CAPITAL EXP. OR REVENUE EXPENDITURE

CAPITAL EXPENDITURE

--Assessee not carrying out mere repairs but total renovation of theater – New machinery, new furniture, new sanitary fitting and new electrical writing were installed beside extensively repairing the structure of building – Said repairs would not qualify as "current repairs" – Expenditure incurred thereon would be capital expenditure.

AIR 1956 Bombay 453, **Approved,** M/s. Ballimal Naval Kishore v. Commissioner of Income-tax. **AIR 1997 SC 851: 1997 AIR SCW 679: 1997 Tax LR 187: 1997 (1) JT 488: 1997 (2) Supreme 61: 1997 (1) Scale 227.**

-**Assessee setting up new business – Foreign firm not only furnished information and technical know-how but also render valuable services in setting up of factory itself – Payment made to foreign firm – Cannot be said to be revenue expenditure merely because it is required to be made on certain percentage of rate of gross turnover of product of income as royalty.**

The courts have applied different tests like starting of new business on the basis of technical know-how received from the foreign firm, exclusively right of the company to use the patent of the trade mark which it received from the foreign firm, the payment made by the company to the foreign firm, the payment made by the company to the foreign firm whether a definite one or dependent upon certain contingencies, right to use technical know-how of production or the activity even after the completion of the agreement, obtaining enduring benefit for a considerable part on account of technical information received from a foreign firm, payment whether made "once for all" or in different installment co-relatable to the percentage of gross turnover of the product to ultimately find out whether the expenditure or payment thus made makes an accretion to the capital asset and after the court come to conclusion that it does not then it has to held to be a Capital expenditure. No single definitive creation by it self could be determinative and, therefore, bearing in mind the changing economic realities of business and the verities of situational diversities the various clause of the agreement are to be examined. But the instant case the tribunal having considered the different clause of the agreement and having come to the conclusion that under the agreement with the foreign firm what was set by the assessee was a new business and the foreign firm had not only furnished information and technical know-how but render valuable services in the setting up of the factory itself and even after a expiry of the agreement there is no embargo on the assessee

to continue to manufacture the product in question, it cannot be said that the entire payment made is revenue expenditure merely because the payment is required to be made on certain percentage of the rate of the gross turnover of the product of the income of as Royalty. M/s. Jonas Woodhead and Sons Ltd., Madras v. Commissioner of Income-tax, Madras. **AIR 1997 SC 1105: 1997 AIR SCW 1131: 1997 Tax LR 285: 1997 (2) JT 485: 1997 (2) Scale 67: 1997 (3) Supreme 283.**

--Expenditure relating to acquisition of lease hold right for setting up of sugar factory – is of capital nature. Gobind Sugar Mills Ltd. v. Commissioner of Income-tax. **1999 AIR SCW 4957: 1998 (8) SCC 606: 1998 (232) ITR 319.**

---Issuance of shares by assessee-company with the view to increase its capital – Amount to capital expenditure and not revenue expenditure – Fact that increase in capital result in expansion of capital base of company and incidentally also helps in business and in profit making of company – Immaterial – Expenses incurred in that connection still retain its character of capital expenditure since expenditure directly related to expansion of capital base of company.

Tax Ref. No. 1 of 1990 decides on December 4, 1996, **Foll.** Brooke Bond India Limited v. Commissioner of Income-tax, West Bengal III, Calcutta. **AIR 1997 SC 1336: 1997 AIR SCW 1438: 1997 Tax LR 378: 1997 (2) Scale 448: 1997 (3) JT 375: 1997 (2) Supreme 728.**

CAPITAL EXPENDITURE OR REVENUE EXPENDITURE

--Appellant taking land lease for 15 years for carrying out excavation thereon agreed to pay rent – Expenses of yearly rent whether has to be regarded as capital expense or revenue expense – Conflict in decision of Supreme Court reported in AIR 1960 SC 1034 and AIR 1966 sc 1564 – Question involved is of recurring nature – Matter directed to be placed before chief Justice for constituting larger Bench. Aditya Minerals Pvt. Ltd. v. Commissioner of Income-tax, Hyderabad. **1998 (8) SCC 444.**

--Finding that expenditure were relatable to acquisition of Capital Assets – Issue of conversion to revenue expenditure, does not arise – Appeal dismissed. Belpahar Refractories Ltd. v. Commissioner of Income-tax. **(1994) 209 ITR 471 (SC).**

CAPITAL GAIN OR REVENUE GAIN.

-- Determination of – Surplus arising from sale of properties acquisition of money lender in course of his business – Not necessarily in nature of Capital gain – depends on fact and circumstances of each case – Cannot be determined in absence of material to show whether assets constituted capital assets or stock in trade of assessee. M/s. A.L.A. Firm v. Commissioner of Income Tax, Madras. **1991 AIR SCW 849: (1991) 2 JT 7: 1991 (2) SCC 558,**

CAPITAL GAIN

--Assessee-company holding shares of several companies – assessee indebted to a finance company - Liquidation of finance liability become necessary because of provision of company Act – Assessee selling shares held by it Finance company after getting approval from Government and rate fixed by government – object of sale cannot be reduction of capital gain tax liability – Section 12-B(2), Proviso not attracted. Commissioner of Income-tax, Madras v. M/s. Amalgamation Pvt. Ltd. **AIR 1997 SC 2404: 1997 AIR SCW 2316: 1997 Tax LR 679: 1997 (5) SCC 33: 1997 (5) JT 50: 1997 (5) Supreme 382.**

--Assessee, retiring partner – Paid certain sum as his shares of value of goodwill or any part thereof -- Said sum is to treated as falling under Cl. (ii) of S. 27. Tribhuvan Das G. Patel v. Commr. of Income-tax, Bombay. **1998 (8) SCC 509.**

DEDUCTION – COST OF ACQUISITION / IMPROVEMENT.

- **Deduction – cost of acquisition / improvement – Estate duty paid on property inherited – Not cost of acquisition or improvement – Not deductible.**
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Estate duty paid by an assessee in respect of property which passes on to him by law of succession does not constitute either cost of acquisition or cost of improvement within the meaning of S. 55. It is not deductible while computing capital gain. It is not proper to say that since under S. 74(1) of the Estate duty Act a first charge is created on the improvement property of the deceased for the purpose of securing payment of the estate duty that as result an interest get carved out of the immovable properties of the deceased in favour of the government in the said of the interest has been acquired by the payment of the estate duty and, therefore, the amount of the proportion of the estate duty paid by the assessee should be treated as cost of acquisition under S. 55(2) of the Act. A charge differ from a mortgage in the sense that in the mortgage there is transfer of the interest in the property mortgage while in a charge no interested is created in the property charged so as to reduce the full ownership to a limited ownership. The creation of the charge under S. 74(1) of the Estate duty Act can not, therefore, be constructed as creation of interest in property that is a subject-matter of the charge. The amount recoverable by way of estate duty would have priority over other liabilities of the accountable person. In the sense in claim in respect of estate duty would have predecease over the claim of the mortgage because the mortgage is also a charge. As a result of the charge created under S. 74(1) of the estate duty Act. It could not be said that title of the assessee to the immovable property received was incomplete and the imperfect in the any way. The assessee had become the full owner of the asset even before the payment of the estate duty and payment of same he had not acquired a new right, tangible or intangible, in the asset. In cannot therefore, to be said the amount proportionate to the

estate duty paid by assessee on the property that were transferred should be treated as cost of acquisition of the assets under S. 48 & 49 read with S. 55(2) of the Act, since the title of the assessee to the immovable property acquired was not incomplete and imperfect in any way. In can not be said that as a result of the payment of the estate duty by the assessee there was an improvement in the title of the assessee and the said payment could be regarded as 'cost of improvement' under S. 48 read with S. 55(1) (b) of the Act. R. M. Arunachalam v. Commissioner of Income-tax Madras. **AIR 1997 SC 2905: 1997 AIR SCW 2916: 1997 Tax LR 754: 1997 (4) Scale 608: 1996 (6) JT 431: 1997 (7) Supreme 207: 1997 (7) SCC 698.**

DEDUCTION – RELIEF UNDER S. 80T (LOSS SET OFF)

-Deduction – relief under S. 80T – can be given only for amount of capital gain after capital loss is set off.

S. 80 T relief can be given only for the amount of capital gains after the capital loss is set off. Section 80 T open with the words "where the gross total income of an assessee……. Includes any income chargeable under the head "capital gains….." this clearly indicates that the gross total income of an assessee has to be determining before the provision of S. 80T can be applied. This is clear also from the provision of S. 80A which say that in computing the total income of the assessee there shall be allowed from his gross total income of an assessee. Determined in accordance with the provision of the said Act. Includes any income by way of long-term capital gain a deduction is permissible there form under S. 80T in computing his total income. The deduction is from "such income". "Such Income" means the assessee's long-term Capital gains and there can be no doubt, having regard to the context, of the correctness of this interpretation.
(1981) 129 ITR 166 (Mad). 1990 Tax LR 1124 (Bom) and (1991) 190 ITR 81 (Cal), **Approved.**
AIR 1985 SC 1585, **Foll.**

Section 80AB was enacted to declare the law as it always stood in relation to deduction to be made in respect of the income specified under Head 'S' of Chapter VI-A. The manner of deduction specified under S. 80AB accords with the interpretation placed upon S. 80T, read independently. H.H. Sir Rama Varma v. Commissioner of Income-tax, Kerala. **AIR 1994 SC 1904: 1994 AIR SCW 1848: 1994 Tax LR 498: 1994 Supp (1) SC 473: 1993 (6) JT 183.**

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exchange or relinquishment – Assessee holder of shares in company – Amalgamation of that company with another company - Transferee company issuing its shares to assessee in pace of shares earlier held by assessee – Constitution neither exchange nor linquishment of capital assets.

The assessee a Hindu Undivided Family, held shares in company 'S' Company 'S' was amalgamated with another company 'NS'. The transfer company 'NS' in accordance with the scheme of amalgamation allotted to members of company S transfer company, one share in transferee company for every two shares of the transferor company held by them. The assessee accordingly came to be allotted certain shares of transferee company 'NS'. The question was whether the allotment amount to exchange or relinquishment of capital asset within meaning of S. 12B.

Held, then no exchange was involved in the transaction. An exchange involves the transfer of property by one person to another and reciprocally the transfer of property by that other to the first person. There must be a mutual transfer ownership of one thing for the ownership of another. In the present case, the assessee cannot be said to have transferred any property any one. When, he was allotted the shares of the company 'NS' he was entitled to such allotment because of his holding share of company 'S'. The holding of shares in the company 'S' was merely a qualifying condition entitling the assessee to allotment entitling the assessee to allotment of the shares of the company 'NS'. The dissolution of the company 'S' deprived the holding of the shares of that company of all its value.

Held, further, that there was also no relinquishment. A relinquishment takes a place when the owner withdraws himself from the property and abandons his rights thereto. It presumes that the property continues the exit after the relinquishment. Upon amalgamation, the shares of company 'S' lost all value as that company stood dissolved. There was therefore no relinquishment. (1974) 95 ITR 656 (Bom), **Affirmed.** Commissioner of income-tax, Bombay v. Rasiklal Menekal (HUF). **AIR 1989 SC 1333: 1990 Tax LR 219: (1989) 177 ITR 198: (1989) 2 SCC 454.**

--Heirloom – Sale – No capital gains. **AIR 1998 SC 2309: 1998 AIR SCW 2213: 1998 Tax LR 833.**

CAPITAL

--Computation – Gratuity reserve – Creation of Actuarial valuation note resorted to, by assessee-company – even surtax officer failed to call upon company to get actuarial valuation and said liability to enable him to compute correct capital base of company for calculation of statutory deduction – Matter remanded to sur tax officer for fresh consideration. Commissioner of income-tax, Gujarat v. Jyoti Ltd. **1996 AIR SCW 912: 1996 Tax LR 304: 1996 (7) SCC 617: 1996 (2) JT 360.**

CAPITAL ASSET

-Capital employed in undertaking – the moment an asset is acquired or purchase for purpose of business – It is capital employed though it is not actually utilized or used during accounting year.

The moment an asset is acquired or purchased for the purpose of the business, it is capital employed though the asset as such is not actually utilized or use during the accounting year. In the chain of events, the earlier Act or events, is the purchase or acquisition of the asset. That by itself entitled the assessee to get the relief. The "employment" of the capital is done or over. The subsequent of later events – including the actual user of the asset has nothing to do in the matter. Commissioner of Income-tax, Bombay v. M/s. Alcock Ashdown & Co. Ltd. **AIR 1997 SC 1997: 1997 AIR SCW 1772: 1997 Tax LR 577: 1997 (2) Supreme 5: 1997 (2) JT 278: 1997 (3) SCC 358: 1997 (1) Scale 753.**

-Determination of cost of acquisition – Asset is depreciable and assessee availed deduction on account of depreciation – Cost of acquisition should be determined in terms of S. 50 read with S. 48 of the I.-T. Act. 1994 Tax LR 667 (Bom) (FB), Overruled.

Where the capital asset purchased by the assessee is depreciable or non depreciable asset, the assessee will have the option for substituting for its actual cost of acquisition its fair market value as on 1-1-1954 but where it is a depreciable asset and the assessee has enjoy depreciable allowances his cost of acquisition shall have to be determine as provided in the S. 50.

S. 50(1) has no dependences on the provision of S. 55(2). There is no mention of "fair market value" in S. 50(1) and beside that the adjustment stated there are with reference to written down value only which has nothing to do with the faire market value. Therefore, in the instance case where the capital asset is depreciable and the assessee has availed of deduction on account of depreciation the cost of acquisition shall have to be determined in term of the provisions of S. 50 read with S. 48. Section 50 is in absolute terms specially providing for fixing the cost of acquisition in the case of depreciable assets only.
1975 Tax LR 310 (Guj); 1978 Tax LR 803 (All) and (1981) Tax LR 1302 (Cal), **Approved.** The Commonwealth trust Ltd., Calicut, Kerala v. Commissioner of Income Tax, Kerala-II, Ernakulam. **AIR 1997 SC 3580: 1997 AIR SCW 3687: 1997 Tax LR 934:1997 (7) JT 479: 1997 (5) Scale 551.**

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Transfer of – Agricultural land – Conversion into non-agricultural and development as housing sites – Allotment of plots therein on lease for 99 years, - Premium charged – Section 12-b of 1922 Act applicable – Grant of lease amount to transfer of capital assets. R.K. Palshikar (H.U.F.) v. I.T. Commissioner, M.P. **AIR 1988 SC 1305: 1988 Tax LR 1201: (1988) 3 SCC 594: (1988) 172 ITR 311.**

CAPITAL BORROWED

-Assessee, Co-operative society, running sugar mill allotting partly paid shares to farmer members – subsequently, establishing Loss Equalization and Capital Redemption Reserve Fund – Members required to deposit in it at certain rate against supply of cane – Deposits to be used firstly converting partly paid up shares in to fully paid up, then, for defraying loan and balances was to be refunded to members – Deposit by members are not loan advanced to society – Interest paid on balance – Not admissible deduction.
The assessee is co-operative society running a sugar mill. For the assessment year 1968-69 it claimed payment of interest. This was interest paid to the accounts of its member, who had deposited certain amount with the assessee in accordance with bye-law No. 50 and it was debited by the assessee to its profit and loss account. In the initial years of the working of the society, certain partly paid shares were allotted to its farmer members. With the view to inducting these members to make further contribution to the capital of the society, Bye-law No. 50 was incorporated in the buy-law of the society. The buy-law as amended providing that there shall be established a 'loss Equalization and capital redemption Reserve Fund' in the society. Every producer share holder shall deposit every

year a sum not less then 0.32 paisa and not more then 0.48 paisa per quintal of the sugarcane supplied by him to the society, as may determined by board until the shares to be subscribe by the members are fully paid up. The amount standing to the credit of this fund presently or to be credited in future shall be used for making the partly paid shares fully paid shares. The balance of the said amount shall be refunded to the members soon after the loan from the industrial corporation is repaid, where the fund shall cease to exit. The money available in the 'Loss Equalization and Capital Redemption Reserve Fund' was utilized by the assessee for the purpose of its business. A part of the amounts was also utilized for converting the partly paid shares. The Board of Directors of the Society decided to pay interest at 6% on the balance available in the aforesaid fund to its various members to whom the balance money belonged. It was on this account that the society claimed an amount of Rs. 1, 18,716/- for the assessment year 1968-69. The claim was rejected by the I.T.O. He took the view that the amounts deposited by the members of the society in the 'Loss Equalization and capital Redemption Reserve Fund' did not represent loans taken by the assessee but constituted a contribution by the members to convert partly paid up shares in to fully paid up shares and they could not fully paid up shares and they could not be considered as the capital borrowed for the purpose of its business. He held that S. 36(1) (iii) did not apply to such interest and that it was not admissible as a deduction in computing the total income of the assessee. For the assessment years 1969-70 to 1972-73 the claim to deduction was made on that account. The Income-tax officer took the same view for these assessment years as he did not the assessment year 1968-69. The same order was passed by the appellant Assistant Commissioner confirmed on the appeals for the remaining year. In second appeal tribunal held that the amount standing to the credit of the 'Loss Equalization and Capital Redemption Reserve Fund' which was utilize by the assessee for the purpose of its business represented moneys borrowed for the purpose of its business and that interest paid on such money was eligible for the deduction of the S. 36(1)(iii). It said that it was not necessary the borrowing must contain an element of payment of interest and that even if deposit was made by the member of the society which was utilized for the purpose of the assessee, the fund represented by such deposit would be 'capital borrowed' for the purpose of S. 36(1)(iii). The High Court agreed with the view taken by the tribunal.

Held, Bye-law No. 50 indicate that deposit were to be made by the producer member in the 'Loss Equalization and Capital Redemption Reserve Fund' for the purpose of making the partly paid shares fully paid shares, and it was understood that the balance of the amount would be applied to the loan taken from industrial finance corporation and thereafter whatever remanded would be refunded to the depositing members resulting in the extinction of the fund. It is apparent that the deposit made by the members can not be regarded as loans advances by the member to the assessee. The money deposited represented contribution by the member for converting partly paid up shares into fully paid up shares and thereafter for defraying the loan taken from the industrial finance corporation. Any balance remaining was to be refunded to the members. The circumstances that there was no certainty that any balance would remain for refunded to the members would in itself indicate that the deposit could not be regarded as loan. A loan necessarily supposes a return of the money loaned. Even under the original bye-law No. 50. Which provided for deposits by the members to the 'Loss Equalization and the

capital Redemption Reserve Fund', it was contemplated that the deposit would be accumulated and utilized for repayment of the entail loan taken from the industrial finance corporation and thereafter for redeeming the 'Government hares' and the balance of the deposit after meeting losses would be converted in to shares capital and each producer member would be issued shares of the assessee. There was never any intension between the assessee and its member to treat the deposit made by the members as loan and that the relationship between the assessee and the member should be that of borrowers and lender. Commissioner of Income-tax, Lucknow v. Bazpur Co-Operative sugar Factory Ltd. **AIR 1989 SC 1866: 1989 Tax LR 907: (1989) 177 ITR 469: (1989) 77 CTR 136.**