Amitabh Bachchan Corpn. Ltd. vs Dy. Cit on 5 June, 2006

ORDER

K.P.T. Thangal, Vice President

1. The appeal by the assessee and the cross objection by the revenue is for the assessment year 1995-96.

2. The effective ground urged by the assessee is directed against the order of the Commissioner (Appeals) in directing the assessing officer that the sum of Rs. 18 crores paid as per agreements dated 10-1-1995 and 11-2-1995, is revenue expenditure, which should be allowed by spreading the deduction equally over the period of ten years, being period of tenure of the agreements. According to the assessee, the Commissioner (Appeals) should have allowed the entire amount as deduction for the assessment year under consideration. Further, the assessee is objecting the reliance placed by the Commissioner (Appeals) on the decision of the Hon'ble Gujarat High Court in the case of Anup Engg. Ltd. v. CIT and the decision of the Hon'blc Supreme Court in the case of Madras Industrial Investment Corpn. Ltd. v. CIT .

3. Coming to the cross objection by the revenue, it is directed against the order of the Commissioner (Appeals) in allowing the claim of the assessee that the payment made to Shri Amitabh Bachchan (Rs. 15 crores) and Smt. Jaya Bachchan (Rs. 3 crores) to the tune of Rs. 18 crores, treating it as revenue expenditure.

4. In this case, the assessee filed the return showing loss of Rs. 17,74,85,826 on 30-11-1995. The case was selected for scrutiny.

5. Assessee was running business in the name and style of "M/s. Sopan Leasing Pvt. Ltd.". Subsequently the name was changed to "M/s Amitabh Bachchan Corporation Limited" ('ABCL'hereinafter referred to as). On 1-10-1994, pursuant to amalgamation, another Private Limited company owned by Shri Bachchan in the name of M/s. Saraswati Auto Visual Pvt. Ltd. was amalgamated with ABCL. This was approved by the jurisdictional High Court vide order dated 31-8-1995 on application No. 79 of 1995 filed by the assessee.

6. While framing the assessment order, assessing officer noticed, an amount of Rs. 18 crores, being aggregate of amounts of Rs. 15 crores and Rs. 3 crores, was paid to Shri Amitabh Bachchan and Smt. Jaya Bachchan and the amount was paid in terms of agreements entered with them and claimed as deductible, in view of company entering into entertainment business. Prior to amalgamation, the company's main income was dividend and interest. The Board of Directors in their meeting held on 1-9-1994 decided to enter into the new business, i.e., entertainment. Assessing officer did not allow the claim of deduction under Section 37(1) and treated it as capital expenditure. The CIT (Central) videhis letter dated 29-2-1996 also held the same view. Assessee approached the first appellate authority. The Commissioner (Appeals) decided the issue in assessee's favour observing that no adjustment of the brand equity can be made under Section 143(1)(a).

7. Assessee was asked the reason why the brand equity payment to Shri Amitabh Bachchan and Smt. Jaya Bachchan should not be disallowed, treating it as capital expenditure. Assessing Officer records, authorised representative appeared on 20-1-1998 and submitted that they have no explanation to offer. Subsequently the assessee filed written submission and opinion of two advocates, Shri Y.P. Trivedi and Shri V.H. Patil. According to them, this is to be treated as revenue expenditure and claimed to be allowable under Section 37(l) of the Act.

8. Assessing officer rejected assessec's claim on the basis of the decision of the Hon'ble Supreme Court in the case of Empire Jute Co. Ltd. v. CIT (1980) 124 ITR 11 (SC). Ile distinguished the facts in the instant case of the assessee from the case of Empire Jute Co. Ltd. (supra). He held, in that case the expenditure was for purchasing longer working hours of loom, which was revenue expenditure; whereas in the instant case of the assessee the payment is made for acquiring a new asset, i.e., the brand/ copyright, that is to say a source of earning profit itself. He held, if the star, to whom payments made for their brands, worked for longer period, this would have been expenditure in the nature of revenue; but here the payment is made for a longer period of ton years. It makes all the difference. Assessing officer relied upon the decision in the case of Vallambrosa Rubber Co. Ltd. v. Farmer 5 TC 529. While coming to the above conclusion, he held, revenue expenditure is incurred every year whereas the payments to both the stars are for once and for all and it is therefore a payment of enduring nature and also a source itself. By making this payment the assessee acquired a brand. It is the tool of the assessee and a new means of access for earning the income. He held, a new source acquisition is payment of capital nature. For the above proposition, he relied upon the decisions in the case of V.Vicks Ltd., 3 K-B 267,- Sum News Papers Ltd. and Associated Newspapers Ltd. v. Federal Commission of Taxation (1938) 61 CLR 337; Tata Hydro Electric Agencies Ltd. v. CIT (1937) 5 ITR 202 (PC); Robert Iddi & Sons Collieries Ltd. v. IRC, TC 67 1, C76 (CSS). Assessing officer further held, in the instant case, the source to earn income is the brand of the artist, by exploiting which the assessee earned income, for which assessee paid Rs. 18 crores to actors Shri Amitabh Bachchan and Smt. Jaya Bachchan. He relied on the decisions in the case of AlianZ & Co. Ltd. v. Bell & B 666 KB;Pingle Industries Ltd. v. CIT;R.B. Seth Moolchand Suganchand v. CIT (SC) and CIT v. S.L.M. Maneklal Industries Ltd. . He held, by acquisition of this brand, the assessee facilitated or enabled the management to conduct business efficiently and at the same time leaves the fixed capital untouched. Expenditure is thus of capital in nature. Assessing officer concluded, by this payment, a new asset has been acquired, i.e., brand of the star, which is the tool for earning the income.

9. Assessing Officer rejected the assessee's claim that the acquisition of brand is for ten years and therefore is not of enduring nature. To come to the above conclusion, he relied upon the decision of the Hon'ble Supreme Court in the case of IR v.Adam 1928 SC 738, wherein Their Lordships held, even eight years expenditure is of enduring nature; as also the decision of the Hon'ble Madras High Court in the case of Chelpark Co. Ltd. v. CIT . Assessing officer also considered the opinion of Shri V.H. Patil, wherein he held that five years would have been ideal. Assessing officer further held, enduring does not mean that ever lasting in character. He got support from the decision of the Hon'ble Supreme Court in the case of CIT v. Coal Shipments (P.) Ltd. . He held, none else can utilise the brand. At the most assessee can only lease out the brand for a period of ten years.

10. Reliance placed by the assessee in the case of Devidas Vithaldas & Co. v. CIT was also rejected. Assessing officer held, the brand equity paid cannot be equated or compared with patent. Patent is protection to an invention, which required registration under Patent Act. Patent has expiry date whereas brand does not have it. Assessee's reliance in the case of Alembic Chemical Works Co. Ltd. v. CIT was also rejected. Assessing officer held, acquisition of brand cannot be equated with technical know-how. He further held, acquisition of brand is not the trading activity of the assessee. Assessee is not purchasing and selling the brands. As noted hereinabove, he held, brand is a source of income and by exploiting the same the assessee will earn profit. Reliance placed by the assessee in the case of CIT v. Ashok Leyland Ltd. was also rejected distinguished the facts and holding that that was a payment made being compensation for termination of services of the managing agent.

11. The contention of the assessee that the artist is not prevent totally in carrying on their profession as artist was also rejected by the assessing officer, holding that in fact, by virtue of Clause 7 of the agreement, assessee has an exclusive control over the services of the artists.

12. Assessee's contention that the assessee has not acquired any asset but only acquired the right to use the name of artist, i.e., the brand, was also rejected. In the light of the decision of the Hon'ble Supreme Court in the case of Mewar Sugar Mills Ltd. v. CIT , assessing officer held that the payment made for monopoly rights is a capital expenditure. In the instant case, the assessee has acquired a monopoly right of the brand for ten years. During this period no other person can utilise the brand. He held, from the business point of view also it is a capital expenditure. Assessee has not acquired anything relating to existing business of the assessee but acquired new asset, which is a tool/source of income.

13. Reliance placed by the assessee on the decision of the jurisdictional High Court in the case of CIT v. Cinceita (P.) Ltd. (1982) 137 ITR 6521 (Bom.) was also distinguished on facts as in that case the expenditure incurred was on stamp duty, registration charges and professional fees paid to the solicitor who prepared and got registered the lease deed; whereas it is not so in the instant case of the assessee. Here it is the payment for acquiring something new. The decision of the jurisdictional High Court again in the case of CIT v. Service Station Equipment (P.) Ltd. (1981) 132 ITR 1301 (Bom.) was also distinguished. It was a case wherein the assessee entered into an agreement with the foreign company for manufacturing equipment, for which foreign party granted patent rights, technical information, etc. providing recurring royalty payment; whereas in the instant case, he held, it is payment once for all. Reliance placed by the assessee in the case of Anup Engg. Ltd. v. CIT was also negatived as the assessee is not covered by the Board Circular, which was not so in that case.

14. Assessing officer held, the amount paid to Shri Amitabh Bachchan and Smt. Jaya Bachchan was for acquiring their capital assets, i.e., their brands. Earlier, assessee's main source was dividend and interest. Now the assessee entered into a new field, i.e., entertainment business. Hence he held, this is not an expansion of existing business but a new line of business. He further noted, for whatever reasons, as per item 4(i) of the audit report in Form No. 3CD, auditors certified that there was no capital expenditure debited to the Profit & Loss Account. Only in the computation of income the expenditure of Rs. 18 crores is claimed as deductible. Assessing Officer accordingly made the

disallowance observing as under:

> On a careful consideration, I find that the claim is patently inadmissible in law since the expenditure was incurred for acquiring the tools of the assessee's trade. As per the Balance Sheet also, there is an acquisition of an asset. The expenditure for acquisition of this asset was an initial outlay for expansion of business of the company by entering into a new line, namely entertainment. This expenditure was for acquiring an enduring benefit.
>
> In view of the above as well as the case law cited by me while distinguishing the case laws cited by Natvarlal Vepari and Company and Sri Y.P. Trivedi and Sri V.H. Patil, Advocates, I am of the firm opinion that expenditure incurred on acquisition of 'Brand Equity' is a capital expenditure and accordingly the same is not deductible under Section 37. Therefore Rs. 18 crores is disallowed.
>
> Aggrieved by the above order, assessee approached the first appellate authority.

15. It was submitted before the Commissioner (Appeals) that if the payment is made not for bringing into existence an asset or advantage but for running the business or working with a view to produce profit, it is revenue expenditure. if the asset or advantage for enduring benefit of the business is thus acquired or brought into existence, it would be immaterial whether the source of payment was capital or income of the concern or whether the payment was made once for all or was made periodically. The source of manner of payment is of no consequence. It is only in those cases where this test is of no use that one may go to the test of fixed or circulating capital and consider whether the expenditure incurred was part of the fixed capital of business or part of the circulating capital, it would be in the nature of revenue expenditure. The tests are mutually exclusive and have to be applied to the facts of each particular case. The commercial expediency of a businessman's decision to incur expenditure cannot be tested on the touchstone of strict legal liability to incur such expenditure. The decision has to be taken from the point of view of the businessman. Reliance was placed upon the decision of the Hon'ble Karnataka High Court in the case of CIT v. Motor Industries Co. Ltd. . It was contended, if the above test is considered, the payment made to Shri Amitabh Bachchan and Smt. Jaya Bachchan is of revenue nature.

16. Thereafter the Commissioner (Appeals) discussed the decision of the Hon'ble Supreme Court in the case of Empire Jute Co. Ltd. v. CIT (1980) 124 ITR 12 (SC) relied by the assessing officer as well the assessee. Commissioner (Appeals) particularly stressed and taken note of the decision of the Hon'ble Supreme Court, wherein it laid down that where a particular expenditure even if it is expended for getting an enduring benefit, even then it may fall in revenue account sometimes. What is material is to consider the nature of advantage, whether it is in the capital field or not. If it merely facilitates assessee's trading operations or enables the management and conduct of business to be carried on more efficiently or more profitably, leaving the fixed capital untouched, the expenditure would be on revenue account, even if the advantage is of enduring nature and available for indefinite future. The court further held, what is capital or revenue depends on what expenditure is calculated to effect from a practical and business point of view rather than upon the juristic classification of the

legal rights. The decisions relied by the assessing officer in the case of Tata Hydro-Electric Agencies Ltd. (supra) and in the case of Pingle Industries Ltd. (supra), Commissioner (Appeals) held, cannot be applied in the instant case of the assessee, particularly in view of the subsequent decision of the Hon'ble Supreme Court in the case of Empire Jute Co. Ltd. (supra), observing that these decisions and other decisions cited must be read and understood in the context of later decisions of the Hon'ble Supreme Court, including Empire Jute Co. Ltd.'s case (supra). He also distinguished the decision relied by the assessing officer in the case of Chelpark Co. Ltd. (supra), for the reason that this was a case where payment was made for restricting the Managing Director from competing with the business for five years. The Commissioner (Appeals) distinguished the decision particularly for the reason that in the instant case of the assessee the assessee is engaging artists for doing job work and it is not the same duty of a Managing Director. He also distinguished the decision of the Hon'ble Supreme Court in the case of Mewar Sugar Mills Ltd. (supra). Getting clue from the decision of the Hon'ble Supreme Court in the case of Coal Shipments (P.) Ltd. (supra), wherein enduring benefit has been discussed, Commissioner (Appeals) held that in the instant case of the assessee the artists have agreed to perform the diverse acts for the assessee whereby the assessee can generate revenues from them and also copyrights on the products. Thus he held, it is the user of brand equity that obtained by the assessee and not any capital asset as such. He further held that the expenditure incurred in acquiring goodwill of course is capital expenditure but the payment made towards user of goodwill is of revenue nature and allowable as such. He particularly noted the observation, "where, however, the transaction is not one for acquisition of the goodwill, but for the right to use it; the expenditure would be revenue expenditure" as observed by the Hon'ble Supreme Court in the case of Devidas Vithaldas & Co. (supra). He also relied upon the decision of the Hon'ble Supreme Court in the case of Alembic Chemical Works Co. Ltd. v. CIT and the decision of the Hon'ble Gujarat High Court in the case of Anup Engg. Ltd. v. CIT . He held, the expenditure incurred by the assessee definitely is not of capital nature but of revenue.

17. However, the Commissioner (Appeals) further held that the payment is made for the right to use the artists for ten years and hence he held, Rs. 18 crores is to be spread over every year equally. He particularly relied upon the decision of the Hon'ble Supreme court in the case of Madras Industrial Investment Corpn. Ltd. v. CIT the following observation of their Lordships:

> . . However, the facts may justify an assessee who has incurred expenditure in a particular year to spread and claim it over a period of ensuing years. In fact, allowing the entire expenditure in one year might give a very distorted picture of the profits of a particular year. Issuing debentures is an instance where, although the assessee has incurred the liability to pay the discount in the year of issue of debentures, the payment is to secure a benefit over a number of years. There is a continuing benefit to the-business of the company over the entire period. The liability should, therefore, be spread over the period of the debentures.
>
> Aggrieved by the above order, assessee is in appeal before the Tribunal.

18. Since the main issue arises out of the cross objection, hence we take up the cross objection first.

19. Shri Girish Dave, the learned Departmental Representative on behalf of the revenue submitted at the outset, the amount paid to both the senior artists, i.e., Shri Amitabh Bachchan and Smt. Jaya Bachchan has been accepted in their hands as capital receipt. Hence, he submitted, the amount should be treated on the same line in the hands of the assessee, the payer.

20. The learned DR briefly submitted, the company was incorporated as Sopan Leasing Pvt. Ltd. on 6-1-1987. The name was subsequently changed to Amitabh Bachchan Corporation Pvt. Ltd. on 29-12-1994. It became a public company on 28-2-1995 and the name again changed to Amitabh Bachchan Corporation Limited (ABCL). Pursuant to the scheme of amalgamation sanction accorded by the Hon'ble Bombay High Court, the business and undertaking of the erstwhile Saraswati Audio Visuals Pvt. Ltd. (hereinafter referred to as 'Saraswati') got transferred to the company from 1-10-1984, being the appointed date.

21. The learned DR submitted, the reasoning of the learned Commissioner (Appeals) given at Page 13, Para 12, that the Hon'ble Supreme Court in the case of Mewar Sugar Mills Ltd. (supra) has not discussed at all the aspect of payment in respect of monopoly rights is incorrect. The finding given in this Para is contrary and self-defeating to his own finding given at Paras 10 and 11. The learned DR further submitted, the finding given at Page 14, Para 13, particularly the observation "the artists have agreed to perform the diverse acts for the appellant-company whereby the appellant-company can generate revenues from them and also hold copyrights on the products of such engagements. Thus; in my opinion; the user of brand equity for 10 years cannot be hit by the above observations" is self defeating. The learned DR submitted, the finding of the assessing officer that it is a new business, has not been discussed by the Commissioner (Appeals) at all beforecoming to the above conclusion. He submitted, as far as the assessee concerned, it is a new business. Earlier the assessee was receiving only dividend and interest, which was treated under income from other sources. Now it is business income.

22. The learned DR submitted, what was acquired by the assessee, viz., ABCL is brand equity and before the acquisition of the brand equity neither Shri Amitabh Bachchan nor Smt. Jaya Bachchan owned any brand. The Commissioner (Appeals) went wrong in coming to the conclusion that prior to the"user"by ABCL, some other persons were holding the brand now given to ABCL. This finding of the Commissioner (Appeals) is contradictory and self-defeating, submitted the learned DR. He further assailed the finding of the Commissioner (Appeals) with reference to the judgment of the Hon'ble Supreme Court in the case of Coal Shipments (P.) Ltd (supra), and submitted that the Commissioner (Appeals) in fact, confounded and confused the acquisition of brand equity with the user of brand equity. He submitted, the very purpose of the agreement was acquisition of brand equity and not its user. Neither Shri Amitabh Bachchan nor Smt. Jaya Bachchan was in the business of selling brands nor was ABCL in the business of acquiring brands. He invited our attention to the decision of the Hon'ble Supreme Court in the case of Shriram Chits (1993) (SU4) SCC 226A for the proposition that deferred revenue expenditure by definition is an intangible asset. He submitted, the expenditure in question must be regarded as capital expenditure as the object of the expenditure was to acquire a new brand and to start a new, business.

23. The learned DR invited our attention to several clauses of the agreement defining the terms "engagement", "engagement schedule", "guaranteed payment", "guaranteed period", "pre-engagement period" and "post-engagement period". The relevant clauses read as under:

> 'Engagements'means the acts, deeds and performances of the Artist by himself and/or jointly with others within India and throughout the world, during the engagements schedule, save and except those accruing to the Artist by virtue of Clause 1.7, which the Corporation alone may exploit commercially to generate revenue and includes the Artist's performances as:
>
> (i) an actor/performer in cinematograph films, feature films and television films and other audio-visualworks howsoever described
>
> (ii) a singer or voice recording artist
>
> (iii) a dancer
>
> (iv) a cornmentatorora compare of live or recorded shows that may be performed or broadcast, telecast terrestrially or otherwise howsoever
>
> (v) a live stage performer
>
> (vi) a model for still and video photography
>
> (vii) a part of any programme organised by the Corporation for the benefit of'tourists and fans or fan clubs of the Artist and/or their members
>
> (viii) responding to telephone calls during promotion programmes arranged by the corporation such as premium ratelines
>
> (ix) endorser of any brand of any product or service, permitting use of the artist's trademark, ideogram, logogram, monogram and name as a user, promoter of such brand or service, or otherwise howsoever save and except brands, products or engagements which the Artist in his reasonable opinion finds derogatory, offensive, unethical or otherwise objectionable
>
> (x) facilitating autography on photographs, articles, writings, voice recording for use in telephone answering machines and generally for merchandising products and engagements.
>
> (xi) facilitating and promoting, at the reasonable discretion of the Corporation all or any article, set-vice, product not offensive to public morality or decency whether or not merchandised by the Corporation which, in the opinion of the corporation will generate revenue for the Corporation save and except any such article, service or

product which the Artist may reasonably consider objectionable

(xii) attending interviews, talk shows arranged or produced by the corporation

(xiii) promoter of art forms, cultures, tourism and travel to such destinations and in such manner as the Corporation may require the Artist to do

(xiv) attending public functions including fashion shows, sales of articles and things merchandised by the corporation, sports events, cultural events, etc.

(xv) promoting at the instance of the Corporation other Artists by oral orwritten means (xvi) a part of commercial advertisements which may be exploited in any media (xvii)attending press conferences arranged by the Corporation and other non-commercial appearances which may include radio and television broadcasts.

'Engagement Schedule' means a schedule during which the Artist will fulfil his obligations under these presents, -which schedule shall contain dates, times and locations for publicity and includes the recording shooting, pre-production period and post-production periods.

'Guaranteed Payment'means the non-refundable sum of Rupees fifteen crores Only, which the corporation shall pay to the artist as the entire consideration for the assignment contemplated in Clause 3 below.

'Guaranteed Period'means the period of 120 working days exclusive of bank and public holidays in any given calendar year during which the artist shall be available for engagements.

'Pre-engagement Period'shall mean such period as the Corporation may allocate in the Engagements Schedule for the purposes of preparing to fulfil his obligations under the agreement such as auditions, tests, rehearsals.

'Post-engagement Period'shall mean such period as the Corporation may allocate in the Engagements Schedule for the purposes of completion of the activity arising out of the engagements of the Artist.

24. The learned DR further brought our attention to clauses 1.2 and 1.7 of the agreement at Pages 160 and 161 of the Paper Book, which reads as under:

1.2 This Agreement is executed subject to the approval by the Reserve Bank of India under the provisions of the Foreign Exchange Regulation Act, 1973 and all payments due to the Artist hereunder shall become due and payable only after receipt of such approval. Any reference in the agreement to any statute or statutory provision shall be construed as including a reference to that statute or statutory provision as from time to time amended modified and extended or re-enacted whether before or after the date of this agreement and to all statutory instruments, orders and regulations for

> the time being made pursuant to it or deriving validity from it. All rights hereby granted to the Corporation are granted solely and exclusively to the Corporation.
>
> 1.7 It is expressly understood that nothing contained in this Agreement shall restrict the right of the Artist to pursue his professional career as art actor, whether in a principal role or otherwise, in Feature Films that the Artist may in his personat capacity sign tip or enter into a contract to act in a Feature Film, with any third party/person having no interest. whatsoever in the Corporation or its activities. Provided that the artist shall not sign for any role in any feature film in cases where the Corporation has obtained from the Artist a prior commitment in relation to a Feature Film similar to the one contemplated above. And provided further that the Artist shall accord priority to complete the Feature Films contemplated in Clause 2.1.2 below.

25. The learned DR further brought our attention to Clause 1.9, which deals with royalty payable after the expiry of the contract period to artist or to his nominee. He further brought our attention to Clause 6.7 of the agreement, wherein the artist is restrained during the validity of the agreement with the assessee to participate in any activity, which the assessce considers against its commercial interest.

26. Inviting our attention to the order of the Tribunal in the case of Amitabh Bachcha and Mrs. Jaya Bachchan (IT Appeal Nos. 4453 and 4504 (Mum.) of 2000 & CO No. I I I (Mum.) of 2001, dated 5-11 -2002), particularly Paras 64, 75, 76, 80, 81, 83, 85 and 87, learned DR submitted. it was always the stand of the recipients, i.e., the artists, what they received was capital receipt. He submitted, it was a case therein that the assignment was granted irrevocably and unconditionally as they waive all the rights in engagements and any such rights they are entitled to either now or in future is restricted. It was also the case therein that the right to manage one's profession and to exercise the same, whim have been assigned to ABCL (assessee herein) by virtue of the agreement, cannot be treated as revenue receipts.

27. The learned DR submitted, inviting our attention to Paper Book Page 4, wherein in Item No. 7 it is mentioned that the assessee-company is entering into a new business, i.e., entertainment filed. It is further mentioned, "Earlier the company's main income was dividend and interest. The Board of Directors in the meeting held on 1-9-1994 decided to enter into entertainment business". Hence this is a new business line and the payment is made for acquiring source as such and this cannot be treated as expansion of existing business and it is a new business itself. The learned DR brought our attention to items (iii) and (iv) at Page 15 of the Paper Book, i.e., 8th Annual Report for 1994-95 of the assessee-company, which read as under:

> (iii) Pursuant to the agreement entered into by and between Smt. Jaya Bachchan and your Company, the company is entitled to exploit her name as brand name for the diverse purposes, set out in the Agreement. In lieu thereof, Smt. Jaya Bachchan has been paid Rs. 3 crores. Smt. Bachchan would, as per the arrangement, also be entitled to share 1 per cent of the profit before tax earned by your company before

taxation.

(iv) In the same fashion, an agreement has been entered into by and between Shri Amitabh Bachchan and your Company, whereas the company is entitled to exploit his name as Brand name for various purposes as are mentioned specifically in the agreement. For this purpose, Shri Amitabh Bachchan would be entitled to receive Rs. 15 crores and share in profit before tax to the tune of 4 per cent.

The learned DR submitted that in Schedule '13' 1(h), Item No. (iii), the assessee has treated the expenditure as a deferred revenue payment.

28. Relying upon the decision of the Hon'ble Supreme Court in the case of Assam Bengal Cement Co. Ltd. v. CIT , learned DR submitted, it is laid down in this decision that purpose, aim and object is to be seen before coming to the conclusion.

29. Inviting our attention to several clauses of the agreement defining the term "engagement" learned DR submitted, assessee is acquiring for the first time brand equity. It is now source of income. He brought our attention to the decision of the Hon'ble Supreme Court in the case of CIT v Jalan Trading Co. (P.) Ltd. (1985) 155 ITR 536(SC), particularly page 541 and submitted, the source and manner of payment is irrelevant in deciding the true nature of the payment. He also relied upon the decision of the Hon'ble Madras High Court in the case of India Mfrs. (P.) Ltd. v. CIT (Mad) for the proposition that consideration paid for acquisition of rights of distribution of products for five years must be considered as capital expenditure.

30. Relying upon the decision of the Hon'ble Madras High Court in the case of 'Chelpark Co. Ltd. (supra), learned DR submitted, any payment made to prevent carrying on of any competitive business for five years was capital in nature and not allowable as a deduction. Learned DR submitted, relying upon the decision of the Hon'ble Andhra Pradesh High Court in the case of CIT v. Southern India Mining & Slab Co. , the expenditure incurred under a lease agreement to acquire the source to draw raw materials for conducting business was held to be capital in nature. The learned DR also relied upon the decision of the jurisdictional High Court in the case of Kirloskar Oil Engines Ltd v. CIT (1994) 206 ITR 132 (Bom.) for the proposition that where there is acquisition of drawings, designs and manufacturing rights, payment made must be regarded as capital in nature. He further relied upon the decision of the Hon'ble Gujarat High Court in the case of Anup Engg. Ltd. (supra) for the proposition that acquisition of exclusive rights for use of patents for manufacturing of goods must be treated as consolidated revenue expenditure and spread over a period of sixteen years.

31. The learned DR further relied upon the decision of the Hon'ble Calcutta High Court in the case of Indian Explosives Ltd v. CIT wherein expenditure for constructing a building on land taken or licence for a period of ten years with an option for renewal for another ten years, was held to be incurred for acquisition of an asset which was a source of profit; as such capital expenditure. The learned DR also relied upon the following decisions for the proposition that expenditure incurred in respect of a benefit of an enduring nature must be regarded as capital expenditure:

(1) CIT v. Hindustan Pilkington Glass Works (2) Grover Soap (P.) Ltd. v. CIT (3) Hawlett Packard India Ltd. v. Dy. CIT (2003) 85 ITD 455 (Delhi) (4) Shaw Wallace & Co. Ltd. v. Assistant Commissioner(2003) 86 ITD 315 (Kol.) (5) Ramakrishna & Co. v. CIT Hence the learned DR submitted, the order of the learned Commissioner (Appeals) is liable to be set aside.

32. In reply to the above, Shri A.V. Sonde, learned Counsel for the assessee submitted, the essential features of the agreement ought to be considered.. learned Counsel submitted, the assessee entered into two separate agreements dated 10-1-1995 with Shri Amitabh Bachchan and Smt. Jaya Bachchan for procuring their services and the right to use their brand equity for the agreed period, to enhance the business prospects of the assessee,. Certain terms of the aforesaid agreements were modified by a supplementary agreement dated 11-2-1995 (placed at Pages 152 to 185 and Pages 186 to 215 of the Paper Book).

33. Learned counsel submitted, Clause 2 defines "contractual engagement"; Clause 3 defines "assignment" and Clause 4 defines "payment", which read as under:

'2. Contractual Engagement 2.1 Subject to payment of consideration as hereinafter set out:

2.1-1 The Artist agrees to perform the engagements and fulfil all commitments related thereto during the Guaranteed period exclusively for the corporation and upon receiving reasonable notice shall make himself available during the Pre-engagement and Post-engagement periods also, 2.1-2 The Artist shall during each and every financial year act/perform in one Feature Film which the Corporation may in its absolute discretion produce or co-produce. Commencement of shooting during a financial year shall be sufficient compliance of the corporation's obligation herein contained.

2.2 The Corporation and the artist shall not at any time during the validity of this agreement do any act which might bring the Corporation and/or the artist or the Product of the engagements into public disrepute or offend any community or public morals or prejudice the Corporation or the artist or the exploitation of the engagements.

2.3 The Corporation shall not require the artist to render engagements of a dangerous or hazardous nature or to undertake work which involves an unreasonable degree of risk.

3. Assignment 3.1 The Corporation shall pay to the Artist a sum of Rupees fifteen crores as follows, being the consideration for the assignment contemplated herein:

(a) Rupees twelve crores within 7 (Seven) working days of receipt of approval of the Reserve Bank of India per Clause 1.2 above.

(b) Rupees three crores within 45 days of receiving approval of the Reserve bank of India per Clause 1.2 above.

Subject to receipt of the aforesaid sum of Rupees fifteen crores, the Artist hereby assigns to the Corporation the entire copyright whether vested contingent or future and all other rights of whatever nature in and to the engagements and the products of the engagements and in any work in which a copyright subsists or may come into existence, whether now known or in the future created to which the artist is now or may at any time after the date of this agreement and during the ten year duration of this agreement be entitled to by virtue of or pursuant to any of the laws in force in any part of the world. The assignment is absolute in respect of the aforesaid rights the Artist is now and will be entitled to during the Ten year duration of this agreement and for the whole period of such rights for the time being capable of being assigned together with all renewals reversions and extensions throughout the world.

3.2 In consideration of the guaranteed payment as above;

3.2-1 The Artist irrevocably and unconditionally grants and confirms to the Corporation all consents required and contemplated by the law relating to copyright, designs, patents and trademarks and all other laws now or in future in force in any part of the world which may be required in respect of the engagement for the exploitation by the corporation of the engagements and the product of the engagements whether or not by means now known or developed in future for the full duration of the rights acquired by the Corporation pursuant to this agreement and pursuant to the laws in force in any part of the worLearned 3.2-2 The artist irrevocably and unconditionally waives all rights in the engagements to which the artist is now or may in the future be entitled pursuant to the provisions of the law relating to copyright, designs, patents and trademarks and any other rights to which the Artist may be entitled under any legislation now existing or in future enacted in any part of the world and surrenders such right to the Corporation.

3.2-3 The Corporation shall subject to maintaining the dignity of the artist, have the right to use the names, sobriquet, autograph, likeness, photograph trademarks ideogram, logogram, monogram and all other products of the engagements or any part of it in connection with any merchandising and/or publishing or music publishing endeavours provided that the Artist shall not be depicted as endorsing any commercial product publicized independently of the engagements where such product is not featured.

3.2-4 The artist warrants and confirms that the corporation shall with the consent of the artist, which shall not be unreasonably withheld, have the right to rriake and/or authorise or commission others to make any documentary film on the engagements and products of the engagements related to the Film and acknowledges that such documentary film may include footage of so-called "behind-the-scenes" activities featuring persons including the artist. The Corporation may feature the Artist in such documentary film and/or any other audio visual production and the Artist confirms that the Corporation shall have the right to exploit any or all of the foregoing in any and all media by any and all manner or means for the full period of copyright including all renewals reversions and extensions and after that so far as permissible in perpetuity throughout the world.

3.2-5 The Artist warrants and confirms that the Corporation shall have the right to reproduce and authorise others to reproduce the voice of the artist and product of the engagements from the soundtracks of the Film if any on to commercial phonograph, compact Disc, Magnetic Tape and/ or other recording media and to sell distribute sub-license and otherwise exploit such recording in any and all media by any and all manner of means for the full period of copyright including all renewals, reversions and extensions and after that so far as permissible in perpetuity throughout the world.

3.2-6 The Corporation shall have the right to 'dub' the artist's voice in English and/or any foreign language to such extent as may be desired by the corporation but at the cost and expense of the Corporation.

4. Payment 4.1 In addition to the Guaranteed Payment And subject to the full, complete and timely performance and observance by the artist of all his obligations under this Agreement, the Corporation shall pay to the artist in each year a sum not exceeding 7.5 (Seven and a half) per cent of the Profit earned by the Corporation before Taxation.

4.2 In addition to what is provided for in Clause 4.1 above, in the event of the Corporation producing or co-producing a feature film in each year as contemplated in Clause 2.1-2 the Corporation shall pay to the artist a sum not exceeding Rupees three crores.

4.3 All sums payable pursuant to this agreement, shall as the artist irrevocably directs be payable in favour of 'Amitabh Bachchan' and the Artist's receipt shall be full and sufficient discharge to the Corporation of the Corporation's liability to make such payments.

4.4 The consideration payable to the Artist under this Agreement is and represents full and final consideration for the rights hereby assigned, the engagements and all products of the engagements and shall include any and all residual, repeat, re-run, foreign use and exploitation. No further or additional payment shall be due from the Corporation.

4.5 TheArtist expressly authorises the Corporation to deductand withhold from all sums due to the Artist under this agreement any sums which may be deductible in accordance with local laws or regulations from time to time on account of taxes or otherwise.

34. Learned counsel submitted, a conjoint reading of clauses 2, 3 and 4 along with definitions of "guaranteed payment", "guaranteed period" and "engagement period" would suggest that the sum of Rs. 15 crores has been paid for the assignment by the assessee to Shri Amitabh Bachchan for (a) the entire copyright whether vested, contingent or future; and (b) all other rights of whatever nature in and to the engagements and any work in which a copyright subsists or may come into existence, whether now known or in future created at any time during ten year duration of the agreement to which the artist would have been entitled to. Learned counsel further submitted, contrary to the submission of the revenue that the right is available for ten years, in effect the assignment was absolute in respect of the aforesaid rights. Assessee would be entitled to all the rights, which may come into existence during ten years agreement period. In other words, whatever comes into existence on account of performance/ engagements and the products of engagements would

absolutely belong to the assessee and not to the artist. The engagements are seventeen in number, as evident from the definition of the term "Engagements" mentioned hereinabove. Learned counsel submitted, in fact, instead of making periodic payments for each one of the activities specified in the engagements, assessee made a consolidated payment of Rs. 15 crores to Shri Amitabh Bachchan and obtained the services of the artist for enumerated seventeen engagements for a period of 120 days for each year, for the next ten years from signing of the agreement. By virtue of this payment, the assessee is not suppossed to make any further payment whatsoever to the artist. If the assessee engages either of the artists for performing any of the acts specified in the engagements, the assessee has to make payment to the performing artist for each and every single engagement specified above throughout the ten year period of agreement, If the assessee makes payment whatsoever from time to time for each and every engagement, to the artist engaged by this agreement or to any other artist, such payment necessarily has to be considered as revenue expenditure, no doubt of it. Now the question is, when the assessee made a consolidated payment for the engagements of the artists and obtained their services for 120 days for each year for the next ten years, whether such consolidated payment becomes capital or revenue. The consolidated payment draws its colour, nature and characteristic from the recurring payment, which the assessee got rid of by this consolidated payment.

35. Learned counsel submitted, the principle first came up for consideration in the case of BW Noble Ltd. v. Metchell (1927) 11 TC 372 (CA). The principle was applied by the Hon'ble Supreme Court in the case of CIT v. Ashok Leyland Ltd. for the first time. In this case the continuance of a managing agency became superfluous owing to a change in certain circumstances. The assessee, to get rid of its liability to pay office allowance as well commission to the managing agency, lump sum payment was made to avoid the recurring expenditure. The question was whether this is a benefit acquired in the nature of enduring benefit or not. The Hon'ble Supreme Court held "that the compensation paid for termination of the services of the managing agents was a payment made with a view to save business expenditure in the accounting period as well as a few subsequent years; it was not made for acquiring any enduring benefit or income-yielding asset. By avoiding certain business expenditure the company could not be said to have acquired enduring benefits or any income-yielding assets. The expenditure was of a revenue nature and was an allowable deduction in computing the profits of the assesseecompany".

36. Learned counsel brought our attention particularly to the following observation of the Hon'ble Supreme Court at page 554, which reads as under

> To quote the illustration given by Rowlatt, J. in B. W. Noble Ltd. v. Mitchell (1927) 11 TC 372, 413 (CA), in the ordinary case a payment to get rid of a servant. when it is not expedient to keep him in the interests of trade would be a deductible expenditure. A payment made to remove the possibility of a recurring disadvantage cannot be considered as a payment made to acquire an enduring advantage.

37. Getting clue from the above, learned Counsel submitted, the payment made-with a view to saving business expenditure, which otherwise likely to incur year after year, but by making consolidated payment which could get rid of, is not a payment made for acquisition of any enduring

benefit. Again this principle, learned Counsel submitted, was applied by the Hon'ble Bombay High Court in the case of CIT v. Associated Cement Companies Ltd. . In this case the assessee's factory was located outside the Municipal limits of Shahabad and the Government decided to include, the area of the factory within the Municipal limits and on negotiation a compromise was reached between the assesee and the Municipality. It was agreed that the assessee would spend Rs. 2 lakhs and odd on installing pipelines, which should become the property of the Municipal Committee and in turn Municipal Committee would exempt the assessee from municipal taxes for a period of fifteen years. Assessee claimed this was revenue expenditure and the Hon'ble High Court agreed with the assessee. Ultimately the Hon'ble Bombay High Court, approving the view taken by His Lordship Rowlatt, J. in B. W. Noble Ltd.'s case (supra), held "a payment made to remove the possibility of a recurring disadvantage cannot be considered as a payment made to acquire an enduring advantage". His Lordship further observed as under:

> According to Mr. Joshi, the conclusions in the above case should be restricted to the facts which had come up for consideration and that the principle enunciated in B.W. Noblescase and in Commissioner of Income tax v. Ashok Leyland Ltd. should be restricted to payment made to employees, agents, directors or managing agents. In myview the principle enunciated is much wider and it appears to have been held that a payment made or expenditure incurred to remove the possibility of a recurring disadvantage (as is the case before us) cannot be considered as payment made to acquire an enduring advantage in the sense that it would be within the test laid down by Viscount Cave L c in Atherton's case.
>
> When the matter was carried before the Hon'ble Supreme Court in the case of CIT v. Associated Cement Companies Ltd. , Their Lordship observed as under:
>
> If this principle is applied to the facts of the case before us, what we find is that the advantage which was secured by the assessee by making the expenditure in question was the securing of absolution or immunity from liability to pay municipal rates and taxes under normal conditions for a period of fifteen years. If these liabilities had to be paid, the payments would have been on revenue account and hence the advantage secured was in the field of revenue and not capital.

38. Again inviting our attention to the decision of the Hon'ble Bombay High Court in the case of Champion Engg. Works Ltd. v. CIT learned Counsel submitted, the issue has to go in assessee's favour. In the case of Champion Engg. Works Ltd. (supra), wherein one Mr. P.V. Shah, appointed as Chief Executive, was paid monthly salary allowances. He was allowed to do private practice, consultation, survey etc. When the renewal stage came after three years of the first appointment period, assessee thought it prudent to pay a lump sum amount instead of making monthly payment to Mr. Shah so as to induce him to give up his private practice as consulting engineer. Assessee claimed this as revenue expenditure. When the matter reached before the Hon'ble Bombay High Court, Their Lordships applied the principles laid down in the case of Atherton v. British Insulated & Helsby Cables Ltd. (1925) 10 TC 155 (HL) and held as under:

The phrase 'enduring', as contained in the speech of Viscount Cave LC, has been explained in subsequent decisions in the following manner:

'(1) The advantage paid for need not be of a positive character and may consist in the getting rid of an item of fixed capital that is of an onerous character. (2) By'enduring'is meant'enduring in the way that fixed capital endures'and it does not connote a benefit that endures in the sense that for a good number of years it relieves the assessee of a revenue payment. A payment which frees an assessee from the liability to make an annual revenue payment is revenue expenditure. Thus, a sum paid by an assesee to free himself from a disadvantageous agency agreement, or a sum paid to an employee in commutation of an annual pension, is revenue expenditure, because it frees the assessee from the liability to make annual revenue payment'.

Learned counsel submitted, the case of the assessee falls within the second proposition inasmuch as the lump sum amount paid saved the company from the liability to make an annual revenue payment; as such it was of revenue nature.

39. Learned counsel further brought our attention to the decision of the Hon'ble Madras High Court in the case of CIT v. Madras Auto Service Ltd. . In this case, learned Counsel submitted, assessee company taken on lease land and building in Bangalore for housing its branch and assessee entered into an agreement with the landlord whereby assessee agreed to demolish the building and construct a new one. The expenditure incurred for demolishing the existing structure and construction of new buildingwas claimed by the assessee as revenue expenditure. This claim was rejected by the revenue authorities on the ground that the expenditure was incurredto obtain a lease and therefore, capital in nature. The Tribunal, instead of looking the expenditure from this angle, noted that what assessee saved was a recurring expenditure. When the matter reached before the Hon'ble High Court, the view taken by the Tribunal was upheld following the principles laid down by the Hon'ble Supreme Court in the case of Ashok Leyland Ltd. (supra), which reads as under:-

The ruling of courts on this point is but an extension of the principle that whatever substitutes or surrogates a revenue expenditure is also revenue expenditure. The surrogated expenditure may be a lump sum payment. It may be laid out at any stage. But if it saves the taxpayer from incurring in the very year or in other years other revenue payments either in whole or in part, then the expenditure has to qualify as revenue expenditure.

In view of the above, learned Counsel submitted, lump sum payment made by the assessee, for engagement of the artists for 120 days in each year, over a period of ten years, is nothing but a lump sum payment for avoidance of recurring payment. Had the assessee paid the artists for each engagement, this would have been treated by the revenue as revenue expenditure. The point before the Bench, learned Counsel submitted, is as to whether it can be considered as a capital expenditure only for the reason that the assessee, by virtue of agreement, has got an exclusive access to the

> artists for the next ten years? The exclusive availability of the artists to the assessee under the contract is relevant in determining the character of the receipt in the hands of the artists. This is particularly so because by this agreement the artists bind themselves to the assessee, thus rendering themselves sterile from entering into contract with other entities for 120 days or enjoying any rights which they would have been entitled to, had they not been bound hand and foot to the assessee. Assessee, at the same time, is at liberty to enter into one or more contracts in respect of one or more engagements with other artists, for any or all the period and anywhere in the world. The binding nature of contract with the artists has no relevance, looking at the agreement through the eyes of the assessee. On the other hand, the exclusivity of commitments undertaken by the artists may result in the payments to the artists, as capital, perhaps in his/her hands. Learned counsel submitted, it is precisely for this reason the Tribunal has held in the case of the artists that the payments received by them are capital receipts.

40. Learned counsel submitted, the decision of the Hon'ble Madras High Court in the case of Madras Auto Services Ltd. (supra) travelled up to Hon'ble Supreme Court and their Lordships approved the view taken by the High Court in CIT v. Madras Auto Service (P.) Ltd. .

41. Learned counsel further submitted, it is not a universally true proposition that the capital receipts in the hands of the payee must necessarily be capital expenditure in the hands of the payer as well. The nature of the receipt is not determinative of the nature of payment. For the above proposition, learned Counsel relied upon the following observation of the Hon'ble Supreme Court in the case of Empire Jute Co. Ltd. (supra):

> 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.
>
> The same principle, learned Counsel submitted, has been taken by the Hon'ble Supreme Court in the case of CIT v. Ciba of India Ltd. and the Hon'ble Andhra Pradesh High Court in the case of CIT v. Warner Hindusthan Ltd. . Learned counsel submitted, in the hands of Shri Amitabh Bachchan, the agreement entered into with the assessee is restrictive, and hence, in his hands the receipt is capital in nature. But in the case of the assessee, the agreement with Shri Amitabh Bachchan is not restrictive one as the assessee can approach many others with the same proposal.

42. Learned counsel further submitted, in considering whether an item of expenditure is of capital or revenue in nature, one must consider the nature of the concern, the ordinary course of business usually adopted in that concern and the object with which the expenses are incurred. For the above proposition he relied upon the decision of the Hon'ble Supreme Court in the case of Assam Bengal Cement Co. Ltd. v. CIT. Learned counsel further tirged, emphasis must be placed upon the business

aspect of a transaction rather than purely legal and technical aspect. For this proposition he relied upon the decision of the Hon'ble Bombay High Court in the case of CIT v. Kolhia Hirdagarh Co. Ltd. P (1949) 17 ITR 545, 555(Bom). He also referred to the decision in the case of Mohanlal Hargovind of Jubbulpore v. CIT (1949) 17 ITR 473,477 (PC), wherein it was held "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 juristic classification of the legal rights, if any, secured, employed or exhausted in the process". Learned counsel further submitted, the expression "capital expenditure" is not defined and the words "in the nature of capital expenditure" which occur in this section make the meaning of the expression more elastic in its application to the facts of each case. The expression must be construed in a business sense except insofar as there may be rules of construction applicable to it.

43. Learned counsel further brought our attention to the decision in the case of Atherton v. British Insulated & Helsby Cables Ltd. (1925) 10 TC 155, 1926 AC 205 (HL), an authority on the subject. In this case the assessee company claimed to deduct a sum, which it settled upon trust to form the nucleus of a pension fund for its employees. The claim was rejected on the ground that the expenditure was of a capital sum, which would forever relieve the company from making any further payment whatsoever. Viscount Cave pointed out in this case that the dictum of Lord Dunedin in Vallambrosa Rubber Co. Ltd. v. Farmer 5 TC 529 that "capital expenditure is a thing which is going to be spent once and for all and income expenditure is a thing which is going to recur every year" is not, and was not intended to be, a decisive test in every . case. There are many cases where a payment though made "once and for all" would be properly chargeable against the revenue receipts for the year.

44. Further, learned Counsel brought our attention to the decision in the case of Anglo-Persian Oil Co. Ltd. v. Dale 16 TC 253,274, wherein Romer LJ laid down that by "enduring" is meant "enduring in the way that fixed capital endures" and it does not connote a benefit that endures in the sense that for a good number of year it relieves the assessee of a revenue payment or a disadvantage. Learned counsel further brought our attention to the decision of the Hon'ble Supreme Court in the case of Assam Bengal Cement Co. Ltd. (supra), wherein Justice Bhagwati elucidated that the expression "once and for all" in Viscount Cave's test does not mean that the payment should be made in a single sum and at one time; i.e. to say, "the expression 'once and for all' is used to denote an expenditure which is made once and for all for procuring an enduring benefit to the business as distinguished from a recurring expenditure in the nature of operational expenses". Learned counsel also relied upon the decision of the Hon'ble Supreme Court in the case of Alembic Chemical Works Co. Ltd (supra), wherein the Hon'ble Supreme Court held that "once for all" payment test is not a conclusive test for determining whether an expenditure constitutes capital expenditure or not. Thus, learned Counsel submitted, a lump sum payment to the artists is not decisive determining factor that determines the nature of expenditure. Learned counsel further relied upon the decision of the Tribunal in the case of Income Tax Officer v. Gemini Pictures Circuit (P.) Ltd (1990) 34 ITD 94 (Mad.). In this case the Tribunal held that a lump sum amount paid by the assessee as future rents up to lease period in order to get lessor to waive its right of re-entry on the ground of non-payment of rent is an allowable expenditure. Learned counsel particularly brought our attention to Para 13 of the Tribunal's decision mentioned above, wherein the Tribunal referred to the decision in the case of

Gemini Arts (P) Ltd. (IT Appeal Nos. 332 and 690 (Mad.) of 1986, dated 26-8-1997), which reads as under:

> 12. There is also a justification for this in the provisions of the Act itself. The expenditure in question is allowable as an expenditure laid out or expended wholly and exclusively for the purpose of the business under Section 37, such expenditure. That section does not limit the expenditure to that incurred for the purpose of earning the income of the year. As long as it is lalearned out for the purpose of business the fact that the assessee may derive some benefit from that expenditure for a period of more than a year does not detract from the eligibility of deduction under that section. Under the original lease deed the rent was payable annually and, therefore, only the rent which accrued and was payable for that year could be allowed as a deduction. When that contract to pay an annual rent was substituted by the contract to pay a lump sum, the original contract to pay the annual rent was discharged in terms of Section 67 of the Indian Contract Act. What survives and is in force is only the substituted contract underwhich the lump sum becomes payable and accrues the expenditure in the previous year relevant to this assessment year itself. While the nature of the payment remains the same because it was the substitution or a surrogate of an earlier revenue expenditure, the point of accrual of the expenditure has undergone a change due to the novation and hence the entire amount becomes deductible under Section 37 of the Income Tax Act, 1961 . Therefore, we are unable to accept the alternative submission of the revenue. In the circumstances, we find that the expenditure of Rs. 1,80,000 was an admissible deduction under Section 37 and we direct the Income Tax Officer to allow the same in computing the total income.

Learned counsel submitted, it is a settled proposition that where the payment is made for the right to use an asset (premises, goodwill, brand, etc.) and not for the acquisition of the asset itself, it is revenue expenditure.

45. Assailing the contention of the learned DR that what the assessee acquired is brand equity and not the right to use, learned Counsel submitted, it is not borne out of record. The amount paid to Shri Amitabb Bachchan and Smt. Jaya Bachchan under the agreements dated 10-1-1995, as modified by supplementary agreements dated 11-2-1995, is for acquisition of right to use brand equity of their names, for diverse purposes and the right to contract with third parties in relation to the engagements meaning the acts, deeds and performances of these artists within India as also throughout the world. The contract is for a period of ten years with 120 working days every year, as per Clause 1. 1 of the agreement. As per Clause 1.7 of the agreement, the artists were otherwise free to pursue their professional carrier. Thus, learned Counsel submitted, the payments were not for brand equity but for partial user thereof.

46. Learned counsel relied upon the decisions of the Hon'ble Supreme Court in the case of Devidas Vithaldas & Co. (supra) and Alembic Chemical Works Co. Ltd. (supra). Learned counsel submitted, in the case of Alembic Chemical Works Co. Ltd. (supra), the assessee, a manufacturer of penicillin, made once for all payments to a Japanese enterprise to get most suitable penicillin producing

strains in a pilot plant, technical information, know-how and written description thereof. The stand of the revenue, Tribunal and High Court was reversed by the Hon'ble Supreme Court and Their Lordships held that the payment was for only supply of most suitable subcultures for augmentation of yield of penicillin and the business of assessee before and after this payment was manufacture of penicillin. It was merely improving or updating the fermentation process, which was already being manufactured by the assessee. The limitation placed on the assessee under the agreement regarding non-partibitity, confidentiality, etc. is more in the nature of use of know-how than its exclusive possession. The idea of 'once for all' payment and 'enduring benefit' are not to be treated as something akin to statutory conditions; nor the notions of 'capital' or 'revenue' a judicial fetish. What is capital expenditure and what is revenue are not eternal verities but needs flexibility so as to respond to the changing economic scenario, The expression "asset or advantage of an enduring nature" was evolved to emphasise the element of a sufficient degree of durability appropriate to the context. There is no single definitive criterion to determine what is revenue or capital outlay. The 'once for all' test is inconclusive. What is relevant is the "purpose of outlay and its intended object and effect", considered in a common sense way having regard to the business realities. "In a given case, the test of 'enduring benefit' might break down".

47. Coming to the instant case, learned Counsel submitted, it is only limited use of human brand equity and one time payment is for augmentation of income in the revenue field as the object and effect of agreements show and statistics of year-wise earnings therefrom. It is an advantage from services to be rendered by human beings, which can never be of enduring nature, as submitted hereinabove. Hence, the payments are allowable in full in the year of payment itself. Learned counsel submitted, the assessee only procured services to be rendered by the artists during the agreed period and would have the right to use their brand equity during such period; as such it is not a case of purchase of brand equity of the artist. Learned counsel further submitted, lump sum payment made is not refundable and the period of user is totally uncertain due to various factors such as popularity of the artists, health of the artists, etc.

48. Coming to the contention of the learned DR that the payment is made for a new and distinct business, learned Counsel submitted, assessee and M/s. Saraswati Audio Visuals Pvt. Ltd. (transferor-company) amalgamated with effect from the appointed date, i.e. 1- 10-1994. This company was already in the business of production etc. of stage plays and entertainment. In the scheme of amalgamation, under the head "C. Rationale", it is stated under Clause 125 of the object clauses, transferee-company is authorised to carry on the business of the transferor-company on the following terms:

> To carry on the business of proprietors and managers of theatres (cinemas, picture-places and concert-halls) and to provide for the production, representation and performance (whether by mechanical means or otherwise) of operas, stage, plays, operettas, burlesques, vaudeville, revues, ballets, pantomimes, spectacular pieces, promenade and other concerts and other musical and dramatic performances and entertainments.

> In other words, learned Counsel submitted, it is clear that M/s. Saraswati Audio Visual Pvt. Ltd. was already in this line of business for quite long period and the assessee was authorised to carry on the business of the transferor-company; hence, it is not correct to say that assessee has entered into a new line of business. Even Profit & Loss Account of M/s. Saraswati Audio Visuals Pvt. Ltd. for earlier years clearly show that this was an existing business and not a new business as contended by the learned DR.

49. Learned counsel further brought our attention to object clauses of transferor-company, which were also included in the object clauses of Memorandum of Association of assessee. Relevant clauses are reproduced hereunder:

> 125. To carry on the business of proprietors and managers of theatres (cinemas, picture-places and concert-halls) and to provide for the production, representation and performance (whether by mechanical means or otherwise) of operas, stage, plays, operettas, burlesques, vaudeville, revues, ballets, pantomimes, spectacular pieces, promenade and other concerts and other musical and dramatic performances and entertainments".
>
> 128. To carry on the business of producers and presenters of and dealers in plays, revues, opera, ballet, pantomimes, pageants, musical and dramatic works, and displays and entertainments of all kinds involving the theatre, cinema, ice rinks, variety stage, music halls, radio, television, and other means of transmitting sound or pictorial effects, and to enter into any arrangements for the management, conduct and control of any such business or businesses, and for the supply of plays, opera and ballet works, dances, scripts, libertti, music, artistes, performers, musicians materials and other facilities, in India and elsewhere.

(The above Clause 128 has been amended pursuant to the resolutions passed at the extraordinary General Meeting held on 25-2-1995 and to order of the Company Law Board dated 30-8-1996) 128A. To carry on the businesses of circus, concert hall, cinema, ballroom, night-club, supper-club and as theatre proprietors and agents; box-office keepers, ticket agents, showmen and exhibitors, song, music, play, programme and general publishers and printers scene, proscenium and general painters and decorators; theatrical and musical agents and caterers for public and private amusements and entertainments of every description.

128B. To carry on the business of proprietors, managers and renters of theatres, dance halls, discotheques, film-producing studios, video and sound recording studios and radio and televisions studios;

128C. To carry on the businesses of Celebrity promotion and management, entertainment promotion and management, Artistes promotion and management and generally as promoters, managers and representatives in all or any spheres of entertainment and sports;

128D. To provide on such terms as may seem expedient all or any of the management, secretarial, advertising, publicity, accountancy, merchandising, personal and social facilities and services required or used in connection with their professional engagements by artistes and other engaged in theatrical, film, radio, television entertainment or supporting activities;

128E. To carry on the business of literary, theatrical, advertising, publicity, press and employment agents, and to undertake and execute any agency or agencies, and in particular for authors, dramatists, composers, actors, musicians, singers, entertainers, sports personalities, theatre proprietors and managers, film and television producers of others;

128F. To carry on any business involving the manufacture, marketing, sales, distribution of hardware and-software related to computers, television broadcasting terrestrial, satellite or otherwise, telemarketing, virtual reality, interactive television, multimedia in all forms including variations and future developments in any or all of the above;

128G. To carry on business as distributors of, buyers and sellers of, and merchants and dealers in cinematograph films, records, tapes and apparatus for recording or reproducing sights and sounds, and all rights to produce, distribute or exhibit any performance, entertainment or event by means of films, records or such other apparatus;

128H. To carry on in all parts of the world the business of making, producing, exhibiting, distributing, renting, letting on hire and otherwise exploiting cinematograph and television films and motion pictures of all kinds, and to act as agents for the purchase, sale, hiring and exploitation of such films, and generally to manufacture, buy, hire, sell, let on hire, produce or otherwise deal in cinematograph, television and other films and video recordings and photographic or other apparatus, articles, plant, machines and accessories capable of being used in that connection or in connection with cinernatograph or television shows, exhibitions and entertainments;

128I. To act as agents in the engaging, providing and employing of, artistes, actors, singers, dancers, variety performers, sportsmen, lecturers, instructors, entertainers and any other persons or companies in connection with the production, transmission and performance of scenarios, plays, operas, pantomimes, ballets, concerts, exhibitions, sports, entertainments, performances and amusements of any kind;

128J. To acquire and dispose of copyrights, licences and any other rights or interests in any literary, dramatic or musical work, and any poem, play, song, composition (musical or otherwise), cinematograph films, television programmes, picture, drawing, work of art or photograph, and to print, publish or cause to be printed or published anything of which the company has a copyright or right to print or publish, and to sell, distribute and deal with any matter so printed or published, and to grant licences or rights in respect of any property of the company to any other person, firm or company.

Learned counsel submitted, in the light of the above objects, it is true, though the main objects of the assessee, formerly known as M/s. Sopan Leasing Pvt. Ltd. did not have these object clauses, but

at the same time was specifically allowed and permitted under the scheme. The amalgamation does not leave any doubt that the business was not a new business or that it is not one of the main objects.

50. Coming to the decisions cited by the learned DR, learned Counsel submitted that all these cases can be classified into two categories. One category of cases deals with situations where the expenditure in question was capital in nature for the reason that the expenditure resulted in acquisition of some assets. For e.g., in the case of Jalan Trading Co. (P.) Ltd. (supra), the payment was made for acquiring by assignment the right to carry on business of a selling agency on a long-term basis. In the case of India Mfrs. (P.) Ltd. (supra), the payment in question was for the acquisition of right for distribution of products for five years. Similarly, in the case of Ramakrishna & Co. (supra), the payment was towards consideration for acquiring right, title and interest in the lease. .

51. Learned counsel submitted, these cases have got no relevance to the case of the assessee inasmuch as by making lump sum payment to Shri Amitabh Bachchan and Smt. Jaya Bachchan, the assessee has surrogated revenue expenditure and saved itself from incurring revenue payments in the year under consideration as well other years. The principle therefore applicable in the case of the assessee is not the principle of acquisition of an asset leading to capital expenditure but the other principle laid down by Viscount Cave LC in Athertons case (supra), wherein two principles are summarized. Learned counsel submitted, it is the second principle that is relevant to the case of the assessee, i. e., "if what is got rid of by a lump sum payment is an annual business expense chargeable against revenue, the lump sum payment should equally be regarded as a business expense".

52. Learned counsel further submitted, the other decisions cited by the learned DR (mentioned hereinabove at Page 18, Para 3 1) are also distinguishable. These cases deal with a situation where the payment was made for eliminating competition. Learned counsel submitted, in the instant case of the assessee, by making payment, the assessee obtained the services of the artists for a period of 120 days in each year over the next ten years for the purpose of its normal business activity, which were hitherto carried out by M/s. Saraswati Audio Visual Pvt. Ltd. Therefore, learned Counsel submitted, far from being a payment in the nature of stopping somebody from working, it is in fact a payment made for obtaining the services of the artists.

53. Learned counsel further submitted, the contention of the learned DR that the objects of the assessee were financial and it was never in the business of entertainment, etc. is irrelevant inasmuch as M/s. Saraswati Audio Visual Pvt. Ltd. which was amalgamated resulting in its incorporation into assessee-company, was very much in the field of entertainment industry and in fact the amalgamation specifies clearly that the activities carred on by M/s. Saraswati Audio Visual Pvt. Ltd. would be deemed to be carried on by the assessee-company. Learned counsel submitted that the payment being made to get rid of recurring payment constitutes revenue payment and ought to be allowed as such.

54. Replying to the above, learned DR submitted that it is true, M/s. Saraswati Audio Visual Pvt. Ltd. amalgamated with ABCL. The business of M/s. Saraswati Audio Visual Pvt. Ltd. was never the

same as that of ABCL. In the scheme of amalgamation only assets and liabilities were passed over to the assessee-company and not the objects. M/s. Sopan Leasing Pvt. Ltd. was only doing financing business. He particularly brought our attention to Page 39 of the Paper Book. M/s. Sopan Leasing Pvt. Ltd. was never in the entertainment business. He submitted, this is so as there is a clear finding by the assessing officer at Page 4 of his order, which reads "in the instant case as discussed above, the assessee's only source of income was dividend and interest .....

55. Hearing the rival submissions and going through the orders of the revenue authorities, we are of the view that the issue has to go in assessee's favour.

56. First we will take up the learned DR's submission that the payment was made for a new and distinct business. Hereinabove we have reproduced object clauses of Memorandum of Association vide Para 49 of our order. Clause 125 authorises the transferee-company to carry on the business of transferor-company. Hence, this view canvassed bv the learned DR is liable to be rejected.

57. Coming to the second proposition that the payment received by the artists, i.e. Shri Amitabh Bachchan and Smt. Jaya Bachchan has already been held as capital receipt in the hands of the recipients and therefore, it should naturally be treated as capital payment in the hands of the assessee as well, we find considerable force in the arguments of the learned Counsel for the assessee, placing reliance upon the decision of the Hon'ble Supreme Court in the case of Empire Jute Co. Ltd. (supra). The relevant portion has already been quoted videpara 41 of our order. In the case of Ciba of India Ltd. (supra), the Hon'ble Supreme Court held, since the assessee did not under the agreement become entitled exclusively even for the period of agreement, the mere access to technical knowledge/experience in the pharmaceutical field can only be treated as revenue expenditure. Coming to the facts in the instant case of the assessee, as rightly contended by the learned Counsel, if the assessee had not paid a lump sum amount, assessee was bound to make the payment as and when the engagements arose. Assessee retained the senior artists. The artists are human beings. It is difficult to equate the performance of the artists on par with the use of some capital assets as such.

58. In the case of Alembic Chemical Works Co. Ltd. (supra), the Hon'ble Supreme Court held, an assessee engaged in the manufacture of antibiotics including penicillin for acquisition of know-how, made certain payments to a foreign party. There was no evidence to indicate that this was not in the line of existing business of the assessee. Hence, the Hon'ble Supreme Court held, this is a payment once for all, yet not capital in nature. Coming to the instant case of the assessee, we have already hereinabove mentioned that M/s. Saraswati Audio Visual Pvt. Ltd. was in the field of entertainment business. As such, it is difficult to hold that assessee was also not in the field after the amalgamation, as approved by the jurisdictional High Court. It is true, as contended by the learned DR that the assessing officer stated at Page 4, assessee's only source of income was dividend and interest, but this finding of the assessing officer does not bring out the facts in entirety.

59. Learned counsel for the assessee has rightly distinguished the decisions and the same have been already reflected in the arguments of the learned Counsel. In the case of Ramakrishna & Co. (supra), the assessee acquired right, title and interest by virtue of certain lease deeds in respect of cinema

theatre and made payments. Undoubtedly the payment to acquire right, title and interest exclusively of cinema theatre can only be treated as acquisition of source itself; whereas the payment to Shri Amitabh Bachchan and Smt. Jaya Bachchan, artists, in our view, is a payment for use of their artistic talents. It is not acquisition of source itself. Source will exist independently and they are also free to perform for others except the time and duration which is acquired by the assessee by virtue of these payments.

60. In the case of Devidas Vithaldas & Co. (supra), P, a Chartered Accountant, took another partner A, reserving himself exclusively the goodwill. The partnership was dissolved subsequently. By virtue of deed of dissolution, the business was to be carried on by A, whereas goodwill was exclusively belonging to P and for the acquisition of goodwill certain payments were made. This was treated as capital by the High Court and reversing the order, the Hon'ble Supreme Court held, the transaction under the deed of dissolution was a licence and not sale of goodwill and the payments were in the nature of royalty and had to be considered as admissible deduction. In the instant case of the assessee, it is true; the agreement is for ten years. For each year the artists are exclusively available to the assessee. At the same time we have to see that for the remaining days over the entire period of ten years they are free to perform for others. The only difference is that for the performance of 120 days in a year for ten years, the payment is made in lump sum. It is an agreement to pay for the performance and the assessee has no exclusive hold on them. Assessee is free to enter into agreement with other artists even for similar nature of performance. Had the assessee engaged the artists without this agreement for each and every engagement, the assesee has to make independent payment? Here the payment is consolidated and paid in lump sum. By making this payment in lump sum assessee in fact saved a recurring payment, which is otherwise to be treated as revenue payment.

61. It is one of the contentions of the learned Counsel for the assesee that in fact the very performance of an artist, the work of a human being cannot be equated with the work of any capital as such. it is full of uncertainties like the dip in popularity, unforeseen reasons, health problems, etc.

62. In the case of B. W. Noble Ltd. (supra), we have noted hereinabove the observation of His Lordship Rowlatt, that payment to get rid of a servant when it is not expedient to keep him in the interest'of trade is deductible expenditure being a payment to remove the recurring disadvantage. His Lordship held that the payment made to remove such disadvantage is not a payment made to acquire an enduring advantage. In reverse the same principle is applicable here. Here the assessee made the payment to avail the performance of the artists when it is expedient to get the artists in the interest of trade and therefore the same is deductible expenditure. The payment made to avail the possibility of an advantage should be considered as a payment made to remove a possible disadvantage and it is not a payment to acquire an enduring advantage.

63. The same principle was reiterated by the Hon'ble Bombay High Court in the case of Champion Engg. Works Ltd. (supra). The observation of the Hon'ble High Court has been quoted hereinabove vide Para 38.

64. In view of the above, we are of the opinion that the cross objection by the revenue is liable to be dismissed.

65. Coming to assessee's appeal, it is directed against the order of the Commissioner (Appeals) in directing the assessing officer to assess the amount of Rs. 18 crores (Rs. 15 crores to Shri Amitabh Bachchan and Rs. 3 crores to Smt. Jaya Bachchan), paid as per the agreement, as revenue expenditure, but spreading the deduction equally over the preiod of ten years being tenure of the agreement.

66. According to the assessee, on the facts and circumstances of the case and in law, the Commissioner (Appeals) ought to have allowed the deduction for the sum of Rs. 18 crores in the assessment year 1995-96 itself, in which the liability for the same incurred. It is also the case of the assessee that the Commissioner (Appeals) went wrong in applying the ratio of the decision of the Hon'ble Gujarat High Court in Anup Engg. Ltd. v. CIT and the decision of the Hon'ble Supreme Court in Madras Industrial Investment Corpn. Ltd. v. CIT in support of the conclusion he arrived at to spread over the payment equally over the ten years.

67. The facts have already been narrated in detail while dealing with the cross objection by the revenue, which we have dismissed.

68. Now coming to the facts in brief, leading to the dispute, though the Commissioner (Appeals) treated the payment of Rs. 18 crores to Shri Amitabh Bachchan and Smt. Jaya Bachchan, the artists, as revenue expenditure in the hands of the assesee, following the decision of the Hon'ble Gujarat High Court in the case of Anup Engg. Ltd. (supra) and the decision of the Hon'ble Supreme Court in the case of Madras Industrial Investment Corpn. Ltd. (supra), he directed the assessing officer to allow the deduction spread over for the entire period of ten years, being the tenure of the agreement itself.

69. Learned counsel for the assessee submitted, the conclusion arrived at by the Commissioner (Appeals) is not tenable. Learned counsel submitted, the learned Commissioner (Appeals) conveniently omitted to reproduce the first four lines of the very Para which he quoted from the decision of the Hon'ble Supreme Court, to decide the issue partly against the assessee, saying that the payment should be allowed as deduction, spreading over the contract period of ten years, learned Counsel brought our attention to the following observation of the Hon'ble Supreme Court in the case of Madras Industrial Investment Corpn. Ltd. (supra):

> Ordinarily, revenue expenditure which is incurred wholly and exclusively for the purpose of business must be allowed in its entirety in the year in which it is incurred. It cannot be spread over a number of years even if the assessee has written it off in his books, over a period of years.
>
> After this observation the Hon'ble Supreme Court further continues "However, the facts may justify an assessee who has incurred expenditure in a particular year to spread and claim it over a period of ensuing years. In fact, allowing the entire

> expenditure in one year might give a very destorted picture of the profits of a particular year. Issuing debentures is an instance where, although the assessee has incurred the liability to pay the discount in the year of issue of debentures, the payment is to secure a benefit over a number of years. There is a continuing benefit to the business of the company over the entire period. The liability should, therefore, be spread over the period of the debentures.

70. Learned counsel submitted, the first four lines of the Para, omitted by the Commissioner (Appeals), clearly lays down that any revenue expenditure which is incurred wholly and exclusively for the purpose of business must be allowed in its entirety in the year in which it is incurred. It cannot be spread over a number of years even if the assessee has written it off in his books, over a period of years. The Commissioner (Appeals) relied upon the portion of the judgment which under certain circumstances gives an option to the assessee to claim it over a period of ensuing years as the words used are "However, the facts may justify an assessee who has incurred expenditure in a particular year to spread and claim it over a period of ensuing years". Hence, learned Counsel submitted, this decision of the Hon'ble Supreme Court, on the contrary, supports the case of the assessee that the entire amount of Rs. 18 crores in the year under appeal was incurred wholly and exclusively for the purpose of business and therefore allowable in the year under consideration.

71. Learned counsel further submitted, issuing debentures at discount is an instance where, although the assessee has incurred the liabihty to pay the discount in the year of issue of debentures, the payment is to secure a benefit over a number of years. In fact, allowing the entire expenditure in one year may give a very distorted picture of the financial position of a particular year. The case before the Hon'ble Supreme Court was in relation to discount on debentures issued and there was user of funds and a stream of income over the period. There were no uncertainties like uncertainties inherent in respect of services to be rendered by human beings, involved therein as they are involved in the present case. In the present case there is no certainty as to whether any benefit or advantage extending or a stream of income over the period of agreement, like in case of user of funds raised from debentures issued. Learned counsel further submitted that the assessee-company entered into two separate agreements dated 10-1-1995 with Shri Amitabh Bachchan and Smt. Jaya Bachchan for procuring their services and the right to use their brand equity for the agreed period, to enhance the business prospects of the assessee. Certain terms of the aforesaid agreements were modified by a supplementary agreement dated 11-2-1995, which are placed at Paper Book, pages 152 to 185 (with Shri Amitabh Bachchan) and Pages 186 to 215 (with Smt. Jaya Bachchan).

72. Inviting our attention to Clause 3 of the agreement (Page 163 of the Paper Book), learned Counsel submitted, lump sum payment is for the assignment as contemplated in the said clause, whereby the artists assign to the Corporation the entire copyright and all other rights of whatsoever nature, which comes into existence from the performance of engagements and the products of engagements, and in any work in which a copyright subsists or may come into existence, whether now known or in the future created, to which the artist is now or may at any time after this agreement but during the period of ten years entitled to, belong to the assessee-company and not to the artists. The assignment is absolute and complete in respect of the aforesaid rights of the artists now and will be entitled to during the ten years duration, the period of the agreement. Whatever

copyrights whether existing or will come into existence in future are given away today including something which may or may not happen in future. As such, the assignment is here and now of events, which may or may not come into existence in future.

73. Learned counsel further submitted, Clause 4 of the agreement (Page 166 of the Paper Book) provides for the payments in addition to the guaranteed payment for all other rights, which are defined in Clause 6 "Artist's warranties and obligations" (Page 169 of the Paper Book). These payments represent full and final consideration for the rights assigned (as per Clause 6), the engagements and all products of engagements and shall include any or all residual, repeat, re-run, foreign use and exploitation. Therefore, the lump sum payment is for the assignment contemplated in Clause 3, which is now and complete today and the payment as per Clause 4 is for a different purpose. Hence, learned Counsel submitted, the event of assignment, for which lump sum payment has been made, occurred today on entering into the agreement and not over the agreement period of ten years.

74. Learned counsel further submitted, clauses 12 and 13 (Page 175 of the Paper Book) "termination and effects of termination", provide that if the artist fails to perform or observe or breaches any of the obligations, undertakings or warranties or if the Corporation fails to pay the consideration in terms thereof, the agreement shall be terminated. These obligations and consideration are referred to in Clause 6 and Clause 4 of the said agreement, learned Counsel submitted, Clause 13.1 (Page 176 of the Paper Book) states that the artist shall continue to comply with all the obligation on the part of the artist under this agreement which are not affected by termination. Clause 13.2 states that even after the termination, the Corporation shall remain entitled to all rights granted or assigned to the Corporation under the agreement and all other rights relating to the engagements of the artists and all the products of engagements. Hence, learned Counsel submitted, the assignment under Clause 3 is absolute and is completed on entering into the agreement, then and there. It is not affected by the events occurring afterwards or by termination. Learned counsel further submitted, the lump sum payment is for the obligation on the part of the artists (clause 3 of the agreement), which is not affected by termination but all other payments will be affected.

75. Learned counsel further submitted, the revenue's contention that the payment made is to secure benefit over the period of ten years is based on observation of the Commissioner (Appeals), wherein reliance was placed upon the findings of the Hon'ble Supreme Court in the case of Madras Industrial Investment Corpn. Ltd. (supra) that there is a continuing benefit to the business of the assessee-company over the entire period of ten years. Learned counsel submitted, however, the argument that the agreement was for ten years; copyright is for future, engagement is for ten years and therefore the expenditure should be spread over equally over a period of ten years, does not hold good. He submitted, this is because, in this case the assignment is here and now of events which may come into existence in the future. Hence, the assignment is completed now; it is for the events, which may occur during ten years after the agreement. Learned counsel submitted, for e.g., in case of annuity policy of life insurance, the lump sum amount paid for receiving annuity over a period of ten years. The contract is complete when the lump sum payment is made. Similarly, in the instant case also the assignment is complete in the year of agreement and it is the events, which may happen or arise during the period of ten years.

76. Learned counsel further submitted, in the case of Madras Industrial Investment Corpn. Ltd. (supra), the decision was rendered in the context of discount on issue of debentures. The expenditure incurred in granting discount on issue of debentures is to enable the issuing company to enjoy benefits of the funds raised through debenture issue for the period of the debentures. Thus, the intention is to secure a benefit over the life of the debentures, as observed by the Hon'ble Supreme Court at page 813, which reads as under:

> Issuing debentures at a discount is anothersuch instance where, although the assessee has incurred the liability to pay the discount in the year of issue of debentures, the payment is to secure a benefit over a number of years. There is a continuing benefit to the business of the company over the entire period. The liability should, therefore, be spread over the period of the debentures.
>
> Learned counsel submitted, the benefit derived by the company over the period of the debentures is in the form of availability of funds for use in business. The funds available for use, those of the company, over the life of the debentures, can be correctly ascertained. On the other hand, the benefit derived by ABCL by virtue of payments made to the artists, under agreements entered into with them, are not definite or ascertainable over the term of the agreements to warrant a pro rata spread over.

77. Learned counsel submitted, unlike money, the value of the right to use the artists'brand equity is not constant. Such value depends on the value of the brand equity itself, which in turn is dependant upon several variable and volatile factors like health and personality of the artist, artist's image in the public eye and perception, likes and dislikes of the masses. Even a single event, act or deed may render the brand equity of the artist obsolete, which in turn would affect the value of the right to use such brand equity or benefit which can be derived or obtained from the use of such brand equity. In fact, there was a lengthy period during which brand equity in this very case yielded no benefit to the assessee.

78. In the case of discount on issue of debentures, learned Counsel submitted, the amount of discount is nothing but the interest, which is revenue expenditure. It is rent for the use of money. There is continuing benefit to the business of the company. Accordingly, spread over of the amount of discount over the period of debentures is justified. However, that is not so in the instant case of the assessee, involving right to use brand equity. Hence, the decision of the Hon'ble Supreme Court in the case of Madras Industrial Investment Corpn. Ltd. (supra) insofar as it deals with spread over of discount is not applicable to the facts in the instant case of the assessee. Section 37(1) of the Income Tax Act, 1961, also does not provide for deferment for expenditure, as can be observed from the decision of the Hon'ble Supreme Court in the same case of Madras Industrial Investment Corpn. Ltd. (supra), wherein it was held as under:

> Ordinarily, revenue expenditure which is incurred wholly and exclusively for the purpose of business must be allowed in its entirety in the year in which it is incurred. It cannot be spread over a number of years even if the assessee has written it off in

his books, over a period of years".

Learned counsel submitted, however, the Hon'ble Supreme Court created an exception to the above rule in the case of Madras Industrial Investment Corpn. Ltd. (supra), keeping in view the peculiar facts of the case, which are very different from the facts of the instant case of the assessee. Learned counsel further submitted that the entire sum paid by assessee to the artists, being revenue expenditure, should be entirely allowed as a deduction in the year in which it was incurred.

79. Learned counsel further submitted, when a debenture is issued, the risk is reflected in pricing or in the rate of interest at which the debentures are issued. In the instant case, the assessee is the sole bearer of the risks resulting from the payment under the agreement. In other words, in this case the payer is bearing the risk and not the payee; whereas in the case of Madras Industrial Investment Corpn. Ltd. (supra) it was the payee who was bearing the risk. Learned counsel further submitted, in the instant case of the assessee, the assessee has incurred the expenditure, which is bearing the risk and not the artists, Shri Amitabh Bachchan or Smt. Jaya Bachchan, receiver of the payment. The risk was undertaken in the year in which the expenditure was incurred; as such it is to be allowed in the year of incurrence.

80. Referring to the decision of the Hon'ble Bombay High Court in the case of Taparia Tools Ltd. v.Joint CIT (2003) 260 ITR 102 (Bom), learned Counsel submitted, in this case the debentures were allotted to six parties. As regards to payment of interest, option was given of periodically receiving interest on half yearly basis @) 18% p.a. for five years or one year upfront payment of Rs. 55 per debenture immediately on allotment. Parties 1 and 6 opted for one year upfront payment while parties 2 to 5 opted for periodic interest. In the return, the assessee claimed full deduction of entire amount of upfront payment, whereas in books of account it was shown as deferred revenue expenditure and the amount was proportionately written off over a period of five years. The life of non-convertible debenture was five years and stream of income was coming in over a period of five years against one time upfront payment of interest. As such, there was distortion of profit, whereas in case of other four parties claim of deduction of interest is made in five years, i.e., as and when interest is paid.

81. Learned counsel further submitted in the case of Taparia Tools Ltd. (supra), the term "matching concept" was discussed on page 116 and distortion of profits resulting from the claim of the assessee. The Hon'ble High Court observed as under:

,,... Therefore, under the mercantile system of accounting, in order to determine the net income of an accounting year, the revenue and other incomes are matched with the cost of resources consumed (expenses). Under the mercantile system of accounting, this matching is required to be done on accrual basis. Under this matching concept, revenue and income earned during an accounting period, irrespective actual cash inflow, is required to be compared with expenses incurred during the said period, irrespective of actual out-flow of cash. In this case, the assessee is following the mercantile system of accounting. This matching concept is

very relevant to compute taxable income particularly in cases involving DRE.

Learned counsel further submitted, on the very same Page 116, while referring to the decision of the Hon'ble Supreme Court in the case of ... It was held by the Supreme Court that the expression'profits or gains' in Section 10(l) of the Indian Income Tax Act, 1922, should be understood in its commercial sense and there can be no computation of such profits and gains until the expenditure, which is necessary for the purposes of earning the receipts is deducted therefrom. Accordingly, the Supreme Court took the view that since the assessee was following the mercantile system of accounting and since the assessee had credited the full sale price of lands in its accounts amounting to Rs. 43,692, the assessee was entitled to estimate the expenditure because without such estimation of expenditure, it was not possible to compute profits and gains. This concept is also applied by the Supreme Court in the case of Madras Industrial Investment Corpn. Ltd.

Learned counsel submitted, in the instant case of the assessee there is no guaranteed revenue against one time guaranteed payment of Rs. 18 crores. This is the payment for services of artists, which is dependent on artists public standing. There may be health problems or uncertainty of life; as such there is no steady stream of income to match the one time guaranteed payment.

82. Learned counsel further submitted, in the case of CIT v. Bhor Industries Ltd. , which distinguished the decision in the case of Taparia Tools Ltd. (supra), it was held that the VRS expenses were incurred by the company to save an expense. It is well settled, ordinarily, revenue expenditure, which is incurred wholly and exclusively for the purposes of business, must be allowed in its entirety in the year in which it is incurred and it cannot be spread over a number of years even though the assessee written it off in its books over a period of years. It is only in cases of special type of assets that the spread over is warranted. At page 184, while distinguishing the decision in the case of Taparia Tools Ltd. (supra), the Hon'ble High Court observed that "to attract the concept of spread over of the VRS expenses there ought to be an income stream coming in order to match the expenditure, which is not present here. Therefore, the matching concept discussed in Taparia Tools Ltd. does not apply here". Learned counsel submitted, both the decisions of the jurisdictional High Court in the case of Taparia Tools Ltd. (supra) and in the case of Bhor Industries Ltd. (supra), were given by the same Hon'ble Judge on 8-1-2003 and 26-2-2003 respectively i.e., within the interval of one month.

83. Learned counsel submitted, the claim of the assessee is allowable in the year of payment itself, as held in the following decisions, which were cited before the revenue authorities as well:

(1) CIT v. Associated Cement Co. Ltd. 172 ITR 257 (SC). In this case the amount spent by the assessee under agreement with Government/Municipality on providing-water pipelines for supply of water; transmission line for lighting the Municipality; and to concrete the main road from factory to station in consideration of non-payment of Municipal rates/taxes for a period of 15 years was allowed. It was held that since the

> assets were of Municipality and since the advantage obtained by the assessee was absolution of immunity from liability to pay Municipal rates/taxes for a period of 15 years, which liability would have been allowed on revenue account if they had to be paid and therefore, the advantage secured was in the field of revenue and hence allowable.

Learned counsel submitted, in the instant case also the advantage obtained by the assessee is in the field of revenue as it has paid in lump sum, for partial user of brand equity for ten years instead of what would have been paid by the assessee transaction-wise during that period with added risk of hike in rates by the artists. Such payments if paid from year to year would have been allowable as revenue expenses; as such the advantage secured is in the field of revenue and hence the lump sum payment is also on revenue account and allowable in the year of payment itself. In the case of Associated Cement Co. Ltd. (supra), even 15 years were not considered by the Hon'ble Supreme Court to be 'enduring' period; whereas in the instant case it is only ten years.

(2) Empire Jute Co. Ltd. v. CIT 124 ITR 1 (SC) Under Indian Jute Mills Association an agreement was entered into by Jute Mills restricting the hours per week, for which the mills could work their looms. However, the mills were allowed to transfer their allotment of hours of work per week to other mills for payment received. This payment made by the assessee was held by the Hon'ble High Court to be capital expenditure. The Hon'ble Supreme Court reversed the said decision. holding that the expenditure was revenue in nature as it was made for operating its looms for longer hours with a view to increasing its profits, observing as under:

> 'There may be cases where expenditure, even if incurred for obtaining an advantage of enduring benefit, may, nonetheless, be on revenue account and the test of enduring benefit may break down. It 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 assessee'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.
>
> 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 juristic 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.

Learned counsel submitted, the case of the assessee squarely falls within the ratio of the above decision, which does limit the period of advantage if it is in revenue file Even if it is considered a case of advantage of enduring benefit, the benefit obtained by the assessee is in commercial field and not in capital filed. The services of the artists are obtained for ten years only for facilitating the assessee's business operations and for increasing its profitability. He further submitted, the services of artists were available only for 120 days in a year and they were free to work elsewhere on other days. Thus, the payment made is only for partial user of brand equity of the artists and not for acquisition thereof and hence it is allowable as revenue expenditure in the year of payment itself as it is clearly on revenue account, incurred with a view to increasing profits of the assessee.

(3) CIT v. Ciba of India Ltd. 69 ITR 692 (SC) In this case payment made by the assessee for non-exclusive user of patents & trademark and for access to technical knowledge & experience in pharmaceutical field of the Swiss Company for a period of five years was allowed as revenue expenditure as the assessee had obtained only right to draw upon the technical knowledge of Swiss company for a limitedperiod, forthepurposes of its business. Neither the Swiss Company had parted with any assets nor did the assessee acquire any asset or advantage of enduring nature.

Learned counsel submitted, in the instant case of the assessee also the assessee had acquired only right to user of the brand equity of the artists for a limited period and that too only for 120 days in a year during the agreement period of ten years. No asset was acquired by the assessee and the advantage was in revenue field; as such the payment is allowable in full in the year of payment itself.

84. Learned counsel further submitted, the above mentioned three decisions of the Hon'ble Supreme Court are in respect of loom hours, trade marks, water & electric lines and patents/trade marks respectively and even then they have been decided in favour of the assessees. The instant case of the assessee is in respect of services to be rendered by human beings, which by their very nature cannot be of "enduring nature". Hence, advantage obtained from such human services can never be of enduring nature.

85. Learned counsel further referred to the decision of the Tribunal in the case of Reliance Industrial Infrastructure Ltd. v. Joint CIT (2002) 75 TTJ (Mum.) 606, wherein it was held that merely because in the books of account the assessee wrote off on average basis over a period of 15 years, the deduction of lease rent as claimed by the assessee on the strength of contractual liability as per the agreement cannot be defeated.

86. Replying to the above, the learned DR submitted, the contention of the learned Counsel that the decision of the Hon'ble Supreme Court in the case of Madras Industrial Investment Corpn. Ltd. (supra) cannot be applied is a contention without merit. In the instant case of the assessee, learned DR submitted, this decision is clearly applicable. He invited our attention to Clause 13, which deals with the effect of termination. It reads as under:

13. Effect of termination The following provisions shall apply on and after notice of termination by the Corporation:

13.1 The Artist shall continue to comply with all of the obligations on the part of the Artist under this agreement which are not affected by termination.

13.2 The Corporation shall remain entitled to all rights granted or assigned to the Corporation under this Agreement and all other rights relating to the engagements of the Artist and the all products of the engagements.

13.3 The Artist shall be entitled only to such consideration as shall have accrued due and become payable, payable pro rata on the date of termination.

Learned DR submitted, reading of the above clause makes it clear that Shri Amitabh Bachchan and Smt. Jaya Bachchan are perpetually bound by this agreement. The artists are allowing the Corporation to exploit. The risk is of the Corporation and not of the artists. In addition to the lump sum payment, there are annual payments and separate payment for the films. In other words, payment is for nothing but to give a right to the Corporation to exploit them. Again the learned DR brought our attention to the decision of the Hon'ble Calcutta High Court in the case of Hindustan Aluminium Corpn. Ltd. v. CIT , the portion reads as under:

> As mentioned hereinbefore, on behalf to the revenue two main contentions were urged before the Tribunal and those were repeated before us, viz., that by entering into the agreement in question in respect of which the payments were claimed as deduction in the year in question, the assessee had secured the capital assets and, therefore, this should be in the capital account and would not be allowed as revenue expenditure. It was, secondly, contended that the spread over of expenditure could not be claimed in the particular year in question with which we are concerned. We must observe that this expenditure in question must be understood in the light of all other clauses that we have set out hereinbefore. All other agreements the assessee-company had entered into were for procuring or securing its rights of a permanent nature-and the company was capitalizing the expenditure in its accounts, like invention, erection of the factory, fabrication of the plant, etc., which we have mentioned hereinbefore. It may be important in this connection, though we are not concerned with other agreements, to refer to some of the clauses of the other agreements. The first agreement was dated 1-1-1960. It is not necessary to refer to all the articles. Article V dealt with description of services rendered by the foreign company. Clause 1 of article V stated as follows....

In the light of the above, the learned DR submitted, the learned Commissioner (Appeals) was justified in holding that the expenditure should be spread over the period of ten years, i.e., to say, the period of agreement.

87. Learned DR further brought our attention to the decision of the Hon'ble Delhi High Court in the case of CIT v. Printpak Machinery Ltd. (2001) 248 ITR 684(Del), particular Page 688, wherein the Hon'ble High Court discussed the decision of the Hon'ble Supreme Court in the case of Madras Industrial Investment Corpn. Ltd. (supra). Learned DR submitted, whether a particular expenditure is revenue expenditure incurred for the purpose of running business must be determined on a consideration of the factual position and by the application of principles of commercial trading. The question must be viewed in the larger context of business necessity or expediency.

88. Learned DR further submitted, inviting our attention to the decision of the jurisdictional High Court in the case of Taparia Tools Ltd. (supra), that it is necessary under the mercantile system of accounting, in order to determine the net income of accounting year, the revenue and other income must be matched with the cost of resources consumed. Under this matching concept, revenue and income earned during an accounting period irrespective of actual cash-flow, is required to be compared with expenses incurred during the period irrespective of actual out-flow of cash. This matching concept is very essential to compute taxable income, particularly in cases involving deferred revenue expenditure.

89. The learned DR again brought our attention to the decision of the Tribunal in the case of Assistant Commissioner v. Amtrex Appliances Ltd. (2005) 94 TTJ (Ahd.) 396, wherein the Tribunal spread over the expenditure claimed over a period of five years since it was in accordance with the accepted accounting practice, which was also not contrary to any of the provisions of the Income Tax Act. Hence, the learned DR submitted, the order of the Commissioner (Appeals) is to be upheld because the spread over is to be seen on the basis of the facts in each and every case and there is no general principle that it should be allowed in the very same year.

90. Inviting our attention to Paper Book page 24, which is the Profit and Loss Account for the year ended 31-3-1995, learned DR submitted, in this year assessee had a large profit and the assessee is claiming the entire deduction of Rs. 18 crores. If this deduction of Rs. 18 crores is allowed as assessee's expenditure, what is left over is about Rs. 3 crores which itself indicates that the assessee is trying to have an advantage, which distorts the actual figure. Hence the learned DR submitted, the order of the learned Commissioner (Appeals) is to be upheld

91. Replying to the above, learned Counsel submitted, in the decision relied by the learned DR in the case of Printpak Machinery Ltd. (supra), the question was of allowability of expenditure on obtaining technical knowhow for five years in its entirety in the year of incurrence; whereas in the instant case of the assessee, the question is not of technical advisor but of an artist, whose services are not consistent. Learned counsel further submitted, even the facts of other case laws relied by the learned DR in the case of Hindustan Aluminium Corpn. Ltd. (supra) and in the case of Amtrex Appliances Ltd. (supra), are not similar to assessee's case; as such these decisions do not apply to the instant case of the assessee. Learned counsel submitted that as the reciprocal obligations between the assessee and Shri Amitabh Bachchan and Smt. Jaya Bachchan having been undertaken, accepted and acted upon in the year under consideration and are indefeasible on both sides even in the event of termination of the agreement, the guaranteed payment is deductible in toto in the year of agreement.

92. We have heard the rival submissions, gone through the orders of the revenue authorities and the decisions cited by the contending parties. We are of the view that the issue has to go in assessee's favour. As rightly contended by the learned Counsel for the assessee, the decision relied by the learned Commissioner (Appeals) in the case of Madras Industrial Investment Corpn. Ltd. (supra), does not support the case of the revenue. The omitted part of the same Para, which has been reproduced hereinabove, makes it clear that if an assessee claims expenditure incurred wholly and exclusively for the business purpose in the normal course, it should be allowed in the very same year. The Hon'ble Supreme Court further held that it cannot be spread over a number of years even if the assessee has written it off in its books of account over a period of years. This observation makes it clear that this cannot be allowed so because the assessee might be doing this purposely with an intention to have a distorted figure and claim the benefit or assessee's liability to pay tax may get a distorted picture. In the instant case of the assessee, there is no evidence before us to show that this is actually the intention of the assessee. In the year under consideration the expenditure is incurred and the assessee is claiming it. The case relied upon by the revenue was in connection with issuing debentures at a discount. The Hon'ble Supreme Court held that the payment is to secure a benefit over a number of years and the assessee was getting a continuing benefit to the business for the entire period. The decision went against the assessee on particular facts.

93. The decision of the Hon'ble Supreme Court relied upon by the learned Counsel, in the case of Associated Cement Companies Ltd. (supra) supports the assessee's case. In this case the assessee had an agreement with Government and Municipality for providing water pipelines, for providing transmission lines and to concrete the road from factory to station in consideration of non-payment of Municipal rates spread over for a period of 15 years. The Hon'ble Supreme Court held that this is an advantage secured but in the field of revenue; hence allowable. As rightly contended by the learned Counsel, the services of the artists are obtained for ten years but for facilitating their continued co-operation, which will go to increase assessee's profitability, It is for 120 days in a year and the artists were free to work anywhere else. it is for user of brand equity and not acquisition as such.

94. Coming to the decision relied upon by the learned DR in the case of Printpak Machinery Ltd. (supra)), the question was allowallibility of expenditure on technical know-how for five years. At page 688, the Hon'ble Delhi High Court held that Section 37(1) of the Act requires that the expenditure should not be of a capital nature. The court held, the question whether a particular expenditure is revenue, incurred for the purpose of business, must be determined on a consideration of the factual position, applying the principles of commercial trading and the question should be considered from larger context of business necessity and expediency. If the outgoing or expenditure is related to carrying on or conduct of the business, then it may be regarded as part of profit-making process and not for acquisition of an asset or right of a permanent character, the possession of which is a condition of the carrying on of the business, the expenditure in such a case may be regarded as revenue expenditure. We have already held hereinabove that the payment made to the artists was not of capital nature because it was for the user of the talents and not for the acquisition of capital as such.

95. Coming to the decision relied upon by the learned DR in the case of Hindustan Aluminium Corpn. Ltd. (supra), it is again payment for securing technical assistance and training of personnel. The Hon'ble Calcutta High Court held that this is not a capital expenditure. The assessee itself sought to spread this expenditure over 20 years and their Lordships allowed it.

96. In view of the above we are of the view that the expenditure as claimed by the assessee is to be allowed in the year of payment itself. Order accordingly.

97. In the result, appeal of the assessee stands allowed and the cross objection of the revenue stands dismissed.