Empire Jute Co. Ltd vs Commissioner Of Income Tax on 9 May, 1980

Equivalent citations: 1980 AIR 1946, 1980 SCR (3)1370, AIR 1980 SUPREME COURT 1946, 1980 4 SCC 25, 1980 TAX. L. R. 1092, 1980 SCC (TAX) 335, (1980) 17 CURTAXREP 113, 1980 (124) ITR 1, 1980 57 TAXATION 88, (1980) 3 TAXMAN 69

Author: P.N. Bhagwati

Bench: P.N. Bhagwati, V.D. Tulzapurkar, R.S. Pathak

PETITIONER:
EMPIRE JUTE CO. LTD.

Vs.

RESPONDENT:
COMMISSIONER OF INCOME TAX

DATE OF JUDGMENT09/05/1980

BENCH:
BHAGWATI, P.N.
BENCH:
BHAGWATI, P.N.
TULZAPURKAR, V.D.
PATHAK, R.S.

CITATION:
1980 AIR 1946 1980 SCR (3)1370
1980 SCC (4) 25
CITATOR INFO :
E 1981 SC 395 (3)
RF 1987 SC 798 (11)
R 1989 SC1913 (14)
F 1991 SC 227 (12)

ACT:
Allowing deduction under section 10(2) (xv) of the Income Tax Act-Revenue expenditure and Capital expenditure-Member of the Jute Mill Association entering into a working time agreement restricting the number of working hours per week for which the mills shall be entitled to work their looms, and also providing for transfer of such working hours between one mill and another amongst a particular group of Mills-Transfer styled as sale of loom hours-Whether the purchase revenue expenditure or capital expenditure for the

purposes of Section 10(2) (xv) of the Act.

HEADNOTE:

Right from 1939, the demand of jute in the world market was rather lean and with a view to adjusting the production of the jute mills to the demand of the world market, various jute mills formed an Association styled as Indian Jute Mills Association and the appellant is one such member of the said Association. As per the objects of the Association a quinquenniel working time agreement was entered into between the members of the Association restricting the number of working hours per week, for which the mills shall be entitled to work their looms. The fourth working time Agreement was entered into between the members of the Association on 9th December, 1954 and it was to remain in force for a period of five years from 12th December 1954. As per the first clause of the fourth working time Agreement no signatory shall work more than forty five hours of work per week subject to alteration in accordance with the provisions of clauses 7(1)(2) and (3) and further subject inter alia to the provision of clause (10) and under that clause, a joint and several agreement could be made providing that throughout the duration of the working time agreement, members with registered complements of loom not exceeding 220 shall be entitled to work upto seventy two hours per week. Clause 6(a) enabled members to be registered as a "Group of Mills" if they happened to be under the control of the same managing agents or were combined by any arrangement or agreement and it was open to any member of the Group Mills so registered to utilise the allotment of hours of work per week of other members in the same group who were not fully utilising the hours of work allowable to them under the working time agreement, provided such transfer of hours of work was for a period not less than six months. Clause 6(b) further (J prescribed three other conditions precedent subject to which the allotment of hours of work transferred by one member to another could be utilised by the latter and two of them were: (i) All agreements to transfer shall, as a condition precedent to any rights being obtained by transferee, be submitted with an explanation to the Committee and Committee's decision . . . whether the transfer shall be allowed shall be final and conclusive and (ii) If the Committee sanctions the transfer, it shall be a condition precedent to its utilisation that a certificate be issued and the transfer registered. This transaction of transfer of allotment of hours of work per week was commonly referred to as sale of looms hours by one member to another. The consequence of such

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transfer was that the hours of work per week transferred by a member were liable to be deducted from the working hours

per week allowed to such member under the working time agreement and the member in whose favour such transfer was made entitled to utilise the number of working hours per week transferred to him in addition to the working hours per week allowed to him under the working time agreement.

The assessee, under this clause purchased loom hours from four different jute manufacturing concerns which were signatories to the working time agreement, for the aggregate sum of Rs. 2,03,255/- during the year 1st August 1958 to 31st July 1959. In the course of the assessment year 1960-61 for which the relevant accounting year was the previous year 1st August 1958 to 31st July 1959, the assessee claimed this amount of Rs. 2,03,255/- as revenue expenditure on the ground that it was part of the cost of operating the looms which constituted the profit making apparatus of the assessee. The. claim was disallowed by the Income Tax officer, but on appeal, the Appellate Assistant Commissioner accepted the claim and allowed the deduction on the view that the assessee did not acquire any capital asset when it purchased the loom hours and the amount spent by it was incurred for running the business of working it with a view to producing day-to-day profits and it was part of operating cost or revenue cost of production. The Revenue preferred an appeal to the Tribunal, and, having lost before it, carried the matter before the High Court by a reference. The High Court, following the decision of the Supreme Court in Commissioner of Income Tax v. Maheshwari Devi Jute Mills Ltd., [1966] 57 ITR 36 held that the amount paid by the assessee for purchase of the loom hours was in the nature of capital expenditure and was therefore not deductible under section 10(2) (xv) of the Income Tax Act. Hence the appeal by assessee by special leave.

Allowing the appeal, the Court

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HELD: 1. An expenditure incurred by an assessee can qualify for deduction under section 10(2)(xv) only if it is incurred wholly and exclusively for the purpose of his business, but even if it fulfills this requirement, it is nob enough; it must further be of revenue as distinguished from capital nature

2. Maheshwari Devi Jute Mills' case was a converse case where the question was whether an amount received by the assessee for sale of loom hours was m the nature of capital receipt or revenue receipt and the Supreme Court took the view that it was in the nature of capital receipt and hence not taxable. The decision in Maheshwari Devi Jute Mills' case cannot on this account be regarded as an authority for the proposition that payment made by an assessee for purchase of loom hours would be capital expenditure, because it is not a universally true proposition that what may be capital receipt in the hands of the payee must necessarily be capital expenditure in relation to the payer. The fact that a certain payment constitutes income or capital receipt

in the hands of a recipient is not material in determining whether the payment is revenue or capital disbursement qua the payer. Whether it is capital expenditure or revenue expenditure would have to be determined having regard to the nature of the transaction and other relevant factors. [1378 G-H, 1379 A-D] H

Race Course Betting Control Board v. Wild, 22 Tax Cases 182. quoted with approval.

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3. Again, Maheshwari Devi Jute Mills' Case proceeded on the accepted basis that loom hours were a capital asset and the only issue debated was whether the transaction in question constituted sale of this asset or it represented exploitation of the asset by permitting its user by another while retaining ownership. No question was raised before the Court as to whether tho loom hours were an asset at all nor was any argument advanced as to what was the true nature of the transaction. This question is res integra and therefore this decision cannot be regarded as an authority for the proposition that The amount paid for purchase of loom hours was capital and not revenue expenditure. [1379 E, 1380 F]

4. It is quite clear from the terms of the working time agreement that the allotment of loom hours to different mills constituted merely a contractual restriction on the right of every mill under the general law to work its looms to their full capacity. If there had been no working time agreement, each mill would have been entitled to work its looms uninterruptedly for twenty four hours a day throughout the week, but that would have resulted in production of jute very much in excess of the demand in the world market, leading to unfair competition and precipitous fall in jute price and in the process, prejudicially affecting all the mills and therefore with a view to protecting the interest of the mills who were members of the Association, the working time agreement was entered into restricting the number of working hours per week for which each mill could work its looms. The allotment of working hours per week under the working time agreement was clearly not a right conferred on a mill, signatory to the working time agreement. It was rather a restriction voluntarily accepted by each still with a view to adjusting the production to the demand in the world market and this restriction could not possibly be regarded as an asset of such mill. This restriction necessarily had the effect of limiting the production of the mill and consequentially also the profit which the mill could otherwise make by working full looms hours. But a provision was made in clause 6(b) of the working time agreement that the whole or a part of the working hours per week could be transferred by one mill to another for a period of not less than six months and if such transfer was approved and registered by the Committee of the Association, the transferee mill would be entitled to utilise the number of working hours per week transferred to

it in addition to the working hours per week allowed to it under the working time agreement, while the transferor mill could cease to be entitled to avail of the number of working hours per week so transferred and those would be liable to be deducted from the number of working hours per week otherwise allotted to it. The purchase of loom hours by a mill had therefore the effect of relating the restriction on the operation of looms to the extent of the number of working hours per week transferred to it, so that the transferer mill could work its looms for longer hours than permitted under the working time agreement and increase is profitability. The amount spent on purchase of looms hours thus represented consideration paid for being able to work the looms for a longer number of hours. Such payment for the purchase of loom hours cannot be regarded as expenditure on capital account. [1380 F-H, 1381 A-E]

6. The decided cases have, from time to time, evolved various tests for distinguishing between capital and revenue expenditure but no test is amount or conclusive. There is no all embracing formula which can provide a ready solution to the problem; no touchstone has been devised. Every case has to be decided on its own facts keeping in mind the broad picture of the whole

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Operation in respect of which the expenditure has been incurred. Two of these tests are:

(a) The test of enduring benefit as laid down in British Insulated and . Helsby Cables Ltd. v. Atherton, 10 Tax Cases 155. Even this test must yield were there are special circumstances leading to a contrary decision There may be cases where expenditure, even if incurred for obtaining advantage of enduring benefit, may, none-the-less, be on revenue account and the test one during benefit may break down. It is not every advantage of enduring nature acquired by an assesses that brings the case within the principle laid down in this test. What is material to consider is the nature of the advantage in a commercial sense. that it is only where the advantage is in the capital field that the expenditure would be disavowable on an application of this test. If the advantage consists merely in facilitating the assesses's trading operations or enabling the management and conduct of the assesses's business to be carried on more efficiently or more profitably while leaving the filed capital untouched. the expenditure would be on revenue account, even though tho advantage may endure for an indefinite future. The test of enduring benefit in therefore not a certain or conclusive test and it cannot be applied blindly and mechanically without regard to the particular facts and circumstances off a given case. [1381 E-G, 1382 A-E]

commissioner of Taxes v. Nchanga Consolidated Copper Mines Ltd., [1965] 58 ITR 241 followed.

(b) The test based on distinction between fixed and

circulating capital as applied in John Smith and Sons v. Moore, 12 Tax Cases, 266. So long as tho expenditure in question can be clearly referred to the acquisition of an asset which falls within one or the other of these two categories such a test would be a critical one. But this test also sometimes breaks down because there are many forms of expenditure which do not fall easily within these two categories and not infrequently, the line of demarcation is difficult to draw and leads to subtle distinctions between profit that is made "out of" assets and profit that is made "upon" assets or "with" assets. Moreover, there may be cases where expenditure though referable to or in connection with fixed capital is nevertheless allowable as revenue expenditure e.g. expenditure incurred in preserving or maintaining capital assets. This test is therefore clearly not one of universal application. [1383 A-D]

Commissioner of Taxes v. Nchanga Consolidated Copper Mines LTD [1965]58 ITR 241; followed.

6. It is true that if disbursement is made for acquisition of a source of profit or income, it would ordinarily be in the nature of capital expenditure But it cannot be said in the present case that the assesses acquired a source d profit or income when it purchased loom hours. The source of profit or income was the profit making apparatus and this remained untouched and unaltered, There was no enlargement of the permanent structure of which the income would be the produce or fruit. What the assesses acquired wag merely an advantage in the nature of relation of restriction on working hours imposed by the working time agreement, so that the assesses could operate its profit earning structure for a longer number of hours. Undoubtedly the profit earn-

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ing structure of the assesses was enabled to produce more goods, but that was not because of any addition or augmentation in the profit making structure but because the profit making structure could be operated for longer working hours. The expenditure incurred for this purpose was primarily and essentially related to the operation or working of the looms which constituted the profit earning apparatus of the assesses. It was an expenditure for operating or working the looms for longer working hours with a view to producing a larger quantity of goods and earning more income and was therefore in the nature of revenue expenditure. [1384 A-D]

7. When dealing with cases where the question is whether expenditure incurred by an assesses is capital or revenue expenditure, the question must be viewed in the larger context of business necessity or expediency. If the outgoing expenditure is so related to the carrying on or the conduct of the business that it may be regarded as an internal part of the profit-earning process and not for acquisition of an asset or a right of a permanent character.

the possession of which is a condition of the carrying on of the business, the expenditure may be regarded as revenue expenditure. [1384 H, 1385 A-C

Nelletroms' Property Ltd. v. Federal Commr. Of Taxation, 72 CLR 634; Robert Addis & Sons Collieries Ltd. v. Inland Revenue 8 Tax Case, 671 quoted with approval.

Bombay Steam Navigation Co. P. Ltd. v. Commissioner of Income Tax, [1953] 55 ITR 52; followed.

9. In the instant case

(a) the payment made by the assesses for the purchase of loom hours was expenditure laid out as part of the process of profit earning. It was an outlay of a business in order to carry it on and to earn profit out of the expense as an expense of carrying it on. It was part of the cost of operating the profit earning apparatus and was clearly in the nature of revenue expenditure; and [1385 D-E

(b) the payment of Rs. 2,03,255/- made by the assesses for purchase of loom hours represented Revenue expenditure and was allowable as a deduction under section 10(2) (xv) of the Income Tax Act. [1387 C-D]

Commissioner of Income Tax v Nchanga Consolidated Copper Mines ltd.. [1965] 58 ITR 241; Commissioner of Taxes v. Curron Company 45 Tax Cases 18; followed.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1 197 (NT) of 1974.

Appeal by Special Leave from the Judgment and order dated 3-8-1973 of the Calcutta High Court in Income Tax Reference No. 109 of 1968.

D. Pal, T. A. Ramachandran & D. N. Gupta for the Appellant.

S. T. Desai, B. B. Ahuja & Miss A. Subhashini for the Respondent.

The Judgment of the Court was delivered by BHAGWATI, J.-This appeal by special leave raises the vexed question whether a particular expenditure incurred by the assessee is of capital or revenue nature. This question has always presented a difficult problem and continually baffled the courts, because it has not been possible, despite occasional judicial valour, to formulate a test for distinguishing between capital and revenue expenditure which will provide an infallible answer in all situations. There have been numerous decisions where this question has been debated but it is not possible to reconcile the reasons given in all of them, since each decision has turned upon some particular aspect which has been regarded as crucial and no general principle can be deduced from any decision and applied blindly to a different kind of case where the constellation of facts may be dissimilar and other factors may be present which may give a different hue to the case. Often cases fall in the border line and in such cases, as observed by Lord M. R. in Inland Revenue v. British Salmon Ero Engines Ltd.(1) "the spin of coin would decide The matter almost as satisfactorily as an

attempt to find persons." But this is not one of those border line cases. The answer to the question here is fairly clear. But first let us state the necessary facts.

The assessee is a limited company carrying on business of manufacture of jute. It has a factory with a certain number of looms situate in West Bengal. It is a member of the Indian Jute Mills Association (hereinafter referred to as the Association). The Association consists of various jute manufacturing mills as its members and it has been formed with a view to protecting the interests of the members. The objects of the Association, inter alia, are (i) to protect, forward and defeat the trade of members; (ii) to impose restrictive conditions on the conduct of the trade; and (iii) to adjust the production of the Mills in the membership of the Association to the demand of the world market. It appears that right from 1939, the demand of jute in the world market was rather lean and with a view to adjusting the production of the mills to the demand in the world market, a working time agreement was entered into between the members of the Association restricting the number of working hours per week, for which the mills shall be entitled to work their looms. The first working time agreement was entered into on 9th January 1939 and it was for a duration of five years and on its expiration, the second and thereafter the third working time agreements, each for a period of five years and in . more or less similar terms, were entered into on 12th June, 1944 and 25th November 1949 respectively. The third working time agreement was about to expire on 11th December, 1954 and since it was felt that the necessity to restrict the number of working hours per week still continued, a fourth working time agreement was entered into between the members of the Association on 9th December 1954 and it was to remain in force for a period of five years from 12th December 1954. We are concerned in this appeal with the fourth working time agreement and since the decision of the controversy before us turns upon the interpretation of its true nature and effect, we shall refer to some of its relevant provisions.

The first clause of the fourth working time agreement (hereinafter referred to as the "working time agreement") to which we must refer is clause (4) which provided that, subject to the provisions of clauses 11 and 12, "..... no signatory shall work more than forty five hours of work per week and such restriction of hours of work per week shall continue in force until the number of working hours allowed shall be altered in accordance with the provisions of Clauses 7(1), (2) and (3)." Clause (5) then proceeded to explain that the number of working hours per week mentioned in the working time agreement represented the extent of hours to which signatories were in all entitled in each week to work their registered complement of looms as determined under clause (13) on the basis that they used the full complement of their loomage as registered with and certified by the committee. This clause also contained a provision for increase of the number of working hours per week allowed to a signatory in the event of any reduction in his loomage. It was also stipulated in this clause that the hours of work allowed to be utilised in each week shall cease at the end of that week and shall not be allowed to be carried forward. The number of working hours per week prescribed by clause (4) was, as indicated in the opening part of that clause, subject inter alia to the provision of clause (10) and under that clause, a joint and several agreement could be made providing that throughout the duration of the working time agreement, members with registered complements of looms not exceeding 220 shall be entitled to work upto 72 hours per week. Clause 6(a) enabled members to be registered as a "Group of Mills" if the happened to be under the control of the same managing agents or were combined by any arrangement or agreement and it was open

to any member of the Group of Mills so registered to utilise the allotment of hours of work per week of other members in the same group who were not fully utilising the hours of work allowable to them under the working time agreement, provided that such transfer of hours of work was for a period of not less than six months. Then followed clause 6(b) which is very material and it provided, inter alia, as follows:-

> "Subject to the provisions of sub-clauses (i) to
>
> (iv)... signatories to this agreement shall be entitled to transfer in part or wholly their allotment of hours of work per week to any one or more of the other signatories; and upon such transfer being duly effected and registered and a certificate issued by the committee, the signatory or signatories to whom the allotment of working hours has been transferred shall be entitled to utilise the allotment of hours of work per week so transferred."

There were four conditions precedent subject to which the allotment of hours of work transferred by one member to another could be utilised by the latter and those of them were as under:

> "(1) No hours of work shall be transferred unless The transfer covers hours of work per week for a period of not less than six months;
>
> (ii) All agreements to transfer shall, as a condition precedent to any rights being obtained by transferees, be submitted with an explanation to the Committee and the Committee's decision.. whether the transfer shall be allowed shall be final and conclusive.
>
> (iii) If the Committee sanctions the transfer, it shall be a condition precedent to its utilisation that a certificate be issued and the transfer registered."

This, transaction of transfer of allotment of hours of work per week was commonly referred to as sale of looms hours by one member to another. The consequence of such transfer was that the hours of work per week transferred by a member were liable to be deducted from the working hours per week allowed to such member under the working time agreement and the member in whose favour such transfer was made was entitled to utilise the number of working hours per week transferred to him in addition to the working hours per week allowed to him under the working time agreement. It was under this clause that the assessee purchased loom hours from four different jute manufacturing concerns which were signatories to the working time agreement, for the aggregate sum of Rs. 2,03,255/- during the year 1st August 1958 to 31st July 1959. In the course of assessment for the assessment year 1960-61 for which the relevant accounting year was the previous year 1st August 1958 to 31st July 1959, the assessee claimed to deduct this amount of Rs. 2,03,255/- as revenue expenditure on the ground that it was part of the cost of operating the looms which constituted the profit making apparatus of the assessee. The claim was disallowed by the Income-tax officer but on appeal, the Appellate Assistant Commissioner accepted the claim and allowed the deduction on the view that the assessee did not acquire any capital asset when it purchased the loom

hours and the amount spent by it was incurred for running the business or working it with a view to producing day-to-day profits and it was part of operating cost or revenue cost of production. The Revenue preferred an appeal to the Tribunal but the appeal was unsuccessful and the Tribunal taking the same view as the Appellate Assistant Commissioner, held that the expenditure incurred by the assessee was in the nature of revenue expenditure and hence deductible in computing the profits and gains of business of the assessee. This view taken by the Tribunal was challenged in a reference made to the High Court at the instance of the Revenue. The High Court too was inclined to take the same view as the Tribunal, but it felt compelled by the decision of this Court in Commissioner of Income Tax v. Maheshwari Devi Jute Mills Ltd.(') to decide in favour of the Revenue and on that view it overturned the decision of the Tribunal and held that the amount paid by the assessee for purchase of the loom hours was in the nature of capital expenditure and was, therefore, not deductible under section 10(2) (xv) of the Act. The assessee thereupon preferred the present appeal by special leave obtained from this Court.

Now an expenditure incurred by an assessee can qualify for deduction under section 10(2) (xv) only if it is incurred wholly and exclusively for the purpose of his business, but even if it fulfils this requirement, it is not enough; it must further be of revenue as distinguished from capital nature. Here in the present case it was not contended on behalf of the Revenue that the sum of Rs. 2,03,255/- was not laid out wholly and exclusively for the purpose of the assessee's business but the only argument was and this argument found favour with the High Court, that it represented capital expenditure and was hence not deductible under section 10(2)(xv). The sole question which therefore arises for determination in the appeal is whether the sum of Rs. 2,03,255/- paid by the assessee represented capital expenditure or revenue expenditure. We shall have to examine this question on principle but before we do so, we must refer to the decision of this Court in Maheshwari Devi Jute Mills case (supra) since that is the decision which weighed heavily with the High Court in fact, compelled it to negative the claim of the assessed and held the expenditure to be on capital account. That was a converse case where the question was whether an amount received by the assessee for sale of loom hours was in the nature of capital receipt or revenue receipt. The view taken by this Court was that it was in the.

nature of capital receipt and hence not taxable. It was contended on A behalf of the Revenue, relying on this decision, that just as the amount realised for sale of loom hours was held to be capital receipt, so also the amount paid for purchase of loom hours must be held to be of capital nature. But this argument suffers from a double fallacy.

In the first place it is not a universally true proposition that what may be a capital receipt in the hands of the payee must necessarily be capital expenditure in relation to the payer. The fact that a certain payment constitutes income or capital receipt in the hands of the recipient is not material in determining whether the payment is revenue or capital disbursement qua the payer. It was felicitously pointed out by Macnaghten, J. in Race Course Betting Control Board v. Wild(') that a "payment may be a revenue payment from the point of view of the payer and a capital payment from the point of view of the receiver and vice versa. Therefore, the decision in Maheshwari Devi Jute Mills' case (supra) cannot be regarded as an authority for the proposition that payment made by an assessee for purchase of loom hours would be capital expenditure. Whether it is capital expenditure

would have to be determined having regard to the nature of the trans action and other relevant factors.

But, more importantly, it may be pointed out that Maheshwari Devi Jute Mills' case (supra) proceeded on the basis that loom hours were a capital asset and the case was decided on that basis. It was common ground between the parties throughout the proceedings, right from the stage of the Income- tax officer upto the High Court, that the right to work the looms for the allotted hours of work was an asset capable of being transferred and this Court therefore did not allow counsel on behalf of the Revenue to raise a contention that loom hours were in the nature of a privilege and were not an asset at all. Since it was a commonly accepted basis that loom hours were an asset or the assessee, the only argument which could be advanced on behalf of the Revenue was that when the assessee transferred a part of its hours of work per week to another member, the transaction did not amount to sale of an asset belonging to the assessee, but it was merely the turning of an asset to account by permitting the transferee to use that asset and hence the amount received by the assessee was income from business. The Revenue submitted that "where it is a part of the normal activity of the assessee's business to earn profit by king use of its asset by either employing it in its own manufacturing concern or by letting it out to others, consideration received for allowing the transferee to use that asset is income received from busi-

ness and chargeable to income tax". The principle invoked by the Revenue was that "receipt by the exploitation of a commercial asset is the profit of the business irrespective of the manner in which the asset is exploited by the owner in the business, for the owner is entitled to exploit it to his best advantage either by using it himself personally or by letting it out to somebody else." This principle, sup ported as it was by numerous decisions, was accepted by the court as a valid principle, but it was pointed out that it had no application in the case before the court, because though loom hours were an asset, they could not from their very nature be let out while retaining property in them and there could be no grant of temporary right to use them. The court therefore concluded that this was really a case of sale of loom hours and not of exploitation of loom hours by permitting user while retaining ownership and, in the circumstances, the amount received by the assessee from sale of loom hours was liable to be regarded as capital receipt and not income. It will thus be seen that the entire case proceeded on the commonly accepted basis that loom hours were an asset and the only issue debated was whether the transaction in question constituted sale of this asset or it represented merely exploitation of the asset by permitting its user by another while retaining ownership. No question was raised before the court as to whether loom hours were an asset at all nor was any argument advanced as to what was the true nature of the transaction. It is quite possible that if the question had been examined fully on principle, unhampered by any pre-determined hypothesis, the court might have come to a different conclusion. This decision cannot, therefore, be regarded as an authority compelling us to take the view that the amount paid for purchase of loom hours was capital and not. revenue expenditure. The question is res integra and we must proceed to examine it on first principle.

It is quite clear from the terms of the working time agreement that the allotment of loom hours to different mills constituted merely a contractual restriction on the right of every mill under the general law to work its looms to their full capacity. If there had been no working time agreement,

each mill would have been entitled to work its looms uninterruptedly for twenty four hours a day throughout the week, but that would have resulted in production of jute very much in excess of the demand in the world market, leading to unfair competition and precipitous fall in jute price and in the process, prejudicially affecting all the mills and therefore with a view to protecting the interest of the mills who were members of the Association, the working time agreement was entered into restricting the number of working hours per week for which each mill could work its looms.

The allotment of working hours per week under the working time k agreement was clearly not a right conferred on a mill, signatory to the working time agreement. It was rather a restriction voluntarily accepted by each mill with a view to adjusting the production to the demand in the world market and this restriction could not possibly be regarded as an asset of such mill. This restriction necessarily had the effect of limiting the production of the mill and consequently also the profit which the mill could otherwise make by working full loom hours. But a provision was made in clause 6(b) of the working time agreement that the whole or a part of the working hours per week could be transferred by one mill to another for a period of not less than six months and if such transfer was approved and registered by the Committee of the Association,, the transferee mill would be entitled to utilise the number of working hours per week transferred to it in addition to the working hours per week allowed to it under the working time agreement, while the transfer of mill would cease to be entitled to avail of the number of working hours per week so transferred and these would be liable to be deduced from the number of working hours per week otherwise allotted to it. The purchase of loom hours by a mill had therefore the effect of relaxing the restriction on the operation of looms to the extent of the number of working hours per week transferred to it, so that the transferee mill could work its looms for longer hours than permitted under the working time agreement and increase its profitability. The amount spent on purchase of loom hours thus represented consideration paid for being able to work the loom for a longer number of hours. It is difficult to see how such payment could possibly be regarded as expenditure on capital account. The decided cases have, from time to time, evolved various tests distinguishing between capital and revenue expenditure but no test is paramount or conclusive. There is no all embracing formula which can provide a ready solution to the problem; no touchstone has been devised. Every case has to be decided on its own facts keeping in mind the broad picture of the whole operation in respect of which the expenditure has been incurred. But a few tests formulated by the court may be referred to as they might help to arrive at a correct decision of the controversy between the parties. One celebrated test is that laid down by Lord Cave, L.C. in British Insulated and Helsby Cables Ltd. v. Atherton(1) where the learned Law Lord stated: "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 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 to capital." This test, as the parenthetical clause shows, must yield where there are special circumstances leading to a contrary conclusion and, as pointed out by Lord Radcliffe in Commissioner of Taxes v. Nechanga Consolidated Copper Mines Ltd.,(1) it would be misleading to suppose that in all cases, securing a benefit for the business would be prima facie capital expenditure "so long as the benefit is not so transitory as to have no endurance at all." There may be cases where expenditure, even if incurred for obtaining advantage of enduring benefit, may, none-the-less, be on revenue account and the test of enduring benefit may break down. lt is not every advantage of enduring nature

acquired by an assessee that brings the case within the principle laid down in this test. What is material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assesse's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. The test of enduring benefit is therefore not a certain or conclusive test and it cannot be applied blindly and mechanically without regard to the particular facts and circumstances of a given case. But even if this test were applied in the present case, it does not yield a conclusion in favour of the Revenue. Here, by purchase of loom hours no new asset has been created. There is no addition to or expansion of the profit making apparatus of the assessee. The income earning machine remains what it was prior to the purchase of loom hours. The assessee is merely enabled to operate the profit making structure for a longer number of hours. And this advantage is clearly not of an enduring nature. It is limited in its duration to six months and, moreover, the additional working hours per week transferred to the assessee have to be utilised during the week. and cannot be carried forward to the next week. It is, therefore, not possible to say that any advantage of enduring benefit in the capital field was acquired by the assessee in purchasing loom hours and the test of enduring benefit cannot help the Revenue.

Another test which is often applied is the one based on distinction between fixed and circulating capital. This test was applied by Lord Haldane in the leading case of John Smith & Son v. Moore(1) where the learned law Lord draw the distinction between fixed capital and circulating capital in words which have almost acquired the status of a definition. He said:

> "Fixed capital (is) what the owner turns to profit by keeping it in his own possession; circulating capital (is) what he makes profit of by parting with it and letting it change masters." Now as long as the expenditure in question can be clearly referred to the acquisition of an asset which falls within one or the other of these two categories, such a test would be a critical one. But this test also sometimes breaks down because there are many - forms of expenditure which do not fall easily within these two categories and not infrequently, as pointed out by Lord Radcliffe in Commissioner of Taxes v. Nchanga Consolidated Copper Mines Ltd. (supra), the line of demarcation is difficult to draw and leads to subtle distinctions between profit that is made "out of" assets and profit that is made "upon" assets or "with" assets. Moreover, there may be cases where expenditure, though referable to or in connection with fixed capital, is never- the less allowable as revenue expenditure. An illustrative example would be of expenditure incurred in preserving or maintaining capital assets. This test is therefore clearly not one of universal application. But even if we were to apply this test, it would not be possible to characterise the amount paid for purchase of loom hours as capital expenditure, because acquisition of additional loom hours does not add at all to the fixed capital of the assessee. The permanent structure of which the income is to be the produce or fruit remains the same; it is not enlarged. We are not sure whether loom hours can be regarded as part of circulating capital like labour, raw material, power etc., but it is clear beyond doubt that they are not part of fixed

capital and hence even the application of this test does not compel the conclusion that the payment for purchase of loom hours was in the nature of capital expenditure.

The Revenue however contended that by purchase of loom hours the assessee acquired a right to produce more than what it otherwise would have been entitled to do and this right to produce additional quantity of goods constituted addition to or augmentation of its profit (' making structure. The assessee acquired the right to produce a larger quantity of goods and to earn more income and this, according to the Revenue, amounted to acquisition of a source of profit or income which though intangible was never-the-less a source or 'spinner' of income and the amount spent on purchase of this source of profit or income therefore represented expenditure of capital nature. Now it is true that if disbursement is made for acquisition of a source of profit or income, it would ordinarily, in the absence of any other countervailing circumstances, be in the nature of capital expenditure. But we fail to see how it can at all be said in the present case that the assessee acquired a source of profit or income when it purchased loom hours. The source of profit or income was the profit making apparatus and this remained untouched and unaltered. There was no enlargement of the permanent structure of which the income would be the produce or fruit. What the assessee acquired was merely an advantage in the nature of relation of restriction on working hours imposed by the working time agreement, so that the assessee could operate its profit- earning structure for a longer number of hours. Undoubtedly, the profit earning structure of the assessee was enabled to produce more goods, but that was not because of any addition or augmentation in the profit making structure, but because the profit making structure could be operated for longer working hours. The expenditure incurred for this purpose was primarily and essentially related to the operation or working of the looms which constituted the profit earning apparatus of the assessee. It was an expenditure for operating or working the looms for longer working hours with a view to producing a larger quantity of goods and earning more income and was therefore in the nature of revenue expenditure. We are conscious that in laws in life, and particularly in the field of taxation law, analogies-are apt to be deceptive and misleading, but in the present content, the analogy of quota right may not be appropriate. Take a case where acquisition of raw material is regulated by quota system and in order to obtain more raw material, the assessee purchases quota right of another. Now it is obvious that by purchase of such quota right, the assessee would be able to acquire more raw material and that would increase the profitability of his profit making apparatus, but the amount paid for purchase of such quota right would indubitably be revenue expenditure, since it is incurred for acquiring raw material and is part of the operating cost. Similarly, if payment has to be made for securing additional power every week, such payment would also be part of the cost of operating the profit making structure and hence in the nature of revenue expenditure, even though the effect of acquiring additional power would be to augment the productivity of the profit-making structure. On the same analogy payment made for purchase of loom hours which would enable the assessee to operate the profit-making structure for a longer number of hours than those

permitted under the working time agreement would also be part of the cost of performing the income earning options I and hence revenue in character.

When dealing with cases of this kind where the question is whether expenditure incurred by an assessee is capital or revenue expenditure, it is necessary to bear in mind what Dixon, J. said in Hallstrom's Property Limited v. Federal Commissioner of Taxation(1): "What is an outgoing of capital and what is an outgoing on account of revenue depends on what the expenditure is calculated to effect from a practical and business point of view rather than upon the justice classification of the legal rights, if any, secured, employed or exhausted in the process." The question must be viewed in the larger context of business necessity or expediency. If the outgoing expenditure. is so related to the carrying on or the conduct of the business that it may be regarded as an integral part of the profit-earning process and not for acquisition of an asset or a right of a permanent character, the possession of which is a condition of the carrying on of the business, the expenditure may be regarded as revenue expenditure. See Bombay Steam Navigation Co. (1953) Pvt. Ltd. v. Commissioner of Income-tax(2) The same test was formulated' by Lord Clyde in Robert Addze & Son's Collieries Ltd. v. Inland Revenue(3) in these words:

"Is 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 a capital outlay, is it expenditure necessary for the acquisition of property or of rights of permanent character, the possession of which is a condition of carrying on its trade at all ?" It is clear from the above discussion that the payment made by the assessee for purchase of loom hours was expenditure laid out. as part of the process of profit- earning. It was, to use Lord Soumnar's words, an outlay of a business "in order to carry it on and to earn a profit out of this expense as an expense of carrying it on." It was part of the cost of operating the profit earning apparatus and was clearly in the nature of revenue expenditure.

It was pointed out by Lord Radcliffe in Commissioner of Taxes v. Nchanga Consolidated Copper Mines Ltd. (supra) that "in considering allocation of expenditure between the capital and income accounts, it is almost unavoidable to argue from analogy." There are always cases falling indisputably on one or the other side of the line and it is a familiar argument in tax courts that the case under review bears close analogy to a case falling on the right side of the line and must therefore be decided in the same manner. If we apply this method, the case closes to the present one that we can find is Nchanga Consolidated Copper Mines case (supra). The facts of this case were that three companies which were engaged in the business of copper mining formed a group and consequent on a steep fall in- the price of copper in the world market, this group decided voluntarily to cut its production by 10 per cent which for the three companies together meant a cut of 27000 tons for the year in question. It was agreed between the three companies that for the purpose of giving effect to this cut, company should cease production for one year and that the assesses

> company and company R should undertake between them the whole group programme for the year reduced by the overall cut of 27000 tons and should pay compensation to company for the abandonment of its production for the year. Pursuant to this agreement the assessee paid to company 1,384,565 by way of its proportionate share of the compensation and the question arose whether this payment was in the nature of capital expenditure or revenue expenditure. The Privy Council, held that the compensation paid by the assessee to company in consideration of the latter agreeing to cease production for one year was in the nature of revenue expenditure and was allowable as a deduction in computing the taxable income of the assessee. Lord Radcliffe delivering the opinion of the Privy Council observed that the assessee's arrangement with companies R and "out of which the expenditure arose, made it a cost incidental to the production and sale of the output of the mine" and as such its true analogy with an operating cost. The payment compensation represented expenditure incurred by the assessee for enabling it to produce more goods despite the cut of 10 per cent and it was plainly part of the cost of performing the income-earning operation. This decision bears a very close analogy to the present case and if payment made by the assessee company to company for acquiring an advantage by way of entitlement to produce more goods notwithstanding the cut of 80 percent was regarded by the Privy Council as revenue expenditure, a fortiori;

expenditure incurred by the assessee in the present case for purchase of loom hours so as to enable the assessee to work the profit making apparatus for a longer number of hours and produce more goods than what the assessee would otherwise be entitled to do, must be held to be of revenue character.

The decision in commissioner of Taxes v. Carron Company(1) also bears comparison with the present case. There certain expenditure was incurred by the assessee company for the purpose of obtaining a supplementary charter altering its constitution, so that the management of the company could be placed on a sound commercial footing and restrictions on the borrowing powers of the assessee company could be removed. The old charter contained certain anti- quoted provisions and also restricted the borrowing powers of the assessee company and these features severely handicapped the assessee company in the development of its trading activities. The House of Lords held that the expenditure incurred for obtaining the revised charter eliminating these features which operated as impediments to the profitable development of the assessee companies business was. in the nature of revenue expenditure since it was incurred for facilitating the day- to-day trading operations of the assessee company and enabling the management and conduct of the assessee company's business to be carried on more efficiently. Lord Reid emphasised in the course of his speech that the expenditure was incurred by the assessee company "to remove antiquated restrictions which were preventing profits from being earned" and on that account held the expenditure to be of revenue character. It must follow on an analogical reasoning that expenditure incurred by the assessee in the present case for the purpose of removing a restriction on the number of working hours for which it could operate the looms, with a view to increasing its profits, would also be in the nature of revenue expenditure.

We are therefore of the view that the payment of Rs. 2,03,255/- made by the assessee for purchase of loom hours represented revenue expenditure and was allowable as a deduction under section 10 (2) (xv) of the Act. We accordingly allow the appeal and answer the question referred by the Tribunal in favour of the assesse and against the Revenue. The Revenue will pay to the assessee costs throughout.

S.R. Appeal allowed.