

# **BOMBAY HIGH COURT**

Habib Hussein

Vs

Commissioner of Income-Tax

(V Desai, C.J. Y Tambe, J.)

08.08.1962

## **JUDGMENT**

### **Tambe J.**

1. This is a consolidated reference under sub-section (1) of section 66 of the Indian Income-tax Act (hereinafter referred to as the Act) for the three assessment years 1950-51, 1951-52 and 1952-53, corresponding accounting years being financial years ending with 31st March, 1950, 31st March, 1951, and 31st March, 1952. During these assessment years, the assessee derived income from various sources including his business of exhibiting pictures in a theatre known as "Liberty Cinema."

2. Some time in the year 1947 the assessee thought of opening a cinema theatre in the City of Bombay. It appears that one Manu Subedar had entered into an agreement with the Government of India to take on lease certain lands at Marine Lines, Bombay, including composite plot No. 41/42 on Queen's Road Estate. On January 6, 1947, the assessee obtained a licence from Manu Subedar in respect of this plot to enter upon this land and erect thereon buildings, cinema theatre, show rooms, shops, business premises and residential quarters. The rental agreed to be paid was Rs. 4,200 per month. Manu Subedar had further agreed that he would give a sub-lease to the assessee for the term of 999 years as and when he would get a regular lease from the Government, and it appears that on 4th October, 1949, Manu Subedar gave a sub-lease to the assessee of the said plot at a rental of Rs 4,200 per month. The building programme, however, was carried on after the license to enter on the land had been obtained by the assessee from Manu Subedar. It appears that for the purpose of erection of the theatre and starting the cinema business, the assessee had requested Manu Subedar to help and assist him in getting prepared suitable plans and designs for the cinema theatre and other buildings, in obtaining permission from the Bombay Municipality for constructing an addition sixth floor, in procuring the required finance to enable the assessee to complete the construction of a modern theatre and other

buildings, in procuring various priorities and permits for scarce materials including cement, steel and petrol for transport, in securing import licences for various goods for the purpose of the cinema theatre, in securing foreign exchange facilities to enable the assessee to import from abroad the various goods required for the purpose of the theatre and other buildings. The assessee had also requested Manu Subedar to advise him from time to time during the course of construction of the Cinema theatre and buildings, and also enter into negotiations with the Bombay Municipal Corporation to get the adjoining roads widened. Manu Subedar responded to these requests made by the assessee and had rendered him assistance in the aforesaid matters. On 4th of June, 1948, an agreement was arrived at between Manu Subedar and the assessee under which in consideration of the aforesaid services and assistance rendered by Manu Subedar, the assessee agreed to give to Manu Subedar for a period of 20 years 2% of the gross annual income earned by him in his cinema business. The other terms agreed to between the parties are as mentioned in annexure "A" to the statement of case. It is not necessary to refer to all of them but it may be mentioned that it was agreed that the payment of 2% of the gross annual income would only be made in the years profits are made. In the year when there was no profit, that year would not be counted towards the 20 years period mentioned in the agreement. Further it was agreed that as security for the due performance and observance of the terms of the agreement, the assessee should within six months of the date of the agreement deposit with Manu Subedar a sum of Rs. 50,000 and it was further agreed that the burden of the aforesaid payment on the assessee was to attach and run with the said cinema theatre known as the "Liberty Cinema" in whosoever hands the said cinema theatre shall be for running cinema shows. Paragraph 3 of the agreement deals with certain financial arrangements between the said Manu Subedar and the assessee in the event the assessee makes an arrangements with any purchaser or distributor of cinema films, the assessee reserving to himself certain guaranteed minimum income. Paragraph 4 provides that if the assessee was to let out the said cinema theatre to any other party or person or sell the said cinema theatre to any other person, the assessee shall makes it a condition with the lessee or the purchaser of the said cinema theatre that the said lessee or the purchaser shall pay to the said Manu Subedar every year up to the said period of 20 years the payments specified in the agreement. Paragraph 5 provides :

"Subject to what is stated in clause (4) above the party of the first part (assessee) shall not assign, transfer, sell or let out the said cinema theatre during the currency of the contract provided however that if the party of the first part shall pay to the second part (Manu Subedar) a lump sum computed at the rate of Rs. 1,250 per month for the then unexpired period of the said period of twenty years plus ten per cent. on such aggregate lump sum then only the party of the first part shall be at liberty to assign, transfer, sell or let out the said cinema theatre free from all claims of the party of the second part under this Agreement and the same shall stand terminated on such payment as aforesaid."

3. The theatre and the building were completed before 1st April, 1949, and the assessee started his business on 1st April, 1949. The assessee desired certain variations in the matter of exercising the option given to him by the aforesaid clause (5) of the agreement made on June 4, 1948, and, therefore, on 15th March, 1950, he addressed a letter to Manu Subedar, the material part of which is in the following terms :

"As I desire to leave my affairs as clear as possible for my son, may I request you to consider whether you would not allow the operation of this clause of capital payment exactly as it is stated to be, to take place not merely in the event of sale of the Liberty Cinema, but also otherwise at my option any time within the next twelve months."

4. By his letter dated 17th March, 1950, Manu Subedar informed the assessee as follows :

"I am agreeable if you wish to buy out for a capital sum the annual payment involved in the agreement under the circumstances other than the sale of the Liberty Cinema."

5. The said capital sum was subsequently determined at Rs. 3,30,000 in accordance with paragraph 5 of the agreement of 4th June, 1948. This new agreement is evidenced by a deed dated 10th July, 1950. It is annexure "B" to the statement of case. Briefly stated, under this agreement, it was agreed between Manu Subedar and the assessee that in full satisfaction of payment of 2 per cent. of the annual gross income as provided in the agreement of 4th June, 1948, for a period of 20 years of profit, the assessee should pay to Manu Subedar a sum of Rs. 3,30,000 within a period of five years by twenty quarterly instalments of Rs. 16,500 commencing from the expiry of the period of three months from the date of the agreement. By way of security for the payment of the said sum of Rs. 3,30,000 the assessee created a second mortgage in favor of Manu Subedar on certain properties mentioned in the agreement. The assessee's system of accounting is mercantile. The assessee has debited the said sum of Rs. 3,30,000 to the cinema building account as royalty payable by him to Manu Subedar as per the original agreement dated 4th June, 1948, subsequently replaced by an agreement dated 10th July, 1950. The entry is in the books of account of the year ending with 31st March, 1950. The controversy between the parties relates to the said sum of Rs. 3,30,000. It is the contention of the assessee that the said sum should be included in the original cost of the depreciable assets to the assessee for the purpose of determining the depreciation allowance allowable to the assessee for the assessment year 1950-51 under clause (vi) of sub-section (2) of section 10 of the Act. On the other hand, it is the contention of the department that the said sum does not form part of the original cost of the depreciable assets to the assessee. The Income-tax Officer did not accept the contention of the assessee. According to him, the amount agreed to be paid by the assessee to Manu Subedar would clearly be an expenditure of a preliminary nature incurred for establishing the business of Liberty Cinema and not for the purpose of acquiring buildings, machinery, etc., for the cinema

business. The assessee took three appeals for the said three assessment years against the orders of the Income-tax Officer to the Appellate Assistant Commissioner. He took the view that a part of the said amount of Rs. 3,30,000 pertains to the cost of residential property and the land on which the buildings stand and a part pertains to the cost of the depreciable assets. He allocated the payments on an estimate basis as under : Rs. 66,000 he allocated on account of the payment of services obtained for the setting up of the business; Rs. 33,000 he allocated as payment made for services obtained for improvement of the land and the balance of Rs. 2,31,000 he allocated as payments made for and in connection with the acquisition of (i) cinema theatre building, (ii) residential building, (iii) exhibition machinery, and (iv) air conditioning machinery. In this view of the matter he allowed the appeal partially and remanded the case to the Income-tax Officer directing him to modify the assessment in the light of the observation made by him in his order. Against this order, the income-tax authorities took further appeals to the Income-tax Appellate Tribunal. These three appeals were consolidated and were disposed of by a common order by the Tribunal. It appears that two contentions were raised by the department before the Tribunal. Firstly, that the Appellate Assistant Commissioner erred in holding that the sum of Rs. 2,31,000 out of Rs. 3,30,000 said to have been paid to Shri Manu Subedar in accordance with the agreement dated July 10, 1950, be allocated to certain depreciable assets mentioned therein for the purpose of computing the depreciation allowance and, secondly, it was contended that as the liability to pay the lump sum amount of Rs. 3,30,000 arose on 10th of July, 1950, as per the agreement of the said date, the said amount or any part thereof, could not be taken into consideration in determining the cost of the depreciable assets for period prior to the 10th of July, 1950, and, therefore, no part of the said sum could be taken into account in determining the depreciation allowance allowable to the assessee in the assessment year 1950-51. The Tribunal accepted the first contention of the department and has allowed the appeals, set aside the order of the Appellate Assistant Commissioner and restored that of the Income-tax Officer. The Tribunal in its order has not dealt with the second contention raised by the income-tax department. It is not necessary to state the reasons given by the Tribunal as Mr. Joshi, counsel for the revenue, has not adopted the line of reasoning of the Tribunal. We will deal with the contentions raised by Mr. Joshi in due course. On an application made by the assessee under sub-section (1) of section 66 of the Act, the Tribunal has drawn up a statement of a case and referred to this court the following question of law :

"Whether the appropriate part of Rs. 2,31,000 (i.e., after excluding that portion of it that is attributable to residential building) apportioned by the Appellate Assistant Commissioner to cinema theatre building, exhibiting machinery and air conditioning machinery on proportionate basis can be considered for the purpose of section 10(5)(a) as part of the 'actual cost to the assessee' in acquiring those assets in the previous year ended March 31, 1950, relevant for the assessment year 1950-51 ?"

6. In our opinion the question as framed by the Tribunal would not properly bring out the question of law arising out of its order. It has to be noted that the Tribunal has expressed no opinion as to whether, in the event any part of Rs. 3,30,000 is liable to be taken into account in determining the actual cost to the assessee, the proper sum would be Rs. 2,31,000. Similarly, it also has expressed no opinion as to whether in the event any part is so liable to be included it could not be included for the assessment year 1950-51. For these reasons, we reframe the question in the following terms to bring out the controversy between the parties arising out of the order of the Tribunal :

"Whether any part of the amount of Rs. 3,30,000 is attributable towards the actual cost of the assessee for acquiring the depreciable assets for running his cinema business and, therefore, liable to be included in determining the depreciation allowance allowable under section 10(2)(vi) read with section 10(5) of the Act ?"

7. Mr. Palkhivala, appearing for the assessee, contends that the Tribunal was in error in holding that no part of the said sum of Rs 3,30,000 was attributable towards the cost of the acquisition of depreciable assets. Manu Subedar has rendered very valuable services to the assessee in securing the sanction of the municipality for the buildings, in obtaining licences and permits for the assessee, for getting scarce materials like cement, machinery from abroad, etc. He had also rendered valuable service to the assessee in securing foreign exchange to pay the cost of machinery, which is being utilised in the business and the sum attributable towards such services properly pertain to the cost of these assets. In the business world such services have to be availed of for the purpose of business.

8. Mr. Joshi, on the other hand, raised three contentions. Firstly, according to him, on a true construction of the first agreement, the payment of 2% gross annual income agreed to be paid by the assessee to Manu subedar for a period of 20 years of profit is nothing but a remuneration for services rendered by Manu Subedar to the assessee for the purpose of setting up a business. No part of that amount, therefore, is attributable towards the acquisition of the depreciable assets. In the second instance, it is his contention that even if a part thereof is so attributable, no liability in that respect arose prior to the commencement of the business, nor any liability in that respect has been ascertained before the first year ended and, therefore, no part of the said sum of Rs. 3,30,000 can be included in the original cost to the assessee in the acquisition of the depreciable assets. According to him the original cost was the cost incurred by the assessee before the business commenced and the sum so determined cannot be altered save and except to correct a mistake or when capital expenditure is incurred during the year for additions, alterations, improvements or expansions. In support of his contention, he referred us to certain rules framed under proviso (a) to section 10(2)(vi). Lastly, he contended that at any rate the consideration of

the second agreement is not to remunerate Manu Subedar for the services rendered by him but is to get the assessee free the fetters imposed on him by paragraphs 4 and 5 of the agreement of 4th June, 1948, and, therefore, no portion of the said amount of Rs. 3,30,000 can form part of the cost of acquisition of the assets.

9. Before we proceed to deal with the contentions raised by counsel for the parties, it will be convenient to consider the relevant provisions of section 10. Omitting the part not material for the purpose of this case, the said provisions read :

"10. (1) Business. - The tax shall be payable by an assessee under the head 'Profits and gains of business, profession or vocation' in respect of the profits or gains of any business, profession or vocation carried on by him.

(2) Such profits or gains shall be computed after making the following allowances, namely :-.....

(vi) in respect of depreciation of such buildings, machinery, plant or furniture being the property of the assessee, a sum equivalent.... to such percentage on the written down value thereof as may in any case or class or cases be prescribed....

Provided that -

(a) the prescribed particulars have been duly furnished.....

(5) In sub-section (2).....'written down value' means -

(a) in the case of assets acquired in the previous year, the actual cost to the assessee.....

(b) in the case of assets acquired before the previous year the actual cost to the assessee less all depreciation actually allowed to him under this Act, or any Act repealed thereby, or under executive orders issued when the Indian Income-tax Act, 1886 (II of 1886), was in force."

10. These provisions indicate that in the computation of the tax payable by an assessee under the head "Profits and gains" of the business, profession vocation, the assessee is entitled to certain deductions, by way of certain allowances and one of the allowances is depreciation allowance in respect of buildings, machinery, plant and furniture, which is the property of the assessee and which he has used for the purpose of his business during the assessment year. The allowance allowable is at a certain prescribed percentage on the written down value. The method for computation of the written down value is two-fold as provided in clauses (a) and (b) of sub-section (5) of section 10 of the Act. In determining the written down value of the assets acquired in the previous year, it is the actual cost to the assessee and in the case of the assets acquired before the previous year the actual cost less the depreciation actually allowed. "Actual cost",

however, is not defined in the Act. The ordinary dictionary meaning of the word "actual" is "existing in fact or fact as opposed to imaginary or past state of things". The dictionary meaning of the word "cost" is "what is laid out or suffered to obtain anything." Depreciation allowance as understood in the commercial world is deduction from profits, which a businessman ordinarily makes with a view to making good the capital investment, which, sooner or later, will have to be replaced on account of the wear and tear of the assets during the course of the business. In our opinion, therefore, the meaning of the expression "actual cost to the assessee" as used in sub-section (5) of section 10 of the Act would be what the assessee has, in fact, expended or laid out for the purpose of acquiring the depreciable assets. It is in the light of the view we have taken of the expression "actual cost to the assessee" that the agreement of date 4th June, 1948, will have to be scrutinised to ascertain whether any of the services rendered by Manu Subedar would reasonably be attributable towards the cost of the depreciable assets.

11. The services, help and assistance rendered by Manu Subedar to the assessee in erecting an up-to-date cinema theatre with air-conditioning arrangements therein and other buildings for residential and business purposes on a suitable site in Bombay have been detailed in paragraph 1 of the said agreement and the consideration for his help, assistance and service rendered, is the agreed payment of 2% of the gross profits for a period of 20 years. The services, help and assistance rendered are detailed in paragraph 1 as under :

"At the request of the party of the First Part (the assessee), the party of the Second Part (Manu Subedar) has rendered to the party of the First Part valuable and material help, assistance and services prior to the construction and throughout the construction of the said cinema theatre and other buildings in the manner following, that is to say :

"(a) For getting prepared suitable plans and designs for the said cinema theatre and other buildings, construction of which was started by the party of the first part on the said plot of land described in the Schedule hereto and for suggesting and making amendments in the said plans and designs.

(b) In obtaining permission from the Bombay Municipality for constructing an additional sixth floor on a portion of the said premises for the purposes of a minuet theatre.

(c) In procuring the required finance to enable the party of the First Part to complete on the said plot of land a modern cinema theatre and other buildings with air-conditioning arrangements.

(d) For procuring various priorities and permits for scarce materials including cement, steel, piping and petrol for transport.

(e) To overcome various difficulties in connection with cinema licence by making representations to Government and Police authorities.

(f) In securing import licences for various goods for the purpose of the said cinema theatre and other buildings.

(g) For securing foreign exchange facilities to enable the party of the First Part to import from abroad various goods required for the purposes of the said cinema theatre and other buildings.

(h) By way of valuable advices and suggestions during the course of construction of the said cinema theatre and other buildings and by contacting various public authorities on behalf of the party of the First Part.

(i) In helping in diverse ways to push on vigorously the said building works and in visiting the said building works during the course of construction frequently.

(j) For entertaining negotiations with the Bombay Municipality for the widening of Marine Lines and Hospital Lane and making the said Hospital Lane into a two way street."

12. It is not disputed before us, and the Income-tax Officer as well as the Tribunal have found, that these services have been rendered by Manu Subedar to the assessee. The question that has to be decided is whether the aforesaid services or any of them are of the nature required for setting up the business and whether they or any of them are attributable to the acquisition of the depreciable assets. It is clear that the services mentioned in clauses(b),(c),(e) and(j) cannot be said to be in any manner connected with the acquisition of the depreciable assets. Services mentioned in clauses(h) and (i) also mentioned in such vague terms that it is hardly possible to say that they have any relevance in the acquisition of the depreciable assets. In our opinion, however, portion of the services mentioned in clauses(a),(d),(f) and(g) could be referable as services rendered for the acquisition of the depreciable assets. It is not in dispute that the expenditure incurred in getting prepared suitable plans and designs for the construction of the cinema theatre; for construction of a minuet theatre; for securing various priorities and permits for scarce materials including cement, steel, piping and petrol for transport; in securing import licenses for various goods for the purpose of the cinema theatre and for securing foreign exchange facilities to enable the assessee to import from abroad various goods required for the purpose of the said cinema theatre, are liable to be included in the cost of the depreciable assets to the assessee. Manu Subedar has rendered assistance to the assessee in these matters. The genuineness of the agreement remunerating Manu Subedar for rendering help in these and other

matters has not been challenged and there is nothing to hold that the remuneration paid to Manu Subedar was not a legitimate remuneration. In these circumstances we see no reason why a portion of the remuneration that is attributable to the help, assistance and services rendered by Manu Subedar in the acquisition of the depreciable assets should not be included in the cost of the depreciable assets.

13. In our opinion, therefore, it would be necessary to ascertain what portion out of Rs. 3,30,000 could reasonably be attributable to portions of the services mentioned in clauses (a), (d), (f) and (g), which are attributable to the acquisition of depreciable assets, which, as already stated, are buildings, plant, machinery and furniture used by the assessee for the purpose of the cinema business. That portion, in our view, is liable to be included in the cost of these depreciable assets to the assessee and this brings us to the second contention raised by Mr. Joshi.

14. As already stated, it is his argument that the remuneration payable to Manu Subedar fixed under the agreement of June 4, 1948, is 2% of the gross annual income from the business for a period of 20 years. It is, therefore, clear that no remuneration could possibly accrue to Manu Subedar before the end of the year in which the business commenced. Mr. Joshi contends that the cost of the depreciable assets are the costs incurred by the assessee at the commencement of the first year of business : to that amount nothing can be added and nothing can be taken out from that amount save and except where a correction of a mistake is required to be made or where some additions are made. In support Mr. Joshi has referred us to proviso (a) to clause (vi) of sub-section (2) of section 10 which provides that, to entitle an assessee to claim depreciation allowance, he has to furnish particulars in the prescribed form. The prescribed form is part of rule 19 of the Rules framed under the Act. Emphasis is laid by Mr. Joshi in support of his argument on the first three columns of the prescribed form. It would, therefore, be convenient to reproduce these columns :

"DEPRECIATION Statement of particulars prescribed under proviso (a) of section 10 (2)(vi) of the Income-tax Act, 1922, and of the amount of depreciation allowable.

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Description of buildings, machinery, plant or furniture.	Written down value as at the beginning of the accounting period.	Capital expenditure during the year for additions, alterations, improvements &
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extensions."

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15. According to Mr. Joshi, "written down value" in column (2) is the expenditure incurred by the assessee in acquiring the depreciable assets at the time of the commencement of the business, and according to him column (3) shows that to that amount the assessee can claim to add only the capital expenditure incurred by him in making any additions, alterations, improvements and extensions during the assessment year.

16. It is not possible to read in column (2) that the written down value mentioned therein restricted only to the expenditure incurred by the assessee before the commencement of the business in acquiring the assets. The heading of the column itself does not say so, but on the other hand, it says "written down value as at the beginning of the accounting period". We have already referred to the definition of "written down value" contained in clauses (a) and (b) of sub-section (5) of section 10 of the Act, and that definition would show that the written down value of the assets acquired during the previous year is the actual cost to the assessee and in the case of assets acquired before the previous year, the actual cost to the assessee less the depreciation actually allowed. It would thus appear that what the written down value is has to be determined in each year in the light of the two definitions contained in clauses (a) and (b) of sub-section (5) of section 10. It has been held in *Karnani Industrial Bank Ltd. v. Commissioner of Income-tax* that the written down value determined in a year does not operate as *res judicata* nor is it conclusive in determining the written down value of the subsequent years. This decision has been approved by the Supreme Court in *Maharana Mills (Private) Ltd. v. Income-tax Officer, Porbandar* and at page 357, after referring to the decision, it has been observed :

"It was held that neither the principle of *res judicata* nor estoppel nor the terms of section 10(2)(vi) of the Act prevented the Income-tax Office from determining for himself what the actual cost of the machinery had been and that depreciation had to be calculated for every year and it was open to Income-tax Officer not merely to perform 'a mathematical operation on the basis if the written down values of the previous year, but one of determining the written down value himself. The limit to which the Income-tax Officer can go back does not stop at the written down value of the previous year but extends up to the figure of the original cost, and the method enjoined by section 10(5)(b) is not that the Income-tax Officer should merely scale down the written down value of the previous year but that he should take into consideration the actual cost, determining it for himself, if necessary, take also into consideration the allowances granted in the past and then make

his own computation as to the written down value for the assessment year with which he is concerned."

17. It is clear from the aforesaid observations of their Lordships that it is open to the Income-tax Officer to determine afresh for himself the original cost of the depreciable assets in the assessment of each year. Mr. Joshi, however, tried to distinguish these cases on the ground that these cases related to a correction of a mistake in the matter of determination of the original cost at the commencement of the business, and, therefore, the observations would have application only to such cases where the Income-tax Officer is required to amend or correct the amount of the original cost determined at the commencement of the year on the ground of a mistake. We are unable to read any such limitation in the rule laid down by their Lordships in the aforesaid observations. Further, in our view, to so construe the provisions might lead to unforeseen results where the capital assets are acquired by a businessman not at an agreed price but on a certain percentage basis of the returns of the business. Such cases would not be inconceivable. A decision in *Minister of National Revenue, Canada v. Catherine Spooner* may come very near it. In that case the assessee entered into an agreement with an oil company by which she sold to the company 20 acres of her land. In consideration of the sale the company agreed to pay her a certain sum of money in cash on the execution of the agreement, to issue to her a certain number of fully paid shares in the company and to deliver to her order a "royalty" of 10 per cent. of all the oil produced from the said lands. The question arose whether the amount paid to her by way of royalty was income or part payment of the instalments of the price of the land sold by her and it was held by their Lordships of the Privy Council that the share of the oil reserved to the assessee was not a "royalty" in the ordinary sense familiar in the case of mining leases, but was in effect payment by instalments of part of the price of the lands which she had sold to the company. It was, therefore, not income but a capital receipt and the amount paid to the assessee was not taxable in her hands. Mr. Palkhivala argued that, in business, instances could be found, where newly patented machinery is purchased by businessmen, to avoid risk on a certain percentage of profits that may be made in the business. Such a deal is mutually advantageous. Businessman pays nothing for the machinery if the business fails. Manufacturer of untried machinery, who is sure of the merits of his production, reaps a harvest when business proves a success. We may frankly say we have not come across such a deal but, as deal but as already said, such a deal is not inconceivable.

18. If Mr. Joshi's contention is accepted, in cases where depreciable assets are purchased not at a fixed price but on percentage basis of gross returns of the business, the assessee would not be entitled to claim any depreciation at all in any year because the price payable would get determined at the end of the year or years and naturally, therefore, would not be an amount expended or a liability incurred for a certain amount by an assessee at the commencement of the

year for acquisition of the assets. Had that been the intention of the legislature, it would have so said clearly by adding "as incurred by him before the commencement of the business" after "actual cost to the assessee" in sub-section (5) of section 10. In our opinion, therefore, a portion of the sum of Rs. 3,30,000 attributable towards the acquisition of the depreciable assets as would be hereafter determined should be included in the actual cost of these assets to the assessee in the year or years of account at the commencement of which the liability to pay it or part thereof had accrued or would accrue.

19. It has next to be seen whether by reason of execution of another agreement, the liability of the assessee under the original agreement of 4th June, 1948, had ceased and altogether a new agreement had taken place between the parties. The contention of Mr. Joshi is that the consideration of the second agreement is to obtain release from the fetters contained in paragraphs 4 and 5 of the agreement of June 4, 1948, and, therefore, liability undertaken cannot form part of cost of the acquisition of the assets.

20. In our opinion, on a proper construction of the agreement of 10th July, 1950, the consideration of the second agreement is to get the assessee released from the burden of payment of 2 per cent. gross annual income for a period of 20 years. The following portion of paragraph 20 of the agreement of 10th July, 1950, makes this position clear :

"AND WHEREAS the Mortgagor (assessee) has requested the Mortgagee (Manu Subedar) to release the Mortgagor from the burden created under the said Agreement dated the 4th day of June, 1948, and to terminate the same on receiving from the Mortgagor a sum of Rupees three lakhs thirty thousand, being the capital value of the said Agreement for the yearly payments payable to the Mortgagee under the said Agreement dated the 4th June, 1948, for a period of 20 years, which the mortgagor would pay to the Mortgagee within a period of five years from the date hereof as hereinafter mentioned and in the meantime to accept from the Mortgagor a Second Mortgage of the Mortgagor's said properties described in Schedules "A" and "B" hereunder written subject to the said prior Mortgages."

Later it has been recited :

"AND THIS INDENTURE ALSO WITNESSETH that in pursuance of the said Agreement and for the consideration aforesaid the hereinbefore recited Agreement dated the 4th day of June, 1948, and made between the Mortgagor of the one part and the Mortgagee of the other part has been terminated from the date hereof and all the liability of the Mortgagor under the same has ceased from the date of these presents."

21. It is clear that the consideration for the second agreement is the termination of the first agreement and not merely to get the assessee released from the fetters created in terms of paragraphs 4 and 5 of the first agreement. In other words, the remuneration agreed to be paid by the assessee to Manu Subedar for the services rendered by him under the first agreement stands substituted by the sum mentioned in the second Agreement. A part thereof as is attributable to services rendered for the acquisition of the depreciable assets will, therefore, have to be allowed to the assessee as a sum to be included in the original cost of acquisition of the depreciable assets. In what year and what sum, or any part or parts thereof, should be allowed is a matter for the Tribunal to decide. It may be stated that Mr. Palkhivala contended before us that the entire amount, which would be determined, should be included in the original cost for the assessment year 1950-51, because the liability to pay it accrued prior to 31st March, 1950, and, therefore, it has to be taken into account in that year; while, on the other hand, it is the contention of Mr. Joshi that the agreement is of 10th July, 1950, much after the expiry of the previous year, it was payable in instalments and, therefore, the amount, if any, ascertained, cannot be included in the assessment year 1950-51. This aspect of the question has not been gone into by the Tribunal and, therefore, in our opinion, we would not be justified in proceeding to decide the question.

22. For the reasons stated above, our answer to the question as framed by us is in the affirmative. Such part of the sum of Rs. 3,30,000 as is determined by the Tribunal to be attributable to the actual cost in the acquisition of the depreciable assets of the cinema business would be included either in whole or in part in such year as the Tribunal would determine.

23. The Commissioner shall pay the costs of the assessee in this reference.

24. Question answered in the affirmative.