C.I.T. Central Bombay vs Jalan Trading Co. (P) Ltd on 9 August, 1985

Equivalent citations: 1985 AIR 1656, 1985 SCR SUPL. (2) 517, AIR 1985 SUPREME COURT 1656, 1986 TAX. L. R. 16, (1985) 3 COMLJ 198, 1985 (19) TAX LAW REV 163, 1985 SCC (TAX) 515, (1985) 23 TAXMAN 1, (1985) 155 ITR 536, 1985 (4) SCC 59, (1985) 48 CURTAXREP 182, 1985 BOM LR 87 461

Author: Misra Rangnath

Bench: Misra Rangnath, V.D. Tulzapurkar, Sabyasachi Mukharji

PETITIONER:
C.I.T. CENTRAL BOMBAY

Vs.

RESPONDENT:
JALAN TRADING CO. (P) LTD.

DATE OF JUDGMENT09/08/1985

BENCH:
MISRA RANGNATH
BENCH:
MISRA RANGNATH
TULZAPURKAR, V.D.
MUKHARJI, SABYASACHI (J)

CITATION:
1985 AIR 1656 1985 SCR Supl. (2) 517
1985 SCC (4) 59 1985 SCALE (2)225

ACT:
Indian Income Tax Act 1922 - Section 10(1)(xv) - Firm obtaining sole selling agency - Benefit of agreement assigned to assessee, a newly incorporated company - 75% of annual profits to be paid to firm - Sum paid - Whether deductible under section 10(1) (xv).

HEADNOTE:
A firm (JTC) obtained the sole selling agency for the products of a manufacturer for two years with a right of renewal. A few months later, under a deed of assignment, the firm assigned the benefits of the agreement to the assessee company under which the assessee carried on the business as

sole selling agents for the products of the manufacturer. Under the deed of assignment the assessee company should take over not the whole of the business of the firm but only the benefit of the contract with the manufacturers in consideration whereof the assessee was to pay to the firm as and by way of royalty, an amount equal to 75% of their profits and commission, remuneration and other moneys received from the manufacturers. The assessee had the option to renew the agreement.

In its income tax return the assessee claimed under section 10 (1) (sv) of the Act deduction of a sum of Rs. 7.93 lacs, which under the deed of assignment lt was required to pay to the firm, but the authorities below rejected the claim. On appeal the Appellate Tribunal held that although no ascertained sum was mentioned for acquiring the right or the enduring benefit, the amount was spent by the assessee for acquiring an asset of enduring benefit, and therefore, the expenditure was capital expenditure. On reference although the High Court held that the asset acquired by the assessee was of an enduring nature, purporting to follow the decision of this Court in Travancore Sugars Chemicals Ltd. v. Commissioner of Income Tax, Kerala 62 ITR 566 lt held that the annual payment by the assessee of 75% of its profits was not in the nature of capital expenditure.

It was contended on, behalf of the Revenue that if the amount had been spent for obtaining a capital asset the assessee would not be entitled to claim it as a deduction.
518

On behalf of the assessee it was contended that once the assessee had paid 75% of its profits to the firm, the amount was no more in its hands as income and since 8. 10(1) envisage the levy of tax on real income in the assessee's hands this was / t income within the meaning of S.10(1) and was not taxable.
Allowing the appeal,
^

HELD: On the finding of the High Court that the expenditure related to acquisition of a capital asset, it was not admissible as a deduction under section 10(2) (xv) of the Indian Income Tax Act 1922. [528 G].

It is well settled that if an expenditure is made for acquiring or bringing into existence of an asset for the enduring benefit of the business, it is properly attributable to capital and is of the nature of capital expenditure. The aim and object of the expenditure would determine, whether it is capital expenditure or revenue expenditure. The source or the manner of the payment would be of no consequence. Where a company had acquired an asset in consideration of recurring payment of certain sum per year which was a right to carry on its business unfettered by any competition from outsiders within the area it was held to be in the nature of a capital asset and the payment

was not deductible under section 10(2) (xv) of the Act. [524 A,C,G]

Assam Bengal Cement Co. Ltd. v. Commissioner of Income Tax 27 ITR 34 = [1955] S.C.B. 1972 applied.

In Travancore Sugars and Chemicals Ltd. which the High Court purported to follow there was a substantial aud definite amount of outright cash payment over and above which an indefinite annual payment had been stipulated. The tests laid down in this case were not intended to be of general application but were given to bring into bold relief the special aspects of the case. The Court itself has pointed this out. Therefore, the High Court erred in importing this reasoning as a test of general application to be applied to the facts of the prevent case. [528 D,E]

In the instant case, the High Court has categorically found that a capital asset had been acquired under the agreement. The assessee was a new company and had no other business. Under the contract lt acquired the right to carry on the business on a long ter basis subject to renewal of the agreement. Therefore,

519

the first of the broad tests l it down in Assam Bengal cases that A the expenditure was made for initial outlay applied and on the finding that a capital asset had been acquired, the expenditure is not liable as a deduction. [528 F-G]

2. There is no merit in the assessee's submission. If the amount had been spent for obtaining a capital asset, the assessee would not be entitled to claim it as a deduction under section 10(1) (xv). [531 C]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1733 of 1973.

From the Judgment and Order dated 26.7.1971 of the Bombay High Court in Income Tax Reference No. 112 of 1963.

G.C. Sharma, K.C. Dua and Miss A. Subhashini for the Appellant.

S.T. Desai, D.N. Misra and Mrs. A.K. Verma for the Respondent.

The Judgment of the Court was delivered by RANGANATH MISRA, J. This appeal by special leave at the instance of the Revenue assails the decision of the Bombay High Court upon a reference under section 66 of the Income Tax Act, 1922 (hereinafter referred to as 'the Act'). In respect of the assessment year 1954-55, the respondent- assessee claimed deduction of a sum of Rs. 7,93,837, under s. 10(1) or alternatively under 8. 10(2) (xv) of the Act in determining its business profits which the Income Tax Officer and the two appellate authorities in due course rejected. On the application of the assessee the dispute regarding admissibility of the claim w referred to the High Court. It

agreed with the Tribunal that 'the assessee had acquired an asset of an enduring nature in lieu of the payment of the amount in dispute; yet, the High Court held that the payment represented business expenditure and the claim of deduction was tenable under 8. 10(2) (xv) of the Act. On reaching this conclusion the Court was of the view that consideration as to whether the payment made by the assessee did not form part of its real income was unnecessary and answered the reference in favour of the assessee. The Commissioner of Income Tax, on obtaining special leave, is in appeal before this Court.

The short facts relevant for appreciating the question for consideration are these:

> M/s. Bharat Barrel & Drum Manufacturing Co. Ltd., ('Bharat Barrel' for short) gave its sole selling agency to a firm - Jalan Trading Co. - by an agreement dated May 1, 1951, for two years with a right of renewal. Assessee - respondent is a private company incorporated on October 16, 1952. & der a deed of assignment dated December 30, 1952, the benefits of the agreement dated May 1, 1951, were assigned to the assessee and from January 1, 1953, under the assignment the respondent carried on the business as selling agents of Bharat Barrel. From May 1, 1953, on the basis of the option for renewal exercised by the assessee an agreement was entered into between Bharat Barrel and the assessee in respect of the sole selling agency and with a renewal clause.
>
> The deed of assignment incorporated the following relevant terms:
>
> "WHEREAS after the incorporation of the said Company (assessee) lt was however agreed that the assignee company should take over not the whole of the business of the Assignors but only the benefit of the aforesaid contract dated the 1st May 1951 with the Said manufacturers on the terms and conditions mutually agreed to and as hereinafter appearing:
>
> 1. In consideration of the premises and of the covenant on the part of the assignees hereinafter contain ed the Assignors as beneficial owners hereby assigns to the assignees:
>
> (i) The said agreement of the 1st day of May 1951 and made between the said Bharat Barrel & Drum Manufacturing Co. Ltd. Of the one part and the assignors of the other part and the full benefit thereof as and from the 1st day of January 1953 and all commission and other moneys payable or to be payable by the manufacturers;
>
> (ii) the full benefit of all pending contracts and orders entered into or given by the assignors in connection with the said agreement
>
> 2. In consideration aforesaid the assignees hereby covenant with the assignors to pay to the assignors as and by way of Royalty an amount equivalent to 75% of their profits and commission remuneration and other moneys received from the manufacturers

> under the said agreement or any further agreement that may be entered into by the Manufacturers with the Assignees in pursuance of the option to renew the agreement contained in cl. 5 of the said agreement dated 1st May 1951."

Assessee claimed to have paid Rs. 7,93,887 being 75% of its net profits in the assessment year 1954-55 and claimed it as a business deduction but the same was rejected by the Assessing Officer as also the appellate authorities. In dealing with the question raised, the Tribunal held:

> "The narrow question, therefore, that we have to decide in this case is whether the payment of Rs. 7,93,837 is made by the assessee for acquisition of an asset or benefit of an enduring character and, therefore, is of a capital nature. In this the only relevant document to be considered, is the deed of assignment dated 30.12.1952. Examining the said deed and particularly clause 2 therein which is already stated above, we think there is no doubt that the payment in question was made by the assessee to acquire the right to carry on the sole selling agency of Bharat Ltd. Or in any case to acquire a benefit of an enduring nature. It is true that in this case no ascertained sum is mentioned for acquiring the right or the enduring benefit. But in our opinion, this factor alone is not a decisive factor in every case. The facts and the circumstances of every case have to be looked into and if on the whole it appears that what was acquired was an asset or an enduring benefit by expending a certain sum, the expenditure can well be held to be a capital expenditure and not a revenue expenditure. In certain cases, it may well be that in conjunction with other facts, the fact that there is no ascertained sum mentioned in order to acquire the asset or the enduring benefit, would lead to the inference that the expenditure is not a capital expenditure. But in this case, we have no doubt that the amount in question was spent for acquiring an asset of enduring benefit and, therefore, we have to hold that the expenditure in question was a capital expenditure..... "

The High Court also negatived the assessee's stand that no enduring asset was acquired and held:

> We cannot accept the assessee's submission that the asset acquired by it when lt obtained assignment of the sole selling agency agreement, is not of an enduring nature. Counsel for the assessee says that the assessee only acquired the right to use the rights under the sole selling agency agreement and that is not an asset of a capital nature. There is no warrant for the submission, because clause 1 of the deed of assignment provides in terms that the firm as a beneficial owner assigned to the assessee 'the said agreement of the 1st day of May 1951..... and the full benefit thereof as and from the 1st day of January 1953 and all commission and other moneys payable or to be payable..... by the manufacturers. Secondly, the right which the assessee acquired under the deed of assignment was a right to act as the sole selling agents till the 1st day of May 1953 in the first instance, coupled with the right to have the sole selling agency agreement renewed for an indefinite period, though for two years at a stretch. mere was some faint argument before us as to the true meaning and scope of the option of renewal, but we see no doubt that under the

agreement of the 1st day of May 1951, the firm had the option to stipulate for a renewal on the same terms and conditions as were contained in that agreement, which must include the term regarding the option for a further renewal for an indefinite period. m us, the assessee obtained an assignment of the agreement between the Company and the firm. That agreement contained the right to have the sole selling agency agreement renewed for an indefinite period. It must follow that the assessee acquired an asset of an enduring nature. Ordinarily, out of this finding the conclusion would have followed that the claim of deduction was not admissible as the expenditure was for acquisition of a capital asset. The High Court, however, referred to this Court's decision in Travancore Sugars & Chemicals Ltd. v. Commissioner of Income Tax, Kerala, 62 I.T.R. 566 = [1967] 1 S.C.R. 423 and adopting the reasonings relied upon in that case to which we shall presently refer, came to hold:

In view of these circumstances, the Supreme Court held that the payment of the annual sum was not in the nature of capital expenditure but was in the nature of revenue expenditure. Each one of the three features adverted to by the Supreme Court is present in the instant case.

and proceeded to conclude the matter by saying: We take the view that the case before us is in material respects similar to the Travancore Sugar case."

The High Court did not examine the aspect relating to whether the payment made by the assessee did not form part of its real income by saying: 'It is enough for our purpose that the payment is deductible under s. 10(2) of the Act.

A four Judge Bench of this Court in Assam Bengal Co. Ltd. v. Commissioner of Income Tax, West Bengal, 27 I.T.R. 34=[1955] 1 S.C.R. 972, indicated that the line of demarcation between capital expenditure and revenue expenditure is very thin. Several English decisions were referred to and the Court approved the opinion of the Full Bench of the Lahore High Court in Benarsidas Jagannath, In re. 15 I.T.R. 185, where Mahajan, J. (as he then was), speaking for the Court, had successfully attempted a synthesis. This Court observed:

The synthesis attempted by the Full Bench of the Lahore High Court truly enunciates the principles which emerge from the authorities. In cases where the expenditure is made for the initial outlay or for extension of a business or a substantial replacement of the equipment, there is no doubt that it is capital expenditure. A capital asset of the business is either acquired or extended or substantially replaced and that outlay whatever be its source whether it is drawn from the capital or the income of the concern is certainly in the nature of capital expenditure. The question however arises for consideration where expenditure is incurred while the business is going on and is not incurred either for extension of the business or for the substantial replacement of its equipment. Such expenditure can be looked at either from the point of view what

is acquired or from the point of view of what is the source from which the expenditure is incurred. If the expenditure is made for acquiring or bringing into existence an asset or advantage for the enduring benefit 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 existence any such asset or advantage but for running the business 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. The source or the manner of the payment would then be of no consequence. It is only in those cases where this test is of no avail that one may go to the test of fixed or circulating capital and consider whether of the business or part of its circulating capital. If it was part of the fixed capital of the business it would be of the nature of capital expenditure and if it was part of its circulating capital it would be the nature of revenue expenditure. These tests are thus mutually exclusive and have to be applied to the facts of each particular case in the manner above indicated. It has been rightly observed that in the great diversity of human affairs and the complicated nature of business operations it is difficult to lay down a test which would apply to all situations. One has therefore got to apply these criteria one after the other from the business point of view and come to the conclusion whether on a fair appreciation of the whole situation the expenditure incurred in a particular case is of the nature of capital expenditure or revenue expenditure in which latter event only it would be a deductible allowance under section 10(2) (xv) of the Income-tax Act. The question has all along been considered to be a question of fact to be determined by the Income-tax authorities on an application of the broad principles laid down above and the Courts of law would not ordinarily interfere with such finding of fact if they have been arrived at on a proper application of these principles. (emphasis ours) In that case before this Court, a lease was obtained with certain stipulations including the payment of a sum of Rs. 5,000 per year. The Court found that it was an enduring benefit for the benefit of the whole business of the company. The fact that it was a recurring payment was immaterial because one had got to look to the nature of the payment which in its turn was determined by the nature of the asset which the company had acquired. The asset which the Company had acquired in consideration of this recurring payment the right to carry on its business unfettered by any competition from outsiders within the area was in the nature of a capital asset and, therefore, the payment was not deductible under s. 10(2) (xv) of the Act. The broad tests laid down by this Court in Assam Bengal Cement Co. Ltd.'s case have been accepted in several subsequent decisions of this Court as also by the High Courts in India.

The facts in Travancore Sugars & Chemical's case were peculiar. The assessee in that case purchased Travancore Sugar Ltd., a Government distillery at Negercoil and the

business assets of a Government Tincture Factory at Trivandrum under an agreement dated June 18, 1937, entered into between the Government of Travancore and the promoters of the assessee company. Under the agreement, cash consideration of Rs. 3,25,000 was to be paid for buying the assets of Travancore Sugars Ltd. In regard to the distillery, the sale price had to be arrived at on the basis of joint valuation by the Engineers to be appointed by the parties. As regards the Tincture Factory, the book valuation was to be adopted for fixing the consideration. The existing distillery licence was agreed to stand recognised in the hands of the assessee for a period of five years after its termination. Government also undertook to purchase pharmaceutical products manufactured by the assessee at the Tincture Factory. Government reserved the right to nominate a director on the Board of Directors of the assessee company without voting powers. The agreement further stipulated payment to Government of 20% of the net profits earned by the company every year subject to a limit of Rs. 40,000 per annum and certain other payments were also undertaken. The 20% stipulation was reduced to 10% by a subsequent agreement. The question that fell for consideration was whether payment of Rs. 42,480 by the assessee company to the Travancore Government in terms of the agreement referred to above as modified, was allowable expenditure under s. 10 of the Act in the year under consideration. This Court stated: It is often difficult, in any particular case, to decide and determine whether a particular expenditure is in the nature of capital expenditure or in the nature of revenue expenditure. It is not easy to distinguish whether an agreement is for the payment of price stipulated in instalments or for making annual payments in the nature of income. The Court has to look not only into the documents but also at the surrounding circumstances so as to arrive at a decision as to what was the real nature of the transaction from the commercial point of view. No single test of universal application can be discovered for a solution of the question. The name which the parties may give to the transaction which is the source of the receipt and the characterization of the receipt by them are of little consequence. The Court has to ascertain the true nature and character of the transaction from the convenants of the agreement tested on the light of surrounding circumstances. So far as these observations formulating the tests are concerned, they are not different from those laid down by this Court in Assam Bengal Cement Co.'s case. The Court then proceeded to apply these tests to the facts of the case and observed:

Examining the transaction from this point of view, it is clear in the present case that the consideration for the sale of the three undertakings in favour of the appellant was: (1) the cash consideration mention ed in the principal agreement, viz., clauses 3, 4(a) and 5(a); and (2) the consideration that Government shall be entitled to twenty per cent of the net profits earned by the appellant in every year subject to a maximum of Rs. 40,000 per annum. With regard to the second part of the consideration there are three important points to be noticed. In the first place, the payment of commission of twenty per cent on the net profits by the appellant in favour of the Government is for an indefinite period and has no limitation of time attached to it. In the second place, the payment of the commission is related to the annual profits

which flow from the trading activities of the appellant-company and the payment has no relation to the capital value of the assets. In the third place, the annual payment of 20 per cent commission every year is not related to or tied up, in any way, to any fixed sum agreed between the undertakings. There is not reference to any capital sum in this part of the agreement. On the contrary, the very nature of the payments excludes the idea that any connection with the capital sum was intended by the parties. It is true that the purchaser may buy a running concern and fix a certain price and the price may be payable in a lump sum or may be payable by instalments. The mere fact that the capital sum is payable by instalments spread over a certain length of time will not convert the nature of that payment from the capital expenditure into a revenue expenditure, but the payment of instalments in such a case would always have some relationship to the actual price fixed for the sale of the particular undertaking. As we have already mentioned, there is no specific sum fixed in the present case as an additional amount of price payable in addition to the cash consideration and payable by instalments or by any particular method. In view of these facts we are of opinion that the payment of the annual sum of Rs. 42,480 in the present is not in the nature of capital expenditure but is in the nature of revenue expenditure and the judgment of the High Court of Kerala on this point must be overruled. As we have already observed, the facts in this case were peculiar. There was a substantial amount of outright cash payment over and above which the indefinite annual payment had been stipulated.

It is interesting to note that this Court by its judgment in Travancore Sugars & Chemicals Ltd. had sent down the matter to the High Court for a re-disposal and the very matter again came before this Court, this time at the instance of the Revenue and the judgment is reported in Commissioner of Income Tax, Kerala v. Travancore Sugars & Chemicals Ltd. 88 I.T.R. 1 = [1977] 2 S.C.R. 738. At page 10 of the Reports, this Court observed:

"In considering the nature of the expenditure incurred in the discharge of an obligation under a contract or a statute or a decree or some similar binding covenant, one must avoid being caught in the maze of judicial decisions rendered on different facts anc which always present distinguishing features for a comparison with the facts and circumstances of the case in hand. Nor would it be conducive for clarity or for reaching a logical result if we were to concentrate on the facts of the decided cases with a view to match the colour of the case with that of the case which requires determination. The surer way of arriving at a just conclusion would be to first ascertain by reference to the expenditure is created and thereafter to apply the principle emblamed in the decisions of those facts. Judicial statements on the facts of a particular case can never assist courts in the construction of an agreement or a statute which was not considered in those Judgments or to ascertain what the intention of the legislature was. What we must look at is the contract or the statute or the decree, in relation to its terms, the obligation imposed and the purpose for which the transaction was entered into.

We agree with these observations. The tests indicated by this Court in Travancore Sugars & Chemicals were not intended to be of general application but were given to bring into bold relief the special aspects of the case as the learned Judges themselves stated. The High Court committed a mistake In importing these reasonings as tests of general application to be applied to the facts of the present case though the facts were indeed quite different. As already pointed out, there was a definite sum of cash consideration in Travancore Sugars Chemicals' case and the special features were taken into account. In the dispute before us the High Court was categorically found that a capital asset had been acquired under the arrangement. Admittedly, the assessee was a new company and it had no other business. It acquired under the contract stipulating to pay 75% of its annual net profits, the right to carry on the business on a long term basis subject to the renewal of the agreement. The first of the broad tests laid down in Assam Bengal Cement Co.'s case that the expenditure was made for the initial outlay squarely applies and on the finding that a capital asset had been acquired (a finding which has not been disputed before us) we must hold that the expenditure related to acquisition of a capital asset and was not admissible as a deduction under s. 10(2) (xv) of the Act.

With this conclusion of ours and no more, the appeal deserved to be allowed. Mr. S.T. Desai for the assessee respondent thereupon sought to raise the contention that once the assessee had paid 75% of its profits of the year, the amount claimed as a deduction was no more in its hands as income and on the principle of real income in the hands of the assessee, we should hold the same was not income within the meaning of s.10(1) of the Act. Initially, objection was raised to this move of Mr. Desai by learned counsel for the Revenue on the ground that such a plea had not been canvassed in the earlier stages of the matter. The question referred to the High Court did raise the issue and the High Court in the penultimate paragraph of its judgment had declined to go into this question by saying that it was sufficient for the disposal of the reference once it took the view that the payment was deductible under s. 10(2) (xv) of the Act. Mr. Desai wanted this aspect of the matter to be sent back to the High Court, but we were not inclined to do so in consideration of the fact that the assessment is for the year 1954-55 - a period three decades away. Thereupon, counsel for both sides agreed to advance their arguments in regard to this aspect to enable this Court to finally deal with this question avoiding remand. Section 10(1) of the Act provides:

The tax shall be payable by an assessee under the head 'Profits & gains of business, profession or vocation' in respect of the profits and gains of any business, profession or vocation carried on by him.

Tax, therefore, under the provision is payable on income and if income is not earned by the assessee no tax is payable. It follows that tax is leviable on the real income in the hands of the assessee. Mr. Desai for the assessee has maintained that when 75% of the net profits have been paid to the partnership firm, the real income in the hands

of the assessee was reduced to 25% of the net profits and that amount alone was assessable to tax. F M/s. Jalan Trading Co., the partnership had initially been appointed as the sole selling agent. On October, 16, 1952, the assessee company came to be incorporated and soon after incorporation by agreement the rights of the firm were assigned to the assessee company. Neither the Income Tax Officer nor the two appellate authorities and nor even the High Court went into the question as to whether the assessee was in fact separate from, and independent, of the partnership firm. It is true that the tenability of the claim of deductibility as a business expenditure of the amount was examined by taking it for granted that the payment had been made by the assessee to the firm. But the exact position having not been investigated no finding has been recorded at any stage. The fact that the partnership and the assessee company bear the same name and soon after incorporation the agreement assigning the firm's rights in favour of the company had been entered, had obviously led the Income Tax Officer to doubt the bona fides. That is why in his order of assessment the Income Tax Officer had observed:

"The payment is also not allowable as it is only an apportionment of profits as pointed out above, as it is nothing but 75% of the net profits of the assessee company and although it has been written to the profit and loss account actually it is nothing but an apportionment of profits and as such the amount is not allowable.

The Appellate Assistant Commissioner took note of the position that the assessment of Jalan Trading Co., the firm, was not before him and observed:

"The amount claimed cannot also be regarded as deduction in the trading account itself because the royalty is ascertained ultimately on the profits and does not go to add to the cost of the drums that are purchased from the manufacturers. Therefore, there can be no question of giving any deduction under s. 10(1) of the Act. The concept of 'real income' apparently based on the decision of the Bombay High Court in the case of 31 I.T.R. 735 has also no relevance because there is no question. Of any deviation of profits of the appellant company by any overriding title.

The Appellate Tribunal in answer to the reiteration of the point raised, said:

"Shri Mistry next submitted that the amount in question is also deductible under s. 10(1) as a trading item and in any event what is to be determined is the assessee's real income and that can only be determined after deducting from the assessee's total income the amount paid to M/s. Jalan Trading Co. It was also stated that in the hands of the recipient the said amount of Rs. 7,93,000 and odd was assessed as revenue receipts and assessing the same in the hands of the assessee would amount to double taxation. In our opinion, this later submission of Shri Mistry can easily be disposed of because even though the real income of the assessee is to be taxed, it is not that each and every outgoing is to be taken into consideration in arriving at the real income of the assessee and if the outgoing is in fact of a capital nature, the same

can never be considered as an allowable deduction under the Act. We are impressed by the argument advanced on behalf of the Revenue that if the amount had been spent for obtaining a capital asset, the assessee would not be entitled to claim it as a deduction under s.10(1) of the Act and on the principle of taxation that income tax is to be levied on the real income, the amount paid for obtaining capital asset would not be deductible. In such circumstances, we are inclined to agree with the appellant's submission that there is no merit in this aspect of the matter and no relief is admissible to the assessee on that score.

We allow the appeal and vacate the Judgment of the High Court and direct that the Tribunal's decision shall be given effect to. Parties are directed to bear their own costs both before the High Court as also this Court.

P.B.R. Appeal allowed.