

# CALCUTTA HIGH COURT

Liberty Cinema

Vs

Commissioner of Income-Tax

(Sinha J.)

19.02.1963

## JUDGMENT

### **Sinha J.**

1. This is a reference under section 66(1) of the Indian Income-tax Act. The reference seeks the answer of this court to the following question :

"Whether, on the facts and in the circumstances of the case, the sum of Rs. 24,498-12-6 incurred for repairs and renovation of the cinema hall and the sum of Rs. 9,890 incurred for legal expense could be allowed as expenses under any of the provisions of section 10(2) of the Indian Income-tax Act?"

The assessee is the lessee of a cinema house belonging to one Jagannath Prosad Roy. Jagannath gave a lease on the 18th February, 1946, of the house along with machinery, furniture and other fixtures to one Mahendra Narayan Roy for a period of five years with an option to renew the lease for another five years. The interest of Mahendra Narayan Roy in the said property was sold on the 12th May, 1950, in auction sale on account of income-tax demands to the partners of the assessee firm along with two other gentlemen, M/s. Agarwalla and Advani. The sale was held under the Public Demands Recovery Act. A sale certificate was granted on the 21st June, 1951. Thereafter, on the 26th July, 1951, and the 30th September, 1951, the assessee purchased the interests of M/s. Agarwalla and Advani. The assessee's accounting year for the assessment year 1953-54 commences from the 28th October, 1951. The facts found are that the expense for the acquisition of the lease up to that date was for Rs. 68,673. In the year of account it was claimed that there was an additional expense of Rs. 34,388 on account of the leasehold buildings and rights and the total expense under the head was, in all, for Rs. 1,03,062. What the assessee did was to write off one-fifth of this amount on the ground that the lease was for five years and the amount written off was one-fifth of Rs. 1,03,062, i.e., Rs. 20,612.

In the statement of the case it is clearly laid down as a fact that the assessee's claim in all the years under appeal was that the amount of Rs. 20,612 should be allowed as an expense written off against acquisition of the lease. The assessee's contention was that so far as the amount of Rs. 34,388 spent in the first year of account was concerned, the entire amount should be allowed as an expense on the ground that the expense was incurred, firstly, for the renovation and repairs and, secondly, for the legal expense for completing its title for the acquisition of the lease. This fact is found and stated in the statement of facts in this reference. It must be emphasised that the claim was, firstly, in respect of renovation and repairs and, secondly, for legal expenses for completing the assessee's title for the acquisition of the lease. The reason for emphasising these two facts will be apparent when we proceed to discuss and decide the question referred to us. The only other fact that should be set out here is that the cinema hall was closed for about seven months and the assessee had to renovate the building and furniture in order to properly start the business. In the statement of case the argument was that the business was carried on from the first day of the accounting year and the expense incurred for such renovation was also made during the time when the exhibition of the pictures was made. The assessee claimed that the sum of Rs. 34,388 should be allowed as repairs under section 10(2)(v) or as an expense under section 10(2)(xv) of the Income-tax Act. The said expense included Rs. 9,890 incurred after the commencement of the business for legal expenses in connection with the proceedings for setting aside the certificate sale and Rs. 24,498-12-6 and Rs. 9,890 are the subject-matter of the question referred to us. The assessee lost before the Income-tax Officer, the Appellate Assistant Commissioner and also before the Tribunal. But the claim of the assessee at these different stages changed from time to time. It will be necessary therefore, to refer to the orders of these three authorities. The Income-tax Officer finds as a fact that from the 1st July, 1951, to the 27th October, 1951, there was no business as the cinema hall was renovated and arrangement for exhibition of the films was finalised. The actual show started on the 29th October, 1951. There was no activity from the 12th May, 1950, when the properties in the cinema were sold by auction on the 1st July, 1951, in connection with the litigation concerning the certificate sale. The actual certificate of sale was granted on the 21st June, 1951. The assessee debited all expenses in connection with the starting of the cinema in an account under the head "leasehold building account" but charged proportionate amount for the relevant assessment year. It was found as a fact by the Income-tax Officer that these expenses were of capital nature and related to the period prior to the starting of the business. Therefore, he disallowed the amount charged to revenue account. If the finding is that these expenses were all of capital nature, very little remains of this reference so far as the assessee is concerned. The Appellate Assistant Commissioner emphasised the fact that these expenses were of capital nature and had been incurred before the commencement of the business of the firm as found by the Income-tax Officer. But he records the fact that the assessee did not seriously contest those findings of the Income-tax Officer that

the expenses were all of capital nature. There was a refinement of the assessee's case before the Appellate Assistant Commissioner. The refinement is that it was contended that even though the expenses were of capital nature, some part of the expenses which were incurred during the accounting year should be allowed. At that time the claim for repairs and renovation was made by the assessee under section 10(2)(v) of the Income-tax Act and there was no question of making any claim under section 10(2)(xv) of the Income-tax Act. The facts found and the conclusion reached by the Appellate Assistant Commissioner are that the repairs and renovation expenses incurred in the relevant year were all of capital nature and, therefore, were not covered by section 10(2)(v) of the Income-tax Act. He added a further reason to come to that conclusion by recording the fact that the assessee was claiming the current repair expenses separately under a different head called "hall maintenance account" as distinguished from the "leaseholding account". Therefore, the Appellate Assistant Commissioner enforced his conclusion that the repairs and renovation expenses claimed in the leasehold building account could not be claimed as current repairs under section 10(2)(v) of the Act. He, therefore, rejected the appeal of the assessee and confirmed the assessment. Before the Appellate Tribunal for the first time the assessee made a case in the alternative under section 10(2)(xv) of the Income-tax Act for allowances of these expenses. The order of the Tribunal makes it clear that the renovation expenses claimed by the assessee were not current repairs within the meaning of section 10(2)(v). It is true that the Tribunal refers to this claim as a claim for a "deferred repair", yet the Tribunal was clear enough to say "it was actually a renewal or restoration in the sense that the repairs were not attended to as and when the need for them arose". The Tribunal, therefore, disallowed the claim of the assessee. On the point of the claim for legal expense the Tribunal confirms and finds the fact that this expense was incurred "for the purpose of completing the title of the assessee". It being found as a fact that the amount was a part of the expenses for the acquisition of the capital asset it could not be allowed as a legal expense.

But the Tribunal in dealing with the alternative claim made for the first time before it under section 10(2)(xv) gave a wrong reasoning in disallowing it, when it said :

"..... when the law had particularly allowed an expense under one head and the amount was not allowable under that head, it was not possible to allow the same kind of expense under the head of section 10(2)(xv) and so the amount could not be allowed under section 10(2)(xv) of the Income-tax Act." This part of the reasoning of the Tribunal cannot be upheld. If the law allows an expense, then how can it be disallowed. A bare reference to section 10(2)(xv) of the Income-tax Act makes it quite clear that one of the conditions to be satisfied there is :

"...the expenditure should not be an allowance of the nature described in any of the clauses (i) to (xiv) inclusive."

That being so it is only when the allowance does not come under any of the previous sub-clauses (i) to (xiv) that a claim can at least aspire to come under clause (xv) of section 10(2) of the Act and not otherwise. It, therefore, cannot be said that because a claim fails under clauses (i) to (xiv) of section 10(2) of the Act, therefore, it must fail under section 10(2)(xv). We respectfully agree with the view expressed in a recent decision of the Division Bench of the Allahabad High Court in J.K. Woollen Manufacturers Private Ltd. v. Commissioner of Income-tax, where it is laid down that under section 10(2)(xv) of the Income-tax Act as it stood before the words "not being an allowance of the nature described in any of the clauses (i) to (xiv) inclusive" were added to the clause, even if an amount was held not to be allowable under section 10(2)(xv), it might still be considered whether it was allowable under section 10(2)(xv). This Allahabad decision, however, dissented from the view taken by the Bombay High Court in Subodhchandra Popatlal v. Commissioner of Income-tax. In this connection it has to be emphasised that we in this reference are not concerned with this conflict between the Allahabad decision and the Bombay decision and we must also emphasise that the Allahabad decision was concerned with a situation before amendment of clause (xv) of section 10(2) of the Income-tax Act by the addition of the word : "not being an allowance of the nature described in any of the clauses (i) to (xiv) inclusive". The point that we wish to emphasise here is that clause (xv) of section 10(2) of the Income-tax Act as it stands now is a residuary clause in the sense that the expenditure claimed thereunder cannot be an allowance of the nature described in any of the clauses (i) to (xiv) of section 10(2). If it be held that it is not an allowance of the nature described in any of these clauses from (i) to (xiv) it is only then that it satisfied one of the conditions under which the claim can come under section 10(2)(xv) of the Act. It will be, therefore, stultifying sub-clause (xv) of section 10(2) and its residuary nature if a construction is put on it to mean that, whenever an allowance fails under these clauses (i) to (xiv), that fact by itself would exclude

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of the claim under clause (xv) of section 10(2) of the Act. The difficulties of the assessee in this reference are insuperable because the facts found are all against the assessee's contention and the claim. He has given no particulars and no details of the so-called expenses for repairs. What these repairs actually were not to be found. Indeed as indicated already it has been found as a fact and even conceded by the assessee before the Appellate Assistant Commissioner that all these expenses were of capital nature and that they were all incurred before the commencement of the business. Even the current lease has not been supplied by the assessee and what appears as a lease is the expired lease. If the assessee wants to deduct from his business profits certain items as allowance under sub-section (2) of section 10 of the Income-tax Act the onus of proving that such allowances are permissible is upon him. The Supreme Court decision in Commissioner of Income-tax v. Calcutta Agency Limited is an authority in support of this proposition, where

Kania J., at page 196, observe :

"Now it is clear that this being a claim for exemption of an amount, contended to be an expenditure falling under section 10(2)(xv), the burden of proving the necessary facts in that connection was on the assessee...."

It is also an authority for the proposition that the High Court in such reference must base its answer of the facts as found by the Tribunal as pointed out Kania C.J., on the same page of the reports, where the learned Chief Justice observe :

"It is, therefore, the duty of the High Court to start by looking at the facts found by the Tribunal and answer the questions of law on that footing. Any departure from this rule of law will convert the High Court into a fact-finding authority, which it is not under the advisory jurisdiction."

Judged by this test and taking the two central facts stated in the statement of case and in the different orders of the Income-tax Officer, the Appellate Assistant Commissioner and the Appellate Tribunal, viz., (1) all these expenses are of a capital nature and (2) that they are all incurred before the commencement of the business, the assessee must fail in this case and the answer to the question referred to us must be in the negative. We must record here that Mr. Mukherjee, learned advocate for the assessee before us, abandoned all claims of the assessee under section 10(2)(v) of the Act and claimed the sums mentioned in the question under section 10(2)(xv) of the Income-tax Act. Even in making this claim under section 10(2)(xv) of the Act his difficulty remains in the finding of fact that the sum of Rs. 24,498-12-6 which he claimed for repairs did in fact relate to capital expenditure. One of the conditions to be satisfied under section 10(2)(xv) is that the expenditure must not be "in the nature of capital expenditure." It will be appropriate at this stage now to refer to some of the arguments and citations made at the Bar. In support of his claim for the allowance of Rs. 24,498-12-6 on account of repairs, the assessee relied on the decision of the Punjab High Court in *Commissioner of Income-tax v. S.B. Ranjit Singh*, for the proposition that a sum can be allowed as the cost of repairs and can be held not to be a capital expenditure even though the expenditure in a particular year is incurred on the ground that it is undertaken to remedy the effect of several years wear and tear or negligence and also in spite of the fact that such expenditure may not be necessary for several years to come after repairs had been effected. This case is of little help to the assessee on the facts of this reference because it is found that the expense here on this account were all of a capital nature and were not to remedy the effect of several years wear and tear or negligence. Lord President Clyde of the Court of Sessions, Scotland, in *Law Shipping Co. Ltd v. Commissioners of Inland Revenue* indicated that even accumulated arrears of repairs can in certain circumstances be regarded as repairs necessary to earn the profits. The Bombay High Court in *New Shorrock*

Spinning and Manufacturing Co. Ltd. v. Commissioner of Income-tax specially emphasised the word "current" in the expression "current repairs" in section 10(2)(v) of the Income-tax Act. Most of the decisions have been reviewed by the Division Bench of this Court in Humayun Properties Ltd. v. Commissioner of Income-tax and it will be unnecessary for us here again to catalogue those cases and discuss them. On the contrast between section 10(2)(xv) and section 12(2) of the Income-tax Act, reference may also be made to the decision of the Division Bench in Madanlal Sohanlal v. Commissioner of Income-tax. But again as we say it is not necessary for us on the facts of this reference to pursue these authorities. Therefore on the facts found that the expenses incurred on this account were all of capital nature, and on the fact that the onus was on the assessee to prove the facts to bring him within the allowance under section 10(2)(xv) of the Act and such onus the assessee having failed completely to discharge by producing any fact showing the nature and character of these expenses, it must be found that the sum of Rs. 24,498-12-6 cannot be claimed under section 10(2)(xv) or under section 10(2)(v) of the Act. The other part of the question relates to the sum of Rs. 9,890 alleged to have been incurred for legal expenses. The assessee claims this also under section 10(2)(xv) of the Income-tax Act. The difficulty in the way of the assessee's claim in this respect is again one of fact and that is that it has been found that such legal expenses were incurred "for the purpose of completing the title of the assessee". In the application before the Tribunal for stating a case for the decision of this court the assessee in fact showed two different sums of money for legal expenses, one of Rs. 10,078-15-3 said to have been incurred as legal expenses in connection with the auction purchase "before" the commencement of the business and the other sum of Rs. 9,890 which is the subject-matter of the question as legal expenses in connection with the proceedings for setting aside certificate sale "after" the commencement of the business. The Tribunal found that the legal expense was for the purpose of completing the title of the assessee and, therefore, this part of the expense was for the acquisition of a capital asset. The claim for legal as an allowance under section 10(2)(xv) of the Income-tax Act has been considered from time to time in some of the reported cases. But somehow or other, the basic character of such a claim seems to have received no close judicial scrutiny. Section 10 of the Income-tax Act deals with profits and gains of business, profession or vocation and the allowance that can be made in computing such profits and gains. A cursory glance at the different sub-clauses from (i) to (xv) shows the type and nature of allowance contemplated by that section. Not one of the clauses between (i) to (xiv) indicates any allowance in respect of legal charges or expenses. If, therefore, legal expenses are to come under section 10(2)(xv) it must come through the door of the language used in this clause, viz :

"Any expenditure (not being an allowance of the nature described in any of the clauses (i) to (xiv) inclusive, and not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purpose of such

business, profession or vocation."

If this point was *res integra* this court would have preferred to consider if legal expenses, as such, could in many circumstances be "in the nature of capital expenditure" within the meaning of these sub-clauses. Legal expenses however have come under "capital expenditure" in the decided cases on the ground that such expenses defended but they may incidentally, directly or indirectly or remotely protect or defend capital or title. But the fundamental question is, can such a test of effect, possible or probable or direct or indirect or remote, make such legal expenses capital expenses. Then, why not all expenses for watch and ward and those employees who guard and protect the property of the business, capital expenses, for they are all defending and protecting the property and the capital of the business. Curiously enough, none of the decided cases appears to have approached this problem from this point of view. On behalf of the revenue authorities the decision of the Australian High Court in *Hallstroms Proprietary Ltd. v. Federal Commissioner of Taxation* was cited to us. Legal expenses amounting to Pounds 6,020 were held to be of revenue and not of a capital nature and, therefore, deductible from the taxpayers assessable income. Latham C.J. proceeded on the basis that the expenditure by the company was not made for the purposes of acquiring an asset or of adding to the profit-yielding subject which constituted the capital structure of the business and also on the basis that the company by making the expenditure did not gain any "enduring advantage". At pages 641-42 Latham C.J. observe :

"It gained nothing - it merely succeeded in maintaining an existing position. The prevention or avoidance of a loss is not a gain of anything. The prevention of subtraction is not the same thing as addition. Occasional legal proceedings are incidental to many businesses. They may result in the acquisition of a new right as, for example, where a person successfully applies for and obtains a patent. But expenditure in the defence of a right enjoyed in common with all His Majesty's subjects is not expenditure incurred in obtaining anything. It is an outgoing of the business incurred in keeping the business going on the same basis as in the past, without any change in the constituent elements of the profit-yielding structure."

Latham C.J. distinguished the leading case, *Southern v. Borax Consolidated Ltd.*, on the ground that there the company incurred costs in defending its title to its land and buildings and was, therefore, entitled to deduct such costs as expenditure wholly and exclusively laid out for the purposes of the business of the company. This principle or basis or test was approved by the Court of Appeal in *Associated Portland Cement Manufacturers Ltd. v. Inland Revenue Commissioners* by Lord Green M.R : "But it is too late in the day for this court to think originally on this subject and the cue handed over to us from the past has to be passed on." The question came up recently before the House of Lords in *Morgan v. Tate & Lyle Ltd.* This of course was

not a case for legal expenses but for expenses incurred by the company in connection with a propaganda campaign to oppose the threatened nationalisation of the industry. At pages 51-52 of that report Lord Reid discussed the cases and the problems raised in this connection. The learned Lord observe :

"There are a number of other cases in which expense incurred in defending or preserving the existence of capital assets has been held to be deductible. In *Southern v. Borax Consolidated Ltd.* legal expenses in defending a title to land abroad were allowed. *Associated Portland Cement Manufacturers Ltd. v. Kerr* was a case rather like *Mitchell v. B.W. Noble Ltd.* Lord Greene M.R. there said : The money that you spend in defending your title to a capital asset, which is assailed unjustly, is obviously a revenue expenditure, and having said that it was not a capital expense, apparently he saw no reason why it should not be deductible. *Cooke v. Quick Shoe Repair Service* somewhat resembled *Ushers Wiltshire Brewery* in that the taxpayer, in order to maintain the goodwill of the business, voluntarily discharged certain liabilities which the vendor of the business had failed to discharge. He was held entitled to deduct these payments because they had been made to preserve an asset of the business. On the other hand, there are cases where it has been held that expenditure is not deductible, because it was not incurred by the taxpayer in his capacity of trader. Payment of a fine is not an ordinary commercial loss (*Inland Revenue Commissioner v. Warnes & Co. Ltd.*); and insurance against loss owing to strikes has been held not to be deductible (*Rhymney Iron Co. Ltd. v. Fowler*; *Thomas Merthyr Colliery Co. Ltd. v. Davis*). I find these last cases difficult to follow and I cannot find that they throw any light on the present case. The ground of judgment is most clearly stated by Slesser L.J. in the latter case where he said (*Thomas Merthyr Colliery Co. Ltd. v. Davis* :

I find the greatest difficulty in taking the view that an expense which is incurred exclusively for the purposes of the trade can be extended to cover an expense wholly and exclusively laid out for the purpose of protecting the trader against the absence of trade.

That may or may not be right in its context, but I do not think it sets out any general rule capable of wider application."

Turning now our attention to the decisions of the Supreme Court in India, the leading case on the subject is *Commissioner of Income-tax v. Finlay Mills Ltd.* There the expenditure was incurred by a company carrying on business of manufacturing and selling textile goods in registering for the first time its trade marks which were not in use prior to 25th February, 1937. It was held that such expenditure was revenue expenditure and an allowable deduction under section 10(2)(xv) of the Income-tax Act, 1922. At pages 478 and 479 of the report Kania C.J. observe :

"In our opinion, this is neither such an asset nor an advantage so as to make payment for its registration a capital expenditure. In this connection it may be useful to notice that expenditure incurred by a company in defending title to property is not considered expenses of a capital nature."

The Supreme Court again had to consider section 10(2)(xv) of the Income-tax Act in the case of Commissioner of Income-tax v. H. Hirjee and also in Haji Aziz and Abdul èShakoor Bros. v. Commissioner of Income-tax. In the former case the assessee was prosecuted under the Hoarding and Profiteering Ordinance and was finally acquitted and claimed the amount spent in defending himself under section 10(2)(xv). It was held there that the distinction between legal expenses of a successful and unsuccessful defence was not sound and that the deductibility of such expenses under section 10(2)(xv) must depend on the nature and purpose of the legal proceedings in relation to the business whose profits were under computation and were unaffected by the final outcome of the proceedings. In the latter case, at page 664, Kapur J. observe :

"In our opinion, no expense which is paid by way of penalty for a breach of the law can be said to be an amount wholly and exclusively laid for the purpose of the business."

The latter case was concerned with the amount paid by way of penalty for breach of the law under the Sea Customs Act. In a recent decision of the Division Bench of the Madras High Court in Transport Co. (Private) Ltd. v. Commissioner of Income-tax it is laid down that where the purpose of the litigation is to maintain an existing title to the assets of the assessee's business, expenditure therefore would be of a revenue nature, but if the purpose was to acquire or cure a defect in the assessee's title to the assets it would be of a capital nature. It was held immaterial whether the assessee figured as a plaintiff or defendant in the action. It was also held immaterial whether the result of the suit was in favour or against the assessee. The Privy Council in Commissioner of Income-tax v. Maharajadhiraj Sir Kameshwar Singh of Dharbhanga had also to consider the question of legal costs being an allowable deduction. On the facts of that case the Privy Council upheld the contention that the respondent was entitled to the deduction claimed on the ground that the main character of the action was against the respondent's father as the money-lender, and his defence to the action was just as essential for the full protection of his rights as creditor in the loan of Rs. 10 lakhs as was his suit for the recovery of that loan the costs of which had been allowed as an expense incurred in his money-lending business. Reliance was placed on behalf of the assessee on the decision of the Allahabad High Court in Jagat Bus Services, Saharanpur v. Commissioner of Income-tax. During the relevant year the road in that case was not in a motorable condition for several months and the assessee had to pay only a sum of Rs. 5,000 to the State and the assessee claimed payment as an allowable deduction under section 10(2)(xii) of the Income-tax Act, 1922, as it then was. It was held that the sum of Rs. 5,000 paid

under the agreement was a revenue expenditure and, therefore, was allowable as a deduction. The position on the authorities, therefore, is that if the legal expenses are incurred in creation, curing or completing title to the capital then it is capital expenditure. The question in each case, however, turns on the point whether the legal expenses in question were incurred for purposes of creating, curing or completing title. The facts therefore in this reference may be reviewed in the light of this principle.

Before reviewing the facts we would also emphasise again the fact found that the legal expenses claimed in this case were "for the purpose of completing the title of the assessee". On the principle laid down by the cases and authorities, it, therefore, becomes clear that legal expenses for that purpose must be regarded as capital expenditure. On the merits also this view can be supported. The sale in this case was under the Public Demands Recovery Act. Section 20 of that Act says that where property is sold in execution of a certificate there shall vest in the purchaser merely the right, title and interest of the certificate-debtor at the time of the sale, even though the property itself be specified. It also provides that where immovable property is sold in execution of a certificate, and such sale has become absolute, the purchaser's right, title and interest shall be deemed to have vested in him from the time when the property is sold and from the time when the sale becomes absolute. The State provides in section 22 for the procedure to set aside such sale of immovable property. Then in section 25 of the Act it is expressly provided that where no application is made under section 22, section 23 or section 24, or where such an application is made and disallowed, the Certificate Officer shall make an order confirming the sale, and, thereupon, the sale shall become absolute. From the scheme of the Act, contained specially in sections 20 to 25, it is clear that the perfection of title under a sale certificate goes through different stages. At first, sale is held under the certificate. There is a period of time given for making the application for setting aside the sale. Thirdly, and lastly, there is a time for "confirming" the sale and making the sale "absolute". Now in the facts of this reference the legal expenses incurred in this case were all incurred within this time between the sale under the sale certificate and before the confirmation of the sale and before the sale became absolute. Naturally, therefore, and rightly the Tribunal came to the conclusion that these legal expenses were incurred for "completing" the title of the assessee and as such was capital expenditure. In ordinary sales, as for instance by private agreement, there is no question of any statutory period for setting aside the sale or for the sale to become absolute or to be confirmed. A person purchasing therefore at a sale held under section 20 of the Public Demands Recovery Act really purchases an inchoate right which is completed by the sale becoming confirmed and becoming absolute under section 25 of the Act. In this case an application was made to set aside the sale under section 22 of the Act before the sale was confirmed or before the sale became absolute and within the time permitted by the statute. The assessee's contention, therefore, that this was revenue expenditure cannot on merits be sustained. To meet this objection an argument was advanced on behalf of the

assessee on the strength of a decision of the Lahore High Court in *Mahabir Parshad & Sons v. Commissioner of Income-tax*. There the assessee claimed to deduct from his assessable income a certain sum which he had spent in defending a suit for pre-emption of a property which he had purchased for business purposes and which he was using as a godown for the storage of his goods. The Lahore High Court came to the conclusion on the facts that the expenditure incurred in defending the suit was revenue expenditure and not capital expenditure within the meaning of section 10(2)(xii) of the Income-tax Act as it then was and it was, therefore, an allowable deduction. The distinction between that case and the present reference is that it was not there a case of statutory sale under statutory provisions where the sale could not become absolute except by a special order as in section 25 of the Public Demands Recovery Act. No doubt an argument was made, as noticed in page 353 of that report, that the expenditure in that case was incurred to improve the capital assets because the assessee purchased the property in a town where the pre-emption Act was in force and where he must have known that some pre-emption would sue for possession of the property. But the court, at page 353, said :

"I must confess, I am unable to appreciate this argument. The title of a purchaser may be attacked on several grounds and the right to pre-emption is only one of them..... The expenditure has so far been incurred only once but there is no guarantee that it may not recur, though it is not likely to recur in connection with a suit for pre-emption. It is as necessary for a businessman to protect his business premises as his stock-in-trade, and I do not see any distinction in principle between litigation expenses incurred to defend the business premises and those incurred to defend the stock-in-trade. Both are incurred wholly and exclusively for the purposes of the business and do not result in the acquisition, improvement or alteration of a capital asset."

This last sentence in the observation makes the distinction clear. There on the facts it was held not to be an acquisition, improvement or alteration of the capital assets. Here on the facts of the reference made in the statement of the case as well as in the order of the Tribunal, it is the other way about and it has been held and found that the legal expense in this case was only for the purpose of completing the title of the assessee. The broad test evolved by the authorities and what Lord Cave formulated as the test in *British Insulated and Helsby Cables Ltd v. Atherton* is that in determining whether litigation expenses are in a particular case capital expenditure is to see whether such expenses were incurred in acquiring a new capital asset or in improving or altering an existing capital asset. Applying that test on the facts of this reference the answer can only be that the legal expenses in this case were capital expenditure. Even in the Lahore case the observation is there that where an assessee purchases a property with a knowledge of defect in title and perfects it by further payment, the expenditure incurred is attributable to capital. A purchaser being an auction-purchaser under certificate proceedings under the Public Demands

Recovery Act purchases with all the risks and hazards of attack recognised by the statute and expenses incurred in connection therewith for completing and perfecting the title must, on the principle laid down by the authorities discussed, be regarded as capital expenditure. No doubt, all legal expenses relating to the protection of the capital are not capital expenditure and some of these expenses may be and very often are revenue expenditure. Litigation expenses incurred by an assessee in litigation concerning his property or capital asset may arise independently of his purchase or the document or root of his title such as attacks from a trespasser or a superior title (as in the case of *Southern v. Borax Consolidated Ltd.* already mentioned). Such expenses will not ordinarily be capital expenses. In such cases the attack really is de hors the root of the title of the assessee on which the assessee depends. Legal expenses incurred for such litigation on grounds independently of or de hors the root of the title on which the assessee relies will ordinarily be revenue expenditure. But a statutory sale with statutory condition and with statutory features that the sale has to be confirmed and made absolute with liberty to aggrieved persons to come in to attack and set aside the sale within a specified period and when, therefore, the attack is made on the very root of the title itself and within the permissible procedure of statutory provision for setting aside such sale stands on a different footing. Then the legal expenses in connection therewith are clearly attributable to capital and must be regarded as capital expenditure. The result, therefore, is that the facts in each case must govern whether legal expenses in an individual instance are capital expenditure or revenue expenditure. There can be no rigid formula nor any invariable test for such legal expenses. For instance the Nagpur High Court in *Central Spinning, Weaving & Manufacturing Co. Ltd. v. Commissioner of Income-tax* and in *Income-tax Appellate Tribunal, Bombay v. Chhaganmal Mangilal* allowed legal expenses as revenue expenditure on the particular facts of these cases, while the Lucknow Bench of the Allahabad High Court in *Anand Beharilal v. Commissioner of Income-tax* held on the particular facts that legal expenses there incurred did not amount to revenue expenditure and did not permit their deduction. In the last-mentioned case the learned Chief Justice, at page 207, observe :

"He chose to purchase the property in presenti with all such defects of title as there might be in it for a consideration which was to be utilised in financing the litigation."

This observation shows that legal expenses that follow in instances where purchaser knowingly "purchases litigations" with a view to perfect known defects of title by litigation may not be revenue expenditure. On the authorities discussed above, we do not consider it appropriate to lay down any rigid or narrow test and this court is content in expressing its concurrence with the broad principle indicated above. For reasons stated above we hold that the two sums of money, (1) Rs. 24,498-12-6 and (2) Rs. 9,890, cannot be deducted as an allowance under section 10(2) of the Indian Income-tax Act either under sub-clause (v) thereof or under sub-clause (xv) thereof. We accordingly answer the question in the negative. The assessee will pay the costs of this

reference. Certified for two counsel.

**LAIK J. - I agree.**

Question answered in the negative.