

(1965) 08 PAT CK 0006

In the Patna High Court

Case No : Misc Judl Case No. 741 of 1961

Commissioner of Income Tax

APPELLANT

Vs

Kirkend Coal Co.

RESPONDENT

Date of Decision : 03-08-1965

Acts Referred:

Income Tax Act, 1922 — Section 10(2), 66(1)

Citation : AIR 1966 Patna 334 : (1966) 60 ITR 537

Hon'ble Judges : R.K. Choudhary, J;A.B.N. Sinha, J

Bench : Division Bench

**Advocate : S.N. Datta, Tarkeshwar Prasad and Leila Seth, for the Appellant;
Brajeshwar Prasad Sinha, V.D. Narayan and Shambhu Saran, for the Respondent**

Judgement

1. This is a reference u/s 66(1) of the Income Tax Act. The question referred for the opinion of the High Court is "whether the sum Rs. 21,911 claimed as stowing expenses is capital expense or revenue expense?"

2. The assessee, Messrs. Kirkend Coal Company is a firm carrying on coal mining business. During the accounting year ending with the 31st December, 1956, they spent a sum of Rs. 21,911 in stowing operations. It is common ground that the stowing in respect of which the aforesaid amount was spent was not undertaken as is generally done in connection with depillaring operations; it was rather undertaken in the process of extraction of coal as a business necessity or expediency. Indeed the Department of Mines required the stowing of certain galleries near the pit-mouth to be done before permission for working the colliery during the accounting year could be given, and, accordingly the assessee expended the aforesaid amount on stowing for being able to work the colliery. In these circumstances, the assessee claimed that the aforesaid expenditure having been incurred for the purpose of its business was revenue expenditure and fell within Section 10(2)(xv) of the Income Tax Act, 1922. The Income Tax Officer as well as the Appellate Assistant Commissioner on appeal by the assessee having held that the expenditure in question was in the nature of capital expenditure

and was thus not a deductible allowance, the assessee preferred an appeal to the Income Tax Appellate tribunal which allowed the appeal and held as follows:

"Stowing is an operation carried out in the process of extraction of coal and unless it is carried out extraction of coal is not possible irrespective of the fact whether depillaring has been done or not in this year. This expenditure is, in our opinion, a revenue expenditure, as it is necessary for the purpose of extraction of coal."

At the instance of the Department, the Income Tax Appellate Tribunal has however stated a case and has referred the question set out above for the opinion of the High Court.

3. Viscount Cave, L. C., in *Atherton v. The British Insulated and Helaby Cables Ltd.* (1926) 10 Tax Cas 155 has pointed out that an expenditure may be treated as properly attributable to capital, when it is made not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade unless however, there were special circumstances leading to an opposite conclusion. His Lordship further pointed out that the criterion suggested by Lord Denedin in *Vallambrosa Rubber Co. Ltd. v. Farmer* (1910) 5 Tax Cas 529 to the effect that "in a rough way" it was "not a bad criterion of what is capital expenditure as against what is income expenditure to say that capital expenditure is a thing that is going to be spent once and for all and income expenditure is a thing which is going to recur every year" was, no doubt, often a material consideration but was not and was obviously not intended by Lord Dunedin to be a decisive one in every case; for it was "easy to imagine many cases in which a payment, though made "once and for all" would be properly chargeable against the receipts for the year". On behalf of the Department, it has been urged that the present case answers fully the test laid down by Lord Cave in *Atherton's* case because in this case apart from the fact that the expenditure was incurred once and for all--a test which may not be decisive the stowing has brought into existence an advantage for the enduring benefit of the assessee's trade or business in so far as it has made it possible for the assessee to continue extracting coal for several years Reliance was also placed on some other English cases and on the decision of the Supreme Court in the case of *Assam Bengal Cement Co. Ltd. Vs. The Commissioner of Income Tax, West Bengal*, which, it was claimed have applied the test laid down by Lord Cave as aforesaid. It has, accordingly, been urged on behalf of the Department that, in so far as the Income Tax Appellate Tribunal has failed to apply the correct test in coming to its conclusion, the same was liable to be reopened by this Court, and, applying the test laid down by Lord Cave as aforesaid, it should be held that the expenditure incurred on stowing in the present case was in the nature of capital expenditure and not revenue expenditure. According to the assessee, however, looking at the matter in the context of business necessity or expediency, as it must be the expenditure in question, not having been incurred "with a view" to bringing into existence any asset or advantage for the enduring benefit or otherwise of the

business, but having been incurred as an integral part of the profit-earning process by the assessee company during the year and being really in the nature of operational expenses was attributable to revenue and not to capital.

4. Now it is well settled that where the ultimate finding on an issue was by way of an inference to be drawn from the facts found, on the application of any principle of law, a mixed question of law and fact arises: the inference itself, in such a case, was a question of law and was open to review by this Court. Whether a certain expenditure was of the nature of capital or revenue character has to be determined with reference to certain well recognised tests as might be applicable to the facts and circumstances of a particular case, and there can be no doubt that if the Income Tax Appellate Tribunal has failed to apply the right test, its ultimate finding determining the question was a finding of law and the High Court will be entitled to take a different view than the one which might have commended itself to that Tribunal.

5. In the present case, however, we are satisfied that applying the right test there is nothing wrong with the ultimate conclusion reached by the Income Tax Appellate Tribunal and the question referred must be answered in favour of the assessee.

6. On the facts of this case it is apparent that the stowing in question in respect of which the expenditure was incurred was undertaken as an operational measure making the extraction of coal during the year in question feasible, and, therefore, the expenditure was, in fact, an integral part of the profit-earning process of the assessee. According to the Appellate Tribunal the expenditure was "necessary for the purpose of extraction of coal". There is nothing on the record to suggest that the expenditure was incurred "with a view to bringing into existence any asset or an advantage for the enduring benefit" of the assessee's trade or business, and on that ground alone it must follow that the dictum of Lord Cave as pointed out above has no application to the instant case. The Supreme Court in the very case referred to on behalf of the Department, viz., in the case of *Assam Bengal Cement Co. Ltd. Vs. The Commissioner of Income Tax, West Bengal*, has pointed out at pp. 986 and 987 (of SCR): (at pp 96 and 97 of AIR) that "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", but, "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". It has further held in the same case that the aim and object of the expenditure would determine the character of the expenditure whether it is a capital expenditure or a revenue expenditure" The Supreme Court has further laid down that whatever test might become applicable, it had to be applied "from the business point of view" It is no doubt true that the Supreme Court in that case approved of and applied the test contained in the aforesaid dictum of Lord Cave but it will be seen that the facts

of the case before the Supreme Court were quite dissimilar to those of the instant case and thus the fact that the same test was applied by the Supreme Court as was applied by the House of Lords as per the dictum of the Lord Chancellor is of no assistance to the Department. In the case before the Supreme Court deduction was being claimed in respect of payment by the assessee company a lessee of lime stone quarries, to the Government who were the lessors, in consideration of the Government entering into certain covenants which ensured elimination of competition in the lessee's field of operation for the whole of the period of the lease that is, for 20 years. This claim of the assessee was rejected by the Supreme Court on the ground that the expenditure had been incurred with a view to bringing into existence an asset or advantage which was to ensure for the whole period of the lease, and thus came well within the test laid down by Viscount Cave. The case of (1926) 10 Tax Cas 155, in which the aforesaid test was laid down by Viscount Cave as well bears no resemblance to the facts of the present case. In that case, the assessee company claimed to deduct a sum of 81,784 pounds which it had settled upon trust with the object of bringing into existence the nucleus of a pension fund for its existing and future employees. This claim was repelled by the House of Lords on the ground that the amount in question having been spent with a view to bringing into existence an asset or advantage for the enduring benefit of the assessee's trade or business was in the nature of capital expenditure. Neither in the case before the Supreme Court nor in the case before the House of Lords the expenditure which was held to be of the nature of capital expenditure could be said to be a part of the assessee's working expenses or having been laid out as part of the process of profit-earning as in the present case. The various precedents to which Viscount Cave has made reference in support of the test which he laid down themselves indicate the type of cases to which the test laid down by his Lordship was applicable; for instance, money spent by a brewing firm with a view to the acquisition of new licensed premises (*Southwell v. Savill Brothers* (1901) 2 KB 349), and expenditure incurred by a ship building firm in deepening a channel and creating a deep water berth (not on their own property) to enable vessels constructed by them to put out to sea (*Ounsworth v. Vickers Ltd.* (1915) 3 KB 267), had been held to be in the nature of capital expenditure. The aim and object for incurring the expenditure in all these cases was to bring into existence an asset or advantage for the enduring benefit of the trade in question but as pointed out that is hardly the position in the present case. In *Tata Hydro-electric Agencies Ltd. v. Commr. of Income Tax, Bombay Presidency and Aden*, AIR 1937 PC 139 the Privy Council has observed:

"What is "Money wholly and exclusively laid out for the purposes of the trade" is a question which must be determined upon the principles of ordinary commercial trading. It is necessary, accordingly, to attend to the true nature of the expenditure and to ask oneself the question is it a part of the company's working expenses; is it expenditure laid out as part of the process of profit earning?"

7. A distinction has been made in this Privy Council case between the acquisition of an income-earning asset and the process of the earning of the income. The present case falls in the latter category. The cases to which we have referred and many more have been all considered by the Supreme Court in the case of *Assam Bengal Cement Co. Ltd. Vs. The Commissioner of Income Tax, West Bengal*, . From which we have set out above the relevant extracts and it follows that if the expense was not made with a view to acquiring an enduring material, asset or advantage, it will not be a capital expense. Indeed it should be remembered in connection with Viscount Cave's speech that the expenditure is attributable to capital if it be made "with a view to bringing an asset or advantage into existence". It is, however, not necessary, as was pointed out by Romer, L. J. in the case of *Anglo-Persian Oil Co. v. Dale* (1932) 16 Tax Cas 253, that the expenditure should have that result; it is the object alone that counts. Likewise, the mere act that an essentially operational expense has in fact resulted in the coming into existence of some advantage which is going to endure or several years is also of no consequence. In the present case it is no doubt, true that, as a result of 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 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. Indeed, it would have detracted from the value of the stowing if it was left incomplete. If a colliery, for instance, were to put up a prop so that certain areas from which coal had been worked out would not subside, the prop has to be effective and the expenses incurred in putting the prop would normally and undisputedly be of a revenue character, even though the effect of putting that prop might enure for some more years. The Supreme Court, in a recent case, *Bombay Steam Navigation Co. v. Income Tax Commr.* AIR 1965 SC 1201 has laid down the test for determining the question whether a particular expenditure had been incurred for the purpose of the business and, therefore, a revenue expenditure in the following words:

"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."

Applying this test and the test laid down by the Supreme Court in the earlier

case of Assam Bengal Cement Co. Ltd. Vs. The Commissioner of Income Tax, West Bengal, and upon a fair consideration of the circumstance under which the expenditure in question was incurred in the present case, as also the aim and object with which it was incurred, we have no hesitation in holding that the sum of money spent on the stowing was by way of revenue disbursement and the question referred must be answered in favour of the assessee.

8. A brief mention of the two cases, viz., that of the Supreme Court Assam Bengal Cement Co. Ltd. Vs. The Commissioner of Income Tax, West Bengal, , which were sought to be relied on by the Department, has already been made and it has been shown how they are distinguishable from the present case. The same is the position with regard to the other cases cited by the learned counsel for the Department. They may, however, be briefly noted. One of those is again a decision of the House of Lords in Bean (H.M. Inspector of Taxes) v. Doncaster Amalgamated Collieries Ltd. (1947) 27 Tax Cas 296. In this case the colliery company had paid a contribution towards a capital scheme which was intended to counteract or remedy the subsidence caused by the company's workings. The test laid down by Viscount Cave in Atherton's case was applied to the facts of this case. It is apparent that it was also a case of expenditure incurred with a view to acquire advantage of enduring benefit to the trade in question, or with a view to acquire something which added to the value of the capital asset of the particular trade in question, and is, accordingly, distinguishable from the present case on that ground alone.

9. The next case on which reliance was placed is Bradbury (H. M. Inspector of Taxes) v. United Glass Bottle Manufacturers Ltd. (1958) 38 Tax Cas 369. In this case the assessee company carried on the trade of glassware manufacturers; and when the National Coal Board began to extract coal near its main factory, the company, in order to guard against the dangers to its work, people and to its trade which would result from subsidence on the factory site, agreed to pay to the Board 40,000 pounds in five equal annual instalments in return for the Board's undertaking not to work coal in any seam lying in or under the site of the factory. On those facts, it was held that the payment of 8,000 pounds towards the first instalment was an expenditure of the nature of capital expenditure. It is quite clear that it was an expenditure incurred for acquisition of something unrelated to the operational work of the company and that, in our opinion, clearly distinguishes the facts of that case from those of the present. As was observed by Hidayatullah, J., delivering the majority judgment of the Supreme Court in K.T.M.T.M. Abdul Kayoom and Another Vs. Commissioner of Income Tax, , "Each case depends on its own facts and a close similarity between one case and another is not enough, because even a single significant detail may alter, the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo in "The nature of the Judicial Process" p. 20) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, its broad resemblance to another case is not at all decisive". Keeping this principle in view, we come to the

conclusion that none of the cases relied upon on behalf of the Department are of any assistance to the Department and on the facts of the present case it must be held that the expenditure incurred in stowing was a revenue expenditure and, having been admittedly expended wholly and exclusively for the purpose of the assessee's business, was "deductible u/s 10(2)(xv) of the Income Tax Act, 1922.

10. In view of the above discussions the question referred for our opinion is answered in favour of the assessee, who will be entitled to its costs. Hearing fee Rs. 250.