KERALA HIGH COURT

Commissioner of Income-Tax

Vs

Ruby Rubber Works Ltd

I.T.R. Nos. 217 and 218 of 1980, 328 of 1982 and 8 of 1984

(Paripoornan, Varghese Kalliath and Pareed Pillay, JJ.)

06.04.1989

JUDGMENT

Varghese Kalliath, J.

1. A Division Bench of this court referred these cases for the consideration of the Full Bench. Thus, these cases have come up before us for decision. Income Tax References Nos. 217 and 218 of 1980.

2. The chief question that arises for consideration in these income-tax references is as to whether replanting subsidy received from the Rubber Board under the Replanting Subsidy Scheme of 1967 by the assessees during the relevant periods of assessment is a revenue receipt taxable under the Income-tax Act, 1961, hereinafter referred to as the "Act".

3. A Division Bench of this court in *Commissioner of Income Tax v. Malayalam Plantations Ltd*[1]. found that the subsidy "was paid to swell the profits of the assessee". The question referred as to whether the subsidy received from the Rubber Board is income of the assessee was thus answered in favour of the Revenue.

4. Learned counsel appearing for the assessees submitted before the Division Bench that the decision in Malayalam Plantations' case [1987] 168 ITR 63 (Ker), required reconsideration and so, the Division Bench referred the matter for a decision by the Full Bench. We propose to decide first I. T. Rs. Nos. 217 and 218 of 1980, since we heard detailed arguments in these two cases.

5. The only question that has to be considered is whether the subsidy received from the Rubber Board by the assessee is income of the assessee liable to be taxed under the Act. The assessee filed an appeal against the order of the Income-tax Officer before the Appellate Assistant Commissioner of Income-tax, Trivandrum, only against the assessment of subsidy amounts received from the Rubber Board as taxable income. The Income-tax Officer held that the amount received by the assessee is not agricultural income. He also found that as the business carried on by the assessee is rubber manufacture and any expenditure incurred for the rubber plantation is also a

[1][1987] 168 ITR 63
business expenditure, the subsidy received thus for recouping some of the expenditure is taxable income.

6. The Appellate Assistant Commissioner disagreed with the Income-tax Officer and held that the avowed object of recouping the cost of planting and replanting rubber trees does not take the character of income and that it is only a capital receipt and so not a taxable receipt at all. The Revenue took up the matter before the Income-tax Appellate Tribunal, Cochin Bench.

7. After considering the provisions of the Rubber Act and the Subsidy Scheme framed by the Rubber Board, the Tribunal held that what was received by the assessee from the Rubber Board was only by way of reimbursement of expenditure incurred by it in replanting rubber trees. It also said that even assuming that the expenditure incurred by way of replanting rubber trees would not be capital expenditure, it cannot be said that the amounts received by the assessee from the Rubber Board are liable to be considered as income, taxable under the Act. The reason stated by the Tribunal is that it cannot be considered under any circumstance that the expenditure incurred by the assessee by way of replanting trees is not an item which can be considered in the computation of the income assessable under the Act. On the particular facts of the case, the Appellate Tribunal also held that merely because the assessee had utilised the rubber from its estates in the business carried on by it, viz., the manufacture and sale of rubber and rubber products, it cannot be said that such amounts received by the assessee from the Rubber Board would form part of its business receipts. The Appellate Tribunal held that the Appellate Assistant Commissioner was justified in deleting the additions of the amount of subsidy received for the assessment years from the computation of the taxable income of the assessee.

8. At the instance of the Revenue, the following question is referred for the decision of this court, by the Income-tax Appellate Tribunal, Cochin Bench : "Whether, on the facts and in the circumstances of the case, Rs. 16,740 and Rs. 17,105 being the subsidy received from the Rubber Board is taxable income for the assessment years 1971-72 and 1974-75, respectively ?"

9. The amount of Rs. 16,740 and Rs. 17,105 are amounts of subsidy received by the assessee for the previous years ended June 30, 1970, and June 30, 1973, from the Rubber Board under a subsidy scheme framed by it. So, as we said earlier, the principal question that we have to decide in these cases is whether the subsidy received by the assessee for the purpose of replanting, from the Rubber Board, is taxable income in the hands of the assessee ?

10. Learned counsel for the assessee very frankly submitted before us that if the ratio of the decision in *V.S.S.V. Meenakshi Achi v. Commissioner of Income Tax*[2], is applicable to the case, the question referred has to be answered in favour of the Revenue. Assuming that the question referred in the case reported in *Commissioner of Income Tax v. Malayalam Plantations Ltd*[3]., is identical with the question that arose in Meenakshi Achi's case [1966] 60 ITR 253 (SC), this court has held that the subsidy
[2][1966] 60 ITR 253 (SC)
[3][1987] 168 ITR 63 (Ker)
paid to the assessee would swell the profits of the assessee, and so, the amount of subsidy is not a capital receipt and is only a revenue receipt which can be included in the taxable income. It is clear and plain that in coming to the above conclusion, the Division Bench proceeded on the

stereobate that the question decided in Meenakshi Achi's case [1966] 60 ITR 253 (SC) was an identical question. Learned counsel submits that an analysis of the facts of the case in Meenakshi Achi's case [1966] 60 ITR 253 (SC) would plainly show that the facts and particularly the scheme of subsidy are quite different from the scheme of subsidy involved in the case decided by the Division Bench in *Commissioner of Income Tax v. Malayalam Plantations Ltd*[4]*.,*

11. Before considering the scheme of subsidy and other facts of the case decided in Meenakshi Achi's case [1966] 60 ITR 253 (SC), we feel that it is necessary to make a thorough survey of the facts of the cases with reference to the subsidy scheme framed by the Rubber Board and the relevant sections of the Rubber Act. Learned counsel submitted before us that when the Division Bench decided the case--*Commissioner of Income Tax v. Malayalam Plantations Ltd*[5]*.,* the subsidy scheme framed by the Rubber Board was not before it, since no detailed and relevant references are seen to have been made to the subsidy scheme framed by the Rubber Board and the provisions of the Rubber Act.

12. Section 8 of the Rubber Act, 1947, provides that it shall be the duty of the Board to promote by such measures as it thinks fit the development of the rubber industry. The Rubber Board has framed the scheme of subsidy on the basis of the power that has been given by the statute under Section 8 of the Rubber Act. Section 9(2) of the Rubber Act provides that the Board shall maintain two funds, a general fund and a pool fund. Further, in Section 9A(1), it is provided that to the general fund shall be credited (a) all sums forming the funds of the Board immediately before the commencement of the Rubber (Production and Marketing) Amendment Act, 1954 ; (b) all amounts paid to the Board by the Central Government under Sub-section (7) of Section 12. Sub-section (7) of Section 12 provides that the proceeds of the duty of excise collected under Section 12 reduced by the cost of collection as determined by the Central Government shall first be credited to the Consolidated Fund of India, and then be paid by the Central Government to the Board for being utilised for the purposes of the Rubber Act, if Parliament, by appropriation made by law in this behalf, so provides.

13. Counsel submitted that on a reading of Sections 8 and 9A read with Sub-section (7) of Section 12, it is plainly clear that the amount of subsidy is paid from the Consolidated Fund of India and such a payment shall be for a public purpose and not to swell the profits of certain assessees under the Income-tax Act.

14. Now, we turn to the subsidy scheme framed by the Rubber Board. It is plainly clear from annexure F of the subsidy scheme framed by the Rubber Board that the subsidy is given for "replanting". It opens with the aim of the scheme, by declaring that the scheme is intended to provide for the grant of subsidy for replanting an area

[4][1987] 168 ITR 63 (Ker)
[5][1987] 168 ITR 63 (Ker)

of 10,000 acres in 1967. Further, it is stated that the rate of subsidy is Rs. 1,000 per acre payable in seven yearly installments, the first being Rs. 400 and the remaining at Rs. 100 per acre. Again, it is made clear that the subsidy will not be given for budding immature unselected plants but will be restricted to replanting. From the above provisions of the scheme, it can be fairly concluded that the object of the scheme is "replanting" and the subsidy is being paid for replanting a high-yielding variety of rubber plants which the Rubber Board and the

Government thought necessary for the development of the rubber industry, a public purpose of vital public interest. The payment of subsidy can be justified only if it promotes a public interest. From the statutory provisions referred to by us and the provisions of the scheme, we feel that the confessed object and purpose of the whole scheme is a public purpose intended and geared to have a more high-yielding variety of rubber plants. It is to encourage the growers to plant good varieties of rubber plants which would ultimately result in the augmentation of a national asset of the country.

15. In a Handbook of Natural Rubber Production in India, published in commemoration of the Silver Jubilee of the Rubber Research Institute of India, in paragraph 29.5.4, it is stated thus :

> "The Rubber Board is implementing many schemes designed to achieve development of the rubber plantation industry on efficient and economic lines. The following essential requirements have been kept in view in formulating the schemes :
> (i) Modernisation of the existing plantations with the object of improving productive efficiency, increasing overall production and reducing cost of production ;
> (ii) Increasing production through expansion of rubber cultivation ;
> (iii) Improvement in processing and presentation ; and
> (iv) Strengthening marketing power of small holders."

Paragraph 29.5.4.1 deals with replanting subsidy schemes. It reads thus:

> "In order to encourage rubber growers to undertake replanting of old and uneconomic plantations, the Board is offering them assistance under its replanting subsidy scheme."

The details of the scheme are given in this paragraph.

16. In the background of the purpose and object envisaged by the scheme and thereby understanding what exactly is the content of the subsidy that is given to the assessee, we shall now advert to the decisions on the point. We have adverted to the statutory provisions and the details of the scheme for the purpose of understanding the true scope and content of the subsidy given to the assessee since the word "subsidy", in different contexts, can have different shades of meaning.

17. Now we feel that it is our obligation to examine what is the nature of the subsidy that was the subject-matter of consideration in Meenakshi Achi's case [1966] 60 ITR 253 (SC), though the Division Bench in Malayalam Plantations Ltd.'s case [1987] 168 ITR 63 (Ker) proceeded to decide the question referred to it in that case, viz., whether the subsidy received from the Rubber Board is the income of the assessee on the basis that an identical question has been decided in Meenakshi Achi's case [1966] 60 ITR 253 (SC). It is also necessary to consider under what circumstances the assessee in Meenakshi Achi's case [1966] 60 ITR 253 (SC) was assessed to income-tax, computing the income including payments made by a foreign Government out of the cess fund against the expenditure incurred on the maintenance of her plantation.

18. Learned counsel for the assessee submitted before us that there were special and peculiar

circumstances involved in that case and it can never be said that the question raised in Meenakshi Achi's case [1966] 60 ITR 253 (SC) was "identical" with the question that arose in Malayalam Plantations' case [1987] 168 ITR 63 (Ker).

19. In Meenakshi Achi's case [1966] 60 ITR 253 (SC), the assessee owned rubber plantations in the Federated Malay States outside Penang. Out of a fund into which cesses collected under the Rubber Industry (Replanting) Fund Ordinance, 1952, on rubber produced in Penang and rubber exported from the Federation other than Penang, were paid, proportionate parts of the cesses so collected, after defraying expenses, were credited to the accounts of the assessee, corresponding to the amount of rubber produced by them, and payments were made to the assessees from the amounts so credited against expenditure incurred on the maintenance of the plantations. From the above facts, it is clear that the amounts from the fund were earmarked for the assessees on the basis of the rubber pro- duced by them and were paid against the expenditure incurred by them for maintaining the rubber plantations and producing rubber. It has to be noted that the amounts paid were particularly earmarked for maintaining the rubber plantation and for producing rubber. There is no reference regarding the replantation or plantation of rubber trees. The amounts were paid with reference to the production of rubber and so, the court held that the amounts received by the assessees were revenue receipts. The following observation of Subba Rao J., as he then was, makes this aspect of the matter clear (at p. 259) :

> "Briefly stated, the basis of the High Court's judgment is that the assessees contributed to the Fund by paying duty on the export of rubber and, therefore, the repayment made to them from out of the Fund must be correlated to the production of rubber. It was clear from the facts narrated above that the assessees were only planters and they were not exporters and, therefore, they did not pay any duty under the Ordinance to the Government. Mr. Sastri, learned counsel for the Revenue, did not support the principle accepted by the High Court that the source of payment was material and not the nature of expenditure. Indeed, his argument was con-trarywise, namely, that the expenditure was revenue expenditure and, therefore, the amounts paid to recoup it partook of that character."

Further, the judgment makes it clear on the facts, that the amounts received by the assessees from the fund earmarked for payment to the assessee was on the basis of the rubber produced by them and so the court found that the receipts by the assessee during the accounting year were revenue receipts and, therefore, liable to be included in their assessable income. Significantly in Meenakshi Achi's case [1966] 60 ITR 253 (SC), the cardinal point to be noted is that it was a case of an assessment of income-tax on the global income received by the assessee from outside India. It is foreign (agricultural) income that was subjected to income-tax. Section 2(1)(a) of the Act defines agricultural income with special emphasis to income derived from land which is situated in India. These vital distinctions are the peculiar features which supported the ratio of the decision in Meenakshi Achi's case [1966] 60 ITR 253 (SC). The case decided by the Division Bench in Malayalam Plantations' case [1987] 168 ITR 63 (Ker) and the cases before us do not at all have those vital distinctive facts/ features found in Meenakshi Achi's case [1966] 60 ITR 253 (SC).

20. Now, we shall refer to certain cases dealing with the question of the payment of subsidy as a capital receipt or a revenue receipt. In *Bengal Textiles Association v. Commissioner of Income Tax*[6], the Supreme Court has broadly stated what should be the principal point to be decided to determine whether a subsidy paid to an assessee is a capital receipt or a revenue receipt. The Supreme Court observed thus (at p. 728) :

> "What is decisive in this case is that these payments were made to the association in order that they be used in the business of the association and for services rendered and they have to be viewed from that point of view. So viewed, the payments cannot be said to be of a benevolent nature. Their very quality and nature make it impossible to treat them as a bounty or subsidy because the use of the words 'bonus or subsidy' in Section 4, proviso (c), connotes that the payment is in the nature of a gift which in the instant case it is not."

The Supreme Court approved the decision of the House of Lords in *Seaham Harbour Dock Co. v. Crook (H.M. Inspector of Taxes)*[7], Lord Buckmaster put the matter very plainly. His Lordship said (at p. 353):

> "Now I do not myself think that the matter can be put more succinctly than it was put by Mr. Hills when he said : 'Was this a trade receipt ?', and my answer is most unhesitatingly : No. It appears to me that it was nothing whatever of the kind. It was a grant which was made by a Government Department with the idea that by its use men might be kept in employment, and it was paid to and received by the Dock Company without any special allocation to any particular part of their properly, either capital or revenue, and was simply to enable them to carry out the work upon which they were engaged, with the idea that by so doing people might be employed. I find myself quite unable to see that it was a trade receipt, or that it bore any resemblance to a trade receipt. It appears to me to have been simply a grant made by the Government for the purposes which I have mentioned, and in those circumstances cannot be included in revenue for the purposes of tax."

Lord Aktin in the same judgment, agreeing with Lord Buckmaster, said (at p. 353) :

[6][1960] 39 ITR 723
[7][1931] 16 TC 333

> "It appears to me that when these sums were granted and when they were
> received, they were received by the appropriate body not as part of their profits or gains or as a sum which went to make up the profits or gains of their trade. It is a receipt which is given for the express purpose which is named, and it has nothing to do with their trade in the sense in which you are considering the profits or gains of the trade. It appears to me, with respect, to be quite irrelevant whether the money, when received, is applied for capital purposes or is applied for revenue purposes ; in neither case is the money properly said to be brought into a computation of the profits or gains of the trade"

21. In *Malayalam Plantations' case*[8] the Division Bench has also accepted the principle stated in

Seaham Harbour Dock Co. v. Crook[9], There cannot be any dispute that if any amount is paid by the Government with an express purpose benevolent and beneficial in the public interest and the same is received by the appropriate body and it has nothing to do with their trade in the sense of acquiring profits or gains of the trade, certainly it is not income in the hands of the recipient. Similarly, if a subsidy or any amount is paid for a beneficial purpose, such as keeping men in employment or starting an industry in a backward area or electrifying a remote area which could not be undertaken but for the grant, such payment, being of a beneficial character, cannot be taxed as income. In applying this principle, necessarily, we have to examine the nature, character and content of the subsidy given to the assessee.

22. In this case, the facts relevant for investigation are the provisions under which the subsidy is granted. These provisions have to be discerned from the provisions of the Rubber Act and the Rubber Board Replanting Subsidy Scheme framed by the Rubber Board. The scheme provided for the grant of subsidy for replanting an area of 10,000 acres in 1967. The scheme is definitely only for one purpose, viz., replanting. It is not for the purpose of upkeeping or maintaining mature or immature plants. The chief purpose is replanting rubber trees. This fact is made clear by saying that the subsidy will be granted for replanting low-yielding unselected rubber planted in or prior to 1956. Further, it is made clear that subsidy will not be given for budding immature unselected plants but will be restricted to replanting. Really, the question referred for a decision by the Income-tax Appellate Tribunal is a mixed question of law and fact because the question of law can be decided only on the basis of the particular nature and character of the subsidy. The Tribunal, in its order, observes thus :

> "From the above particulars, it will be apparent that what was received by the assessee from the Rubber Board was only by way of reimbursement of expenditure incurred by it in replanting rubber trees."

Incidentally, perhaps, as part of the operation of replanting, some amounts may be used for the purpose of terracing the land, making pits for planting the trees and also for the upkeep and maintenance of the plants. But, all these are minor and incidental or ancillary operations for achieving the ultimate purpose of replanting. The finding of the Tribunal is that subsidy has been given for the purpose of replanting. In the context of these facts, the two decisions of the Supreme Court relied on by the

[8][1987] 168 ITR 63 (Ker)
[9][1931] 16 TC 333 (HL)

Division Bench in *Malayalam Plantations' case*[10] *Karimtharuvi Tea Estates Ltd. v. State of Kerala*[11], and *Travencore Rubber and Tea Co. Ltd. v. Commr. of Agrl*[12]. are not apposite to answer the question referred by the Tribunal. Of course, the first case is a case relating to a tea estate and the second case, though relates to rubber trees, the facts and circumstances are quite different. There, the question that was considered was one of deduction of expenses for calculating the assessable agricultural income of a rubber estate consisting of mature yielding rubber trees and immature rubber plants which have not come into bearing. The Supreme Court held that the entire amount expended on the superintendence, weeding, etc., of the whole rubber estate, without any deduction for expenses as towards the upkeep and maintenance of immature rubber plants not yielding income in the relevant year, should be allowed, under Section 5(j) of the Act, against the profits earned. The question with which we are concerned here is about creating a new asset by replanting new rubber trees.

23. Learned counsel for the Revenue submitted that the amount received as subsidy in the hands of the assessee is income. But, he was not able to specify under what category this income can be included for the purpose of making it taxable income. Whether it is an amount received for capital expenditure or for revenue expenditure is a test to determine whether it is an income which is taxable under the Income-tax Act. The line of demarcation between capital expenditure and revenue expenditure is very thin. The problem finally turns on the question of distinction between capital expenditure and revenue expenditure or, in other words, whether the amount of subsidy received is a capital receipt or revenue receipt. The importance of the distinction is obvious. For the present purpose, it lies in the fact that the taxpayer can exclude it if the amount received as subsidy is a capital receipt from his total taxable income. The forensic field of conflict involved in this question is an intellectual minefield in which the principles are elusory and shrinking (at any rate that is the view taken by Lord Cullen in *Mac Taggart v. B and E Strump*[13], Analogies are perfidious and slippery, treacherous as it would appear from the observations of Lord Radcliffe in *Commissioner of Taxes v. Nchanga Consolidated Copper Mines Ltd*[14]., "Precedents appear to be vague signposts pointing in different directions" (See the collection of illustrations to be found in Lord Hanworth MR's judgment in *Anglo-Persian Oil Co. Ltd. v. Dale*[15], Lord Upjohn in *Regent Oil Co. Ltd. v. Strick, (Inspector of Taxes*[16]) used the phrase that the direction finder is to be "judicial common sense". The same view is seen expressed in the observations in the same case by Lord Reid. But it is hazardous to adopt the practice of "judicial common sense" in revenue cases'. Counsel appearing for the Revenue and the taxpayer argued the case ably in favour of their different chosen routes through this minefield. There are several decisions which point to the difficulties besetting the task. Lord Macnaghten in *Dovey v. Cory*[17], said thus :

> "I do not think it desirable for any tribunal to do that which Parliament has abstained from doing--that is, to formulate precise rules for the guidance or embarrassment of businessmen in the conduct of business affairs. There never has been, and I think there never will be, much difficulty in dealing with any

[10][1987] 168 ITR 63 (Ker) [12] I.T., [1961] 41 ITR 751 [14][1964] 1 All ER 208 (PC)
[11][1963] 48 ITR 83 [13][1925] SC 599)
[15][1932] 1 KB 124, 136 [17][1901] AC 477, at p. 488 (HL)
[16][1965] 3 All ER 174 (HL)

particular case on its own facts and circumstances ; and, speaking for myself, I rather doubt the wisdom of attempting to do more."In *Countess Warwick Steamship Co. Ltd. v. Ogg*[18], Rowlatt J. said :

> "It is very difficult, as I have observed in previous cases of this kind, following the highest possible authority, to lay down any general rule which is both sufficiently accurate and sufficiently exhaustive to cover all or even a great number of possible cases, and I shall not attempt to lay down any such rule"

Bowen L.J., in the course of the argument in *City of London Contract Corporation Ltd. v. Styles (Surveyor of Taxes)*[19], put the test thus :

> "You do not use it 'for the purpose of your concern, which means, for the purpose of carrying on your concern, but you use it to acquire the concern."

We are tempted to say that the subsidy received by the assessee is used to acquire an asset by replanting high-yield variety of rubber trees. The difference is, as said by Bowen L. J., the expenditure in the acquisition of the concern will be capital expenditure and the expenditure in carrying on the concern is revenue expenditure. This makes the vital difference between the cases reported in *Karimtharuvi Tea Estates Ltd. v. State of Kerala*[20], and *Travencore Rubber and Tea Co. Ltd. v. Commr. of Agrl. I.T*[21]*.,*

24. Lord Dunedin in *Vallambrosa Rubber Co. Ltd. v. Farmer (Surveyor of Taxes)*[22], suggested another criterion thus :

> "Now, I don't say that this consideration is absolutely final or determinative, but in a rough way I think it is not a bad criterion of what is capital expenditure as against what is income expenditure to say that capital expenditure is a thing that is going to be spent once and for all, and income expenditure is a thing that is going to recur every year."

In fact, Rowlatt J. adopted the dictum suggested by Lord Dunedin in *Ounsworth (Surveyor of Taxes) v. Vickers Ltd*[23]*.,* and said that the real test was between expenditure which was made to meet a continuous demand for expenditure as opposed to an expenditure which was made once for all.

25. In *Atherton (H.M. Inspector of Taxes) v. British Insulated and Helsby Cables Ltd*[24]*.,* Viscount Cave L. C. laid down the test, which has almost universally been accepted as a test for determining what is capital expenditure as distinguished from revenue expenditure. Viscount Cave L. C. observed, at page 192, thus :

> "But there remains the question, which I have found more difficult, whether apart from the express prohibitions, the sum in question is (in the words used

[18][1924] 2 KB 292, 298 [20][1963] 48 ITR (SC) 83 [22][1910] 5 TC 529, 536 (C. Sess)
[19][1887] 2 TC 239, 243 (CA) [21][1961] 41 ITR 751 (SC) [23][1915] 6 TC 671
[24][1925] 10 TC 155 (HL)

> by Lord Sumner in Usher's case [1914] 6 TC 399 (HL)) a proper debit item to be charged against incomings of the trade when computing the profits of it; or, in other words, whether it is, in substance, a revenue or a capital expenditure. This appears to me to be a question of fact which is proper to be decided by the Commissioners upon the evidence brought before them in each case ; but where, as in the present case, there is no express finding by the Commissioners upon the point, it must be determined by the courts upon the materials which are available and with due regard to the principles which have been laid down in the authorities. Now, in *Vallambrosa Rubber Co. Ltd. v. Farmer*[25], Lord Dunedin, as Lord President of the Court of Session, expressed the opinion that 'in a rough way' it was 'not a bad criterion of what is capital expenditure as against what is income expenditure to say that capital expenditure is a thing that is going to be spent once and for

all and income expenditure is a thing which is going to recur every year' ; and no doubt this is often a material consideration. But the criterion suggested is not, and was obviously not intended by Lord Dunedin to be, a decisive one in every case ; for it is easy to imagine many cases in which a payment, though made 'once and for all,' would be properly chargeable against the receipts for the year . . . But when an expenditure is made, not only once and for all but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

26. The above quoted English decisions have been referred to by Bhagwati J. in *Assam Bengal Cement Co. Ltd. v. Commissioner of Income Tax*[26], and as a principle, Bhagwati J. observed thus (at p. 42) :

"The distinction was thus made between the acquisition of an income-earning asset and the process of the earning of the income. Expenditure in the acquisition of that asset was capital expenditure and expenditure in the process of the earning of the profits was revenue expenditure."

27. In a decision of the Court of Appeal in *Tucker v. Granada Motorway Services Ltd*[27]., Stamp and Orr LJJ. observed thus (headnote) :

"In determining whether a payment is of a capital or revenue nature, the questions to be asked are whether the payment brings some asset or advantage into existence and whether it is an enduring asset and advantage, i.e., enduring in the same way that fixed capital endures, and not whether it is made with a view to bringing into existence some asset or advantage for the enduring benefit of the trade."

The subsidy scheme makes it very clear that the amount of subsidy has to be spent "for the acquisition of an asset" by replanting rubber plants of high-yielding varieties. The Division Bench in Malayalam Plantations' case [1987] 168 ITR 63 (Ker) has

[25][1910] 5 TC 529
[26][1955] 27 ITR 34 (SC)
[27][1979] 1 All ER 23

referred to Section 10(30) of the Act which allowed exclusion of subsidy for tea plantation from the computation of total income and the Division Bench observed that what was otherwise includible in such computation was specifically excluded by the Legislature. The Division Bench further said that the object of the Legislature in so excluding the subsidy for tea plantation was to confer a special benefit in view of the peculiar predicament of that industry. His Lordship said that what is significant, however, is that, but for the exemption, subsidy of the nature is part of the includible items in the computation of income.

28. We feel that this is not a very good reason to hold that the subsidy granted for "replanting rubber" is an includible income since it has not been excluded under Section 10 of the Act. It has

to be noted that a percentage of income from the profits earned from the business of growing and manufacturing tea in India, is an income under the Income-tax Act. But the profits earned by the business of growing rubber is not an income under the Income-tax Act. Now, it has to be noted that Section 10(31) has been inserted by the Finance Act, 1988, with effect from April 1, 1989, to exclude the amount of subsidy received from the Rubber Board from the computation of the total income of the assessee.

29. It is difficult for us to say that the subsidy given to the rubber growers for replanting is not for a beneficial purpose. We feel certain that it is for the definite purpose to encourage rubber growers to undertake replanting of old and uneconomic plantations and for that the Board is offering them assistance under its replanting subsidy scheme. This economic assistance is offered by the Board under stringent conditions for implementing a scheme designed to achieve development of the rubber plantation industry on efficient and economic lines. It is done to promote public interest. We find it difficult to hold that the replantation subsidy given to the rubber growers is to "swell" the profits of the assessees. In this view, with great respect, we are unable to concur with the Division Bench decision reported in *Commissioner of Income Tax v. Malayalam Plantations Ltd*[28]*.,*

30. In the result, we hold that the replantation subsidy paid to the assessee is not a revenue receipt and cannot be included in the computation of the profits or income of the assessee. Accordingly, we answer the question in the negative and against the Revenue.

Income-tax Reference No. 328 of 1982.

31. In this case, two questions are referred for the decision of this court. First question is:

> "Whether, on the facts and in the circumstances of the case, income-tax on capital gains is exigible on the trees comprised in the rubber estate sold ?"

An identical question has been answered in *Commissioner of Income Tax v. Alanickal Co. Ltd*[29]*.,* in the negative and against the

[28][1987] 168 ITR 63 (Ker) [29][1986] 158 ITR 630 (Ker)

Revenue. So, we also answer the question in the negative and against the Revenue.

32. The second question referred to in the above ITR is :

> "Whether, on the facts and in the circumstances of the case, the subsidy received from the Rubber Board is income of the assessee ? "

In view of the decision in ITRs Nos. 217 and 218 of 1980, we answer the question in the negative and against the Revenue.

Income-tax Reference No. 8 of 1984.

33. In view of the decision rendered in ITRs Nos. 217 and 218 of 1980, the question referred is answered in the negative and against the Revenue. We direct the parties to bear their respective

costs in these income-tax referred cases. A copy of this judgment under the seal of the High Court and the signature of the Registrar shall be forwarded to the Income-tax Appellate Tribunal, Cochin Bench.

Dismissed.