

IN THE HIGH COURT OF BOMBAY AT GOA**TAX APPEAL NO. 51 OF 2008**

The Commissioner of Income Tax,
having office at Aayakar Bhavan,
Patto Plaza, Panaji, Goa.

.... Appellant

Versus

Zuari Industries Ltd., having office at
Jaikisan Bhawan, Zuarinagar, Goa
403 726.

.... Respondent

Ms. Amira Razaq, Standing Counsel for the Appellant.

Mr. Madhur Agarwal with Mr. P. Arolkar, Advocates for the Respondent.

**Coram:- M.S. SONAK &
C.V. BHADANG, JJ.**

RESERVED ON: 22nd November, 2019

PRONOUNCED ON: 2nd January, 2020

(Signed judgment is pronounced by M.S. Sonak, J. as per clause (i) of Rule 1 of Chapter XI of Bombay High Court Appellate Side Rules as C.V. Bhadang, J. is sitting at Mumbai.)

JUDGMENT: (Per C.V. Bhadang, J.)

On 23rd June 2008, this Appeal was Admitted on the following substantial questions of law:

(I) Whether on the facts and in the circumstances of the case the ITAT was justified in holding that interest of Rs.1,97,91,197/- paid on borrowings,

capitalized in the books of account for setting up of Argon Gas Plant as a revenue expenditure, even before putting the said plant into operation ?

(II) Whether on the facts and in the circumstances of the case, the ITAT was justified in holding that the amount of Rs.7,09,10,000/- paid to Texmaco, as deferred revenue expenditure allowing the payment to be amortised for a period of 8 years ?

2. Brief facts necessary for the disposal of the Appeal may be stated thus:

The respondent/assessee is a Company engaged in manufacture of fertilizers and cement. The respondent filed its return for the Assessment year 1995-96 on 2nd November 1995, which was revised on 27th March 1997, declaring income of Rs.68,02,32,080/-. It appears that the case was selected for scrutiny and notices under Section 143(2) and 142(1) of the Income Tax Act (Act for short) were issued calling for various details, which were supplied by the respondent. The Assessing Officer (AO) by an order dated 24.03.1998 completed the assessment in the following terms:

(i) The expenditure of Rs.2,01,000/- on foreign travel of the wives of the Directors of the Company was disallowed.

(ii) Insofar as interest of Rs.1,97,91,197/- on the loan for capital borrowed for setting up of Argon Gas Plant is concerned, the assessee claimed the interest paid on such borrowing as a revenue expenditure. The AO did not agree with the claim and held that such interest on borrowed capital is part of the actual cost as defined in Section 43(1) Explanation 8 of the Act.

(iii) Insofar as payment of Rs.7,09,10,000/- to Texmaco for the purposes of having continuous supply of limestone as a raw material, the assessee claimed it as a revenue expenditure. Here again, the AO did not agree with the claim as made and added back the said amount as capital expenditure.

3. Feeling aggrieved, the assessee filed an Appeal before the CIT (Appeals). The CIT (Appeals) by an order dated 14th January 2003, confirmed the order of the AO on the issue of payment made to Texmaco as capital expenditure. However, the CIT(Appeals) allowed the expenditure incurred on the foreign travel as business expense and the interest on

borrowings for setting up of Argon Gas Plant as revenue expenditure. The assessee carried the matter in Appeal before the Income Tax Appellate Tribunal (ITAT), insofar as the treatment of the payment made to Texmaco in Appeal No. 27/PNJ/2003 is concerned. The Revenue challenged the order in Appeal No. 38/PNJ/2003 against the issue of expenditure on foreign travel and interest on borrowings.

4. The ITAT by an order dated 25th September 2007, allowed the assessee's Appeal holding the payment made to Texmaco as deferred revenue expenditure thereby permitting the assessee to amortise the amount for a period of eight years. As regards the Revenue's Appeal, the ITAT relying on its earlier decision, directed the AO to delete the disallowance. As regards the issue of interest on borrowings, the ITAT upheld the order of CIT (Appeals). Feeling aggrieved the Revenue is in Appeal.

5. As the substantial questions of law framed would show that, we are only concerned about the issue of the treatment of interest on borrowings for setting of the Argon Gas Plant and the payment made to Texmaco.

6. Insofar as the first question about the interest on borrowing for setting up of the Argon Gas Plant is concerned, it may not detain us for long, as the issue is covered by the decision of the Hon'ble Supreme Court in the case of **Deputy Commissioner of Income Tax Vs. Core Health Care Ltd. 6[2008] 167 Taxman 206 (SC)**. In that case, the assessee Company was engaged in the business and sale of intravenous solutions. During the assessment year under consideration, the assessee had installed new machinery and claimed deduction of interest on the borrowings. The AO disallowed the amount on the ground that, during the year assessee had installed the new machinery, production was not started. That order was confirmed by the CIT (Appeals). The ITAT held that the amount could not be added as income, which order was ultimately confirmed by the Hon'ble Supreme Court. Before the Hon'ble Supreme Court following substantial question of law arose for determination:

Whether interest paid in respect of borrowings on capital assets not put to use in the concerned financial year can be permitted as allowable deduction under Section 36(1)(iii) of the Income Tax Act 1961 ?

7. On behalf of the Revenue, reliance was placed on Explanation 8 to Section 43(1) of the Act, in order to claim that the assessee was not entitled to claim deduction for interest on the borrowings, particularly when the machines were not put to use during the assessment year under consideration. It was contended that the provisions of Section 36(1)(iii) were required to be harmoniously construed with Explanation 8 to Section 43(1) of the Act regarding actual cost. According to the Revenue, the provisions of Section 36(1)(iii) being general in nature had to give way to the special provisions contained in Explanation 8 to Section 43(1) of the Act.

8. The Hon'ble Supreme Court held that interest on money borrowed for the purposes of business, is a necessary item of expenditure. For allowing such deduction, three conditions are required to be satisfied, namely, (i) the money i.e. capital must have been borrowed by the assessee (ii) it must have been borrowed for the purposes of the business and (iii) the assessee must have paid interest on the borrowed amount. It was *inter alia* held that what is germane is whether the borrowing was for the purpose of the business. It

has been held that the legislature has made no distinction in Section 36(1)(iii) between capital borrowed for a revenue purpose and capital borrowed for capital purpose. What Section 36(1) (iii) emphasizes is user of the capital and not the asset which comes into existence as a result of the borrowed capital. It has been held that the Explanation 8 to Section 43(1) as well as the concept of actual cost has no application to Section 36(1)(iii) of the Act.

It can thus be seen that once it is shown that the borrowing was for business purpose, the interest paid on such borrowing would be an allowable deduction. Thus, no exception can be taken to the finding recorded by the ITAT on the issue of interest on borrowings. The substantial question of law framed at (I) is answered against the appellant and in favour of the assessee.

9. This takes us to the second substantial question of law as framed.

In order to appreciate the rival contentions, it is necessary to note few more facts. A Company styled as "Texmaco" was having a cement Plant at Yerraguntala (Andhra Pradesh). The cement Plant although, a sick industrial unit

was in working condition and a going concern. Texmaco had acquired mining rights from Government of Andhra Pradesh on 14th May 1982 for a period of 20 years for mining of lime stones as raw material over an area of 1,000 sq. kms. of land. Since the cement Plant had become sick, it was being operated by the respondent under a working arrangement and the respondent was carrying on cement business effectively from 1st January 1994. The Plant was ultimately transferred to the respondent on 7th February 1995 for a consideration, which includes the consideration of Rs.709.11 lakhs for purchase of the mining rights in order to ensure supply of raw material for its cement division. Accordingly a Memorandum of Understanding (MoU) was signed between the parties on 28th October 1994. At the time the said rights were obtained by the respondent, eight years of the mining lease was remaining. The respondent claimed before the AO that the the payment having been made for procurement of raw material for its cement manufacturing business was allowable as revenue expenditure. The respondent therefore amortised the amount over eight years in its books of account. The AO refused to accept the claim on the ground that the amount was spent for obtaining an advantage of enduring nature and

was thus a capital expenditure. The CIT (Appeals) has concurred with the finding of the AO. It was held that the respondent has spent the amount towards purchase of an enduring source being the right of winning and taking away the limestone deposits. It was held that payment was made to buy "long lasting source of raw material, which would yield such material for years to come". It was further held that there is a clear difference between the price paid to buy raw material and the price paid towards buying long lasting source of material and the former can be held as a revenue expenditure, while the later has to be held as a capital expenditure.

10. The CIT (Appeals) placed reliance on the decision of the Hon'ble Supreme Court in the case of **R.B. Seth Moolchand Suganchand Vs. Commissioner of Income Tax [1972] 86 ITR 647 (SC)**, which was found to be squarely applicable to the facts of the case. In fact, the CIT (Appeals) found "startling similarities" between the facts in the present case and the one obtaining in the case of *R.B. Seth Moolchand Suganchand*.

11. The ITAT on the contrary found that the limestone quarries were not acquired by the respondent through the transaction with Texmaco. It was found that the quarries continued to be owned by the Andhra Pradesh Government. The rights acquired by the respondent are only in substitution of the rights of Texmaco for extracting limestone from the quarries. The ITAT found that "in that way the amount paid by the assessee company was in the reserve of materials necessary for running its business". The ITAT has noted the submissions made on behalf of the assessee in the case of **Pingle Industries Ltd. Vs. Commissioner of Income Tax [1960] 40 ITR 67 (SC)**. This is what is held by the ITAT in para 11 of its order:

11. We have duly considered the rival contentions and gone through the records carefully. The assessee company had paid a sum of Rs.7,09,10,000/- to M/s Texmaco in acquiring the right to extract limestone from the mines taken on lease by M/s Texmaco from the Government of Andhra Pradesh. As rightly argued by the assessee, the limestone quarries were not acquired by the assessee through the deal. The limestone quarry is still owned by the Government of Andhra Pradesh.

The right acquired by the assessee company is to substitute M/s Texmaco and assume their right for the purpose of extracting limestone from the quarries. In that way amount paid by the assessee company was in the reserve of materials necessary for running its business. In this context, the proposition made by late N.A. Palkiwala while arguing in Pingle's case are very much relevant. That where an assessee made an outright purchase of mines and quarries had partook the character of capital expenditure as what is acquired by the assessee is an asset. In a case where ownership is not acquired but only interest in land is acquired, the nature of the expenditure depends upon the fact that for which purpose the right was acquired or the right is acquired. In a case where not even an interest in land is acquired but only an arrangement is made for the supply of raw materials, the expenditure will be in the nature of revenue expenditure. Therefore, as the facts speak for themselves, in the present case there is no reason to hold the amount of Rs.7,09,10,000/- is not capital expenditure in nature.

12. We have heard the learned Counsel for the parties.
Perused record.

13. It is submitted by Ms. Razaq, the learned Counsel for the appellant that the respondent has acquired mining rights held by Texmaco for ensuring uninterrupted supply of raw material which is a benefit of an enduring nature. It is submitted that over and above the consideration paid for acquiring the lease hold rights, the respondent was also paying the royalty to the government of Andhra Pradesh. It is submitted that the case is squarely covered by the decision in the case of *R.B. Seth Moolchand Suganchand*. It is submitted that the reliance placed by the ITAT on the decision in the case of *Pingle Industries Ltd.* is misplaced. It is submitted that the only reasoning articulated by the ITAT while upsetting the concurrent finding of the AO and the CIT (Appeals) is as contained in para 11 of the order, which is cryptic. It is submitted that except observing that the "facts speak for themselves," there are no material reasons recorded by the ITAT, while disagreeing with the finding recorded by the AO and the CIT (Appeals). On behalf of the appellant, reliance is placed on the following decisions.

- i. Gotan Lime Syndicate Vs. Commissioner of Income Tax [1966] 59 ITR 718 (SC).

- ii. Pingle Industries Ltd. Vs. Commissioner of Income Tax [1960] 40 ITR 67 (SC).
- iii. Aditya Minerals (P) Ltd. Vs. Commissioner of Income Tax [1999] 106 Taxman 337 (SC).
- iv. R.B. Seth Moolchand Suganchand Vs. Commissioner of Income Tax [1972] 86 ITR 647 (SC).
- v. Union of India & Others Vs. M/s Playworld Electronics Pvt. Ltd. & Another (1989) 3 SCC 181.

14. Mr. Agrawal, the learned Counsel for the respondent has submitted that the respondent has only purchased rights to mine the mineral, namely, the limestone and there is no purchase or transfer of leasehold rights. It is submitted that even assuming that it was a benefit of an enduring nature, it was essentially an expenditure on revenue account for obtaining raw material. It is submitted that the substance of the transaction has to be looked into while determining whether the expenditure is on revenue or capital account. It is submitted that looked from commercial view, it was essentially to acquire raw material and thus, has rightly been

held to be on a revenue account. It is submitted that the reliance placed by the AO and the CIT (Appeals) on the decision in the case of *R.B. Seth Moolchand Suganchand* is misplaced. On behalf of the respondent, reliance is placed on the following decisions:

- i. Commissioner of Income Tax, Bombay City-I Vs. Associated Cement Companies Ltd. [1988] 172 ITR 257.
- ii. National Organic Chemical Industries Ltd. Vs. Commissioner of Income Tax [1993] 69 Taxman 160 (Bombay).
- iii. Pingle Industries Ltd. Vs. Commissioner of Income Tax, Hyderabad [1960] 40 ITR 67
- iv. Commissioner of income Tax Vs. Madras Auto Service (P) Ltd. [1998] 233 ITR 468

15. We have considered the rival submissions made. The material facts are not in dispute. It is undisputed that Texmaco, which was a concern in the manufacture of cement was holding a lease from Andhra Pradesh Government for mining of limestone from vast tract of land. Texmaco had become a sick unit and a reference was pending before the Board for Industrial and Financial Reconstruction (BIFR) under

Section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 and a scheme was sanctioned under Section 18(4) of the said Act on 06.08.1993 for its rehabilitation. However, the same could not be implemented. On Texmaco's suggestion, a revised proposal for its rehabilitation by transfer of the cement Plant to the respondent, which is a group company of Texmaco, was mooted. As an interim arrangement, prior to proposed transfer of the Cement Division under an agreement dated 5th January 1994 between Texmaco and the respondent, it was *inter alia* agreed that the respondent shall run and operate the Cement Plant at Yeraguntala, Andhra Pradesh for a period of three years from 1st January 1994 and thus, it was the respondent which was operating the cement Plant under the interim arrangement. The parties have accordingly entered into a Memorandum of Understanding (MoU) on 28th October 1994. The Plant was ultimately transferred to the respondent on 7th February 1995. The consideration for the transfer of the cement division includes Rs.709.11 lakhs for takeover of lease, which Texmaco had with the Andhra Pradesh Government, which the respondent claimed to be incurred on revenue account.

16. The AO has considered the issue in details and has held that the amount was spent for acquiring a benefit of enduring nature and was thus on capital account. The CIT (Appeals) has concurred with the finding of the AO. While doing so, the AO and CIT (Appeals) have relied on the decision of the Hon'ble Supreme Court in the case of *R.B. Seth Moolchand Suganchand*. As noticed earlier, the only reasoning articulated by the ITAT to differ is to be found in para 11 of the order. A bare perusal of the same would show that the ITAT has not even adverted to the decision in the case *R.B. Seth Moolchand Suganchand*. The ITAT has referred to the "propositions made by Mr. Palkhiwala, while arguing the case of *Pingle Industries Ltd.*", which the ITAT has found to be relevant. The ITAT has then found that the quarries were not acquired by the respondent and same continued to be owned by the Andhra Pradesh Government. Lastly, the ITAT has found that the payment was made by the assessee to "substitute" itself in the place of Texmaco and to assume their rights for the purpose of extracting limestone from the quarries. The ITAT has found that no interest having been acquired or created in the land and only an arrangement being

made for the supply of raw material, the expenditure will be in the nature of revenue expenditure.

17. In order to appreciate the rival submissions, it is necessary to refer to the decision in the case of *R.B. Seth Moolchand Suganchand and Pingle Industries Ltd.* in some details. In *R.B. Seth Moolchand Suganchand*, the assessee was granted a lease of certain areas for mining of Mica for twenty years. The mines were earlier worked out by other companies for a period of fifteen years. The question was whether the expenditure for acquiring the leasehold rights were on revenue or a capital account. The Hon'ble Supreme Court held that the lease was a long term lease and it conferred right to excavate mica, that is to remove it, grade it and pay royalty to the government in accordance with the quality of mica extracted and thus, was a revenue expenditure. On behalf of the assessee it was contended that the expenditure was for getting a specific quantity of mica in the mines which was assessee's stock in trade. On behalf of the Revenue, it was contended that the amount of lease was a capital expenditure in as much as the pillars of mica (before it is mined) cannot be said to be stock in trade. Accepting the

claim made on behalf of the Revenue, the expenditure was held to be capital expenditure.

18. We find that the facts obtaining in the case of *R.B. Seth Moolchand Suganchand* have a close resemblance, with the facts herein, as rightly found by the CIT (Appeals) and the said decision would be applicable on all fours to the present case.

19. Coming to the case of *Pingle Industries Ltd.*, it is significant to note that the said case has been considered by the Hon'ble Supreme Court in the case of *R.B. Seth Moolchand Suganchand*. Incidentally, *Pingle Industries Ltd.* was also a case of mining where the assessee had obtained a lease for excavating shahabadi stones for a period of twelve years for which an annual payment was agreed upon. The Court after taking a survey of several Indian and English cases for determining what is a capital expenditure and what is a revenue expenditure by a majority judgment held that the assessee by its long term lease, had acquired leasehold rights to win stones and that the stones "in situ" were not its stock in trade in a business sense, but a capital asset from which after

extraction it converted the stones into its stock in trade. The Hon'ble Supreme Court noted its earlier decision in the case of **Abdul Kayoom Vs. Commissioner of Income Tax [1962] 44 ITR 689**, in which it has been held that what is decisive is (i) the nature of the business (ii) the nature of the expenditure (iii) the nature of the right acquired and (iv) their relation interse and this is the only key to resolve the issue in the light of the general principles governing such cases.

It can thus be seen that the nature of the right acquired may be one of the criteria, however, it alone is not decisive. We find that what has weighed with ITAT is predominantly the nature of the right. Even here, we are unable to agree with the proposition that there is no creation of any right or interest in the land. This is because by transfer of rights of Texmaco, the respondent is authorized to mine and to win the mineral from the mines, remove it and use it as a raw material in its cement Plant.

20. Coming back to the case of *R.B. Seth Moolchand Suganchand* this is what is held:

The determining factor will depend largely on the nature of the trade in which the asset is employed.

The several cases which do not deal with the mining leases but are concerned with different assets are of little help in the same way as in Mohanlal Hargovind Vs. Commissioner of Income Tax [1949] 17 ITR 473 (PC) cases relating to the purchase or leasing of mining quarries, deposits of brick earth were considered not to be of assistance by the Privy Council in case of a contract for collecting and removing tendu leaves. The principles enunciated for determining the nature of the expenditure have, been sought to be applied to different situations arising on the facts of each case, but the difficulty in matching them with the seeming irreconcilability are perhaps explicable only on the ground that the determination in any particular case is dependent on the character of the lease or agreement, the nature of the asset, the purpose for which the expenditure was incurred and such other factors as in the facts and circumstances of that case would indicate. If we confine our attention to the mining leases, what appears to us to be an empirical test is that where minerals have to be won, extracted and brought to surface by mining operations, the expenditure incurred for acquiring such a right would be of a capital nature. But where the mineral has already been gotten and is on the surface, then the expenditure incurred for obtaining the right to acquire the raw material, that is, the mineral, would be a revenue expenditure laid out for the acquisition

of stock-in-trade.

(Emphasis supplied)

21. The Hon'ble Supreme Court further went on to hold as under:

An expenditure incurred for acquiring a right to take away sand from the surface of river beds has been treated as if the sand was stock-in-trade-M.A. Jabbar Vs. Commissioner of Income Tax [1968] 68 ITR 493, in the same way as tendu leaves have been treated by the Privy Council in Mohanlal Hargovind's case. In the former case, Bhargava, J. indicated a number of factors which led to the conclusion that the expenditure incurred by the assessee in obtaining the lease was revenue expenditure for the purpose of obtaining stock-in-trade and not capital expenditure which were: (1) that the lease was for a very short period of 11 months only; (2) that the sole right which was acquired by the assessee under the lease deed was to take away the sand lying on the surface of the leased land where no question of raising, digging or excavating for the sand before obtaining it was involved. In other words, no operation had to be performed on the land itself and "is not a case where the gravel is in any true sense" as pointed out in Golden Horse Shoe (New) Ltd.'s case "was

won from the soil it is merely shovelled up where it lies”.

Thus insofar as a case of mining lease is concerned , the empirical test as held by the Hon'ble Supreme Court is that where the mineral has already been gotten and is lying on the surface (unlike in the present case), it would be a revenue expenditure. However, where the mineral has to be removed, brought to the surface and then used, it cannot be regarded as a stock in trade and thus the expenditure made will be an expenditure on a capital account.

22. In the case of *Pingle Industries Ltd.*, the Hon'ble Supreme Court has noted the submission made on behalf of the assessee that all cases of mines and quarries fall into following three classes:

- i. in which mines and quarries are purchased outright
- ii. in which ownership is not aquired but only an interest in land and
- iii. in which there is not even an interest in land but there is an arrangement in praesenti and de futuro to ensure supply of raw material.

23. The contention was that barring the first category, the other two categories exclude a case of the expenditure being considered as a capital expenditure. The further contention was that the case fell under the third category which incidentally is also the contention on behalf of the assessee in the present case.

24. On behalf of the assessee, reliance was sought to be placed on the decision of the judicial committee in the case of *Mohanlal Hargovind Vs. Commissioner of Income Tax [1949] 17 ITR 473 (PC)*, in which there was an agreement to purchase tendu leaves as raw material for manufacture of bidis. The argument to substitute sand and gravel for tendu leaves was not accepted. The Judicial committee held thus:

"But I cannot say the same of the sand and gravel, part of the earth itself, which was the subject of the contract in the present case and which I think could only become part of the stock-in-trade of this gravel merchants' business when it had, in the true sense, been won, been excavated and been taken into their possession."

25. The Hon'ble Supreme Court in the case of *Pingle Industries Ltd.* expressed its concurrence with the view as expressed. The following observations in the context of what is held in the case of *Mohanlal Hargovind's* case are apposite.

"We are in entire agreement that such a distinction is not only palpable but also sensible. The present case is a fortiori. Here, the stones are not lying on the surface but are part of a quarry from which they have to be extracted methodically and skillfully before they can be dressed and sold. These deposits are extensive, and the work of the assessee carries him deep under the earth. Such a deposit cannot be described as the stock-in-trade of the assessee, but stones detached and won can only be so described."

26. Thus, we find that the reliance placed by the ITAT on certain submissions advanced on behalf of the assessee in the case of *Pingle Industries Ltd.* is entirely misplaced. We find that the ITAT has failed to appreciate that in fact, in that case, a similar contention on behalf of the assessee as in the present case was negated.

27. We would now propose to make a brief reference to the other decisions cited on behalf of the parties.

28. In the case of *Gotan Lime Syndicate*, the assessee which was a registered firm was carrying on the business of manufacture of lime from limestone. The government had sanctioned leasing out of a certain area of lime deposits in favour of the assessee on an agreement to pay royalty of Rs.96,000/- per annum. The question was whether it was a capital or a revenue expenditure. The Hon'ble Supreme Court found that in that case there was annual payment of royalty or dead rent and no lumpsum payment was ever settled or paid. In such circumstances, it was found that the payment was not a direct payment for securing an enduring advantage, but had a relation to the raw material to be obtained. It is significant to note that the case of *Pingle Industries Ltd.* was cited on behalf of the Revenue. The Hon'ble Supreme Court found that the said case is distinguishable on the ground that in the case of *Pingle Industries Ltd.*, there was a lumpsum payment for acquiring a capital asset of enduring benefit to his trade. It is necessary to emphasize that in the present case also, there is a lumpsum payment for acquiring an advantage of an enduring nature.

29. In the case of *Aditya Minerals (P) Ltd.*, the Hon'ble Supreme Court finding an apparent conflict in the decision in the case of *Pingle Industries Ltd.* and *Gotan Lime Syndicate's* case had referred the issue to a larger bench. The matter was placed before a constitution bench. The constitution bench found that there was material difference in the facts as obtaining in the case of *Pingle Industries Ltd.* and *Gotan Lime Syndicate*. In the case of *Aditya Minerals (P) Ltd.*, on facts, it was found that the case involved payment of rent for the land that was leased. The rent was payable at the rate of Rs.35/- per acre per month. The assessee was required to pay the rent in advance, for the entire period of the lease which was fifteen years. The advance deposit so made was adjustable against rent of each month and it carried no interest. In such circumstances, on facts, it was held that the case was on par with the case of *Pingle Industries Ltd.* and the assessee's Appeal was dismissed.

30. We now propose to make a brief reference to the cases cited on behalf of the respondent.

31. In the case of *Associated Cement Industries Ltd.*, the Company was running a cement factory at Shahabad. The factory premises were included in the municipal area. A tripartite agreement was entered into between the government, the municipality and the Company whereby the Company had undertaken to supply water to the municipality and provide water pipeline, to supply electricity for street lighting and to put up a transmission line for laying of the main road from the factory to the railway station, in consideration of which the Company got exemption from paying tax for a period of fifteen years. As per the terms agreed, the pipeline was eventually to become the property of the municipality. It was in these circumstances held that the amount spent for providing the pipeline was a revenue expenditure as the advantage secured, namely, the exemption from paying municipal taxes for a period of fifteen years was only in the field of revenue. We find that the case is clearly distinguishable on facts.

32. In the case *National Organic Chemical Industries Ltd.*, the assessee Company was in the business of manufacturing of chemicals. The company constructed a jetty

under a licence granted by the government for the purpose of handling chemicals manufactured by it. Under the terms of the agreement the jetty was always to belong to the government. The assessee was however given preferential rights to use the jetty without payment of any charges for a period of three years after which it was required to pay fees in the discretion of the government. This Court found that the expenditure was incurred to obtain commercial advantage and to facilitate trading and thus, was a revenue expenditure. The case is distinguishable on facts as the expenditure was incurred to obtain advantage in the field of revenue, namely, to save fees for the use of the jetty and to have a commercial advantage of the preferential use of the same. What is significant is that the jetty was to belong to the government. We are unable to see as to how the case can come to the aid of the assessee in the present case.

33. Lastly, in the case of *Madras Auto Services (P) Ltd.*, the assessee had taken premises on lease for a period of thirty nine years. The lease premises were eventually demolished and a new building was constructed by the assessee at its expense which as per the terms agreed, belonged to the

lessor. The assessee got the user of the building at a concessional rent. The question was whether the amount spent on the construction of the building was deductible as a revenue expenditure. It was held that by spending the amount on the construction of the building, the assessee did not acquire any capital asset in as much as the building belonged to the lessor. The only advantage the assessee got was of a concessional rent which was for obtaining a business advantage and was thus a revenue expenditure. The case in our opinion turned on its own facts.

34. We find that the reliance placed by the ITAT on certain submissions made on behalf of the assessee in the case of *Pingle Industries Ltd.* is misplaced. We also find that the ITAT could not have held that because the mine continued to belong to the Government (in fact the mineral rights would always belong to the Government) and the observation that the facts speak for themselves are insufficient to interfere with the concurrent finding of fact properly recorded by the AO and the CIT (Appeals). We find that the respondent had obtained a long term captive source of the raw material by purchase of right from Texmaco. However, at the same time the raw

material was required to be won, gotten and brought to the surface and as such, cannot be said to be a stock in trade as held by the Hon'ble Supreme Court in the case of *R.B. Seth Moolchand Suganchand*. Consequently, the substantial question of law framed at serial no. II is answered in the negative and in favour of the appellant. The Appeal is partly allowed. The impugned order passed by the ITAT on the aforesaid issue no. (II), is hereby set aside. The order passed by the AO on the aforesaid issue, as confirmed by the CIT (Appeals) is hereby restored. In the circumstances, there shall be no order as to costs.

C. V. BHADANG, J.

M. S. SONAK, J.

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