Bikaner Gypsums Ltd vs Commissioner Of Income Tax, Rajasthan on 23 October, 1990

Equivalent citations: 1991 AIR 227, 1990 SCR SUPL. (2) 313, AIR 1991 SUPREME COURT 227, 1991 (1) SCC 328, 1990 TAX. L. R. 1059, (1990) 4 JT 481 (SC), 1990 (4) JT 481, 1991 (1) UPTC 450, 1991 ALL TAXJ 339, 1991 UPTC 1 450, (1990) 53 TAXMAN 279, (1990) 3 COMLJ 313, (1990) 89 CURTAXREP 176, (1991) 187 ITR 39, (1991) 5 CORLA 1

Author: K.N. Singh

Bench: K.N. Singh, K.N. Saikia, Kuldip Singh

PETITIONER:
BIKANER GYPSUMS LTD.

Vs.

RESPONDENT:
COMMISSIONER OF INCOME TAX, RAJASTHAN

DATE OF JUDGMENT23/10/1990

BENCH:
SINGH, K.N. (J)
BENCH:
SINGH, K.N. (J)
SAIKIA, K.N. (J)
KULDIP SINGH (J)

CITATION:
1991 AIR 227 1990 SCR Supl. (2) 313
1991 SCC (1) 328 JT 1990 (4) 481
1990 SCALE (2)876

ACT:
Income Tax Act 1922/Income Tax Act 1961--Section 10(2)(xv)/ Section 37(1)-Capital or revenue expenditure--Determination of in the case of mining leases--Factors to be considered What are.

HEADNOTE:
The appellant-assessee carried on the business of mining gypsum. The predecessor-in-interest of the assessee acquired a lease from the Maharaja of one of the erstwhile princely

State on September 29, 1948 for mining of gypsum for a period of 20 years over an area of 4.27 square miles in the State. The lease was liable to be renewed after the expiry of 20 years. By a deed of assignment dated December 11, 1948 the rights under the lease were assigned to the assessee company, in which the State Government owned 45% shares.

The assessee entered into an agreement with a Government of India Public Undertaking for the supply of gypsum of minimum of 83.5% quality. Under the lease, the assessee was conferred the liberties and powers to enter upon the entire leased land and to search for win, work, get, raise, convert and carry away the gypsum for its own benefits in the most economic convenient and beneficial manner and to treat the same by calcination and other processes. The lease agreement consisted of several parts and each part contained several clauses. Clause 3 of part Iii prescribed restrictions on mining operation within 100 yards from any railway, reservoir, canal or other public works. This clause had been incorporated in the lease to protect the railway track and railway station which was situated within the area demised to the lessee.

The assessee exclusively carried on the mining of gypsum in the entire area demised to it. The Railway Authorities extended the railway area by laying down fresh track, providing for railway siding and further constructed quarters in the leased area without the permission of the assessee.

The assessee company filed a civil suit for ejecting the railways from the encroached area but it failed in the suit. 314

As the assessee company on research and survey found that under the railway area a high quality of gypsum was available, which was required as raw material by the Public Sector Company, all the parties (Public Sector Company, the Railway Board and the assessee company) negotiated the matter, the Railway Board agreeing to shift the railway station, track and yards to an alternative area offered by the assessee, the parties equally bearing the cost of the shifting.

Under the aforesaid agreement, the assessee company paid a sum of Rs.3 lakhs as its share towards the cost of shifting of the Railway Station and other constructions, and claimed deduction of the said sum for the assessment year 1964-65. The Income Tax Officer rejected the assessee's claim on the ground that it was a capital expenditure. The order was confirmed on appeal by the Appellate Assistant Commissioner.

On appeal by the assessee, the Income Tax Appellate Tribunal held that the payment of Rs.3 lakhs by the assessee company was not a capital expenditure, but a revenue expenditure. The Tribunal referred the question to the High Court under section 256 of the Income Tax Act, 1961, on an application by the revenue, which held that since on payment of Rs.3 lakhs to the Railways the assessee acquired a new asset

which was attributable to capital of enduring nature, the sum of Rs.3 lakhs was a capital expenditure and it could not be a revenue expenditure.

In the appeal to this Court on the question whether the payment of Rs.3 lakhs to the Northern Railway was a revenue expenditure and was a deduction allowable under the Income Tax Act, 1961.

Allowing the appeal, this Court,

HELD: 1(a) Where the assessee has an existing right to carry on a business, any expenditure made by it during the course of business for the purpose of removal of any restriction or obstruction or disability would be on revenue account, provided the expenditure does not acquire any capital asset. [326A]

(b) Payments made for removal of restriction, obstruction or disability may result in acquiring benefits to the business, but that by itself would not acquire any capital asset. [326B]

Gotan Lime Syndicate v. C.I.T., Rajasthan & Delhi, [1966] 59 ITR 718; M.A. Jabbar v. C.I.T., Andhra Pradesh, Hyderabad, [1968]

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2 SCR 413 and Commissioner of Inland Revenue v. Carron Company, [1966-69] 45 Tax Cases 18, referred.

Empire Jute Company v. C. I. T., [1980] 124 ITR 1, affirmed.

In the instant case, the assessee have been granted mining lease in respect of 4.27 square miles under which he had right to sink, dig, drive, quarry and extract mineral i.e. the gypsum and in that process he had right to dig the surface of the entire area leased out to him. The payment of Rs.3 lakhs was not made by the assessee for the grant of permission to carry on mining operations within the railway area, instead the payment was made towards the cost of removing the construction which obstructed the mining operations. On the payment made to the Railway Authorities the assessee did not acquire any fresh right to any mineral nor he acquired any capital asset instead, the payment was made by it for shifting the Railway Station and track which operated as hindrance and obstruction to the business of mining in a profitable manner. [326C-E]

2. There may be circumstances where expenditure, even if incurred for obtaining advantage of enduring benefit would not amount to acquisition of asset. The facts of each case have to be borne in mind in considering the question having regard to the nature of business, its requirement and the nature of the advantage in commercial sense. [326F-G]

3(a) The test for considering the expenditure for the purposes of bringing into existence an asset or an advantage for the enduring benefit of a trade is not always true and conclusive. [327B]

3(b) In considering the cases of mining business the nature of the lease the purpose for which expenditure is made, its relation to the carrying on of the business in a

profitable manner should be considered. [326H]

In the instant case, existence of Railway Station, yard and buildings on the surface of the demised land operated as an obstruction to the assessee's business of mining. The Railway Authorities agreed to shift the Railway establishment to facilitate the assessee to carry on his business in a profitable manner and for that purpose the assessee paid a sum of Rs.3 lakhs. The payment made by the assessee was for removal of disability and obstacle and it did not bring into existence any advantage of an enduring nature. There was therefore. no acquisition of any capital asset. [326H; 327A] 316

British Insulated and Helsby. Cables Ltd. v. Atherton, [1926] AC 205, explained.

Assam Bengal Cement Co. Ltd. v. The Commissioner of Income Tax, West Bengal, [1955] 1 SCR 972, referred to.

R.B. Seth Moolchand Suganchand v. Commissioner of Income Tax, New Delhi, [1972] 86 ITR 647, distinguished.

4. The Tribunal rightly allowed the expenditure on revenue account. The High Court failed to appreciate the true nature of the expenditure. It committed an error in interfering with the findings recorded by the Income Tax Appellate Tribunal. [327B-C]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 262 (NC) of 1976.

From the Judgment and Order dated 24.4.1975 of the Rajasthan High Court in D.B. Civil I.T.R. No. 45 of 1969. Mrs. Anjali Verma for JBD & Co. and D.N. Misra for the Appellant.

O.P. Vaish, S. Rajappa, Vinay Vaish, S.K. Aggarwal and Ms. A. Subhashini for the Respondents.

The Judgment of the Court was delivered by SINGH, J. This appeal is directed against the judgment and order of the High Court of Rajasthan dated 24.4.1975 answering the question referred to it by the Income Tax Appellate Tribunal in the negative, in favour of the Revenue and against the assessee. The question referred to the High Court was as under:

> "Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the payment of Rs.3 lakhs to the Northern Railway was a revenue expenditure and was a deduction allowable under the Income Tax Act. 1961?"

The circumstances leading to the reference and the appeal was necessary to be stated. The Natural Science (India) Ltd. predecessor-ininterest of the assessee acquired a lease from the Maharaja of the erstwhile Bikaner State on September 29, 1948 for mining of gypsum for a period of 20 years over an area of 4.27 square miles at Jamsar. The lease was liable to be renewed after expiring of 20 years. The Natural Science (India) Ltd. by a deed of assignment dated December 11, 1948 assigned the

rights under the lease to the Bikaner Gypsums Ltd., a compa- ny wherein the State Government owned 45 per cent share. The Bikaner Gypsums Ltd. (hereinafter referred to as the asses- see) carried on the business of mining gypsum in accordance with the terms of conditions stated in the lease. The asses- see entered into an agreement with Sindri Fertilizers, a Government of India Public Undertaking for the supply of gypsum of minimum of 83.5 per cent quality. Under the lease, the assessee was conferred the liberties and powers to enter upon the entire leased land and to search for win, work, get, raise, convert and carry away the gypsum for its own benefits in the most economic, convenient and beneficial manner and to treat the same by calcination and other proc- esses. Clause 2 of Part II of the lease authorised the lessee to sink, dig, drive, quarry, make, erect, maintain and use in the said lands any borings, pits, shafts, in- clines, drifts, tunnels, trenches, levels, water-ways, airways and other works and to use, maintain, deepen or extend any existing works of the like nature in the demised land for the purpose of winning and mining of the mineral. Clause 3 granted liberty to erect, construction, maintain and use on or under the land any engines, machinery, plant, dressing, floors, furnaces, brick kilns, like kilns, plaster kilns etc. Clause 4 conferred liberty on the lessee to make roads and ways and use existing roads and ways. Clause 7 granted liberty to the assessee to enter upon and use any part of parts of the surface of the said lands for the purpose of stacking, heaping or depositing thereon any produce of the mines or works carried on and any earth materials and substance dug or raised under the liberties and powers. Clause 8 conferred liberty on the lessee to enter upon and occupy any of the surface lands within the demised lands other than such as are occupied by dwelling houses or farms and the offices, gardens and yards. Clause 9 conferred power on the lessee to acquire, take up and occupy such surface lands in the demised lands as were then in the occupation of any body other than the Government on payment of compensation and rent to such occupiers, and if the lessee is unable to acquire such land from the tenants and occupiers, the Government undertook to acquire such surface land for the lessee at the lessee's cost. Clause 15 of Part II conferred liberty and power on the lessee to do all things which may be necessary for winning, working getting the said minerals and also for calcining, smelting, manufac- turing, converting and making merchantable.

Part III of the lease contained restrictions and condi- tions to the exercise of the liberties and powers and privi- leges as contained in Part II of the lease. Clause 2 of Part III provided that the lessee shall not enter upon or occupy surface of any land in the occupation of any tenant or occupier without making reasonable compensation to such tenant or occupier. Clause 3 prescribed restriction on mining operation within 100 yards from any railway, reser- voir, canal or other public works. It reads as under:

> "Clause 3: No mining operations or working shall be carried on or permitted to be carried on by the lessee in or under the said lands at or to any point within a distance of 100 yards from any railway, reservoir, canal or other public works or any buildings or inhabited site shown on the plan hereto annexed except with the previous permission in writ- ing of the Minister, or some officer authorised by him in that behalf or otherwise then in accordance with such in- structions, restrictions and conditions either general or special which may be attached to such permission. The said distance of 100 yards shall be measured in the case of a Railway Reservoir or canal horizontally from the outer of the bank or of outer edge of the cutting as the

> case may be and in the case of a building horizontally from the plinth thereof."

The above clause had been incorporated in the lease to protect the railway track and railway station which was situate within the area demised to the lessee. Clause 5 of Part VIII of the agreement stated as under:

> "Clause 5: If any underground or mineral rights in any lands or mines covered and leased to the lessee in accordance with the provisions of those presents be claimed by any 'Jagir- dar' 'Pattedar', 'Talukdar', tenant or other person then and in all such cases the Government shall upon notice from the lessee forthwith put the lessee in possession of all such lands and mines free of all costs and charges to the lessee and any compensation required to be paid to any such "Jagir- dar", 'Pattedar', 'Talukdar', tenant or other person claim- ing to have any underground or mineral rights shall be paid by the Government."

The assessee company exclusively carried on the mining of gypsum in the entire area demised to it. The Railway author- ities extended the railway area by laying down fresh track, providing for railway siding. The Railways further con- structed quarters in the lease area without the permission of the assessee company. The assessee company filed a suit in civil court for ejecting the Railway from the encroached area but it failed in the suit. The assessee company, there- upon, approached the Government of Rajasthan which had 45 per cent share of it and the Railway Board for negotiation to remove the Railway Station and track enabling the asses- see to carry out the mining operation under the land occu- pied by the Railways (hereinafter referred to as the 'Rail- way Area'). Since, on research and survey the assessee company found that under the Railway Area a high quality of gypsum was available, which was required as raw material by the Sindri Fertilizers. All the four parties namely, Sindri Fertilizers, Government of Rajasthan, Railway Board and the assessee company negotiated the matter and ultimately the Railway Board agreed to shift the railway station, track and yards to another place or area offered by the assessee. Under the agreement the Railway authorities agreed to shift the station and all its establishments to the alternative site offered by the assessee company and it was further agreed and all the four parties, Sindri Fertilizers, Govern- ment of Rajasthan, Indian Railway and the assessee company shall equally bear the total expenses of Rs. 12 lakhs in- curred by the Railways in shifting the railway station, yards and the quarters. Pursuant to the agreement, the assessee company paid a sum of Rs.3 lakhs as its share to the Northern Railway towards the cost of shifting of the Railway Station and other constructions. In addition to that the assessee company further paid a sum of Rs.7,300 to the Railways as compensation for the surface rights of the leased land. On the shifting of the Railway track and Sta- tion the assessee carried out mining in the erstwhile Rail- way Area and it raised gypsum to the extent of 6,30,390 tons and supplied the same to Sindri Fertilizers. The assessee company claimed deduction of Rs.3 lakhs paid to the Northern Railway for the shifting of the Railway Station for the assessment year 1964-65. The Income-Tax Officer rejected the assessee's claim on the ground that it was a capital expenditure. On appeal by the assessee, the Appellate Assistant Commissioner confirmed the order of the Income-Tax Officer. On further appeal by the assessee the Income Tax Appellate Tribunal held that the payment of Rs.3 lakhs by the assessee company was not a capital expenditure, instead it was a revenue expenditure. On an application made by the Revenue the Income Tax Appellate

Tribunal (hereinaf- ter referred to as the Tribunal referred the question as aforesaid to the High Court under s. 256 of the Income Tax Act, 1961. The High Court held that since on payment of Rs.3 lakhs to the Rail- way the assessee acquired a new asset which was attributable to capital of enduring nature, the sum of Rs. 3 lakhs was a capital expenditure and it could not be a revenue expendi- ture. On these findings the High Court answered the question in the negative in favour of the Revenue against the asses- see and it set aside the order of the Tribunal by the im- pugned order.

Learned counsel for the appellant contended that since the entire area had been leased out to the assessee for carrying out mining operations, the assessee had right to win, the minerals which lay under the Railway Area as that land had also been demised. to the assessee. Since, the existence of railway station, building and yard obstructed the mining operations, the assessee paid the amount-of Rs.3 lakhs for removal of the same with a view to carry on its business profitably. The assessee did not acquire any new asset, instead, it merely spent money in removing the ob- struction to facilitate the mining in a profitable manner. On the other hand, learned counsel for the Revenue urged that in view of the restriction imposed by Clause 3 of Part III of the lease, the assessee had no right to the surface of the land occupied by the Railways. The assessee acquired that right by paying Rs.3 lakhs which resulted into an enduring benefit to it. It was a capital expenditure. Both the counsel referred to a number of decisions in support of their submissions.

The question whether a particular expenditure incurred by the assessee is of Capital or Revenue nature is a vexed question which has always presented difficulty before the Courts. There are a number of decisions of this Court and other courts formulating tests for distinguishing the capi- tal from revenue expenditure. But the tests so laid down are not exhaustive and it is not possible to reconcile the reasons given in all of them, as each decision is rounded on its own facts and circumstances. Since, in the instant case the facts are clear, it is not necessary to consider each and every case in detail or to analyse the tests laid down in various decisions. However, before we consider the facts and circumstances of the case, it is necessary to refer to some of the leading cases laying down guidelines for deter- mining the question. In Assam Bengal Cement Co. Ltd. v. The Commissioner of Income Tax, West Bengal, [1955] 1 SCR 972,'this Court observed that in the great diversity of human affairs and the complicated nature of business opera- tion, it is difficult to lay down a test which would apply to all situations. One has, therefore, to apply the criteria from the business point of view in order to determine whether on fair appreci- ation of the whole situation the expenditure incurred for a particular matter is of the nature of capital expenditure or a revenue expenditure. The Court laid down a simple test for determining the nature of the expenditure. It observed:

> the expenditure is made for acquiring or bringing into existence an asset or advantage for the enduring bene- fit of the business it is properly attributable to capital and is of the nature of capital expenditure. If on the other hand it is made not for the purpose of bringing into exist- ence any such asset or advantage but for running the busi- ness or working it with a view to produce the profits it is a revenue expenditure. If any such asset or advantage for the enduring benefit of the business is thus acquired or brought into existence it would be immaterial whether the source of the payment was the capital or the income of the concern or whether the payment

was made once and for all or was made periodically. The aim and object of the expenditure would determine the character of the expenditure whether it is a capital expenditure or a revenue expenditure." In K.T.M.T.M. Abdul Kayoom and Another v. Commissioner of Income Tax, [1962] 44 ITR 589, this Court after consider- ing a number of English and Indian authorities held that 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. The Court observed that what is decisive is the nature of the business, the nature of the expenditure, the nature of the right 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. In that case the assessee claimed deduction of Rs.6, 111 paid by it to the Government as lease money for the grant of exclusive rights, liberty and authority to fish and carry away all chank shells in the sea off the coast line of a certain area specified in the lease for a period of three years. The Court held that the amount of Rs.6,111 was paid to obtain an enduring benefit in the shape of an exclusive right to fish; the payment was not related to the chanks, instead it was an amount spent in acquiring an asset from which it may collect its stockin-trade. It was, therefore, an expenditure of a capital nature.

In Bombay Steam Navigation Co. Pvt. Ltd. v. Commissioner of Income Tax, Bombay, [1965] 1 SCR 770, the assessee pur- chased. the assets of another Company for purposes of carrying on pas- senger and ferry services, it paid part of the consideration leaving the balance unpaid. Under the agreement of sale the assessee-had to pay interest on the unpaid balance of money. The assessee claimed deduction of the amount of interest paid by it under the contract of purchase from its income. The court held that the claim for deduction of amount of interest as revenue expenditure was not admissible. The Court observed that while considering the question the Court. should con-.. sider the nature and ordinary course of business and the object for which the expenditure is in- curred. If the outgoing or expenditure is so related to the carrying on or 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 perma- nent character, the possession of which is a condition for the carrying on of the business, the expenditure may be regarded as revenue expenditure. But, on the facts of the case, the Court held that the assessee's claim was not admissible, as the expenditure was related to the acquisi- tion of an asset or a right of a permanent character, the possession of which was a condition for carrying the busi- ness.

The High Court has relied upon the decision of this Court in R.B. Seth Moolchand Suganchand v. Commissioner of Income Tax, New Delhi, [1972] 86 ITR 647, in rejecting the assessee's contention. In Suganchand's case the assessee was carrying on a mining business, he had paid a sum of Rs. 1,53,800 to acquire lease of certain areas of land bearing mica for a period of 20 years. Those areas had already been worked for 15 years by other lessees. The assessee had paid a sum of Rs.3,200 as fee

for a licence for prospecting for emerald for a period of one year. In addition to the fee, the assessee had to pay royalty on the emerald excavated and sold. The assessee claimed the expenditure of Rs.3,200 paid by it as fee to the Government for prospecting licence as revenue expenditure. The assessee further claimed that the appropriate part of Rs. 1,53,800 paid by it as lease money was allow-able as revenue expenditure. The Court held that while considering the question in relation to the mining leases an empirical test is that where minerals have to be won, extracted and brought to surface by mining operations, the expenditure incurred for acquiring such a right would be of a capital nature. But, where the mineral has already been gotten and is on the surface, then the expenditure incurred for obtaining the right to acquire the raw material would be a revenue expenditure. The Court held that since the payment of tender money was for acquisition of capital asset, the same could not be treated as a revenue expenditure. As regards the claim relating to the prospecting licence fee of Rs.3,200 the Court held that since the licence was for prospecting only and as the assessee had not started working a mine, the payment was made to the Government with the object of initiating the business. The Court held that even though the amount of prospecting licence fee was for a period of one year, it did not make any difference as the fee was paid to obtain a licence to investigate, search and find the mineral with the object of conducting the business, extracting ore from the earth necessary for initiating the business. The facts involved in that case are totally dif- ferent from the instant case. The assessee in the instant case never claimed any deduction with regard to the licence fee or royalty paid by it, instead, the claim relates to the amount spent on the removal of a restriction which obstruct- ed the carrying of the business of mining within a particu- lar area in respect of which the assessee had already ac- quired mining rights. The payment of Rs.3 lakhs for shifting of the Railway track and Railway Station was not made for initiating the business of mining operations or for acquir- ing any right, instead the payment was made to remove ob- struction to facilitate the business of mining. The princi- ples laid down in Suganchand's case do not apply to the instant case.

In British Insulated and Helsby Cables Ltd. v. Atherton, [1926] AC 205, Lord Cave laid down a test which has almost universely been accepted. Lord Cave observed:

"... 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, I think that there is very good reason (in the absence of special circum- stances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue out to capital."

This dictum has been followed and approval by this Court in the cases of Assam Bengal Cement Co. Ltd. (supra); Abdul Kayoom (supra) and Seth Sugancha.nd (supra) and several other decisions of this Court. But, the test laid down by Lord Cave has been explained in a number of cases which show that the tests for considering the expenditure for the purposes of bringing into existence, as an asset or an advantage for the enduring benefit of a trade is not always true and perhaps Lord Cave himself

had in mind that the test of enduring benefit of a trade would be a good test in the absence of special circumstances leading to an opposite conclusion. Therefore, the test laid down by Lord Cave was not a conclusive one as Lord Cave himself did not regard his test as a conclusive one and he recognised that special circum- stances might very well lead to an opposite conclusion. In Gotan Lime Syndicate v. C. I. T., Rajasthan & Delhi, [1966] 59 ITR 7 18, the assessee which carried on the busi- ness of manufacturing lime from limestone, was granted the right to excavate limestone in certain areas under a lease. Under the lease the assessee had to pay royalty of Rs.96,000 per annum. The assessee claimed the payment of Rs.96,000 to the Government as a revenue expenditure. This Court after considering its earlier decision in Abdul Kayoom's case (supra) and also the decision of Lord Cave in British Insu- lated (supra), held that the royalty paid by the assessee has to be allowed as revenue expenditure as it had relation to the raw materials to be excavated and extracted. The Court observed that the royalty payment including the dead rent had relation to the lime deposits. The 'Court observed although the assessee did derive an advantage and further even though the advantage lasted at least for a period of five years there was no payment made once for all. No lump sum payment was ever settled, instead, only an annual royal- ty and dead rent was paid. The Court held that the royalty was not a direct payment for securing an enduring benefit, instead it had relation to the raw materials to be obtained. In this decision expenditure for securing an advantage which was to last at least for a period of five years was not treated to have enduring benefit. In M.A. Jabbar v. C.I.T. Andhra Pradesh, Hyderabad, [1968] 2 SCR 413, the assessee was carrying on the business of supplying lime and sand, and for the purposes of acquiring sand he had obtained a lease of a river bed from the State Government for a period of 11 months. Under the lease he had to pay large amount of lease money for the grant of an exclusive right to carry away sand within, under or upon the land. The assessee in proceedings for assessment of incometax claimed deduction with regard to the amount paid as lease money. The Court held that the expenditure incurred by the assessee was not related to the acquisition of an asset or a right of permanent character instead the expenditure was for a specific object of ena- bling the assessee to remove the sand lying on the surface of the land which was stock-in-trade of the business, there- fore, the expenditure was a revenue expenditure. Whether payments made by an assessee for removal of any restriction or obstacle to its business would be in the nature of capital or revenue expenditure, has been consid- ered by courts. In Commissioner of Inland Revenue v. Carron Company, [1966-69] 45 Tax Cases 13 the assessee carried on the business of iron founders which was incor-

porated by a Charter granted to it in 1773. By passage of time many of its features had become archaic and unsuited to modern conditions and the company's commercial performance was suffering a progressive decline. The Charter of the company placed restriction on the company's borrowing powers and it placed restriction on voting rights of certain mem- bers. The company decided to petition for a supplementary Charter providing for the vesting of the management in Board of Directors and for the removal of the limitation on compa- ny's borrowing powers and restrictions on the issue and transfer of shares. The company's petition was contested by dissenting share-holders in court. The company settled the litigation under which it had to pay the cost of legal action and buy out the holdings of the dissenting share- holders and in pursuance thereof a supplementary Charter was granted. In assessment proceedings, the company claimed deduction of payments made by it towards the cost of obtain- ing the Charter, the amounts paid to the dissenting share- holders and expensed in the action. The Special Commissioner held that the company was

entitled to the deductions. On appeal the House of Lords held that since the object of the new Charter was to remove obstacle to profitable trading, and the engagement of a competent Manager and the removal of restrictions on borrowing facilitated the day-to-day trading operation of the company, the expenditure was on income account. The House of Lords considered the test laid down by Lord Cave L.C. in British Insulated Company's case and held that the payments made by the company, were for the purpose of removing of disability of the company trading operation which prejudiced its operation. This was achieved without acquisition of any tangible or intangible asset or without creation of any new branch of trading activity. From a commercial and business point of view nothing in the nature of additional fixed capital was thereby achieved. The Court pointed out that there is a sharp distinction between the removal of a disability on one hand payment for which is a revenue payment, and the bringing into existence of an advantage, payment for which may be a capital payment. Since, in the case before the Court, the Company had made payments for removal of disabilities which confined their business under the out of date Charter of 1773, the expendi- ture was on revenue account. In Empire Jute Company v. C.I. T, [1980] 124 ITR I, this Court held that expenditure made by an assessee for the purpose of removing the restriction on the number of working hours with a view to increase its profits, was in the nature of revenue expenditure. The Court observed that if the advantage consists merely in facilitat- ing the assessee's trading operations of enabling the man- agement and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving he fixed capital untouched, the expenditure would be on revenue account even though the advantage may endure for an indefinite future. We agree with the view taken in the aforesaid two decisions. In our opinion where the assessee has an existing right to carry on a business, any expendi- ture made by it during the course of business for the pur- pose of removal of any restriction or obstruction or disa- bility would be on revenue account, provided the expenditure does not acquire any capital asset. Payments made for remov- al of restriction, obstruction or disability may result in acquiring benefits to the business, but that by itself would not acquire any capital asset.

In the instant case the assessee had been granted mining lease in respect of 4.27 square miles at Jamsar under which he had right to sink, dig, drive, quarry and extract mineral i.e. the gypsum and in that process he had right to dig the surface of the entire money, licence fee and other charges for securing the right of mining in respect of the entire area of 4.27 square miles including the right to the miner- als under the Railway Area. The High Court has held that on payment of Rs.3 lakhs, the assessee acquired capital asset of an enduring nature. The High Court failed to appreciate that Clause 3 was only restrictive in nature it did not destroy the assessee's right to the minerals found under the Railway Area. The restriction operated as an obstacle to the assessee's right to carry on business in a profitable man- ner. The assesse paid a sum of Rs.3 lakhs towards the cost of removal of the obstructions which enabled the assessee to carry on its business of mining in an area which had already been leased out to it for that purpose. There was, there- fore, no acquisition of any capital asset. here is no dis- pute that the assessee completed mining operations on the released land (Railway Area) within a period of 2 years, in the circumstances the High Court's view that the benefit acquired by the assessee on the payment of the disputed amount was a benefit of an enduring nature is not sustain- able in law. As already observed, there may be circumstances where expenditure, even if incurred for obtaining advantage of enduring benefit may not amount to acquisition of asset. The facts of each case have to be borne in mind in consider- ing the question

having regard to the nature of business its requirement and the nature of the advantage in commercial sense.

In considering the cases of mining business the nature of the lease the purpose for which expenditure is made, its relation to the carrying on of the business in a profitable manner should be considered. In the instant case existence of Railway Station, yard and buildings on the surface of the demised land operated as an obstruction to the assessee's business of mining. The Railway Authorities agreed to shift the Railway establishment to facilitate the assessee to carry on his business in a profitable manner and for the purposes the assessee paid a sum of Rs.3 lakhs towards the cost of shifting the Railway construction. The payment made by the assessee was for removal of disability and obstacle and it did not bring into existence any advan- tage of an enduring nature. The Tribunal rightly allowed the expenditure on revenue account. The High Court in our opin- ion failed to appreciate the true nature of the expenditure. We are, therefore, of the opinion that the High Court committed error in interfering with the findings recorded by the Income Tax Appellate Tribunal. We, accordingly, allow the appeal, set aside the order of the High Court and re- store the order of the Tribunal. The appellant is entitled to its costs.

N.V.K. Appeal allowed.