

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX REFERENCE NO. 63 OF 1991

Larsen & Toubro Limited]
L & T House, N.M. Marg,]
Ballard Estate, Bombay – 38.] ... Applicant

Vs

The Commissioner of Income-tax,]
Bombay City-III, Bombay.] ... Respondent

Mr. J.D. Mistri, senior counsel with Mr. B.D. Damodar for the Applicant.

Mr. Vimal Gupta for the Respondent.

**CORAM : S.J. VAZIFDAR, &
M.S. SANKLECHA, JJ.**

WEDNESDAY, 5TH SEPTEMBER, 2012

JUDGMENT : [Per S.J. Vazifdar, J.]

1. This is a Reference under section 256(1) of the Income Tax Act, 1961. The Income Tax Appellate Tribunal, by an order dated 24th October, 1988, dismissed the applicant's appeal being ITA No. 2983/Bom/84, against the order of the Commissioner of Income-tax

(Appeals) pertaining to assessment year 1980-81. The Tribunal has referred the following questions of law for the opinion of this Court :-

(1) Whether on the facts and in the circumstances of the case, the Tribunal erred in holding that the assessee was not entitled to the weighted deduction under section 35B of the Income-tax Act, 1961 in respect of bank interest and bank charges of Rs.28,20,501/- incurred by it on Export Packing Credit facilities ?

(2) Whether on the facts and in the circumstances of the case, the Tribunal erred in holding that the professional fees of Rs.71,200/- paid by the assessee in respect of its cement project was a capital expenditure and not revenue expenditure ?

(3) Whether on the facts and in the circumstances of the case, the Tribunal erred in holding that Rs.75,00,000/- received by the assessee from B.B.C. Brown Brower Company Limited, Switzerland under Memorandum of Settlement dated 12th March, 1979 was a revenue receipt ?

2. The assessee filed Notice of Motion No.1679 of 1991, seeking a direction to annex thereto, the documents mentioned in the affidavit in support of the Notice of Motion and, in the alternative, seeking leave of the Court to refer to the said documents. As an order of remand would unnecessarily delay this Reference, which has already been pending for over twenty years, we permitted the respondent to refer to the documents.

Re: Question No.1.

3. The facts, so far as Question No.1 is concerned, are these :-

The assessee had availed of an export packing credit facility

from the State Bank of India. The assessee relied upon the details of the expenses under section 35B as furnished in Exhibit-A to the Notice of Motion. We will, for the purpose of this Reference, presume the same to be correct. It shows that an amount of Rs.28,07,372/- was paid towards interest in India. The assessee claimed the benefit of section 35B in respect thereof. We will also presume that the applicant was a registered export house at the relevant time. Further, we will presume, as stated in the certificates furnished by the State Bank of India and by the Canara Bank, that the applicant availed of export credit facilities from them and that the advances from the account were given only for the purchase of raw material for manufacturing goods to be exported out of India / supplied under deemed exports and that the advances were made available only when the applicant submitted a copy of the export contract entered into with the foreign party and that these accounts were different from the normal cash credit accounts.

4. Mr. Mistri relied upon the judgment of the Madhya Pradesh High Court in *Commissioner of Income Tax v. Vippy Solvex Product*

Pvt. Ltd. (1986) 159 ITR 487. It is not necessary to refer to the judgment in detail for it has admittedly been dissented from by a Division Bench of this Court in *KEC International Limited v. Commissioner of Income-tax (2010) 322 ITR 465.* The Division Bench held as under :-

“In our view, the views taken by the Andhra Pradesh High Court, Calcutta High Court, Madras High Court are correct. We concur with the view taken Walchandnagar Industries Ltd.'s case [1994] 206 ITR 328 (bom). We are not in agreement with the reasoning given by the Madhya Pradesh High Court in the case of Vippy Solvex Product (P.) Ltd.'s case [1986] 159 ITR 487. The very definition of the expression “packing credit” as advanced in the Export Credit (Interest Subsidy) Scheme, 1968, indicates that it is a loan or advance for the purpose of purchase processing and packing of goods. The Reserve Bank requires the lending bank to furnish it a declaration in writing that the loan was granted for pre-shipment activities. That necessarily means that the activities for which the loan has been granted have to be carried out within India. Section 35B(1)(b)(viii) operates only when there is a performance of services outside India. Mere obtaining of a packing credit loan or payment of interest thereon in India cannot be said to entail the performance of any service outside India. The said expenditure would, therefore, not be deductible. The question is, therefore, answered in the negative and in favour of the Revenue.”

5. Question No.1 is, therefore, answered in the negative, against the assessee and in favour of the respondent.

Re: Question No.2.

6. Before the Tribunal the assessee conceded that for the reasons stated in an earlier order of the Tribunal in the case of the assessee itself, the issue is liable to be decided against it. It is obviously, however, open to the assessee to urge the contention in this Reference.

7. However, in the assessee's case, a Reference was filed before this Court, *inter-alia*, on this issue being Reference No.67 of 1989. By an order dated 15th June, 2012, we answered the Reference in favour of the Revenue considering ourselves bound by the decision of this Court in *Commissioner of Income-tax v. J.K. Chemicals Ltd.* 207 ITR 985 and *Trade Wings Limited v. Commissioner of Income-tax* 185 ITR 267.

This question is also, therefore, liable to be answered in the negative, against the assessee and in favour of the respondent.

Re: Question No.3.

8. This question requires the facts to be stated in detail. The facts, as stated in the statement of case, are these.

(A) The assessee had entered into an agreement dated 10th May, 1974 with Hindustan Brown Broweri Limited (HBB). The recital, *inter-alia*, states that the assessee was “actively engaged in the business of sale and distribution of several engineering and electrical products throughout the territory of the Republic of India”. It further stated that HBB was desirous of appointing the assessee as the distributor of electrical motors of various types manufactured by it.

Clauses 2, 3, 6 & 10 of the agreement read as under :

“2. APPOINTMENT

2.1 *This agreement confers on L&T the non-exclusive right to offer and sell the products to customers as hereinafter provided in this agreement. HBB shall, however, have the right to sell the products direct to any customers themselves or through other distributors and/or agents.*

2.2 *This agreement shall be on a Principal to Principal basis. Upon delivery of goods to L&T or its customer, as the case may be, the property in the product shall be deemed to have passed to L&T for the purpose of this Agreement.*

2.3 *During the validity of this agreement L&T undertakes not to deal in the said territory in products*

similar to those and products which are competitive to products manufactured by HBB and covered by this agreement.

3. DURATION

3.1 This agreement will come into effect from 20th March, 1974 and shall be for a period of five years from that date unless terminated by either party in writing to the other.

.....

6. PRICES

6.1 HBB shall sell the products covered by this agreement as per the pricelist attached hereto and marked "A". These prices are for products delivered to L&T at HBB's godowns in various States. All expenses such as packing, freight, insurance, octroi and any other levies for transporting the material from HBB's factory to HBB's godowns will be borne by HBB. If L&T require HBB to despatch materials to any destination other than HBB's godowns, L&T shall bear the Central Sales Tax and all other expenses such as packing, freight, insurance and any other levies for transporting material will be borne by HBB.

6.2 The prices in the price-lists attached hereto and marked "A" shall be subject to review normally in May and October every year taking into account market conditions and any changes will be implemented by mutual agreement. Either party shall be entitled to request review of the prices at any other time should it deem it necessary.

.....

10. NO AGENCY RELATIONSHIP

10.1 It is distinctly understood that L&T shall buy from HBB the products on Principal to Principal basis and on L&T's account and nothing herein contained or done pursuant hereto shall constitute L&T as agents of HBB for any purpose whatsoever and that all acts and things done or to be done by L&T unless expressly other provided herein shall be at L&T's own cost and expenses."

(B) The above agreement would have expired on 10th May, 1979. The assessee relied upon minutes of a meeting held by it on 9th February, 1979, which record that the assessee's Chairman referred to a letter dated 1st February, 1974 from Brown Boweri & Company Limited (hereinafter referred to as "BBC") agreeing to support the renewal of the 10th May, 1974 agreement between the assessee and HBB and that in view thereof, the assessee's Chairman proposed that the assessee ought to requisition an EOGM of the shareholders of HBB to consider it's reappointment for a further period of five years in terms of the 10th May, 1974 agreement. The following resolution was passed :

"RESOLVED THAT Larsen & Toubro Limited being a shareholder of HBB holding more than 10% of the equity capital of HBB requisition an Extra-ordinary General Meeting of the shareholders of HBB to consider the

reappointment of Larsen & Toubro Limited as the distributors / sole selling agents of HBB for a further period of five years from 20th March 1979 on the terms and conditions finalised between the Company and the Managing Director of HBB as evidenced by the letter dated 19th August 1978 addressed by Mr. K.N. Shenoy the Managing Director of HBB to Mr. D.L. Pradhan one of the Vice-Presidents of the Company.”

(C) The assessee, accordingly, by a letter dated 19th February, 1979, requisitioned an EOGM of HBB.

(D) A meeting of the assessee was held on 12th March, 1979. The minutes thereof record that it's Chairman had discussions with the representatives of BBC and that an agreement had been arrived at between them. It is not necessary to refer to the contents of these minutes as ultimately an agreement was arrived at between the assessee and BBC which we will now refer to.

9. An agreement titled “Memorandum of Settlement” was entered into between BBC on the one hand and the assessee and Engineering Construction Company Limited (ECC) on the other. Clause 1 provided that upon the expiration of the agreement dated 10th May,

1974, the assessee would not be reappointed as the distributor of the products of HBB. Clause 2 provided that the assessee would also not be reappointed as the sole selling agent in respect of any other products manufactured by HBB after the expiration of the agreement dated 10th May, 1974. By clause 3, the assessee agreed to withdraw the requisition for the EOGM by the said letter dated 19th February, 1979. By clause 4(a) the assessee agreed to procure a letter of resignation from one of its nominees on the Board of Directors of HBB and furnish the same to BBC. Clause 4 (b) provided that after the assessee and ECC had sold and transferred not less than 50% of their shares in HBB, the assessee would procure a letter of resignation from one of their remaining nominees on the Board of Directors of HBB and furnish a copy thereof to BBC. Clause 4 (c) provided that after the assessee and EEC had sold and transferred the remaining shares of HBB, they would procure the resignation of their last nominee on the Board of Directors of HBB and furnish a copy of the letter to BBC.

Clause 5 required the assessee to sell and transfer the equity shares held by it in HBB to the parties mentioned therein within one

year. It further provided that the assessee would not purchase or subscribe to or otherwise acquire any shares, equity or preference, of HBB. A similar provision was made in clause 6 in respect of the shares held by EEC. Clauses 8 and 9 provided that till the said shares were sold by the assessee and ECC, they would support and vote in favour of any and all proposals of the Board of Directors of HBB. Clauses 10, 11 and 12 of the Memorandum of Settlement read as under :-

“(10) BBC shall pay to L&T the sum of Rs.7,500,000/- (Rupees seven million five hundred thousand only) as follows :-

Rs.2,500,000/- (Rupees two million five hundred thousand only) within 30 days from the date of this Memorandum of Settlement.

Rs.5,000,000/- (Rupees five million only) within 30 days of notification by L & T to BBC of the sale and transfer by L & t and ECC in accordance with the provisions of clause (5) and (6) hereof and confirmation by HBB that such transfer has been duly recorded in its Register of Members.

(11) In the event of the average selling price of all the said 99,542 equity shares and the said 10,000 equity shares being less than Rs.260/- (rupees two hundred and sixty only) per share, BBC shall pay to L&T 50 per cent of the aggregate amount of the difference calculated on the basis of Rs.260/- (Rupees two hundred and sixty only) per share and the said average price per share, it being agreed and understood that BBC's total liability under this clause

(excluding BBC's liability under this clause) excluding BBC's liability under clause (10) hereof for the said sum of Rs.7,500,000/- (Rupees seven million five hundred thousand only) shall not in any event exceed Rs.3,000,000/- (Rupees three million only). The further sum (if any) payable under this clause shall be paid by BBC to L&T within 30 days of notification by L&T to BBC of the sale and transfer by L&T and ECC in accordance with the provisions of Clauses (5) and (6) hereof and confirmation by HBB that such transfer has been duly recorded in its Register of Members.

(12) The parties hereby expressly agree and declare that the payments contemplated by clauses (10 and (11) hereof shall be in full and final settlement, satisfaction and discharge of all claims (if any) of l&t or ECC against BBC.”

10. We preface our consideration of the assessee's case with a reference to two judgments relied upon by Mr. Mistri.

11. In *Kettlewell Bullen & Co. Ltd. v. CIT, Calcutta, (1964) 53 ITR 261*, the Supreme Court, after reviewing several authorities, held as under :

“These cases illustrate the principle that compensation for injury to trading operations, arising from breach of contract or in consequence of exercise of sovereign rights, is revenue. These cases must, however, be distinguished from another class of cases where compensation is paid as a solatium for loss of office. Such compensation may be regarded as capital or revenue; it would be regarded as capital, if it is for

loss of an asset of enduring value to the assessee, but not where payment is received in settlement of loss in a trading transaction.

.....

On an analysis of these cases which fall on two sides of the dividing line, a satisfactory measure of consistency in principle is disclosed. Where on a consideration of the circumstances, payment is made to compensate a person for cancellation of a contract which does not affect the trading structure of his business, nor deprive him of what in substance is his source of income, termination of the contract being a normal incident of the business, and such cancellation leaves him free to carry on his trade (freed from the contract terminated) the receipt is revenue : Where by the cancellation of an agency the trading structure of the assessee is impaired, or such cancellation results in loss of what may be regarded as the source of the assessee's income, the payment made to compensate for cancellation of the agency agreement is normally a capital receipt.”

12. In *Karam Chand Thapar & Bros. P. Ltd. v. CIT (1971) 80 ITR 167*, the Supreme Court noted that the question whether a particular income arising from the termination of one of the managing agencies of a multi-agency concern is a capital receipt or a revenue receipt, is undoubtedly a difficult question, the difficulty being inherent in the problem itself. It was further observed that none of the numerous decisions of this Court had laid down a precise principle of universal application, but various workable rules had been evolved for guidance. The Supreme Court held that in determining the question whether the

receipt is capital or income it is not possible to lay down any single test as infallible or any single criterion as decisive. The question must ultimately depend on the facts of the particular case and the authorities bearing on the question are valuable only as indicating the matters that have been taken into account in reaching a decision.

13. Mr. Mistri submitted that it is not a part of the assessee's business to give up its business viz. the distributorship of HBB's products. Nor is it its business to give up its right to nominate directors on the Board of other companies or to agree to sell its shares in companies pursuant to such an arrangement. He further submitted that the assessee was not in the pump motor business. The termination of the distributorship agreement would be an end to its business in this regard. The receipt of Rs.75,00,000/- cannot, therefore, be the assessee's income.

14. Mr. Gupta submitted that the judgments do not support the assessee's case in view of the fact that it had multiple businesses, the distributorship agreement being one of them. He further submitted

that upon the termination of the distributorship agreement, the assessee was free to enter into similar agreements with other parties. Moreover, this was not the only distributorship agreement that the assessee had entered into. On its own admission, as evidenced by the recital to the distributorship agreement, it had actively engaged in the business, *inter-alia*, of distribution of several engineering and electrical products throughout India.

15. The present case does not involve a consideration of a managing agency agreement which has its own complications. It is, however, not without its own complications which arise not on account of the nature of the distributorship agreement dated 10th May, 1974, between HBB and the respondent, but on account of the nature of the composite agreement contained in the memorandum of settlement dated 12th March, 1971, between BBC and the respondent.

Firstly, the memorandum of settlement is not between the parties to the distributorship agreement viz. the assessee and the HBB, but between BBC, the assessee and Engineering Construction Corporation Limited (ECC). BBC is also a shareholder of HBB. We

will, however, for the purpose of this Reference, proceed on the basis that EEC's interest merges with and is the same as that of the assessee. The memorandum of settlement, therefore, is really an agreement between two shareholders.

Secondly, the memorandum of settlement did not deal only with a settlement of disputes between the assessee and HBB in respect of the distributorship agreement. It dealt with a lot more. It also involved the assessee and EEC selling their shares in HBB, their agreeing never to subscribe for the shares of HBB and their withdrawing the Directors nominated by them on the Board of Directors of HBB.

Thirdly, and most important, the memorandum of settlement does not specify the consideration for the payment of the sum of Rs.75,00,000/-. We will now deal with this aspect in further detail.

16. Clause 10 of the memorandum of settlement merely states that BBC shall pay the respondent, the sum of Rs.75,00,000/- in the manner stated therein, but does not specify the purpose for which it is paid. The respondent has also not clearly stated the purpose for which

BBC agreed to pay it the said amount. A construction of the agreement leads to a variety of reasons for which the payment may have been made. Indeed, the payment of Rs.75,00,000/- could be in consideration for any one or more of the assessee's promises/obligations under the memorandum of settlement. Under the memorandum of settlement, the assessee had agreed, *inter-alia*, not to insist upon its reappointment as a distributor after the expiration of the distributorship agreement dated 10th May, 1974 with HBB; to vote in favour of any and all proposals of the Board of Directors of HBB till the shares were sold; to procure the resignation of its nominees on the Board of Directors of HBB and to sell its shares in HBB and to procure the performances of similar covenants by EEC.

17. It is pertinent to note that before the authorities, the assessee had contended that the payment of Rs.75,00,000/- was akin to a gift, whereas before us Mr. Mistri contended that the payment was for relinquishing its rights under the distributorship agreement.

It was for the respondent to take a clear stand as to the purpose for which it received the sum of Rs.75,00,000/- from BBC under the

memorandum of settlement and to establish the same. Only the respondent was aware of this fact and it also chose not to disclose it.

18. The result would, however, be the same even if we presume for the purpose of this Reference, that the payment of Rs.75,00,000/- was made in consideration of the assessee agreeing not to enforce its alleged right to have the distributorship agreement continued.

There is nothing to establish or even indicate that the assessee developed facilities or infrastructure only for the purpose of conducting the distributorship agreement with HBB. Nor is there anything to establish that in the event of the distributorship agreement coming to an end, such facilities or infrastructure, if any, could not be utilized for the purpose of a similar distributorship agreement with any other party. It could not, in fact, have been so for the obvious reason that the distributorship agreement was only for a period of five years. The assessee had contended that BBC had, even prior to the distributorship agreement, indicated that it would support the renewal thereof. However, the assessee's case in this regard is also not clear. The minutes of the meeting held on 9th February, 1979 merely state

that the assessee's Chairman had referred to the letter dated 1st February, 1974, from BBC agreeing to support the renewal of the selling agency's distributorship agreement on the expiry of the present term. We will presume that the date 1st February 1974 is not a typographical error and that it was a letter addressed prior to the execution of the distributorship agreement dated 10th May, 1974. The minutes of the meeting, however, do not indicate the duration of the alleged extension. In any event, the respondent has not indicated any facts to the effect that it conducted its affairs in such a manner as to prepare for the alleged extended period of the distribution agreement as well.

19. Upon the expiry of the distributorship agreement, the assessee was free to enter into similar agreements with any other party. It is not the assessee's case that it was incapable of or was unable to do so for any reason. The assessee has not established that its trading structure even in respect of activities similar to the said distributorship agreement with HBB were impaired. In this regard it is important to recall that in the recital to the distributorship agreement it is stated that

the assessee was “actively engaged in the business of sale and distribution of several engineering and electrical products throughout the territory of the Republic of India”.

20. The distributorship agreement entitled the parties to have the price stipulated therein reviewed periodically. It is doubtful if the agreement could ever have continued in the event of the parties not having agreed to the price at the periodical reviews. Clause 6.2 of the agreement reads as under :

“6. PRICES

.....

6.2 The prices in the price-lists attached hereto and marked “A” shall be subject to review normally in May and October every year taking into account market conditions and any changes will be implemented by mutual agreement. Either party shall be entitled to request review of the prices at any other time should it deem it necessary.”

The prices were subject to the review to be conducted in May and October every year and changes were to be implemented by mutual agreement. The clause did not merely provide for a change by mutual agreement for in that event, it may have been possible for the

assessee to contend that any change in the price could only be by mutual agreement and if one of the parties did not agree to a change, the price stipulated in the agreement would prevail. In the present case, however, the price itself was subject to a review meaning thereby that either party was entitled to insist upon a change in the price. It is difficult, therefore, to conclude that the distributorship agreement was of an enduring nature.

21. The distributorship agreement was a part of the assessee's business. At the cost of repetition, in the recital to the distributorship agreement, it is stated that the assessee was “actively engaged in the business of sale and distribution of several engineering and electrical products throughout the territory of the Republic of India”. The termination thereof and the compensation allegedly paid in respect thereof was also only a part of the normal running of the business of the assessee.

22. Mr. Mistri submitted that the sum of Rs.75.00 lacs cannot possibly constitute the assessee's income for it is not a part of the

assessee's business to give up its business and towards that to further give up its representation on the Board of Directors as well as its shares. The assessee however, has not furnished any details or break-up as to the purpose for which it was paid this sum by BBC. The assessee has not even been consistent in its stand. It contended before the authorities that the payment was a gift or at least akin to a gift. Its stand in the reference was entirely different and without establishing the factual basis for the same.

23. Mr. Mistri submitted that the assessee was not in the pump motor business and therefore, the termination of this agreement would be an end to this business carried on by it under the distributorship agreement. He stated that the respondent dealt only with pump motors manufactured by HBB. He relied upon clause 2.3 of the distributorship agreement which prevented the assessee from dealing in HBB's products in India or products similar thereto which were competitive to such products.

24. This restriction however, operated only during the subsistence

of the agreement. It ceased to operate upon the termination thereof. It is not the assessee's case that it was either prevented or even otherwise unable to enter into similar agreements in respect of such products manufactured by other enterprises. In a given case, the termination of a distributorship agreement may affect the distributors trading structure. In this case, however, the assessee has not established any factors to indicate that its trading structure was adversely affected.

25. It is also significant to note that the assessee was not dependent upon this business alone. It engaged itself in various other business activities. The return of income filed by the respondent on 31.7.2008 declaring a total income of Rs.11,32,55,290/- derived from its business activities which included the business as industrial engineers, manufacturers of switchgears, dairy machinery, paper machinery, cement machinery, petrol pump machinery and goods for industrial use. The distributorship agreement was but a part of it. Moreover, this was not the only distributorship agreement that the assessee had. It was on its own admission in the recital to the distributorship agreement “actively engaged in the business of sale and distribution of

several engineering and electrical products throughout the territory of the Republic of India”. There is nothing to suggest that the termination of this particular distributorship agreement has impaired its trading structure or source of income. The termination of the agreement has not been shown to have affected the assessee's business in any manner whatsoever. It has not been shown to have impaired the profit-making structure of the assessee or to have resulted in the destruction of a source of income of the assessee.

26. Mr. Gupta's reliance upon a judgment of the Division Bench of this Court in *Blue Star Limited vs. CIT* (1996) 217 ITR 514 is well founded considering the facts of this case.

The Division Bench held as under :

“The question whether a particular income arising from termination of a contract is a “capital receipt” or a “revenue receipt” is undoubtedly a difficult question to be answered. Where, on a consideration of the circumstances, a payment is made to compensate a person for cancellation of a contract which does not affect the trading structure of the recipient's business nor deprive the recipient of what in substance is the source of income, termination of contract being a normal incident of the business, and such cancellation leaves the recipient of the amount free to carry on his trade, the receipt is “revenue”. However, where by cancellation of agency the trading

structure of the assessee is impaired or such cancellation results in the loss of what may be regarded as the source of the assessee's income, payment made to compensate for such cancellation of agency agreement is normally a "capital receipt". In the facts of the case, we are required to consider as to whether the sum of Rs. 5 lakhs received by the assessee was received to compensate the assessee for cancellation of the said agreement with BME which did not affect the trading structure of the assessee nor deprive the assessee of what in substance was its source of income or by cancellation of the said agreement, the trading structure of the assessee was impaired or such cancellation resulted in loss of source of the assessee's income. Considering the nature of the said agreement and perusing the various clauses contained therein in our view, the said agreement culminating in a contract between the assessee and BME was in the nature of normal trading contract entered into in the ordinary course of the assessee's business. The assessee carried on widespread business activities as is evident even from the assessment order for the relevant assessment year showing the taxable income of the assessee at more than Rs. 86 lakhs. The agency agreement of the assessee with BME as borne out from the said agreement was only one of the many activities of the assessee. The widespread nature of business activities carried on by the assessee were not adversely affected by the termination of the said agreement and in the facts of the case, it cannot be said that there was cessation of business resulting in destruction of the source of income so far as the assessee is concerned. The said agency agreement was entered into by the assessee in the normal course within the framework of the normal business of the assessee and the termination thereof could be treated as a normal incident of the business. Even with the termination of the said agreement, the assessee was left free to carry on its normal trading activities. By cancellation of the agency, the trading structure of the assessee was

not impaired. In the facts of the case, we hold that the compensation amount of Rs.5 lakhs received by the assessee was not in the nature of “capital receipt”. It was in the nature of “revenue receipt”.

27. We do not read the judgment to hold that whenever an assessee has multiple businesses and is engaged in various business activities, it follows as absolute rule that compensation paid to it for the termination of one of them or a contract relating to any of them cannot be on revenue account. The mere fact that an assessee is engaged in multiple business activities would not be decisive of every case. Nor would the mere fact that an assessee has several contracts in respect of the same business or even type of business be necessarily decisive in every case. Whether the receipt of compensation for the termination of an agreement is a revenue receipt or a capital receipt would depend on the facts of the case. The test would, in each case, be as held by the Supreme Court in *Kettlewell Bullen & Karam Chand Thapar*, whether the compensation was for injury to trading operations or whether it was paid as a solatium for loss of office. Even in the latter case, it would be necessary to determine whether the compensation was for loss of an asset of an enduring value to the assessee or

whether it was received in settlement of a loss in a trading transaction. Further, it would be necessary to determine whether the cancellation of a contract, in respect whereof compensation is paid affects the assessee's trading structure or deprives him of his source of income.

There may, for instance, be cases where an assessee is engaged in multiple businesses but the business other than the one for which compensation has been received for the termination thereof are so insignificant that the termination is found to have affected the assessee's trading structure and deprived him of his source of income. This would be so even if an assessee has several contracts of the same nature. The other contracts may be so insignificant that the termination of the one for which compensation is received dries up the assessee's source of income and affects its trading structure itself. It is impossible to lay down any parameters even in this regard such as, for instance, the percentage that the loss bears to the entire business. This may vary from year to year. It would depend upon various factors in each case, such as the future prospects lost by an assessee on account of the termination.

28. Mr. Mistri relied upon a judgment of the Supreme Court in *Oberoi Hotels pvt. Ltd. vs. CIT (1999) 236 ITR 903* in respect of his submission that merely because the assessee engaged itself in more than one business, the ground of loss of source of income is not inapplicable. We have just expressed our views on this proposition. As far as this judgment is concerned, the nature of the agreements therein and the nature of distributorship agreements such as the one before us are entirely different. It involved the assessee operating, managing and administering the hotels belonging to others. The assessee had entered into an agreement for operating a hotel in Singapore. The agreement was to remain in force initially for ten years. The assessee however, had an option to have the same renewed for two further periods of ten years each. The agreement gave the assessee an option of purchasing the hotel in certain circumstances. A Receiver was appointed in respect of the hotel, with whom the assessee entered into a detailed agreement. The assessee gave up its rights under the original agreement for a consideration. The question was whether the receipt of the amount was capital receipt or revenue receipt. The Supreme Court held that the assessee had suffered a loss

of source of income by determination of its rights.

The distributorship agreement in this case is entirely different. We have already indicated the tenuous nature of the assessee's stand as well.

29. Our conclusion is not based merely on the fact that the assessee admittedly had other distributorship contracts or on the fact that the assessee is engaged in several other lines of activities. Our conclusion is based on the fact that the assessee has not established that the termination of the distributorship agreement has resulted in a loss of source of income or has affected its trading contract. This was not even the assessee's case before the authorities before whom it was contended that the receipt was in the nature of a gift or akin to a gift. The material on record, in fact, establishes that the distributorship agreement was but one of the many contracts that the assessee had entered into. It was one of the many activities that the assessee had engaged in and that the assessee is not prevented in any manner whatsoever from continuing a similar line of business with other enterprises.

30. In the circumstances, Question No.3 is answered in the negative
i.e. in favour of the Revenue.

31. In the result, the Reference is answered in favour of the
Revenue and against the assessee.

There shall be no order as to costs.

M.S. SANKLECHA, J.

S.J. VAZIFDAR, J.