

(1977) 10 BOM CK 0021

In the Bombay High Court

Case No : Income-tax Reference No. 70 of 1971

Commissioner of Income Tax

APPELLANT

Vs

J.A. Trivedi Bros.

RESPONDENT

Date of Decision : 04-10-1977

Acts Referred:

Income Tax Act, 1961 — Section 37

Citation : (1979) 117 ITR 983

Hon'ble Judges : R.M. Kantawala, J;M.N. Chandurkar, J

Bench : Division Bench

Advocate : R.J. Joshi, for the Appellant; C.J. Thakkar, for the Respondent

Judgement

Chandurkar, J.—At the instance of the revenue, the following question has been referred to the High Court by the Income Tax Appellate Tribunal:

"Whether, on the facts and in the circumstances of the case, the expenditure of Rs. 1,50,000 incurred by the assessee-firm on earth cutting in the Dukka Hurki Mine is allowable as revenue deduction u/s 10(2)(xv) of the Indian Income Tax Act, 1922 ?"

2. The facts on which this question has arisen in the course of assessment for the assessment year 1958-59 are not in dispute. The assessee is a firm whose business consists of mining manganese and coal. The manganese mines are located in Balaghat district in Madhya Pradesh. One such mine is known as Dukka Hurki Mine (hereinafter it is referred to as "the mine"). In respect of this mine in the year of accounting ending December 31, 1957, the assessee showed the extract of 920 tons and the expenditure incurred therefore was disclosed at Rs. 1,60,611. The break-up of this amount is as follows:

Rs. Wages for manganese extraction (920 tons) 6,117 Earth cutting wages 1,43,101 Sundry wages 5,694 Engine work wages for pumping out water 4,414 Wages for mates 1,285 ----- Total 1,60,611 -----

3. The ITO treated only a sum of Rs. 10, 611 as being of revenue nature and the balance of expenditure of Rs. 1,50,000 was considered as expenditure of capital nature in respect of the mine. It is not possible to ascertain as to which expenditure, other than the expenditure on earth cutting amounting to Rs. 1,43,101, was treated as capital expenditure. But the main dispute admittedly related to the amount which was shown by the assessee to have been spent on account of wages in respect of earth cutting. The ITO took the view that the assessee had started working a new pit described as the mine in question and since it was a new pit that was being dug, the expenditure of earth cutting was of a capital nature. What weighed with the ITO was that the mine in question which was purchased by the assessee from the Tatas was put into operation in 1952 and some ore was extracted in the year 1953-54, but that the working of the mine was started some time in 1957. According to the ITO, it was the case of the assessee that in the course of mining operations it was noticed that at certain points the reef had certainly disappeared and mining had to be stopped, such disappearance of the reef being known to geologists as "intrusion". Since the reef had disappeared and was not found to be continuous, the earth had to be dug out and that the area was already a proved area and what the assessee was doing was merely carrying on mining operation by working on the reef. The disappearance of the reef, according to the assessee, was one of the vagaries of erratic deposits of ore and the assessee would not have been able to extract ore unless he had taken recourse to the earth-cutting which formed an intrinsic part of the mining operations. An expenditure amounting to Rs. 1,50,000 having been disallowed as deductible expenditure, the assessee filed an appeal before the AAC.

4. The AAC separated the expenditure for the working of the mine in question from the other expenditure incurred by the assessee and he took the view that the mine was abandoned for a long period of time and heavy expenditure was incurred for opening it with a view to restart the mining operation. According to the AAC, having regard to the comparatively low output, the unduly large expenditure could not be said to be of a revenue nature. The AAC, therefore, confirmed the order of the ITO.

5. In appeal, however, the Tribunal reversed the decision of the Income Tax authorities. The Tribunal took the view that in the system of mining known as open-cast system, the expenditure on earth cutting had to be regarded as revenue expenditure and the fact that the mine was abandoned earlier, did not change the nature of the earth-cutting expenditure. The Tribunal found that mining operations were started by the assessee in the accounting period relevant to the assessment year 1952-53, and the expenditure was, therefore, not incurred to put the mine in a condition fit for operation. Reliance was placed before the Tribunal on the decision in *Bonner Surveyor of Taxes v. Basset Mines Ltd.* [1912] 6 TC 146, and the Tribunal took the view that the operation of the cutting earth which was technically known as removing the overburden could not be equated with the sinking of shafts which is involved in the case of *Basset*

Mines. The Tribunal consequently found that the amount of Rs. 1,50,000 which was disallowed should be allowed as revenue deduction. In view of this decision against the revenue, the question reproduced above has been referred at the instance of the revenue.

6. Mr. Joshi appearing for the revenue has contended that this was not a case of a simple removal of earth and that having regard to the largeness of the expenditure involved, the earth cutting operations also could have been carried on a large scale which according to the learned counsel was intended to put the assessee-company in a position to obtain the ore and the expenditure, therefore, partook of capital expenditure and not revenue expenditure. Mr. Joshi has heavily relied on the decisions in *Morant Surveyor of Taxes v. Wheal Grenville Minning Company* [1894] 3 TC 298, *Bonner Surveyor of Taxes v. Basset Mines Ltd.* [1912] 6 TC 146 and *United Collieries Ltd. v. IRC* [1929] 12 TC 1248. We shall deal with these cases later in the judgment.

7. On the other hand it is contended by Mr. Thakkar appearing for the assessee that, on the findings of the Tribunal, the expenditure which was disallowed by the ITO and the AAC was not incurred for earlier proving or exploring the mine and that that expenditure has not resulted in any improvement of asset by fixing any permanent structure. According to the learned counsel the expenditure is clearly incurred for the purposes of business for winning the manganese ore and merely because the amount appeared to be large as compared with the ore won, the nature of the expenditure did not get changed from revenue expenditure.

8. The question which, therefore, falls for consideration is whether the amount of Rs. 1,50,000 which has been allowed by the Tribunal as deductible expenditure being in the nature of revenue expenditure was rightly so allowed or whether it was in the nature of capital expenditure. On facts there does not appear to be any dispute. The mine in question is one of the mines which was worked by the assessee. It was no doubt purchased from the Tatas and the assessment year in question was not the first year when the mine was worked by the assessee. The Tribunal found as a fact that the mine was worked right from the accounting year relevant to the assessment year 1952-53, that the deposits in the mine had already been proved, that the mining operation had been done on the same reef area by the assessee in the earlier years, that the earth work was done not with a view to explore or to prove the mine or to reach the point where the ore could be reached and that the digging was done by the assessee from the top consistent with the mining laws and that because the reef had been found to be broken, the quantity of ore was less in spite of considerable earth work. Thus, the mining operation started right in the year 1952-53. Every year ore has been won out of this mine and in view of the fact at one time before the mine was purchased by the assessee it was an abandoned mine, that would have no relevance so far as the expenditure incurred in the assessment year in question is concerned. Further, the Tribunal has found as a fact that the mining operations were carried out according to open-cast system and the nature of the operation

which has been found by the Tribunal was that the opening of a new pit amounted to what was known in technical language as removing the overburden. The cutting of the earth resorted to by the assessee had admittedly not resulted in bringing into being any permanent fixture or structure. It may be helpful to refer to what is meant by open-cast working so far as the winning of ore is concerned. A publication styled as Monograph on Manganese Ore (July 1974 edition) issued by the Indian Bureau of Mines, which is a part of the Ministry of Steel and Mines of the Government of India, has been made available to us by the learned counsel for the assessee. Regarding open-cast working it is stated as follows on page 119:

"Workings of manganese mines in India can be broadly classified into 3 groups, viz., (a) open-cast, (b) underground and (c) dump workings.

9. Open-cast workings:-As already mentioned, a vast majority of the mines in India are worked by open method. All the mines are labour intensive. In a manually worked pit, the height of the benches formed is commonly 1.5 meters. In the case of a soft over-burden, mining consists of loosening the earth by crow-bars only.

10. It is only in dispute that the expenses in respect of deduction as claimed were on account of manual labour employed for loosening the earth. It may be important to point out that the above quoted description of the operation seems to include the removal of the overburden as a part of the mining process, because what has been stated is that mining consists of loosening the earth by crowbars. The nature of the expenditure, therefore, shows that it was incurred for the purpose of removal of the earth known technically as earth-cutting which was an intrinsic part of the process of mining. The question which, therefore, calls for our consideration is whether such an expenditure could properly be described either as capital expenditure or revenue expenditure. It is now well known that no test with regard to whether a particular expenditure should be classified as capital expenditure or as revenue expenditure can be exhaustive. The tests which have been laid down by the Supreme Court in *Assam Bengal Cement Co. Ltd. Vs. The Commissioner of Income Tax, West Bengal*, where the propositions which were laid down by the Full Bench of the Lahore High Court in *Benarsidas Jagannath*, (1947) 15 ITR 185 Lahore need not be referred to for the purposes of the present case because it does not appear to be the case of the revenue that the nature of the expenditure incurred falls in any one of the three categories which were laid down by the Lahore High Court. We may, however, refer to certain observations in that case where the Supreme Court has recognised the fact that it would be difficult to lay down a test which could be applied to all situations and that the criteria laid down by the Lahore High Court had to be applied from the business point of view. After referring to the criteria laid down by the Full Bench of the Lahore High Court, the Supreme Court has observed as follows (p. 45):

"In cases where the expenditure is made for the initial outlay or for extension of

a business or a substantial replacement of the equipment, there is no doubt that it is capital expenditure. A capital asset of the business is either acquired or extended or substantially replaced and that the outlay whatever be its source whether it is drawn from the capital or the income of the concern is certainly in the nature of capital expenditure."

11. It is not the case of the revenue before us that the expenditure incurred in earth cutting was either expenditure for the purposes of expenditure of business or any replacement of the equipment. On the finding of the Tribunal that the mine was being worked since the assessment year 1952-53, the expenditure could not be also of the nature of initial outlay. Dealing with the expenditure incurred while the business is going on, the Supreme Court observed as follows (p. 45):

"The question however arises for consideration where expenditure is incurred while the business is going on and is not incurred either for extension of the business or for the substantial replacement of its equipment. Such expenditure can be looked at either from the point of view of what is acquired or from the point of view of what is the source from which the expenditure is incurred. If the expenditure is made for acquiring or bringing into existence an asset or advantage for the enduring benefit of the business it is properly attributable to capital and is of the nature of capital expenditure. If on the other hand it is made not for the purpose of bringing into existence any such asset or advantage but for running the business or working it with a view to produce the profits, it is a revenue expenditure... The aim and object of the expenditure would determine the character of the expenditure whether it is a capital expenditure or a revenue expenditure ... It has been rightly observed that in the great diversity of human affairs and the complicated nature of business operations it is difficult to lay down a test which would apply to all situations. One has therefore got to apply these criteria one after the other from the business point of view and come to the conclusion whether on a fair appreciation of the whole situation the expenditure incurred in a particular case is of the nature of capital expenditure or revenue expenditure in which latter event only it would be a deductible allowance u/s 10(2) (xv) of the Income Tax Act."

12. Referring to the test of enduring benefit, the Supreme Court cited with approval the interpretation of that phrase in *Anglo-Persian Oil Company Ltd. v. Dale* [1932] 1 KB 124 ; [1931] 16 TC 253 , where Romer L.J. observed that by enduring benefit is meant enduring in the way that a fixed capital endures. These tests will have, therefore, to be borne in mind to apply in the context of the nature of the operations which are involved in the business of mining. Each case, therefore, must be decided on its own facts as further reported by the Supreme Court in *Gotan Lime Syndicate Vs. Commissioner of Income Tax, Rajasthan and Delhi* , where the Supreme Court pointed out that none of the tests laid down in the various authorities to distinguish between revenue expenditure and capital expenditure is exhaustive or universal and each case must depend on its own

fact, and a close similarity between one case and another is not enough, because even a single significant detail may alter the entire aspect. Dealing with the test of the enduring advantage, it was pointed out by the Supreme Court in the same case that it is not in every case where there is enduring advantage obtained as a result of incurring expenditure that such expenditure can be treated as capital expenditure. It was observed by the Supreme Court (p. 72):

"It is not the law that, in every case, if an enduring advantage is obtained, the expenditure for securing it must be treated as capital expenditure for, as pointed out by Channell J. In *Alianza Company v. Bell* [1904] 2 KB 666 "... in the ordinary case, the cost of the material worked up in a manufacture is not a capital expenditure; it is a current expenditure, and does not become a capital expenditure merely because the material is provided by something like a forward contract, under which a person for the payment of a lump sum down secures a supply of the raw material for a period extending over several years."

13. The Supreme Court referred to the observations of Viscount Cave and observed thus:

"Viscount Cave acknowledged that in certain cases an expenditure for obtaining an enduring advantage need not be capital expenditure for he inserted the words "in the absence of special circumstances leading to an opposite conclusion" within brackets."

14. Now, it cannot be seriously disputed in this case that, in the strict sense of the terms, no new asset which can be said to be tangible asset has been brought into existence as a result of cutting the earth. What appears to be the escape for the learned counsel for the revenue is that it was cutting of the earth which enabled the assessee to reach the ore and it was this advantage which must be construed as an enduring advantage and, therefore, the expenses must be treated as capital expenditure. It is difficult for us to accept this contention. Cutting of earth is a very necessary part of the mining operations, because unless you remove the overburden it will not be possible to reach the mine. In the present case the undisputed facts show that because of geological factors or situation the reef from which the ore was being won, had disappeared and was not visible, and if the reef had to be uncovered for the purposes of mining ore, earth cutting operations had to be resorted to. Thus, if these operations were an essential and intrinsic part of the whole process of mining, it is difficult to see why these expenses could not be treated as operational expenditure for the purposes of winning the ore. The mere fact that as the assessee went on cutting the earth he was able to reach the reef of the mine, did not mean that he was bringing into being any advantage which could be said to be of enduring character. Merely because the cutting of earth at earlier stages enabled him to go further, it would by itself not convert the expenditure incurred by the assessee into capital expenditure. We may refer with advantage to the decision of the Supreme Court in *Commissioner of Income Tax, Bihar and Orissa Vs. Kirkend Coal Co. New Birbhum Coal Co. Ltd.*, . That was an appeal from the decision of

the Patna High Court in Commissioner of Income Tax Vs. Kirkend Coal Co., . The facts of that case show that the assessee who was carrying on coal mining business, had incurred certain expenditure in carrying out stowing operation under the direction of the Department of Mines which had to precede the depillaring operation. The ITO had taken the view that on account of such stowing the extraction of coal was made possible at least for a score of years to come and were, therefore, of an enduring benefit and the expenditure incurred over such stowing was in the nature of capital expenditure. This view of the Income Tax authorities was reversed by the Tribunal and in reference the High Court of Patna held that the mere fact that as a result of stowing, the assessee-company would be able to win coal for a number of years would not transform what was not essentially an operational expenditure into an expenditure of a capital nature, and in view of the object and the purpose for which the stowing was undertaken the expenses were allowable under s. 10(2) (xv). The following passage from the Division Bench decision of the Patna High Court is important (p. 543):

"It is, however, not necessary, as was pointed out by Romer L.J. in the case of Anglo-Persian Oil Company v. Dale [1931] 16 TC 253 that the expenditure should have that result (bringing an asset or advantage into existence); it is the object alone that counts. Likewise, the mere fact that an essentially operational expense has in fact resulted in the coming into existence of some advantage which is going to ensure for several years is also of no consequence. In the present case, it is, no doubt, true that, as a result the stowing, it had become possible for the assessee-company to continue to extract coal for a number of years to come. But, in view of the object and the purpose with which the stowing was undertaken in the present case, we do not see how the mere fact that, as a result of the stowing, the assessee-company would be able to win coal for a number of years would transform what was essentially an operational expenditure into an expenditure of a capital nature. There is nothing to suggest that the stowing would have been done to any lesser degree if it was meant to be effective for the accounting year alone."

15. We have referred in extenso to the paragraph from the judgment because this test has been affirmed by the Supreme Court and the reported decision does not give the facts in detail. In appeal by the revenue, the Supreme Court held that the High Court was justified in holding that the expenditure in dispute was revenue expenditure and then observed as follows: Commissioner of Income Tax, Bihar and Orissa Vs. Kirkend Coal Co. New Birbhum Coal Co. Ltd., :

"This court had in various decisions laid down the principles to be applied distinguishing revenue expenditure from capital expenditure. In BOMBAY STEAM NAVIGATION CO. (1953) PRIVATE LTD. Vs. COMMISSIONER OF Income Tax, BOMBAY., this court observed:

"Whether a particular expenditure is revenue expenditure incurred for the purpose of business must be determined on a consideration of all the facts and

circumstances, and by the application of principles of commercial trading. The question must be viewed in the larger context of business necessity or expediency. If the outgoing or expenditure is so related to the carrying on or conduct of the business, that it may be regarded as an integral part of the profit-earning process and not for acquisition of an asset or a right of a permanent character, the possession of which is a condition of the carrying on of the business, the expenditure may be regarded as revenue expenditure".

16. These observation in our view apply wholly to the case before us. As we have already pointed out, the operation of earth digging is an intrinsic part of the mining operation and it would, therefore, become an integral part of the profit-earning process. Indeed, winning the ore would be almost impossible unless you reach it in the process of mining by cutting the earth. The Tribunal, therefore, it appears to us, was more than justified in taking the view that the expenditure was in the nature of revenue expenditure.

17. Mr. Thakkar appearing on behalf of the assessee has referred us to a decision of the Calcutta High Court in *Kalyanji Mavji and Co. Vs. Commissioner of Income Tax*, . Where the question was whether the expenditure incurred for the purposes of digging coal from the colliery which is already in existence, owned by the assessee in its business, but not worked for some time, by removing the impediments to the working of the some to facilitate the existing trade of the company, was in the nature of revenue expenditure, the Calcutta High Court, after a review of several decisions dealing with the question of capital expenditure and revenue expenditure, has observed (p. 251):

"An expenditure which has to be incurred by an assessee in the course of its trade to enable the assessee to carry on its trading operation should usually be considered to be revenue expenditure when other necessary conditions are satisfied."

18. These observations have our respectful concurrence. Now, the decision relied upon by the learned counsel for the revenue admittedly did not deal with the fact similar to those appearing in the instant case. In the first case of *Morant Surveyor of Taxes v. Wheal Grenville Mining Company* [1894] 3 TC 298, the question was whether the expenditure incurred on the construction of a new shaft altogether when it was found that the area of ground which had been worked from one shaft will become impossible to work any further from that shaft was revenue expenditure and the court held that it was capital expenditure. Apart from the fact that the expenditure incurred in the instant case on account of earth cutting which we have held was intrinsically one part of the mining process, cannot be equated with the expenditure incurred on the construction of as shaft which has to be newly constructed. It is important to point out that in the same case *Wright J.* has taken a view that in the given case if the shafts are shallow, expenditure for sinking such shafts could properly be treated as part of mining expenditure. These observations again highlight the fact that the question whether the expenditure is in the nature of capital expenditure or revenue

expenditure has to be decided on the fact of each case.

19. In the other case, *Bonner Surveyor of Taxes v. Basset Mines Ltd.* [1912] 6 TC 146 the decision in *Morant's case* [1894] 3 TC 298 was followed and it was held that the cost of deepening a main shaft could not be allowed as revenue expenditure. While holding that the expenditure could not be treated as revenue expenditure, the learned judge in terms referred to the ordinary decision in *Morant's case* [1894] 3 TC 298 as may be clear from the following observations (p. 151):

"I think the above description of the shaft shown quite clearly that the money expended on the extension of the shaft for a distance of 50 fathoms was in no sense a working expenditure within the definition suggested by Mr. Danckwerts at page 302 of *Morant v. Wheal Grenville Mining Co.* [1894] 3 TC 298 and there is no statement in connection with the description which could in any way be said to be evidence of its being such working expenditure."

20. In view of the fact that we have already distinguished the very basis of this judgment, the decision in *Basset Mines Ltd.* [1912] 6 TC 146 cannot be of any assistance to the revenue.

21. The third decision in the *United Collieries Ltd. v. IRC* [1929] 12 TC 1248 is again a decision based on its own facts. The decision shows that a mine which was worked in 1914 was abandoned as it was found that it was inadvisable to continue work on the lower seams as water had accumulated in the pit up to the upper seams. The lower seams were free from water in 1923 and the cost of dewatering were claimed as deduction in the computation of their profits by the company for the purposes of Corporation Profits Tax contending that the expenditure was incurred in the ordinary course to enable the continuance of the operation. It was held that the expenditure was of a capital nature. Here again the fact which weighed with the learned Law Lords was that the mine had been abandoned for a long time and that the dewatering was no part of the working expenses of the colliery because it was intended to keep a permanent access to the minerals open and that dewatering was something that a person had to do as a condition precedent to the working of minerals as a profit. The decision thus turned on its own facts.

22. The quantum of the expenditure, as contended by Mr. Joshi, had really no relevance so far as the question of determination of the nature was concerned. If the expenses incurred for earth cutting was a part of the operation expenditure, the fact that comparatively the yield of the ore was small, would not change the nature of the expenditure. We are, therefore, satisfied that the Tribunal had taken the correct view of law and rightly held that the expenditure is to be deductible as revenue expenditure. The question to us is answered in the affirmative and in favour of the assessee. Revenue to bear the costs of the assessee.