C. I. T., Bombay City

Vs

Bombay Burmah Trading Corpn., Bombay

Civil Appeal Nos. 1 of 1974 and 1355-56 of 1973

(K. N. Singh, Sabyasachi Mukharji JJ)

16.07.1986

JUDGMENT

SABYASACHI MUKHARJI, J. –

1. These appeals are from the judgment and order of the High Court of Bombay dated April 22/24, 1970. These are by certificate granted by the High Court under Section 66-A(ii) of the Indian Income Tax Act, 1922. The judgment under appeal is Bombay Burmah Trading Corpn. Ltd. v. CIT. ((1971) 81 ITR 777 (Bom))

2. The familiar yet not always easy to answer question whether a particular receipt is capital or revenue looms large in these appeals arising out of the assessment to income tax for the assessment years 1950-51, 1951-52 and 1953-54, the accounting years respectively ending on May 31, 1950, May 31, 1951 and May 31, 1953.

3. The assessee is a public limited company limited by shares. It derived income from several sources including certain business operations. These operations were carried out in India and abroad and used to be carried out, inter alia, in Burma and Siam. The assessee company carried on business in Burma from 1862 onwards. In connection with its business of selling timber, the assessee-company had to enter into contracts which are mentioned as 'forest leases' with the Government of Burma. In the year of account ending on May 31, 1950, the assessee-company was the owner of about 15 forest leases. The agreed position between the parties was that all the forest leases contained provisions and clauses exactly similar to the specimen copy dated October 28, 1925 which was taken into consideration by the High Court. It may be mentioned, however, that the forest leases were for the duration of 15 years and in respect of large areas. Under these leases, the assessee-company was authorised to fell the teak trees and convert them into the logs and, upon completion of the extraction thereof, to remove the logs after payment of royalty to the Government of Burma for its own purposes. Clause 27 in these leases authorised the assessee-company even after the expiate of the period of 15 years of the lease to remove the legs in respect whereof extraction had been completed upon payment of royalty. The period for such removal under Clause 27 was fixed at three years after the expiry of the lease period mentioned in Clause 4. These leases contained renewal clauses. The forest leases of assessee-company did not commence on the same date and related to different parts of the forests in Burma. These leases were made as mentioned hereinbefore, in 1862 first and had been continuously renewed from time to time.

4. It was stated that five similar business organisations obtained forest leases from the Government of Burma for their business in timber. Before the period of 15 years mentioned in these leases expired, the Second World War started and the Japanese army overran Burma. The then Government

of Burma than extended the period of current leases until such time as it became possible to resume forest operations and for such further periods as might be required for settlement of the new forest lease to be executed between these business organisations and the government. Upon termination of the hostilities, in connection with the resumption of the forest operations, the government made provisional arrangements in terms of what is referred to in paragraph 7 of the statement of the case as "weight agreement". The Union of Burma came into existence from January 4, 1948. Under Section 44(2) of the Constitution of Burma, there was a directive for nationalisation, inter alia, of the forest exploitations. Thereafter correspondence took place, inter alia, between five European companies who were exploiting forests in Burma under the various leases and the government in connection with the taking over of the exploiting by the Government of Burma. The High Court noted the relevant correspondence dealing with such arguments.

5. On June 1, 1948, a thief of the total teak area mentioned in the 15 forest leases of the ownership of the assessee-company was taken over by the Government of Burma. Forest exploitation in respect of the rest of the 2/3rds area was also taken over by the government on or about June 10, 1949. In that connection, certain correspondence had been addressed by the assessee-company to the government. The Union of Burma on the one hand and the assessee-company and Steel Brothers & Company Ltd. on the other executed an agreement dated June 10, 1949 on the footing that the forest leases had already been terminated. The agreement provided for making over by the assessee-company to the President of the Government of Burma of the assessee-company's 'residuary rights' under the forest leases together with the non-duty paid logs wherever found and also for making over of all the assets pertaining to the forest leases viz. headquarters, elephants, cattle, stores, buildings, dwelling houses, motor transport, tractors, launches, etc. and for certain other incidental matters. The agreement provided for handing over by the President of the Government of Burma to the assessee-company of 50,000 tons of teak logs of the specified qualities mentioned in Clause 7 of the said agreement. There was no dispute between the parties that in pursuance of the agreement the assessee-company had made over to the Government of Burma the assets mentioned in Clause 1 of the agreement. There was also no dispute that in pursuance of the agreement the Government of Burma handed over in all 43,860 tons of logs to the assessee-company. There was no dispute that those 43,860 tons of logs were delivered against three kinds of assets in the following quantities :

(1) 28,847 tons against non-duty paid logs handed over by the assessee-company to the government.

(2) 2,946 tons against depreciable assets like land and buildings, launches, furnitures and stores.

(3) 12,067 tons against livestock like elephants, etc.

6. The account of these 43,860 tons of logs delivered by the government was maintained by the assessee-company in what is described in the Income Tax Officer's report as "Burma forest assets realisation reserve account".

These 43,860 tons of logs were sold off by the assessee-company from time to time in the accounting years 1949, 1950, 1951 and 1952. The aggregate sale proceeds during the above four years came to Rs. 1,35,55,611 as appears from the assessment order which is annexed to the statement of the case. In connection with these sale proceeds, the Income Tax Officer stated that, as the receipts and sales of logs had taken place over a period of four years, the amount realised had to be allocated amongst the various years. He further stated that the bases of the allocations was agreed

to by the assessee. He proceeded to make the allocation on the footing that the assessee had incurred costs for getting delivery of these logs at the rate of Rs. 225 per ton on June 10, 1949. He then considered the proceeds realised and made the allocations for the assessment years 1950-51 and 1951-52 in the manner appearing in paragraph 9 of the statement of the case submitted to the High Court. Upon allocation made in the above manner, the Income Tax Officer's finding was that in the year ending May 31, 1950, the assessee had received 18,676 tons of logs. The sale proceeds of Rs. 65,52,153 were received in respect of non-duty paid logs delivered to the assessee-company. The sale proceeds of Rs 31,980 were received in respect of logs received against depreciable assets, stores and livestock. For the accounting year ending May 31, 1951, the Income Tax Officer held that the assessee had received in all 16,299 tons of logs. The sale proceeds of those logs were allocated as follows : (at p. 785 of the reports)

Rs. 5,78,896 in respect of non-duty paid logs handed over by the assessee-company to the government. Rs. 2,69,975 in respect of the logs delivered against handing over of depreciable assets, stores and livestock.

7. The question that arose upon such allocations having been made in the manner indicated was as to whether the receipt of Rs 65,52,153 in the accounting year ending May 31, 1950, and Rs. 5,78,896 in the accounting year ending May 31, 1951 was exempt from tax as being a receipt of capital nature as contended by the assessee-company. Similarly, the further question which arose was as to whether sale proceeds amounting to Rs. 31,980 in the accounting year ending May 31, 1950, and Rs. 2,69,975 in the accounting year ending May 31, 1951, in respect of depreciable assets were liable to tax under the Act or were altogether free from such liability. The Income Tax Office as well as the Appellate Assistant Commissioner made findings against the assessee-companies in connection with these amounts. On behalf of the assess-company it was urged before the Appellate Tribunal that the entire receipt and delivery of the 43,860 tons of logs were on capital account. The submission was that the assessee's business of dealing in timber in Burma had got sterilised and the above quantity of logs was received only in respect of the said sterilization or loss of the capital asset. In connection with that submission, the Appellate Tribunal held against the assessee-company that the assessee's business had not stopped and there was no question of sterilization of its business. The forest lease owned by the assessee-company had expired and were not bound to be renewed and the "residuary rights" available to the assessee-company under Clause 27 of the forest leases were merely rights to remove the extracted logs within a period of three years from the forest areas. The assessee-company had no interest in land of the forest areas.

8. The Tribunal, however, observed that though the agreement referred to certain residuary rights under Clause 27 of the agreement there was nothing to show that any compensation was paid in respect of any rights available to the assessee under Clause 27 of the lease agreement.

9. The contention that the realisations were in respect of capital assets was rejected. It was further held that the realisation in respect of logs received against depreciable assets, stores and livestock were profits and liable to tax. In calculating the profits it was held that the logs received by the assessee-company were received by it at the cost value of Rs. 225 per ton.

10. After having record the findings in the aforesaid manner, the Tribunal referred to the High Court concerned i.e. the High Court of Bombay, certain questions of law for the assessment year 1950-51 and 1951-52. The High Court felt that question no. 1 in both these assessment years need not be answered and this position was agreed to by the parties. The following questions for these two assessment years were really considered by the High Court :

I. Assessment year 1950-51 :

#1. * * * *##

2. Whether, on the facts and in the circumstances of the case, the amount of Rs. 65,52,153 or any part thereof was exempt from tax as being a receipt of a capital nature ?

3. Whether, on the facts and in the circumstances of the case, the amount of Rs. 1,41,156 was liable to tax under the second provision to Section 10(2)(vii) of the Income Tax Act, and whether there was any evidence that the conditions of the application of the provision were all satisfied ?

4. Whether, on the facts and in the circumstances of the case, the amounts of Rs. 5250, Rs. 1025 and Rs. 25,705, being the excess realisations over Rs. 225 per ton for logs received in respect of depreciable assets, stores and livestock, respectively, were liable to tax under the Act ?

II. Assessment year 1951-52 :

#1. * * * *##

2. Whether, on the facts and in the circumstances of the case, the amount of Rs. 5,18,896 or any part thereof was exempt from tax as being a receipt of a capital nature ?

3. Whether, on the facts and in the circumstances of the case, the amounts of Rs. 44,407, Rs. 8639 and Rs. 2,16,929, being the excess realisations over Rs. 225 per ton for logs received in respect of depreciable assets, stores and livestock, respectively, were liable to tax under the Act ?

11. Similarly for the assessment year 1953-54, the questions referred by the Tribunal to the High Court were as follows :

1. Whether, on the facts and in the circumstances of the case, the amount of Rs. 5,58,188 or any part thereof was exempt from tax as being a receipt of a capital nature ?

2. Whether, on the facts and in the circumstances of the case, the amount of Rs. 9493, being the amount of compensation received for stores acquired by the Burmese Government, was liable to tax under the Act ?

12. The High Court answered all these questions in favour of the assessee. The High Court answered for the assessment year 1950-51 the question 2 in the affirmative for the entire amount, questions 3 and 4 in the negative, for the assessment year 1951-52 the second question in the affirmative and question 3 in the negative. For the assessment year 1953-54 both the questions were answered in the affirmative. The revenue has come up in appeals.

13. In order to appreciate the controversy, broad features of the facts, some of which have been noted before, have to be borne in mind. The business in question of the assessee stated in Burma in

1861. There were 15 agreements with the Government of Burma for exploitation of forests at the relevant time. The agreements were entered into at different times and provided for expiry of leases on different dates. At page 27 of the Paper Books a typical agreement dated October 28, 1925 in indicated. Similar agreements were entered into for other leases. The terms proceeded, inter alia, as follows :

> 1. General rights of contractor. - The contractor shall within the series of coupes into which the forest area described in Schedule I and hereinafter referred to as "the Concession Area" shall be sub-divided as provided in Clause 5 and during the periods for extraction therefrom prescribed in Clause 6 and subject to such further conditions, limitations and restrictions as rate hereinafter prescribed have the sole right and license to -
>
> (a) fell the teak trees girdled or marked in that behalf by the officers of the Forest Department in accordance with the directions contained in Clause 8 and any naturally dead standing teak trees;
>
> (b) convert into logs all such trees, all naturally felled teak trees and all felled teak timber left unlogged from former operations; and
>
> (c) remove all such logs and all logs left unextracted from former operations :
>
> Provided that in any area to which a scheme for concentrated exploitation in accordance with any sanctioned working Plan has been applied the Contractor shall have to rights in standing teak trees under five feet six inches in girth measured at breast bright from the ground.
>
> 2. Grant of other rights in Concession Area. - The Government acting on behalf of the Secretary of State reserves to itself the right to enter into agreements with other parties for the extraction of timber other than that which the contractor is entitled to extract under this Agreement from the whole or from any part of the Concession Area.

The proviso to that clause need not be set out.

14. Clause 4(1) was as follows :

> 4. Period during which Agreement is in force. - (1) This Agreement shall come into force on the 1st day of January 1926 and shall unless previously terminated under Clause 26 or Clause 29 terminate after the expiry of a period of fifteen years; viz. on the 31st day of December, 1940 :
>
> Provided that in respect of the rights conferred by Clause 27 or by sub-clause (2) of this clause and in respect of every liability incurred under this Agreement it shall continue in force for such further period as is necessary for the enjoyment of such rights and the enforcement of such liabilities.

15. Clause 15 of the agreement authorised the assessee-company to cut canals, make water courses, build bridges and other railway works etc. on certain conditions. Clause 16 dealt with control of such private railways. Clause 18 dealt with the inspection etc.

16. Other relevant clauses were :

> 19. General responsibilities of Contractor. - Nothing herein contained shall be deemed to relieve the contractor, his agents and servants of the duty of complying with any Act of the legislature and of the rules thereunder at the time being in force and applying to the Concession Area.
>
> 20. Within thirty days from the dates respectively on which measurement statements of timber have been furnished to the contractor by the Forest Department the contractor shall pay or cause to be paid into such Government Treasury as the Government may appoint royalty in respects thereof according to the following rate namely :
>
> # * * * *##

17. Clause 21 read as follows :

> 21. Marking of timber after measurement. - The contractor shall be entitled to have the timber which has been measured for royalty marked at the time of measurement with a Government hammer-mark denoting that the timber has been so measured and after payment of such royalty the timber thus marked shall become the property of the contractor.

18. Clause 23 was as follows :

> 23. Teak timber is Government property up to the payment of royalty. - Until teak timber has been marked and royalties have been paid thereon in accordance with the preceding clause it shall be deemed to be the property of the Government and the contractor shall have no right to sell mortgage or hypothecate it or create any charge or lien thereon.

19. Clause 27 of the agreement provides as follows :

> 27. On the conclusion of the period specified in Clause 4 or on the termination of this agreement under Clause 26 or Clause 29, as the case may be, -
>
> (a) the contractor shall be allowed a further period of three years for delivering at a measuring station and removing therefrom after payment of royalty on or otherwise dealing as provided in Clause 20 with any timber bearing his authorised hammer-marks the extraction of which has in accordance with the terms of this agreement been completed before the date of such conclusion or termination and on the expiry of such further period he shall cease to have any rights whatever in timber not yet so delivered :
>
> Provided that the rates of royalty payable under this clause shall be the same as the rates fixed for the concession area under any new agreement whether with the present contractor or with other parties subsequent to this agreement or in the event of no new agreement being entered into at the rates of royalty set out in Clause 20 of this agreement;

(b) the contractor shall be given such reasonable times as in the opinion of the Government may be necessary to allow him to dispose of such of his buildings, mills, railways or other structures erected for the purposes of his business under this agreement as are standing on land at the disposal of the Government.

20. Under Clause 29 the contractor was given the rights to terminate the agreement at any time by given two years notice in writing.

21. On January 1, 1926, there was commencement of the agreement. December 31, 1940 was the due date of expiry of the agreement. On April 7, 1942, there was extension by the Government of Burma of the long term agreement till such time as it became possible to resume forest operations and for such further period as might be required for settlement of new agreements. On January 24, 1948, there was a letter by the Government of Burma to the assessee and others in connection with ending of joint working arrangements between consortium of 5 contractors on the one hand and Government of Burma on the other hand for exploitation of forests. On February 4, 1948, there was the assessee's letter to the Government of Burma indicating their specific rights under the Forest Agreement in respect of logs in the course of extraction on termination of agreements.

22. On February 10, 1948, the Burmese Government replied to the assessee's letter dated February 4, 1948 informing that the normal period of occupancy of agreement had already expired and the life of the agreement had been prolonged under letter dated April 7, 1942 and also under the Weight Agreement which expired on May 1, 1947. Government's decision to terminate long term pending lease negotiations and to terminate on May 31, 1948 joint operations in the area intended to be taken over by government and the government's intention to consider any claims of residuary rights under the expiring agreements was also indicated to the assessee. On June 10, 1949, there was an agreement between the President of Union of Burma and the assessee and Steel Bros., inter alia, dealing with the residuary rights under Clause 27 of the 1925 Agreement and the settlement to be made in respect thereof.

23. The agreement, inter alia, reiterated that whereas under lease under Clause 27, there were certain residuary rights as we have noted hereinbefore, whereas certain questions had arisen in the settlement being made by the government as regards the said rights as well as the assets of the lessees in the forest areas which the lessees desired to surrender to the government, the parties had agreed to resolve this question indicated under Clause 1 therein. It is not necessary to sent out the details here. These have been set out at pages 80-81 of the paper-book.

24. We have set out the relevant portions of the material documents relied before the High Court. It may be mentioned that the High Court in its judgment has set out the discussion at page 793 of the report ((1971) 81 ITR 777 (Bom)) between the Government of Burma and the assessee company. The said discussion recorded is as follows :

The Government of Burma was always the greater. Apparently this was so because the forests were always of the ownership of the government. The government was the single owner of all the forests. These forests were never intended to be transferred to any grantee at any time. The forest leases were always of duration of 15 years or more. They always related to extremely large areas which were sub-divided into large coupes. These coupes were also not to be worked at the same time, but according to schedule fixed in respect thereof. Each specified group of coupes was to be worked within three years. The extraction of the trees was to be completed within the fixed

period of three years. The schedule fixed was compulsorily to be adhered to. The work of extraction was to be done in accordance with the rules prescribed for felling, logging and removal. The government was accordingly not a seller of any stock-in-trade and the assessee was not a purchaser of any stock-in-trade. The assessee undertook the obligations of various kinds so as to complete the work of extraction as indicated in the contract. The assessee had to maintain extremely large establishments and headquarters at various places and had in that connection put up various premises including dwelling houses and buildings. It had to maintain diverse sorts of mechanical appliances and had, inter alia, owned motor transport, tractors, launches, elephants, cattle and diverse assets for the purposes of working these forest leases. The government was not concerned in any part of the operations relating to the extractions done by the assessee. The main concern of the government was only to charge royalty before the logs, whereof extraction was completed, were removed by the assessee from the contract area. It is of importance that the right of extraction and/or to fell, convert and remove that was given to the assessee was to be exercised in respect of the growing forest trees and/or uncut timber. There was a further right to log all felled teak timber left unlogged from former operations. The consideration that was charged by the government was only the royalty agreed to be paid to the government.

25. The main question, is, whether the acquisition of forest leases by the assess was capital asset or stock-in-trade. The next question which arises for the first two years is whether there is any scope of application of Section 10(2)(vii) of Indian Income Tax Act, 1922 in respect of the amount of Rs. 1,41,156 for the assessment year 1950-51 and for 1951-52 whether the amounts of Rs. 44,407, Rs. 8639 and Rs. 2,16,929, being the excess realisations over Rs. 225 per ton for logs received in respect of depreciable assets, stores and livestock were liable to tax under the Act. The two questions relevant for the assessment year 1953-54 will be deal with separately.

26. The main submission by Shri B. B. Ahuja on behalf of the revenue was that the assessee was operating on a wide field in more than one country for obtaining its stock-in-trade in timber. The fresh contracts entered into by the assessee (15 at the material time) which commenced and expired at different times, were contracts entered in the course of its business. It was, therefore, submitted that these were trading contracts. The assessee's right under the contract of 1925, according to Shri Ahuja, was to (i) fell teak trees. The assessee was trading in teak; (ii) convert them into logs; and (iii) remove them on payment of royalty.

27. Under Clause 27 of the Agreement, the assess had no interest in land as such, it had only a right to collect and take away logs, its stock-in-trade, it could not fell any fresh trees. The agreement dated June 10, 1949 was entered into by the assessee, according to the learned counsel for the revenue, in the course of its business. He further submitted that 28,847 logs received by the assessee under the agreement dated June 10, 1949, were in substitution of the logs that it had already cut and had not been able to remove from the forests. It was urged, it was merely a recompense for its rights in the stock-in-trade.

28. It has to be borne in mind that though the assessee had several sources of income including income from business operation, the assessee's company's main income was from felling the trees and carried on the said business on an extensive scale.

29. On behalf of the assessee, it was submitted that forest leases constituted the income producing

assets of the company. Mr. Kaka submitted that these involved the setting up of the entire business and investment of large funds in building dams, canals, roads, railways, buildings, etc. He drew our attention to Clause 15 of the lease agreement which has been set out at page 14 of the paper-book in statement of case. Mr. Kaka further reiterated that the leases were for a long duration with a first right of refusal to any subsequent leases. Reference was made in this connection to Clause 4(2) of the lease agreement appearing at page 30 of the paper-book. The forest leases, it was urged by him, were not ordinary commercial contracts made in the course of carrying on their trade or for the disposal of their products. These leases related to the whole structure of the assessee's profit making apparatus. It was further submitted that these regulated the assessee's activities, defined what they might or might not do and affected the whole conduct of the assessee's business. According to him the forest leases, therefore, constituted the capital assets of the assessee's business. He relied on a decision in Van Den Berghs Ltd. v. Clark (3 ITR 17, 25 (ED) (HL) : 19 TC 390 : 1935 AC 431) and also Hood Bars v. IRC (No. 2) (39 TC 188)

30. Shri Kaka, therefore, submitted that the rights acquired under the contract were three-folds viz. (1) to fell trees (2) to convert the felled trees into logs and (3) to remove the logs. He referred us to Clause 1 of the lease agreement which appears at page 27 of the paper-book. Detailed provisions were made in Clauses 9, 10 and 11 regarding each of these operations.

31. It was further submitted that during the initial period of 15 years the assessee had the right to carry on all the three operations while under the residual rights the assessee could only carry on the operations of logging and removal of logs already felled by him.

32. Under Clause 27, the assessee had no rights in the felled logs but only had the right to log and remove them and acquire the same after payment of royalty. It was his submission that in the absence of Clause 27 the assessee would have no right to the felled trees which would have remained the property of the Government of Burma. We are of the opinion that he is right. It was further submitted that the assessee had no rights to felled trees which were not logged and removed within 3 years according to the terms of Clause 27 of the lease agreement.

33. The consideration for the 43,860 tons of logs agreed to be handed over to the assessee was the surrender to the residuary rights under the forest leases and the acquisition of the assets pertaining to the forest leases. He referred us in this connection to Clause 1 of the Takeover Agreement which has been set out at page 80 of the paper-book.

34. Mr. Kaka further submitted that one lumpsum consideration was paid for both the surrender for the residuary rights and acquisition of assets of the business under Clause 7 of the Takeover Agreement at page 82. The splitting up of the consideration, according to him, in Clause 10 was merely for the implementation of the agreement as Schedule provided in the manner of handing over the logs to the assessee in exchange of certain assets. If the residuary rights and assets had not been acquired by the government the assessee would have carried on his business for another 3 years and logged and removed the felled trees. The assessee was prevented from carrying on this business upon the nationalisation of the forest resources and the consequential acquisition of the residuary rights and assets pertaining to the forest leases belonging to the assessee. Mr. Kaka urged that compensation therefore paid for acquisition of the residuary rights and assets was for the sterilisation of the company's business and therefore a capital receipt. He relied on the observations of Lord Buckmaster at page 463 and Lord Wrenbury at page 465 in Glenboig Union Fireclay Co. v. IRC (12 TC 427). It was further urged that once it was held that the forest leases constituted the capital assets of the assessee, compensation paid for the sterilisation of even a part of a capital asset

must be regarded as a capital receipt. Furthermore, according to him, it made no difference whether there was sale of an asset out and out or it was a means of preventing the acquisition of profits that would otherwise be gained. He urged that in either case the asset of the company was sterilised or destroyed. Reliance was placed on the observations of this Court in CIT v. Vazir Sultan & Sons ((1959) 36 ITR 175, 191 : 1959 Supp 2 SCR 375 : AIR 1959 SC 814) and Godrej & Co. v. CIT ((1959) 37 ITR 381 : (1960) 1 SCR 527 : AIR 1959 SC 1352).

35. It is, therefore, necessary as mentioned hereinbefore to examine whether the acquisition of forest leases by assessee were acquisitions of capital assets. Though we will refer to some of their decisions to which our attention was drawn and which were referred to by the High Court, it is well to bear in mind the basic principles. These are : if there was any capital asset, and if there was any payment made for the acquisition of that capital asset, such payment would amount to a capital payment in the hand of the payee. Secondly, if any payment was made for sterilisation of the very source of profit making apparatus of the assessee, or a capital asset, then that would also amount to a capital receipt in the hand of the recipient. On the other hand if forest leases were merely stock-in-trade and payments were made for taking over the stock-in-trade, then no question of capital receipt comes. The sum would represent payments of revenue nature or trading receipts. Whether in a particular case, for the contracts of the type with which we are concerned, payments were capital receipts or not would depend upon the facts and circumstances of the case. In this connection it is important to bear in mind that normally in trade there are two types of capital, one circulating capital and the other fixed capital. Fixed capital is what the owner turns to profit by keeping it in his own possession; circulating capital is what he makes profit of by parting with it and letting it charge hands. Therefore, circulating capital is capital which is turned over and in the process of being turned over, yields profits or loss. It is well settled as the High Court observed in the judgment under appeal that what is capital assets in the hands of one person may be trading assets in the hands of the other. The determining factor is the nature of the trade in which the asset was employed. Compensation received for immobilisation, sterilisation, destruction or loss, total or partial of a capital asset would be capital receipt. If a sum represented profit in a new form then that was income but where the agreement related to the structure of assessee's profit making apparatus and affected the conduct of the business, the sums received for cancellation or variation of such agreement would be capital receipt.

36. In Senairam Doongarmall v. CIT ((1961) 42 ITR 392, 406 : (1962) 1 SCR 257 : AIR 1961 SC 1579) this Court observed as follows after discussing several authorities :

> All these case were decided again on their special facts. Though they involved examination of other decisions in search for the true principles, it cannot be said that they resulted in the discovery of any principle of universal application. To summarise them : South India Pictures case (CIT v. South India Pictures Ltd., (1956) 29 ITR 910 : 1956 SCR 223 : AIR 1956 SC 492) was so decided because the money received was held to be in lieu of commission which would have been earned by the business which was still going, and the receipt was treated as the fruit of the business. The same reason was given in Jairam Valji case (CIT v. Rai Bahadur Jairam Valji, (1959) 35 ITR 148 : 1959 Supp 1 SCR 110 : AIR 1959 SC 291) and the Shamsher Printing Press case (CIT v. Shamsher Printing Press, (1960) 39 ITR 90 (SC)). In Vazir Sultan case ((1959) 36 ITR 175, 191 : 1959 Supp 2 SCR 375 : AIR 1959 SC 814), the compensation was held to replace loss of capital, and in Godrej case ((1959) 37 ITR 381 : (1960) 1 SCR 527 : AIR 1959 SC 1352), the compensation was said not to have any relation to the likely income or profits but to loss of capital. Each case was

thus decided on its facts.

We have so far shown the true ratio of each case cited before us, and have tried to demonstrate that these case do no more than stimulate the mind, but none can serve as a precedent, without advertence to its facts. The nature of the business, or the nature of the outlay or the nature of the receipt in each case was the decisive factor, or there was a combination of these factors. Each is thus an authority in the setting of its own facts.

37. All these cases have been discussed in the judgment under appeal at page 795 of the reports. As Hidayatullah, J., as the Chief Justice them was observed in Senairam Doongarmall v. CIT ((1961) 42 ITR 392, 406 : (1962) 1 SCR 257 : AIR 1961 SC 1579) each case depended upon the facts of each case.

38. This Court had occasion to consider some of these aspects in CIT v. Gangadhar Baijnath ((1972) 86 ITR 19 : (1972) 4 SCC 28 : 1973 SCC (Tax) 33) where at page 25 of reports referring to several authorities in noted : (SCC p. 34 citing from CIT v. R. B. Jairam Valji, 35 ITR 148 : AIR 1959 SC 291)

The question whether a receipt is capital or income has frequently come up for determination before the courts. Various rules have been enunciated as furnishing a key to the solution of the question, but as often observed by the highest authorities, it is not possible to lay down any single test as infallible or any single criterion as decisive in the determination of the question, which must ultimately depend on the facts of the particular case, and the authorities bearing on the question are valuable only as indicating the matters that have it be taken into account in reaching a decision : vide Van Den Berghs Ltd. v. Clark (3 ITR 17, 25 (ED) (HL) : 19 TC 390 : 1935 AC 431). That, however, is not to say that the question is one of fact, for, as observed in Davies (Inspector of Taxes) v. Shall Co. of China Ltd. ((1951) 32 TC 133 : (1952) 22 ITR (Supp) 1 (CCA)), these questions between capital and income, trading profit or no trading profit, are questions which, though they may depend no doubt to a very great extent on the particular facts of each case, do involve a conclusion of law to be drawn from those facts.

39. Similar observations were made in CIT v. Manna Ramji and Co. ((1972) 86 ITR 29 : (1973) 3 SCC 43 : 1973 SCC (Tax) 93). The court reiterated the same principle.

40. We have referred to the discussion which took place with the Government of Burma on October, 28 1925. Having regard to all these, the forest leases, in our opinion, affected the very structure of the operation of the assessee. In this connection we may remind ourselves of the decision of the House of Lords in Van Den Berghs Ltd. v. Clark (H. M. Inspector of Taxes) (3 ITR 17, 25 (ED) (HL) : 19 TC 390 : 1935 AC 431). In that case a Dutch company and the assessee who were competitors in the manufacture and dealing in margarine, in order to end the competition entered into an agreement in 1908, by which they bound themselves to work in friendly alliance and to share their profits and losses in accordance with an elaborate scheme therein specified; further, it was stated that they would promote the commercial, pecuniary, buying and selling and other interests of the two companies. In 1913 another agreement was entered into modifying the original basis of ascertaining and sharing profits, and, subject thereto, continued in force the provisions of the agreement of 1908 until December 1940. During the war the agreements were not operated, but in 1920 a third agreement was made modifying the two previous agreements as to the basis of profit sharing, extending the branches of the business, and again continuing the principal agreement of 1908 till December 1940. In 1927, three agreements were made, under which the appellants agreed

to determine the agreements of 1908, 1913 and 1920 in consideration of the payments to them of Pounds 450,000. The Special Commissioners held that that sum was paid in respect of the pooling agreements, and must be brought in for the purposes of arriving at the balance of the profits of the appellants for the year ending December 1927, and consequently that the sum was an income receipt. Finally, J., held that the canceled agreements were capital asset of the appellants and that the sum of Pounds 450,000 was not an income receipt at all. The Court of Appeal restored the decision of the Commissioners, who had held that the sum was not received by appellants in consideration of the surrender of a fixed capital asset, but arose from a transaction attributable to circulating capital, and therefore an income receipt. By the House of Lords it was held that Pounds 450,000 was not an item of profit arising to the appellants from the carrying on of their trade, as the agreements which were canceled were not ordinary commercial contracts made in the course of trading nor merely agreements as to how trading profits should be distributed, but affected the while conduct of their business. It was held that money laid out in the cancellation of so fundamental an organisation of a trader's activities could not be regarded as an income receipt or disbursement. The agreements formed the fixed framework within which their circulating capital operated, and were not incidental to the working of their profit making machine. The court reiterated the observations and principles laid down by Lord Cave in British Insulated & Helsby Cables Ltd. v. Atherton. The observations of Lord Macmillan at page 25 of Van Den Berghs Ltd. (3 ITR 17, 25 (ED) (HL) : 19 TC 390 : 1935 AC 431) are apposite to the facts before us. The three agreements which the appellants in that case had consented to cancel were not ordinary commercial contracts made in the course of carrying on their trade; they were into contracts for the disposal of their products or for the engagement of agents or other employees necessary for the conduct of their business. These regulated the appellant's activities, defined what the appellants might and what might not do and affected the whole conduct of the appellant's business. Accordingly, Lord Macmillan found it, in that case, difficult in seeing how money laid out to secure or money received for the cancellation of, so fundamental an organisation of a trader's activities could be regarded as an income disbursement or an income receipt. Lord Macmillan notes that the legal character of the payment should not be misjudged by the magnitude of payment - for the magnitude is a relative term. But the magnitude of a transaction is not an entirely irrelevant consideration. With respect we accept this approach of Lord Macmillan to the facts of the present case before us, which appears to be basically similar.

41. The forest lease therefore constituted, in our opinion, capital assets of the assessee. The same conclusion is fortified by the observations of House of Lords in the case of Hood Bars v. IRC (No. 2) (39 TC 188).

42. In CIT v. Vazir Sultan & Sons (1959) 36 ITR 175, 191 : 1959 Supp 2 SCR 375 : AIR 1959 SC 814), this Court held that in considering whether compensation paid to an agent on the cancellation of his agency was a capital receipt or a revenue receipt, the first question considered was whether the agency agreement in question was a capital asset of the assessee's business and constituted its profit making apparatus and was in the nature of its fixed capital, or it was a trading assets or circulation capital or stock-in-trade of its business. If it was the former compensation received would be a capital receipt, if the agency was entered into by the assessee in the ordinary course of his business and for the purpose of carrying on that business it would fall into the latter category and the compensation received would be a revenue receipt.

43. Having regard to the nature of the forest leases which we have discussed before, in our opinion, the payments made for cancellation or sterilisation of the rights under these leases would be capital receipts. See in this connection the observations of Lord Backmaster in the decision of House of Lords in Glenboig Union Fireclay Co. Ltd. v. IRC (12 TC 427). The observations of Lord Wrenbury

are at page 465.

44. We have discussed the facts regarding the cancellation and circumstances under which it was entered, and we may refer to the facts stated in the judgment of the High Court at pages 798-799 of the reports. As a result of the above findings the High Court came to the conclusion that sum of Rs. 65,52,153 mentioned in question no. 2 for the assessment year 1950-51 and the sum of Rs. 5,18,896 mentioned in question No. 2 for the assessment year 1951-52 were related to the 28,847 tons of logs which are exempt from tax as being receipt of a capital nature on the background of the facts found by the High Court. Question no. 3 really does not arise because for levy of a balancing charge under Section 10(2)(vii) of Income Tax Act, 1922, it is absolutely necessary that the depreciable assets should have been sold at a price agreed to between the parties. See in this connection also the observations of this Court in CIT v. Motors & General Stores (P) Ltd. ((1967) 66 ITR 692 : (1967) 3 SCR 876 : AIR 1968 SC 200). But in exchange there is a reciprocal transfer of interest in movable property, a corresponding transfer of interest in another movable property which is often denoted as 'barter'. The agreement of June 10, 1949 had resulted from the enforcement of the government's policy of nationalisation of forest operation and the agreement does not involve any transaction of sale between the assessee and the Union of Burma. The assessee company never paid any money by a price in respect of assets delivered to it by the government; therefore, this amount of Rs. 1,41,156 could not be brought to tax against the assessee company under the second provision to Section 10(2)(vii) of the Indian Income Tax Act, 1922. The question accordingly was rightly decided in favour of the assessee.

45. Regarding question no. 4 in the assessment year 1950-51 and question no. 3 in the assessment year 1951-52, these related to the delivery of 2,946 and 12,067 tons of logs to the assessee company in respect of the depreciable assets, stores and livestorck mentioned in sub-clause (b) of Clause 1 of the agreement dated June 10, 1949. The High Court was right in holding that logs came into possession of the assessee company in consequence of the agreement made on June 10, 1949 against delivery of all outstanding or residuary rights of the assets to the government. The arrangement was in consequence of nationalisation of forest operations in Burma. The whole of the quantity of 43,860 tons of logs delivered to the assessee company was in lieu of the asset of the forest leases and the other diverse assets which were handed over by the assessee-company to the government on June 10, 1949. These logs were not received by the assessee company on revenue account at all. The fact that the assessee company did not mix up these logs with any of the stock-in-trade held by it in its ordinary course of business is an indication of the fact that the assessee did receive these as stock-in-trade. These logs were received by the assessee company for four years and held by it in the account which is described as 'Burma' forest assets realisation reserve accounts'. The sale proceeds of these logs could not be held to have been received by the assessee company on revenue account. The High Court was right. The question no. 4 in the first year and the question no. 3 in the second year must be answered in the negative and against the revenue.

46. We have set out hereinbefore the questions relating to assessment year 1953-54. It appears from the facts that nothing was paid by the government to the assessee company in connection with 1/3 area of the forest areas which the government had taken over from the assessee company on June 1, 1948. The assessee-company had filed a suit against the government in connection with the timber logs and stores taken over by the government on June 1, 1948. The facts in connection with the delivery of these goods appeared in the letter of the government to the assessee company dated January 24, 1948. In the suit filed by it, the assessee company succeeded in obtaining a decree for Rs. 5,58,188. The Tribunal held that the timber taken over by the government in respect of 1/3rd area was stock-in-trade and the proceeds were taxable. Mr. Kaka was right in his submission that the

timber taken over was towards the residuary rights in respect of the assets lying within 1/3rd area taken over on June 1, 1948. The price of the timber as such was never paid by the government. In the decree, this sum was awarded in lieu of the rights which the assessee company had under Clause 27 in respect of 1/3rd area taken over by the government. To these facts, the terms of the agreement dated June 10, 1949 would be applicable. This sum cannot, therefore, be taxed.

47. On the question no. 2 for the assessment year 1953-54 no argument was advanced before the High Court on behalf of the assessee and the High Court answered the question in the affirmative.

48. In view of the principles involved and the nature of the transactions, we are of the opinion that the High Court was right in answering the questions in the manner it did. In the premises these appeals fail and are dismissed with costs.

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