I do not think that the reference to the coast line off the South Arcot District makes any difference between the present case and the case on which the decision in Mohanlal Hargovind v. Commissioner of Income-tax (1) was rendered. If in the matter of plucking of tendu leaves the expenditure under the contract was, in a business sense, expenditure on revenue account, I fail to see why a similar expenditure for gathering conch shells in motion under the surface of the sea near the coast line should not, in a business sense, be considered as expenditure on revenue account. This aspect of the case was emphasised by their Lordships in the following paragraph:

> "It appears to their Lordships that there has been some misapprehension as to the true nature of these agreements and they wish to state at once what in their opinion is and what is not the effect of them. They are merely examples of many similar contracts entered into by the appellants wholly and exclusively for the purpose of their business, that purpose being to supply themselves with one of the raw materials of that business. The contracts grant no interest in land and no interest in the trees or plants themselves. They are simply and solely contracts giving to the grantees the right to pick and carry away leaves, which of course, implies the right to a appropriate them as their own property."

In the case under our consideration the only right granted to the respondent firm was to take and carry away conch shells of a specified type and size, which of course, implies the right to appropriate them as the respondent firm's own property. The right to go into the sea and cast nets etc. was merely ancillary to the real purpose of the contract.

Nor do I think that the circumstance that the contracts conferred an exclusive privilege or right is a matter of any significance. In Mohanlal Hargovind v. Commissioner of Income-tax (1) the contracts were exclusive and their Lordships stated:

> "It is true that the rights under the contracts are exclusive but in such a case as this that is a matter which appears to their Lordships to be of no significance. These

observations are as apt in their application to the present case as they were in the case before their Lordships of the Privy Council.

(3) The Privy Council draw a distinction between cases relating to the purchase or leasing of mines, quarries, deposits of brick earth, land with standing timber etc. On one side and the case under its consideration on the other. It referred to the decision in Alianza Co. v. Bell(1) and said:

"....the present case resembles much more closely the case described and distinguished by Channell, J. at page 673 of the report in Alianza Co. v. Bell of the cost of material worked up in a manufactory. That side the learned Judge, is a current expenditure and does not become `a capital expenditure merely because the material is provided by something like a forward contract, under which a person for the payment of a lump sum down secures a supply of the raw material for a period extending over several years'."

In Kauri Timber Co. Ltd. v. Commissioner of Taxes(2) the company's business consisted in cutting and disposing of timber. It acquired in some cases timber bearing lands, in other cases it purchased the standing timber. The leases were for 99 years. So far as the cases where the land was acquired were concerned there could have been no doubt that the expenditure made in acquiring it was capital expenditure. In the case of the purchase of the standing timber what was acquired was an interest in land. The purchasers bought the trees which they could allow to remain standing as long as they liked. It was pointed out that so long as the timber at the option of the company remained upon the soil, it derived its sustenance and nutriment from it. The additional growths became ipso jure the property of the company. In these circumstances it was held that the expenditure was capital expenditure. In the case before us some reliance was placed by the appellant on the term that shells less than 2 1/4 inches in diameter brought inadvertently to shore had to be returned at once alive to the sea.

The argument was that such shells might later grow in size by receiving sustenance and nutriment from sea water and could be later gathered by the respondent firm when they reached the size of 2 1/4 inches in diameter or more. This, it was argued, brought the present case nearer the decision in Kauri Timber case (1). I am unable to agree. It is to be remembered that live shells move under the surface of the sea and they do not remain at the same place, as trees do. A shell less than 2 1/4 inches in diameter returned alive to the sea may move away from the contract area and may never be gathered by the respondent firm. In these circumstances the appellant is not entitled to call to his aid the test of "further vegetation" or "sustenance and nutriment" referred to in the Kauri Timber case (1).

From whatever point of view we may look at the case, it seems to me that the facts of the present case are indistinguishable from those of the case in Mohanlal Hargovind v. Commissioner of Income-tax(2) In Mohanlal Hargovind's case (2) the right was to pluck tendu leaves; in our case the right was to gather conch shells of specified type and size. This distinction, it is obvious, makes no difference. In the High Court it was contended on behalf of the appellant that Mohanlal Hargovind's

case (2) related to the acquisition of raw materials whereas the present case relates to the acquisition of "chanks" by a dealer who sells them without subjecting them to any manufacturing process, and this distinction, it was contended, made the decision in Mohanlal Hargovind's case (2) inapplicable to the present case. The High Court rejected this contention and in my opinion rightly. I agree with the High Court that on principle and in a business sense, there is no distinction between acquiring raw materials for a manufacturing business and acquiring or purchasing goods by a dealer for the purpose of sale, particularly when there is no question of any excavation etc., in order to win the goods and make such goods parts of the stock-in-trade, a point which weighed with the Court of Appeal in Stow Bardolph Cravel Co. Ltd. v. Poole (1) and with my learned brethren in Pingle Industries Ltd. V. Commissioner of Income-tax (2). No such point is present in this case. I have been unable to find any other distinction between the two cases which would make a difference in the application of the principles for discriminating between capital expenditure and revenue expenditure.

To adopt again the language of Lord Green, I see no ground in principle or reason for differentiating the present case from the case in Mohanlal Hargovind v. Commissioner of Income-tax (3).

On behalf of the respondent firm a further question was agitated, namely, whether an allowance for the cost of gathering the conch shells by nets etc., should not be given, even though the rent paid under the contract was not allowable, under s. 10 (2) (xv) of the Income-tax Act and a reference was made in this connection to the decision in Hood Barrs v. Commissioners of Inland Revenue (4). I do not think that we are concerned with that matter in the present appeal. The only question which arises for decision is the one referred to the High Court. I have held that the High Court correctly answered the question which related to the payment of the sum of Rs. 6111/- only. The question having been correctly answered by the High Court, the appeal fails and must be dismissed with cost.

HIDAYATULLAH, J.-This appeal was heard with Pingle Industries, Ltd., Secunderabad v. The Commissioner of Income-tax (5), in which judgment was delivered by us on April 26 1960. In accordance with the decision in Pingle Industries case (1), this appeal was allowed. Later, a review petition of (No. 16 of 1960) was filed on the ground that this appeal was not governed by the decision in Pingle Industries case (1), and that as it was not fully argued, it should be reheard. It is unnecessary to go into the reasons why the rehearing was granted, except to say that there was perhaps a misunderstanding about the concessions made by counsel. We were, therefore, satisfied that we should grant the rehearing, and have since heard full arguments in this appeal.

K. T. M. T. M. Abdul Kayoom and Hussain Sahib (respondent) is a registered firm, and carries on business in conch shells locally known as "chanks", which are found on the bed of the sea all along the coast-line abutting on the South Arcot District. The respondent took on lease from the Director of Industries and Commerce, Madras "the exclusive right, liberty and authority to take and carry away all chanks founnd in the sea"

> for a period of three years ending on June 30, 1947. The consideration was Rs. 6, 111/- per year payable in advance. For the year of assessment, 1946-47 (the year of account ending June 30, 1945) the respondent in showing its profits from business

sought to deduct Rs. 6,111/- on the ground that this was an expenditure not of a capital nature but wholly and exclusively laid out for the purpose of business under s. 10 (2) (XV) of the Income-tax Act. This claim was disallowed by the Income-tax Officer, and on appeal, by the Appellate Assistant Commissioner. On further appeal to the Appellate Tribunal, the respondent contended that the ruling of the Privy Council in Mohanlal Hargovind's case (2) applied to the case, inasmuch as the payment was to secure the stock- in-trade for its business. The Appellate Tribunal, though it was of opinion that the Privy Council case applied, felt itself bound by the earlier Full Bench decision of the Madras High Court in K.T.M.T.M. Abdul Kayoom Hussain Sahib v. Commissioner of Income-tax, Madras (1) relating to this respondent, and dismissed the appeal. The Tribunal, however, acceded to a demand for a case, and referred the following question to the High Court for its decision :

"Whether on the facts and circumstances of the case the payment of the sum of Rs. 6,111- made by the assessee under the terms of the agreement entered into with the Director of Industries and Commerce, Madras, on 9th November 1945 was not an item of revenue expenditure incurred in the course of carrying on the business of the assessee and, "therefore, allowable under the provisions of section 10 of the Indian Income-tax Act".

The reference went before a Divisional Bench, which referred the case for decision of a Full Bench. The Full Bench held that the case was covered by the Privy Council case above referred to, observing:

"In our opinion, the facts in the case before the Judicial Committee are indistinguishable from the facts of the present case. In one case, the leaves had to be picked from trees by going upon the land, while in the other case the chanks had to be collected and gathered by dividing into the sea. It is impossible to construe the documents in the present case as conferring any interest in that portion of the sea from which the exclusive right of winning the chanks was conferred upon the assessee."

The High Court also did not see any difference between raw materials acquired for a manufacturing business and the acquisition of chanks in the present case, and held that the chanks were acquired as the stock-in-trade of the respondent and the transaction was tantamount to purchase of goods, The High Court, however, certified the case as fit for appeal, and the Commissioner of Income-tax has filed this appeal.

The material terms of the agreement in the case are as follows :

"1. The lessor hereby grants unto the lessees the full free and exclusive right, liberty and authority to fish or take and carry away all chank shells in the sea off the coast line of the South Arcot District including the French Kuppams of Pondicherry more particularly described in the schedule hereto to hold the premises to the lessees from

the first day of July 1944 for a period of three years ending 30th June 1947 paying therefor the yearly rent of Rs. 6, 111 (rupees six thousand one hundred and eleven only) to be paid yearly in advance, the first payment to be made within fifteen days from the date of intimation of acceptance and the second and third payments to be made on or before the 15th June 1945 and 1946, respectively at the Government Treasury at Tuticorin or Madras.

x x x

3. The lossee hereby covenants with the lessor as follows :-

x x x

(ii) To deliver to the Assistant Director of Pearl and Chank Fisheries, Tuticorin all Velampuri shells that may be obtained by the lessees upon payment of their value as determined by the Assistant Director.

(iii) To collect Chanks in nets and by means of diving as well. In the process of such collection of shell not to fish chank shells less than 2 1/4 inches in diameter if any chank shells less than 2 1/4 inches in diameter be brought inadvertently to shore, to return at once alive to the sea all such undersized shells.

(iv) Not at any time hereafter to transfer or underlet or part with possession of this grant or the rights and privileges hereby granted or any part thereof without the written consent of the lessor.

x x x

(vi) To report to the Assistant Director of Pearl and Chank Fisheries (South), Tuticorin the actual number of shells kept unsold in different stations after the expiry of the lease period."

An analysis of the agreement shows that the respondent obtained an exclusive right to fish for "chanks" by the method of diving and nets and to appropriate them except those below 2 inches in diameter, which had to be returned alive to the sea and Velampuri shells which had to be sold compulsorily to Government. The respondent had also to report to its lessors at the end of the term, the number of shells not sold. The right was exclusive, but was not capable of being transferred or underlet, and it was for a fairly long period. The coast line involved was also fairly long.

There is no doubt that the payment of Rs. 6,111/- was an expenditure wholly and exclusively for the purpose of the business of selling shells, just as the payment to the divers and other sundry expenses were. But an expenditure for the purpose of the business may be of a capital nature, and if it is so, it cannot be claimed as a deduction. The question is whether this payment was of a capital nature.

What is attributable to capital and what, to revenue has led to a long string of cases here and in the English Courts. The decisions of this Court reported in Assam Bengal Cement Co., Ltd. v. Commissioner of Income-tax and Pingle Industries case (1) have considered all the leading cases, and have also indicated the tests, which are usually applied in such cases. It is not necessary for us to cover the same ground again. Further, none of the tests is either exhaustive or universal. Each case depends on its own facts, and a close similarity between one case and another is not enough, because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo * by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, its broad resemblance to another case is not at all decisive. What is decisive is the nature of the business, the nature of the expenditure, the nature of the light acquired, and their relation inter se, and this is the only key to resolve the issue in the light of the general principles, which are followed in such cases.

A trader may spend money to acquire his raw materials, or his stock-in-trade, and the payment may often be on revenue account but not necessarily. A person selling goods by retail may be said to be acquiring his stock-in-trade when he buys such goods from a wholesaler. But the same cannot be said of another retailer who buys a monopoly right over a long period from a producer of those goods. The amount, he pays to secure the monopoly, through a part of the expenditure to secure his stock-in-trade is not of the same character as the price he pays in the first illustration. By that payment, he secures an enduring advantage and an asset which is a capital asset of his business. In the same way, if a manufacturer buys his raw materials he makes a revenue expenditure, but when he acquires a source from which he would derive his raw materials for the enduring benefit of his business, he spends on the capital side. Thus, a manufacturer of wollen goods buys his wool buys his raw materials, but when he buys a sheep farm, he buys a capital asset. There is then no difference between purchase of a factory and the purchase of the sheep farm, because both are capital asset of enduring nature.

The respondent in this case has tried to distinguish Pingle Industries case (1) and to bring its case within the ruling of the Privy Council in Mohanlal Hargovind's case (2). When the former case was argued, the attempt was to bring it also within the rule of the Privy Council, but now, the differences between the two cases are recognised and Pingle Industries case (1) is said to be entirely different. In deciding the present appeal, it is hardly necessary to do more than analyses once again the facts and circumstances of these two cases to show why those two cases were differently decided, and the present case will then be easily disposed of, not on its similarity to another but on its own facts. We shall begin with the Privy Council.

Mohanlal Hargovind and Co., was a firm of bidi manufacturers, which needs tendu leaves in which tobacco is wrapped to make bidis. Tendu leaves were thus the raw material of the business. Tendu leaves can be bought from dealers who sell tendu leaves in a large way. Now, what did the firm do ? It took leaves of forests with a right to pick the leaves. This right carried with it the right to coppice small tendu plants and to pollard the tendu trees. There was, however, no right in the trees or the land and the right to go over the land was merely ancillary. Looked at from the point of view of business, there was no more than a purchase of the leaves, and the leaves were needed as raw materials of the business. In deciding the case, the Judicial Committee discounted the right to

coppice small tendu plants and to pollard the tendu trees as a very insignificant right of cultivation necessary to improve the quality of the leaves, but which right ranked no higher than the right to spray a fruit tree. The right of entry upon the land was also considered ancillary to the main purpose of the contract, which was acquisition of tendu leaves and tendu leaves alone, and it was observed that even if this right of going on the land and plucking the leaves was not expressed in the contract, it would have been implied by law. Their Lordships then observed that the High Court diverted its view from these points, and attached too much importance to cases decided upon quite different facts. They then observed that "cases relating to the purchase or leasing of mines, quarries, deposits of brick earth, land with standing timber...." were of no assistance, and concluded:

> "If the tendu leaves had been stored in a merchant's godown and the appellants had bought the right to go and fetch them and so reduce them into their possession and ownership it could scarcely have been suggested that the purchase price was capital expenditure. Their Lordships see no ground in principle or reason for differentiating the present case from that supposed." (p. 478) That case thus involved no right in land or trees; the licence to be on the land was merely an accessory right; the right of cultivation was insignificant. The term was short, and the collection of leaves was seasonal. Leaves once collected, the operation pro tempore was over till the fresh crop came. There was thus no acquisition of an enduring asset in the way capital endures; it was more a purchase of crops of two or three successive years shewered on an agreement to ensure the supply of raw materials, Contrast this with the facts of Pingle Industries case (1). The business of the assessee there, was selling stone slabe called flag stones. These stones were first won from the quarries and then dressed and shaped and then sold. Now, what did the assessee do ? It took leases of stone quarries in a large number of villages for twelve years. Primarily, this was done to obtain stones for its business. It could have been a contract by which it would have been entitled to so many cubic feet of stones to be extracted in a particular period. It took long-term leases of vast areas in several villages to ensure supplies for a considerable time. The leases were not limited by quantity, nor did they refer to any stones in particular. It could take all or it could take none; but it could not have carried away all the stones, if the supply outran its efforts. The stones were embedded in earth, layer upon layer, and had to be systematically extracted. Till the stones at the top were removed, it could not remove those at the bottom, and there were still more layers further below. In there circumstances, no specific quantity having been bought or sold either expressly or impliedly, the stones being immovable property or a part thereof and the contract being long-teem contracts, Mohahlal Rargovind's case (2) was held inapplicable, and it was held that the assessee in Pingle Industries case (1) had acquired an enduring asset and the expenditure was on capital account.
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> These cases between them show adequately the dividing line, which exists between capital expenditure and revenue expenditure. To determine on which side of the line the particular expenditure falls, one may often put himself the question posed by Lord Clyde in Robert Addie and Sons Collieries Ltd. v. Commissioners Inland Revenue (3) "It it part of the Company's working expenses, is it expenditure laid out

> as part of the process of profit earning ? -or, on the other hand, is it capital outlay, is it expenditure necessary for the acquisition of property or of rights of a permanent character, the possession of which is a condition of carrying on its trade at all?"

The same question was again posed by the Judicial Committee in Tata Hydro-Electric Agencies, Ltd. v. Commissioner of Income-tax (1). The answer to this question in each of the two case of Mohanlal Hargovind (2) and Pingle Industries (3) is entirely different. The difference can be noticed easily, if we were to read here what Channell, J. said in Alianza Co. Ltd. v. Bell (4):

> "In the ordinary case, the cost of the material worked up in a manufactory is not a capital expenditure, it is a current expenditure and does not become a capital expenditure merely because the material is provided by something like a forward contract, under which a person for the payment of a lump sum secures a supply of the raw material for a period extending over several years.....If it is merely a manufacturing business, then the procuring of the raw material would not be a capital expenditure. But if it is like the working of a particular mine, or bed of brick earth and converting the stuff into a marketable commodity, then, the money paid for the prime cost of the stuff so dealt with is just as much capital the money sunk in machinery or buildings."

The first part of the observation is applicable to Mohanlal Hargovind's case (2) and the latter part, to Pingle Industries case (3). What is said of a manufacturing concern is equally applicable to a non-manufacturing business. It is the quality of the payment taken with what is obtained, that is decisive of the character of the payment.

We may now pass on to the facts of the case before us. The respondent carried on the business of selling chanks. It obtained its supplies from divers, from whom it purchased the chanks, and having got them, perhaps cheap, it resold them at a profit. This is one mode in which it carried on its business. In this business, it was directly buying its stock-in-trade for resale. The other method was to acquire exclusive right to fish for chanks by employing divers and nets. The business then changed to something different. The sale was now of the product of another business, in which divers and equipment were first employed to get the shells. It thus took leases of extensive coastline with all the right to fish for chanks for some years. The shells were not the subject of the bargain at all, as were the tendu leaves; but the bargain was about the right to fisht. There can be no doubt that what it paid the divers when it bought chanks from them with the view of reselling them was expenditure laid out wholly and exclusively for the purpose of its business, which was not of a capital nature. That business was buying goods and reselling them at a profit. But a different kind of business was involved when it went in for fishing for chanks. To be able to fish for chanks in reserved waters it had to obtain the right first. It, therefore took lease of that right. To Mohanlal Hargovind, the leaves were raw materials, and that firm preferred to buy a number of crops over years rather than buy them as it went along. Hence the remark that the leaves were bought, as if they were in a shop.

Under the lease which the respondent obtained, it had a right to take only chanks of particular dimensions and shape, but it had to fish for them and obtain them first. The rest of the chanks were not its property. The smaller chanks had to be returned alive to the sea, and Velampuri chanks had to be compulsorily sold to the state. Of Course, the smaller chanks put back into the sea would grow, and if fished later, be its property to take, but till they grow, it had not claim. The chanks were on the bed of the sea. Their exact existence was not known, till the divers found them, or they got netted. Chanks which were there one day might have been washed back into the deep sea, and might never be washed back into a place where they would be within reach. Similarly, other chanks not there one day might come within reach on another day. All these matters make the case entirely different from the case of a purchase from the divers. In obtaining the lease, the respondent obtained a speculative right to fish for chanks which it hoped to obtain and which might be in large quantities or small, according to its luck. The respondent changed the nature of its business to fishing for chanks instead of buying them. To be able to fish, it had to arrange for an area to fish, and that arrangement had to be of some duration to be effective.

This is not a case of so much clay or so much salt petre or a dump of tailings or leaves on the trees in a forest. The two modes in which the respondent did the business furnish adequate distinguishing characteristics. Here is an agreement to reserve a source, where the respondent hoped to find shells which, when found, became its stock-in-trade but which, insitu, were no more the firm's than a shell in the deepest part of the ocean beyond the reach of its divers and nets. The expenses of fishing shells were its current expenses as also the expenses incurred over the purchase of shells from the divers. But to say that the payment of lease money for reserving an exclusive right to fish for chanks was on a par with payments of the other character is to err. It was possible to say of the former, as it was possible to say of the tendu leaves in Mohanlal Hargovind's case (1), that the chanks were bought because the money paid was the price of the chanks. But it would be a straining of the imagination to say that the amount paid for reserving the coastline for future fishing was the price of chanks, with which the respondent did its business. That amount was paid to obtain an enduring asset in the shape of an exclusive right to fish, and the payment was not related to the chanks, which it might or might not have brought to the surface in this speculative business. The rights were not trasferable, but if they were and the firm had sold them, the gain, if any, would have been on the capital side and not a realising of the chanks as stock in-trade, because none had been bought by the firm, and none would have been sold by it.

In our opinion, the decision of the High Court, with all due respect, was, therefore, erroneous, and the earlier decision of the Full Bench of the same High Court was right in the circumstances of the case.

In the result, the appeal is allowed; but there will be no order about cost.

BY COURT. In accordance with the majority judgment of the Court, the appeal is allowed, but there will be no order about costs.