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Court : Mumbai

Decided On : Jul-13-2000

Reported in : (2002)76TTJ(Mumbai)396

Appeal No. : ITA No. 6355/Mum/1997 13 July 2000 A.Y. 1993-94

Appellant : Tips Cassettes and Record Co.

Respondent : Asstt. Cit

Advocate for Pet/Ap. : Hari Raheja, *for the Assessee* Sanjay Singh, *for the Revenue*

Judgement :
ORDER

R.P. Tolini, J.M.

This assessee's appeal is directed against the order of the Commissioner (Appeals) for assessment year 1993-94 and raises the following grounds of appeal :

'1. Learned Commissioner (Appeals) has erred in adding back the 'audio right' expenses claimed at Rs. 1,43,33,495 and learned Commissioner (Appeals) is not justified in upholding the additions. Appellant prays that in view of the facts discussed in details in appellate order of Commissioner (Appeals)-XXIX for assessment year 1992-93 and same being identical to the facts of assessment

year under appeal, as stated by the learned Commissioner (Appeals) Central-V in his very order, same should have been allowed as 'revenue expenses' as claimed by the assessee, subject to consideration of the relief already allowed under section 35A of the Act as pointed out by the learned Commissioner (Appeals) Central-V, Mumbai. Appellant prays that 'audio right' expenses be allowed as claimed.

2. Learned Commissioner (Appeals) is not justified in disallowing 1/3rd of the motor car expenses and the depreciation claimed, as personal expenses and random relief given by the learned Commissioner (Appeals), Central-V does not meet the ends of justice. Appellant prays that the firm owns number of cars which mainly are used by the staff for the bona fide business purpose as such disallowance of expenses and depreciation at 1/3rd as made by the learned Commissioner (Appeals) is too high and same be reduced to reasonable quantum say 1/6th to meet the ends of justice.'

2. Briefly stated the facts in respect of ground No. 1 are that the assessee is carrying on the business of manufacturing and sale of unrecorded and pre-recorded (with recorded film music, i.e., sound track) audio cassettes and CDS. The pre-recorded cassettes and CDs are from motion pictures and musical software, i.e., non-film songs. These are sold under trade name and logo 'Tips'. In this type of business activity, the producers of films are owners of the sound track, i.e., sounds and music and are owners of the copyrights thereof. The assessee being manufacturer of pre-recorded cassettes as well purchase such sound tracks from producers and for consideration the copyrights owned by the film producers are assigned to the assessee by way of written agreements as per the stipulations contained therein. By and large copyrights owned by the producers are assigned for perpetuity and world wide rights in favour of the assessee. After entering into agreement and making the payment as per the stipulation of the agreements, the assessee purchases master plate, i.e., original sound track of film songs and music which are commonly known as audio rights also. The assessee's business is to manufacture such pre-recorded cassettes on mass scale. Therefore, such type of agreements are entered into with various producers for assignment of copyrights from various films/titles. The assessee has sound recording and

transmitting equipments and machinery. After acquiring the master plate, the songs and music recorded therein are transmitted/recorded in unrecorded cassettes and CDs. After this process, the cassettes/CD becomes a pre-recorded cassette/CD which are sold and marketed under the logo 'Tips'. The assessee manufactures its own blank cassettes and are purchased from outside on job work basis also, It shall be pertinent to mention here that besides getting assigned rights of recording from producers the assessee has an in-house establishment to create non-film songs or basic programmes which are also recorded on such cassettes and CDS and are subsequently marketed. Impliedly for this type of activity the assessee has own copyrights of such music. From the said master plate several copies are reproduced which are ultimately sold in the market. Depending upon the popularity of number of songs, the volume of sale is procured. The assessee claimed the expenditure on acquisition of such rights from the producers as revenue expenditure.

3. It shall be pertinent to mention here that the assessee was further selling/assigning such rights in export trade also. Since the assessee claimed the expenditure as revenue expenditure, the amount received on assignment of export sales was credited in the trading account under the head 'Sales'. The closing stock of the finished goods reflected in the trading account included cost of audio rights under the head 'Other cost of production for closing stock'. In addition, the assessee made various entries relating to the claim of expenditure under revenue expenditure.

4. During the course of assessment, the assessing officer required the explanation of the assessee as to why this expenditure should not be treated as capital in nature incurred for the acquisition of audio rights/copyrights as the same was treated as capital expenditure in earlier years. The assessee filed a written reply which is reproduced in the assessment order itself. The reply contained categorical explanation. To appreciate and consider the various technical terms, etc., it shall be worthwhile to reproduce the same to avoid repetition and overlapping of facts :

'To manufacture and market pre-recorded cassettes of films assessee-firm has to purchase the master plate, i.e., original sound track of film songs also commonly known as audio rights, which of course is acquired in perpetuity from different film producers for making several copies of audio cassettes of various films. It is only after acquiring the audio rights of various films the music and songs of the pictures whose audio rights are acquired are transmitted by reproducing such music and songs in audio cassettes which are also manufactured and/or purchased from the outside on job work basis.

In other words assessee's business is to produce and market the audio cassette under its logo 'TIPS' for which they have to purchase the audio rights of various films from different producers of motion pictures which ultimately are reproduced and transmitted in audio cassettes either manufactured by the assessee-firm or manufactured/or purchased from outside on job work basis.

In view of the above facts of the case, it is clear that acquiring of audio rights is the basic ingredient for production of the audio cassettes without which pre-recorded cassettes of motion pictures cannot be conceived as such the same is to be treated as part and parcel of raw material used for manufacturing the cassettes. Since audio right itself is an item to be used for production and not an equipment to help the production, expenses incurred on this item directly vary with the turnover of the goods produced and sold as evident from the enclosed statement of purchases of audio rights and sales for the past three years. As such, the said expenses is rightly claimed as manufacturing expenses and debited to trading account at Rs. 1,43,33,495 (to the extent of cassettes released during the year) and on the same basis cost of audio rights is also included while valuing the closing stock of the finished cassette included in the closing stock of Rs. 1,93,96,761 shown in the trading account. Similarly, export receipts of audio rights of Rs. 69,16,792 has been shown under sale, hence is considered as a trading receipt. Furthermore, interest on loans and finance brokerage paid on advance for audio rights and shown in the balance-sheet have also been capitalised. This itself shows that the assessee treats its audio rights as its stock-in-trade.

Considering the above facts, you will. appreciate that amount spent for purchase of audio rights is rightly claimed as manufacturing expenses which though purchased and held in perpetuity is of the revenue nature hence the same is allowed as claimed under section 37(1) of Income Tax Act.

Reason as to why audio rights of Rs. 1,43,33,495 as shown in the trading account should be considered as revenue and not capital expenses :

Assessee's business is that of reproduction of audio sound and music from the original track record of the songs provided by the film producers commonly known as audio right (hereinafter referred to as master plate). The master plate containing the original sound track of the film relating to the songs and with the help of this master plate, the firm makes several copies of audio cassettes which are ultimately sold in the market. The master plate is similar to a formula or a mould used in the manufacturing. The firm produces several of these cassettes for different films every year and for the reproduction of such series of cassettes, it requires a different master plate. Further for each film that is being made, the producers require music cassettes and sound tracks, which the firm manufacturers with the help of this master plate and provides the cassettes prior to release of the film. No doubt this master plate is retained by the firm but its use and reuse would entirely depend upon the marketability of the cassettes manufactured by it. Further, as soon as the series of the cassettes relating to a film are manufactured and marketed the master plates becomes useless, though in rare cases they do get reused for manufacturing cassettes of additional copies. The life of the master plate is very short, though the assessee retains the right of the same in perpetuity.

We further submit that the master plate is a formula of raw material from which copies are made since the master plate is only a raw material the cost of the purchase of the raw material is an allowable deduction in evaluating the gross profit derived in the manufacture and sale of the copies.

Furthermore, the frequency with which films are made which results in new types of music has considerably reduced the life of the sound track for it is outdated very fast. The master plate of one could not be substituted for another and for every new music recording a totally different plate is required, indicated very clearly that

the plate is nothing more than a raw material. It is contended that merely for the reason that the payment of the master plate is paid in a lumpsum format, it does not make any difference because, without the contents of that the initial price is paid and it can never be equated with purchase of any technical know-how. It is further contended that nor than the payment the important fact that has to be given consideration of is the nature of the item that is acquired since the plate is basic material to facilitate the copying of the payment made for it, is nothing more than the revenue.

We once again reiterate that unlike the tangible and visible products which have raw material that is either visible, tangible, the present product is reproduction of sound, music, etc., embedded into magnetic tapes or gramophone records. The payment of audio rights is relatable to the magnetic tapes or the gramophone records or compact discs fitted with the same sound, music, dialogues, etc. The production of filled tapes, etc., is nothing more than duplication of the original. The original master plate is primarily a raw material and incidentally happens to be the substratum of the business of the assessee. The only point of difference is that the substratum part is entirely incidental to the main activity of reproduction of the original plate which is reproduction of the original is impossible without the original, since the making of the master plate had cost the producer certain sum of money he gets reimbursed from the assessee in the shape of fixed sum. The selling price of tapes of the audio cassettes consists of the sale value of the basic empty tapes or and the either elements towards the overhead cost filing them up with sound music, dialogue, etc. To further substantiate our arguments, the assessee-firm while valuing closing stock of the finished goods shown in the trading account also include cost of audio rights under the heading other cost of production for closing stock. Similarly, export receipts of audio rights are also shown as export sales under heading sales in the trading account. Furthermore, interest as loan and finance brokerage paid on advance for audio rights and shown in the balance sheet have also been capitalised. All the above facts taken into consideration itself shows that the assessee treats its audio rights as its stock-in-trade as such the same be considered as a revenue expenses.

We further submit that the master plate obtained from the producer contains only that material that has been filled into it and the plate could be used to make exact copies of that plate only. From this point of view, it clearly indicates that for every producers from whom the copies are made from the plate, the plate is different.

In other words, the final product produced by the assessee is very different from one to another. For every series of items of music, sound, etc., that is being made the basic material is different and is never uniform, as such it would be wrong to hold that the expenditure is in the nature of capital.'

5. The assessing officer, however, rejected the claim of the assessee and held the expenditure as capital in nature by observing as under :

'On going through the detailed submission of the assessee it may be pointed out that audio rights cannot be equated to raw material/stock material as it is a right in perpetuity. Audio rights is a global right and the copies of the audio cassettes can be made out of the master plates as many a time as there is demand for the songs of movies. Once the series related to the films are manufactured and marketed, the master plates do not become useless, They can be used for manufacturing further cassettes. Therefore, acquiring the audio rights is of an enduring nature. Hence, the same has to be treated as capital in nature in respect of which section 35A is applicable. A similar view has been confirmed by the Commissioner (Appeals) for assessment years 1990-91 & 1991-92 by treating the expenditure as capital in nature. The assessee is before the Tribunal for the assessment year 1992-93. The learned Commissioner (Appeals) vide the order No. CIT (A)/XIX/AC.(Inv)/Cir. 27(1)/IT/392/1994-95, dated 13-10-1995, has held that these expenditures are revenue in nature and the case was decided in the favour of the assessee. However, the department has not accepted the decision of the Commissioner (Appeals) and the appeal is pending before the Tribunal. In view of the facts mentioned above the expenditure incurred by the assessee on audio rights is treated as capital expenditure and deduction under section 35A of the Income Tax Act, 1961 is allowed accordingly.'

6. The assessee preferred first appeal. Before we proceed to the appellate order of the Commissioner (Appeals), it shall be pertinent to mention the interesting

aspect of the assessee's case. This type of additions are subject-matter of appeal from assessment years 1990-91 to 1995-96. In all these years, the assessing officer has hold the expenditure as capital in nature. In first appeals in assessment years 1990-91, 1991-92, 1993-94 and 1995-96, the Commissioner (Appeals) has upheld the action of the assessing officer. However, the Commissioner (Appeals), in assessment years 1992-93 and 1994-95 has held that the expenditure is revenue in nature and allowed the assessee's appeal on this issue. The orders where Commissioner (Appeals) has held the expenditure as capital in nature the assessee is in appeal and the cases where the Commissioner (Appeals) has held the same to be of revenue nature, the department is in appeal. The present case being a stay granted matter, after fulfilling the conditions of the stay, this appeal has come up for hearing before us.

7. In the first appeal, the assessee reiterated its stand and relied on the order of the Commissioner (Appeals) for assessment year 1992-93 which was in assessee's favour. It was pleaded that since the Commissioner (Appeals) in this year has thoroughly examined the issue and held the same as revenue expenditure, this appellate order should serve as a precedent to be followed. The Commissioner (Appeals), however, dismissed this ground of the assessee by observing as under :

'I have carefully considered the reasonings of the assessing officer, the written as well as oral submissions of the appellant and have carefully gone through the appellate order of Commissioner (Appeals) XXIX for the assessment year 1992-93, because the facts for this year were identical to the facts for the assessment year 1992-93 and because the Commissioner (Appeals) XXIX had thoroughly examined the issue. If the appellate order has to serve as a precedent to be followed, it has to stand the test of certain basic judicial norms. The jurisdictional High Court of Bombay has very clearly laid down in H.A. Shah & Co. v. CIT : [1956]30ITR618(Bom) that though res judicata is not strictly speaking applicable to the income-tax proceedings, yet the appellate authorities should be slow in departing from the findings recorded in the same set of facts. The same ratio is laid down by the Hon'ble Madras High Court in CIT v. L. G. Rama Murthy & Ors. : [1977]110ITR453(Mad) . In the assessment year 1990-91, the Commissioner

(Appeals) IX vide his order dated 25-7-1994, had held similar expenses to be capital in nature and the same finding was repeated by the Commissioner (Appeals) IX in the assessment year 1991-92. This finding had been arrived at largely on the basis of the agreements which the appellant had entered into with the concerned parties for obtaining audio rights. Certain comments regarding the accounts of the appellant were also made in the process but the basic reason for treating the expenses as capital in nature was that the appellant had acquired the audio rights for perpetuity. It was admitted before me that the agreements relevant for this year were identical to the agreements which related to the assessment years 1990-91 and 1991-92. I have laboured very hard to find anything in the appellate order for the assessment year 1992-93 which could disclose either existence of fresh facts or existence of a different type of agreements for that year. The Commissioner (Appeals)-XXIX had no doubt recorded certain findings regarding accounting entries by the appellant but such entries can never be decisive of the issue. Thus according to me, the Commissioner (Appeals)-XXIX reached a different conclusion on the same set of facts which prevailed in the assessment years 1990-91 and 1991-92. Such an order cannot serve as a precedent. In view of this, I am unable to follow the order of Commissioner (Appeals)-XXIX for the assessment year 1992-93. For reasons mentioned in the appellate order dated 25-7-1994, for the assessment year 1990-91 and the appellate order for the assessment year 1991-92 dated 28-10-1994. I am unable to accept the arguments of the appellant and uphold the action of the assessing officer. Ground No. 1, is, therefore, rejected.'

In fine, the Commissioner (Appeals) held that the appellate order for assessment year 1992-93 cannot be held as precedent and relying on first appellate orders for assessment years 1990-91 and 1991-92 dismissed the assessee's ground.

8. Since the Commissioner (Appeals) has relied on the orders of earlier years it shall be pertinent to consider what was held by the Commissioner (Appeals) there. In assessment year 1990-91, the Commissioner (Appeals) dismissed the claim of the assessee by holding as under :

'As a matter of fact every thing depends upon the agreements in question and the agreements in the present case, sample of which has been reproduced by the assessing officer in the assessment order clearly show that the expenses in question were capital in nature. The Hon'ble Madras High Court in Shri Krishna Tiles & Potteries Madras (P) Ltd. v. CIT : [1988]173ITR311(Mad) has held in a case of lease which were for more than five years, that the amount paid as salami or lease amount was capital in nature. Taking into account the peculiar facts of the case it is held by the court that the expenses in question were capital in nature. Since section 35A specifically deals with the type of expenses in question and no convincing reasons have been advanced applicability of section 35A, I hold that the action of the assessing officer was proper and accordingly ground No. 1 is rejected.'

9. In assessment year 1991-92, the Commissioner (Appeals) dismissed the claim of the assessee following his above order in assessment year 1990-91. Since the assessee's claim in assessment year 1992-93 was accepted by the Commissioner (Appeals) as holding the same to be revenue in nature, distinguishing the above orders of the Commissioner (Appeals), it should also be pertinent to consider the factors which led the Commissioner (Appeals) to hold the expenditure as revenue in nature for assessment year 1992-93 as the assessee has relied on this order, which reads as under :

'3.18. From what has been stated above and on the basis of various principles laid down by the Supreme Court cited (supra) I am of the view that the claim of the appellant is revenue in nature. This, I say for the following reasons:

(i) The 'audio rights' or 'master plates' is raw material for the production of audio cassettes and, therefore, it is integral part of profit-making process. The payments thus made for acquiring these rights is for the purchase of raw material, and, therefore, a manufacturing expense.

(ii) Keeping in view the fact that large number of songs are being produced during the year the value of the master cassette cannot be said to be of permanent nature. The value would also depend upon the success of the film. Considering the modern trend in the music world I am of the view that the life of 'master plate'

is temporary.

(iii) On careful consideration of the matter it is seen that the 'audio rights have also been shown in the closing stock by the appellant at Rs. 8,41,413 (para 10 of the assessment order). While treating the amount of Rs. 41,41,413 as capital in nature the assessing officer has not subtracted the closing stock of the 'audio rights' from the net profit. Thus, it is clear that in effect the appellant has only claimed (Rs. 47,07,182 - 8,41,413, Rs. 38,65,769) by way of outgoing for the 'audio rights'.

(iv) During the year the amount paid by way of advance is Rs. 77,55,996 for 19 films assessee has credited Rs. 47,07,182 in the profit and loss account as only 20 songs were released in the year under consideration. This only shows that the amount has been claimed in the year when the film is actually released. This also shows that the amount involved entails at least 20 'master plates' and, therefore, the outgoing is not once and for all but because of the peculiar business of the assessee for the reproduction of the music it has to purchase a number of 'audio rights' during the year so as to improve the business. Considering the frequency of purchase of 'audio rights' and the business of the assessee I am of the view that it is revenue in nature. Since the business of reproducing cassettes is already in existence and it is during the currency of the business that the assessee has purchased 'audio rights' to improve its business and profitability the decision of the Supreme Court in the case of Alembic Chemical Works Co. Ltd. v. CIT : [1989]177ITR377(SC) shall apply.

The applicability of section 35A will only arise when the expenditure is found to be capital in nature in case it is held that the same is not capital in nature then the provisions of section 35 do not apply and the expenditure has to be considered under section 37 of the Income Tax Act.

(v) The assessing officer himself in para 11 of the assessment order has treated the 'audio rights' to the extent of Rs. 16,77,272 as revenue expenses. This only shows that the appellant besides making use of the 'audio rights' (master plates) in the manufacture of audio cassettes is also dealing in 'audio rights' which is evident from the export sales of Rs. 41,41,413. Accordingly these rights have, therefore, to be considered as revenue in nature in its entirety and, therefore, action of the

assessing officer in treating it as capital in nature and also revenue in character (for export sales) appears to be inconsistent.

3.19. In this regard I have also carefully gone through the decision of various Tribunals cited (supra) which were not found applicable by my predecessor on the facts of the case. For holding so he has been mainly guided by the fact that in this case it was the royalty amount which was claimed as revenue expenditure whereas in the case of appellant lump sum payment has been made to distributors and, therefore, he was of the opinion that it was capital in nature. But for this the nature of business and all other factors are identical to the case in hand. After going through the decision of the Tribunal, Delhi Bench 'A' in the case of Super Cassettes Industries (P) Ltd. I find that although the appeal was against the order under section 263 passed by the Commissioner but the Tribunal has given its findings on merits as well. In that case also besides royalty payments some initial payments was also made which has also been treated as revenue in nature. It was held that the 'master plate' could be termed as raw material and the activity of the assessee was absolutely that of jobber. The content of the plate was a design, the formula, raw material all embedded into one. The plate in these circumstances would not be termed to be capital in nature. In para 11 of the order it is mentioned that :

'the initial payment of lump sum also does not change its basic character as elucidated above.'

On the facts and circumstances of the case it was, therefore, held that the payment made was of revenue account.

3.20. In this case also one would see that by showing the stock-in-trade 'audio rights' on the credit side of the profit and loss account, in effect the appellant has claimed only the net value of that 'audio rights' which has been used for the manufacture of the audio cassettes' during the year. It is not that the entire amount of lump sum has been claimed while working out the net profit. Since the net value claimed in the profit and loss account depends upon the number of cassettes manufactured during the year I am of the opinion that the amount claimed is again not fixed but would vary depending upon the raw material used (audio rights)

during the year. This would, therefore, be a variable factor from year to year and to say that a lump sum amount in its entirety has been claimed by the appellant would not be correct.

3.21. As discussed above I am of the view that considering the life of the 'master plate' in the music world which is undergoing rapid change in the modem time it would be proper to say that the purchase of 'audio rights' is not an advantage of enduring benefit to the trade. There are specific circumstances leading to the conclusion of this case to show that the expenditure is revenue in nature particularly keeping in view the fact that the 'master plate' is nothing but a raw material in this line of business. Thus following the criteria laid down by the Supreme Court cited (supra) I am of the view that the expenditure claimed by the appellant is revenue in nature. The case of R.B. Seth Mulchand Suganchand v. CIT : [1972]86ITR647(SC) was that of mining leases where minerals are part of the land and have to be won, extracted and brought to the surface, expenditure for acquiring the right over or in the land to win the minerals would be of a capital nature. It was also held that however, the mineral has already been gotten and is on the surface, expenditure incurred for obtaining the right to acquire the raw materials, i.e., the mineral, would be revenue expenditure laid out for the acquisition of stock-in-trade. In the case of production of audio cassettes the master cassette represents the original sound music is like the mineral which has already been gotten on the surface. The assessee has incurred expenditure for obtaining the right to acquire this music, i.e., raw material and, therefore, applying the principle laid down by the Supreme Court it can be stated that the expenditure claimed is revenue in nature.

While examining this issue I have also come across the fact that the assessee has also made claim regarding the programme expenses of Rs. 8,64,101 which were debited in the profit and loss account and on which the explanation of the assessee in its, letter dated 19-1-1995, has been accepted by the assessing officer. It is seen that the appellant-firm in addition to producing the audio cassettes of motion pictures also produces audio cassettes for basic programmes which is their own creation. Instead of duplicating or recording the music from the 'master plate' as in case of motion picture basic programmes are recorded from

the live programmes arranged in studio by the assessee. Programme expenses includes the payments made to musicians, singers, artistes and such other incidental expenses connected with recording of basic programmes, i.e., 'Jai-Matadi', Mohmed Rafi, Funkar Ek, Aawas Anek and other basic programmes in regional languages songs, Sindhi, Marathi, Bhojpuri, etc. It is pertinent to mention that this amount has been treated by the assessing officer as revenue in nature. The question which arises for decision is whether this amount treated as revenue in nature is any different from that of payment made for purchase of 'audio rights'? It is seen that the purchase rights are paid to the producers for obtaining the 'master plate' from them whereas the programme expenses have been incurred by the appellant itself for making the 'master plate' from them whereas the programme expenses have been incurred by the appellant itself for making the 'master plate' of the various programmes as stated above. The expenditure incurred by the assessee in both the cases is similar in nature except that for 'audio rights', purchase price has been paid to the producer for obtaining 'master plate' whereas in the latter case the 'master plate' is itself produced by the assessee. Since the programme expenses have been treated as revenue in nature the expenditure claimed for purchase of 'audio rights' would also stand in the same footing and, therefore, it is held to be revenue in nature. '

10. The learned counsel for the assessee, besides relying on the order for assessment year 1992-93 of Commissioner (Appeals) contended that the assessee is not owner of copyrights of film sound-tracks. It is an assignment of such rights by the producers. The recurring feature of the manufacturing activity of the assessee is to produce a variety of recorded music cassettes. For this purpose, the assessee had to purchase audio rights from producers which, in legal language, is called as assignment of copyrights. In addition, the assessee had own recording studio facilities where in-house music programmes and songs were recorded, the copyright whereof was possessed by the assessee. It is not the activity of the assessee to manufacture recorded cassettes of only one film but the same was to produce various film titles. Consequently, the quality and nature of songs and music has to vary. The assessee has installed machinery for reproducing the sound-track which is the fixed capital of the assessee. The assessee's recurring business is to procure assigned rights for reproduction of

copyright films as well as to reproduce in-house programmes and songs and manufacture recorded audio cassettes and CDs as finished products. The master plate is a miniature input to be reproduced on a large number of blank cassettes and CDs. Consequently, the master plate and blank cassettes and CDs are the raw material of the assessee and the recorded cassettes and CDs are the finished products. According to the learned counsel, the capital assets of the assessee are the recording studio equipment, etc., and raw material is the master plate empty cassettes and other ingredients and the finished product is recorded cassettes. In the agreement the word 'assignment and perpetuity' are used. The assessing officer and Commissioner (Appeals) have been overtly impressed by these words only. Without going into the real substance of the assessee's business merely because the perpetuity and copyright words are used a summary approach is adopted to hold that the expenditure is capital in nature and hit by section 35A of the Act. The learned counsel further argued that in order to determine the issue it is essential to look into the real nature of the assessee's business, its modus operandi and its relevance in the competitive trade. The assessing officer and Commissioner (Appeals) have gone strictly on the form of the agreement that too, choosing the confined words and have completely ignored the substance of the agreement and its involvement in determining the realities of the assessee's business. Despite several judgments that there cannot be fixed guidelines to hold whether an expenditure is capital or revenue in nature, the lower authorities have tried to adopt some fixed guidelines which are not applicable to the assessee's case. The music industry is a very competitive and fast changing industry. The music albums released contains few songs which become popular and the cassette is sold mainly on the basis of some popular songs recorded therein. These cassettes become outdated within a very short time as some other cassettes catch the attraction of the masses. Consequently, in effective terms, the life of a music cassette and, in turn, its master plate is short in business parlance. The time the recorded cassettes are released and become popular, the rampant piracy in the trade takes over and the market is flooded with pirated cassettes at much lesser rates thereby posing serious challenge to the life of the marketability as assessee's cassettes. In fact, there is no potential in the master plate or the recorded cassettes which can be termed as capital asset. The same are fast

changing and subject to fluctuations of the market and advertisements.

11. According to the learned counsel what is assigned is user of the copyrights on worldwide basis as per agreement. What in effect is given is a master plate containing the original sound-track and which is nothing but the raw material of the assessee as the assessee's business is to sell recorded cassettes of several films, occasions and albums. The recurring and regular feature is to manufacture new songs and music and sell the same. Since the finished products are varied, the source thereof is nothing but the raw material which cannot be obtained without obtaining assignment or rights by way of agreement. The agreement form may use the words 'perpetuity' but the same, if looked in the context of foregoing becomes merely a word of form for the user/license of raw material. Since there is no potential life thereafter, the right assigned are termed in a formative manner as perpetual in nature.

12. The learned counsel argued that there is inconsistency in the views of the lower authorities about capital and revenue. The in-house programmes, soundtracks development by the assessee using its own studio facilities and the copyrights whereof are owned by it and the expenditure incurred in this behalf including payments to lyricists, musicians, singers, studio facilities, etc., are allowed as revenue expenditure. According to him, this also emanate from the master plates or similar service whose copyrights are with the assessee. The same is held as revenue in nature holding the same to be raw material of the assessee. Simply because, the master plate copyrights are held by somebody-else, cannot convert the raw material of the assessee's manufacturing activity into a capital asset. According to him, the in-house master plate development are the master plates taken by way of assignment of copyrights are basically the smaller ingredients of input, i.e., raw material. A mere form of agreement cannot alter the real character of a particular item in assessee's business. An item of raw material will remain raw material irrespective of the source from which it is procured. Whereas in assessee's case, the character of raw material is converted into a capital asset merely because the assessee has procured it from another source, i.e., the holder of a copyright.

13. The learned counsel asserted that section 35A comes into picture when the expenditure incurred is capital in nature on acquisition of copyrights. However, if the expenditure incurred on copyrights is revenue in nature the question of applicability of section 35A does not arise. The learned counsel further argued that the legislature is conscious of fast changing environment of cinematographic film music computer softwares, etc. A parity was drawn by rule 9A of the Income Tax Rules, whereby the cost of production of a feature film certificate for release by Censor Board is fully allowed as revenue expenditure if the film in released for exhibition on commercial release had the amount spent is before 90 days of the end of the commercial year. Merely because the word perpetuity and assignment of copyright occurs, the lower authorities have adopted a very pedantic and technical approach. They were not bothered to examine the facts of the assessee's business as to what is the raw material of the assessee and what is the finished product and what is the capital assets. The assessee has a song recording studio or gets the activity done on hire basis. The presence of these activities by itself cannot run the business because for that the essential need is of raw material by which the finished product is made. Because of the existence of words 'assignment of copyrights and perpetuity' the lower authorities held the same to be capital asset without bothering to examine the vital issue that the same constitute as raw material and any payment made for procurement of raw material will not amount to capital expenditure. The ingredient being raw material any wording in the agreements, cannot bring the same into the net of section 35A which deals with the incurring of capital expenditure in this behalf. The action of the lower authorities in accepting the expenditure on in-house music production as revenue in nature itself evidences that where the lower authorities considered the issue on broad basis, the same has been held as raw material of the assessee and the expenditure thereof has been allowed as revenue expenditure. Merely because the amount was large and the rights were governed by agreements with the user of words 'assignment of copyrights and perpetuity' the same has been held as capital in nature without analysing that it is the same activity which has been held to be revenue in nature on in-house music development.

14. According to the learned counsel, the master plate is very important for profit-making apparatus of the assessee's business, being integrally connected with the

manufacturing process in numbers, quality, quantity, the same is raw material. It is not the one master plate which runs the assessee's business, but the same is to be frequently changed depending on time and popularity and its effective life terminates very soon. The number of master plates used are much in number which shows that the frequent change in raw material was necessitated by the manufacturing activity, i.e., producing varied variety of film music. The matter plate in the form of raw material is nothing but a formula embedded on a device without which the assessee cannot manufacture its finished products. For every new album a totally new master plate is required which is sound, music, etc., all embedded on magnetic tapes.

15. The learned counsel further stressed that the amount earned by the assessee by export sale of such recording rights has been credited in the trading account as a revenue receipt which has been accepted by the department as revenue in nature. This leads to an inconsistency where same rights in the hands of the assessee are held as capital in nature and on the other hand, the same is held as revenue nature when the same rights are further assigned for export purposes.

16. The learned counsel for the assessee relied on the following case laws :

(1) Empire Jute Co. Ltd. v. CIT : [1980]124ITR1(SC) ;

(2) Alembic Chemical Works Ltd. v. CIT : [1989]177ITR176(Bom) ; and

(3) CIT v. Kirloskar Tractors Ltd. (1998) 98 Taxman 112 (Bom).

17. Dealing with the Empire Jute Co. Ltd.'s case (supra), the learned counsel contended that the Supreme Court has clearly laid down that it is not every advantage of enduring nature acquired, by an assessee that brings the case within the principle of holding enduring benefit as capital in nature. What is material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the same would be disallowable as revenue expenditure on the application of test of enduring benefit. On the other hand, if the advantage consists of in facilitating the assessee's trading operations or enabling the management and conduct of assessee's business to be carried on

more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account even though the advantage may endure for indefinite future. The test of enduring benefit is, therefore, not a conclusive test to be applied blindly and mechanically without referring to the particular facts and circumstances of given case. According to him, this principle laid down by their Lordships of Supreme Court is clearly applicable to, the facts emerging from the assesseee's case. Here, the capital field of the assessee is the sound recording studio equipments, etc. The advantage of assignment of rights of master plate facilitates the assessee starting operations or enables the conduct and management of assessee's business more efficiently and more profitably in the sense that without master plate, the assessee cannot run its business because the same is nothing but reproduction of the sound track contained therein. Consequently, the master plate being nothing but the tool to facilitate the assessee's operations, control and management more efficiently and more profitably the same is of revenue nature. Here also, seemingly, the word 'perpetuity' is used in agreements, but on factual terms, the life is very small. In any case, the Hon'ble Supreme Court has held that even the advantage endures for an indefinite future, the same will be revenue in nature. The dictate of the Supreme Court is very clear so as to consider the nature of the advantage in a commercial necessities and background has to be looked into to determine the nature of expenditure. The lower authorities, in assessee's case, has merely chose to pick some words from the agreements, i.e., assignment of copyrights and perpetuity and without bringing on record an iota of analysis, have summarily and blindly held that the expenditure is capital in nature covered by section 35A. The Supreme Court has, repeatedly held that the test of enduring benefit is not a certain or conclusive test and the regard has to be had to the particular facts and circumstances of the given case. The Hon'ble court have further held that while deciding as to what is outgoing of capital assets and outgoing on account of revenue depend on what the expenditure is; to be considered from a practical and business point of view rather than upon the juristic classification of legal rights whether secured, employed or exhausted in the process. In these circumstances, the question must be fitted in the larger context of business necessity or expediency. In assessee's case, the lower authorities, instead of taking a practical

and business point of view, have summarily picked up the juristic classification of legal rights and without applying them and viewing them in larger context of business necessity or expediency of assessee's business have termed the same as capital in nature without subscribing any reason by analysing the various facts and figures supplied by the assessee.

18. The learned counsel further relied on Alembic Chemical Works Ltd. (cited supra) wherein their Lordships of the Hon'ble Supreme Court have held that the infinite variety of situational diversities in deciding capital or revenue expenditure, it is not possible to formulate any general rule. The question in each case will depend on significant aspect of that case. Judicial metaphors are narrowly to be watched for starting as advice and to liberate thought, they end often by enslaving it. The idea of once for all payment and enduring benefit are not to be treated as something akin to the statutory conditions. Capital and revenue expenditure treatment needs to be flexible so as to respond to the changing economic realities of business. According to him, the Supreme Court has cautioned repeatedly that judicial metaphors should be watched narrowly and for enduring benefit and once for all payment should not ipso facto be treated as statutory conditions to hold the expenditure as capital in nature. A progressive and pragmatic approach is to be adopted to respond to the changing economic realities of business. It has been pertinently held that what is relevant is the purpose of outlay and its identity, object and effect is to be considered in a common-sense way having regard to the business realities. In a given case, the test of enduring benefit might break down. According to him, in the assessee's case, the relevant object was to sell consistently changing new titles and songs for which new master plates were necessitated and they could not be procured without entering into agreements, i.e., to enter into judicial metaphors. Nevertheless, the basic effect remains that the assessee wanted a raw material to manufacture fast changing finished product, i.e. music cassettes. The expenditure has to be looked in the changing realities of business. Since the music cassette business/industry is fast changing with their life span and rampant piracy, the life of the master plate, though juristically looking perpetual, is nothing but a shortlived piece of business use which can only be described as raw material. The Hon'ble Supreme Court has advised a common-sense approach to decide the issue having regard to the

business realities. In no way, their Lordships have held that simply because the outlay is for enduring benefit or some juristic words are used, they by itself, shall be sufficient to hold the expenditure as capital in nature. On the other hand, the repeated caution is not to be totally influenced by such circumstances.

19. The learned counsel, in fine argued that the above principles are distinguish laid down by the Supreme Court which have been followed in various subsequent Supreme Court and High Court judgments and they will hold the field. According to him, viewed from the guidelines enunciated by their Lordships of Supreme Court in the above three cases, the assessee's case gets a clear dimension that from a common-sense approach in the changing economic realities of the business, the master plate is nothing but a piece of raw material for a manufacturer to manufacture a series of musical cassettes from a series of such master plates into pre-recorded audio cassettes and CDs. The changing economic realities are that audio business, the life of a master plate though, juristically appearing perpetual, is shortlived, riddled by rampant piracy and fast changing test of listeners making a popular song obsolete in no time. Consequently, the expenditure is nothing but revenue in nature. Looking at the treatment given to the export assignment of copy rights as revenue in nature and its acceptance by the assessing authorities, it becomes clear that they were viewing a part of it as revenue in nature without assigning any cogent reason as to why the amount spent on assigning of rights from other producers is capital in nature.

20. Besides reliance was placed on Kerala High Court judgment in the case of CIT v. Cochin Refineries Ltd. : [1982]135ITR278(Ker) , for the proposition that in order to attract section 35A, it is necessary that there should be an expenditure of capital nature and the same should be incurred on the acquisition of patent rights or copyrights used for the purposes of business and when all these three conditions are satisfied, then the question of deduction under section 35A arise. In the instant case, since the expenditure is revenue in nature, the same cannot be covered under section 35A. Having dealt with the principles differentiating between revenue and capital expenditure in the lights of above Supreme Court judgments, the learned counsel further argued that the issue in question is covered in favour of the assessee by following Tribunal judgments which deal with the aspects of

amounts paid for assignments of right for re-recording cassettes, CDs and gramaphone records, etc. :

(1) Super Cassettes Industries (P) Ltd. v. CIT ;

(2) M. Subramaniam v. Dy. CIT (1992) 42 ITD 676 (Mad);

(3) Gramophone Co. of India Ltd. v. Dy. CIT (1994) 48 i TD 145 (Cal); and

(4) Venus Records & Tape Mfg Co. (Mum) (copy placed on record).21. In Super Cassettes Industries (P) Ltd.'s case (supra), the assessee was engaged in business of manufacturing pre-recorded audio and video cassettes as also blank audio and video cassettes, akin to the assessee's case. This concern purchased master plate by way of assignment of copyrights which contain original sound-track and songs, reproduced the same into blank cassettes with the help thereof and sold the same in market. The concern here had paid the consideration money partly in shape of a fixed sum initially and partly by way of percentage of sale value of the recorded cassettes. For every producer from whom the master plate was purchased, the plate was different. The assessee's claim was that the final product as produced by the assessee was different. For every series of item of music sound, etc., was never uniform. The contents of the plate was a design, formula and raw material all embedded into one. The plate cannot be termed as of capital nature. The initial lump sum payment and subsequent reimbursement in the form of royalty on sales will not change the character of its expenditure being revenue in nature. The Hon'ble Members of the Tribunal, Delhi Benches, following the judgments of the Hon'ble Supreme Court in the case of Travancore Sugars & Chemicals Ltd. v. CIT : [1966]62ITR566(SC) , Gotan Lime Syndicate v. CIT : [1966]59ITR718(SC) and Empire Jute Mills Co. Ltd. v. CIT (cited supra) held that the royalty paid including the cost was on revenue account and hence was fully allowable as deduction in computing the income of the assessee.22. In M. Subramaniam's case (cited supra), the line of activity is similar to the facts of the assessee's case. In this case, the royalty was paid on the basis of price of each cassette sold. The Hon'ble Members of the Madras Benches held that the royalty thus paid was for the raw material embedded in the cassette. Thus, the same went in the cost of production and varied with the quantity of cassette production. Even

though the licence had been given for duration of the copyright, the manufacture and sale of cassettes would depend upon the popularity of the songs which, in the case of film songs may not last even a year. Therefore, the recurring payment of royalty was uncertain and variable and such a payment could not be regarded as capital expenditure. Even if the test of acquisition of profit-making apparatus was applied as against cost of performance income earning operations. It was further held that the expenditure laid out do not give the assessee any enduring benefit and resulted only in a revenue expenditure. The outlay was in consonance with the actual production and, therefore, a proper input of the income earning operations. It was finally held that the amounts paid by the assessee were in the nature of revenue expenditure and application of section 35A was not justified.23. In Gramophone Co of India Ltd.'s case (cited supra) the activity of manufacturing is akin to the case of the assessee with an added feature of gramaphone records. The Hon'ble Members of Calcutta Benches held that in the normal course of business, the assessee required music as its raw material which was obtained from various sources. One source was EMI from whom the rights were obtained over the materials for the purpose of reproducing the music contained in them. For music cassettes and gramophone records. The other sources were artistes, film producers and authors of songs meaning thereby in-house productions. It was held that the royalty payment was directly relatable to the raw material irrespective of the fact of the agreement being for 3 to 5 years. The agreement was held to be to ensure continuous supply of the raw material for a payment which was made as and when sales took place. The agreement in this case was for 5 years. Still, it was held that even during this period it was quite conceivable that there may be no demand for a particular music or work of particular artist and, therefore, the assessee may not have occasion to reproduce the recording more than once. The theory of enduring advantage was distinguished in this case on the basis that the advantage must be in the capital field and not in the revenue field. Since the assessee's business itself consist of reproducing and selling recorded music the royalty payment for the purchase of original music which form the raw material was an expenditure incurred out of business necessity just as a sugar manufacturer would require sugarcane as his raw material. The payment was so related to the conduct of the assessee's business that it must be regarded as an

integral part of the profit-earning process and not for any acquisition of any right of permanent character. The learned counsel stressed that it has been unequivocally held that the amount spent by assessee in procuring music in various forms including rights thereof and cost of in-house productions is nothing but raw material and the Hon'ble Bench has gone at length to bring a simple parity in the form of sugarcane being raw material for sugar manufacturers goes to establish without doubt that such expenditure is for procurement of raw material which is essential for assessee's business and the expenses thereof can only be revenue in nature.24. Taking up Venus Records' case (cited supra), the learned counsel submitted that the facts of this citation are exactly similar to that of the assessee's case. The Venus Records was doing the business of manufacturing audio cassettes and also trading in cassettes. Re-recording rights were purchased from film producers for manufacturing cassettes to be sold in the market. The assessee entered into various agreements with film producers and paid lump sum amount for acquiring the re-recording rights of various film songs and claimed the entire payment made as per the agreement as revenue expenditure. The assessing officer disallowed the claim of revenue expenditure and like the case of the assessee treated the same under section 35A. The Hon'ble Members adopted the principles laid down by their Lordships of the Supreme Court in the cases of Alembic Chemical Works & Empire Jute Co. Ltd. (cited supra). These principles are already argued and have been adopted in this case. The terms and conditions of the agreements were considered which are contended to be similar to that of assessee's agreements. Reliance was placed on

(1) Super Cassettes Industries (P) Ltd.,

(2) M. Subramaniam,

(3) Gramophone Co.'s case (cited supra). The Hon'ble Members followed these decisions of the Tribunal and held that the expenditure incurred by the assessee in acquisition of re-recording rights was on revenue account and allowable deduction. The learned counsel summed up his reliance on these four Tribunal judgments of Delhi, Madras, Calcutta and Mumbai Benches on the note that all the cases deal in activities similar to the assessee, i.e., reproduction of music sound

and songs on blank and embedded cassettes by acquiring copyrights by assignments from film producers. The terms of payment are either based on sales over a period of time or lump sum in part and balance based on sales or periodicity and finally only lump sum payments. The variation in terms of payment of consideration which may be called as royalty or fee or licence or any other juristic name has been held to be not of much consequence while deciding the issue of capital or revenue. In all these cases, it has been held that the principles laid down in the cases of Empire Jute Mill Co. & Alembic Chemicals (cited supra) are applicable while deciding the issue of revenue expenditure vis-a-vis payments made for assignment of rights for procuring recording rights from film producers. In all these Tribunal judgments it has been held that the principle laid down by Empire Jute Mill Co. and Alembic Chemicals cases are applicable in deciding the issue of revenue expenditure in favour of the assessee. The facts of all the cases are similar to assessee's case. The payment in lump sum or in part are covered by these judgment and are held in favour of the assessee. The whole exercise comes to only logical conclusion that the expenditure incurred is revenue in nature and should be allowed as such. The pertinent finding in all these Tribunal judgments is that the original sound-track music assigned to the assessee in the form of master plate is nothing but the raw material of the assessee. All the facts in this regard have been extensively discussed and a clear finding to this effect uniformly in all the cases have been arrived at. Once it is held that the master plate is raw material of the assessee irrespective of any small variations in the terms of agreements, the payments made in this behalf become only revenue payments made for the purposes of ensuring smooth supply of raw material. This proposition is accepted by the revenue itself while deciding the nature of expenditure incurred by the assessee for in-house production of musical cassettes it has been allowed as revenue expenditure. When the expenses incurred for in-house creation of music is allowed as revenue expenditure meaning thereby that the same is raw material, there can be no impediment in holding that the payments made towards assignment of rights being for procurement of the same raw material being revenue in nature.25. Regarding the second ground, the learned counsel argued that the assessing officer disallowed 1/3rd out of vehicle expenses and depreciation claim on the ground that no day-to-day log-book is maintained and

personal element of user by the partners, and their family members cannot be denied, and the addition was made in assessment years 1992-93. The Commissioner (Appeals) gave partial relief by retaining the disallowance at Rs. 30,000 and disallowance on account of depreciation was upheld. The learned counsel submitted that the firm owns number of cars which are used by the staff for the benefit of assessee's business. Merely non-maintenance of day-to-day log-book cannot justify such huge disallowance on account of personal use when it has not been established that there is, in fact, a corresponding personal use. It was urged that the disallowance being on presumptions is higher excessive and a reasonable view be adopted.26. The learned Departmental Representative, on the other hand, took us through the chequered history of assessee's case in which the issue has been held in favour of the assessee by Commissioner (Appeals) in assessment years 1992-93 and 1994-95 and has been held against the assessee in assessment years 1990-91, 1991-92, 1993-94 and 1995-96. The learned Departmental Representative argued that the order of the Commissioner (Appeals) for assessment year 1995-96 is elaborate discussing the cases of Empire Jute Co., Alembic Chemicals (cited supra) and Tribunal judgments relied on by the assessee. The facts of the assessee's case have been thoroughly distinguished by the Commissioner (Appeals) in this order and it was urged that the findings of the Commissioner (Appeals) may be treated as arguments of the Departmental Representative on this issue.27. The learned Departmental Representative argued that it is undisputed that the assessee acquired the copyrights of original sound-track by assignment for a fixed sum in perpetuity. Section 35A has been introduced with avowed object to amortise the expenditure of capital nature incurred on the acquisition of patent rights or copyrights used for the purposes of the business. The business of the assessee is not to deal in copyrights and the same is to sell pre-recorded cassettes of the films. By acquiring copyrights in perpetuity what was acquired was a capital asset akin to the machinery used by the assessee for re-recording and other paraphernalia required to manufacture the recorded cassettes. The expenditure was incurred by the assessee to acquire an enduring benefit in perpetuity and which was essential for the use of the machinery to be made for further purposes of the assessee's business. It was argued that whether the life of a film sound-track is short or long

and whether any particular song may become popular to be re-recorded again and again is not a consideration or a condition precedent while executing the assignment of copyrights. When the agreement is executed, what is simply understood between the parties is that the assignments given rights of recording in perpetuity on world-wide basis and the assignees accept the rights accordingly and the consideration is paid, A subsequent cut in the life and the sound-track may be a subsequent consideration but the same cannot be relevant at the time of execution of the agreement. Similarly, the issue of rampant piracy as argued by the assessee is also of no consequence and the short life of a sound-track and possibility of piracy cannot make a capital expenditure into a revenue expenditure or vice versa. It was argued that the rule 9A as referred to by the assessee's counsel for allowing the cost of production of film is on different footing and a specific piece of legislation. Had the legislature been of the view that similar treatment is to be given to sound-track industry, the same could have been provided. It was argued that the expenditure of in-house production has been allowed; but the same do not stand on the same footing in procurement of copyrights. It was further argued that the treatment of accounting entries as sought to be raised in the assessee's case are irrelevant to decide the issue of capital and revenue because the entries are self-serving and the issue is to be decided in exclusion and on principle. It was argued that the facts of various Tribunal judgments are different from the assessee's case and the same has been highlighted in details in the Commissioner (Appeals)'s order for assessment year 1995-96. Strong reliance was placed by the Departmental Representative in the case of Heeralal Phoolchand v. CIT : [1947]15ITR205(All) which has dealt at length in the said order by the Commissioner (Appeals).28. The learned Departmental Representative further argued that master plate and audio rights are different. The master plate cannot become synonymous to audit rights. The assessee in perpetuity acquires audio rights and not the master plate. The same is given to the assessee by producers in consideration of assignment of copyrights in perpetuity. Therefore, the issue being raised that the master plate is raw material, therefore, the expenditure is revenue in nature does not decide the issue completely as what we are concerned is the nature of audio rights being capital and not the master plate.29. Besides these arguments, major emphasises was

placed by the learned Departmental Representative on the order of the Commissioner (Appeals) for assessment year 1995-96 rejected the claim of the assessee and held that the provisions of section 35A are applicable to his case on following conclusions :

'(i) The expenditure incurred by the appellant was for acquisition of copyrights;

(ii) The expenditure was capital in nature;

(iii) The Provisions of section 35A of the Income Tax Act were brought in the statute to deal with such expenditure (refer to object and purpose of this legislation);

(iv) The rule of interpretation discussed in paras 1.4.4. and 1.4.15 ante;

(v) The judgment of the Allahabad High Court in the case of Hiralal Phoolchand (supra) which clarifies the distinction between payment for 'royalty' and 'copyright' is applicable in this case;

(vi) The provisions of the Copyrights Act, 1957;

(vii) The expenditure incurred by the appellant was not 'royalty' and hence an the orders of the Tribunal, relied upon by it, do not apply in this case;

(viii) The orders of the Commissioner (Appeals), favourable to the appellant, cannot be followed as they are based on aforesaid orders of the Tribunal; and

(ix) The observations of the Madras Bench of the Tribunal in paras 8 and 12 of its order in the case of M. Subramaniam, reproduced in italics in pages 18 & 19 ante, support the view taken in this order.'

These conclusions have been arrived at by the Commissioner (Appeals) after elaborate discussions on various aspects. It has been found that the provisions of section 35A were introduced by Finance Act, 1966, to allow deduction of expenditure incurred on acquisition of copyrights. Prior to this, the same was allowed as deferred revenue expenditure under administrative instructions issued by the Income Tax Department. These administrative instructions were given

legislative sanction by introduction of section 35A. The Commissioner (Appeals) held that the argument that the transfer of copyrights by the producers of cinematographic films to the assessee-company is not provided by the provisions of section 35 is contrary to the object of the provisions brought in this statute. Subsequently section 35A is withdrawn with effect from 1-4-1999, because the expenditure on acquisition of copyright was to be allowed as a revenue expenditure it was withdrawn as a consequence of amendment to section 32 providing depreciation on intangible assets. Consequently the legislature has cautiously retained the treatment of acquisition of copyright in one form or the other. The Commissioner (Appeals) negatived the plea of the assessee that there was no expenditure in the capital field for the acquisition of audio rights was held to be against the very object of the legislation as equated to para 1.4.8. To this effect, the Commissioner (Appeals) relied on Hiralal Phoolchand case (cited supra). In fact, the thrust of the Commissioner (Appeals)'s finding is that in this case it was held that once it is found that the transaction was a purchase of copyright then it inevitably follow that it must be a capital expenditure in the circumstances of this case. The issue of assessee's acquisition of rights in held as capital in nature by putting strong emphasis on this case. It shall be pertinent to mention the facts of the case as recorded by the Commissioner (Appeals) in his order :

'..... The assessee in this case was a joint Hindu family. It carried on a family business of publishing and selling books. It was a practice of this family to make agreements with the authors to produce books (mostly dealt in school and college) for them which the assessee, in due course, would publish. There was a dispute between the assessee and the two authors of a school entitled 'Hindustani Reader'. The claim of the authors was they were entitled to 3 years' royalties. This dispute was resolved in the accounting year in this case after an agreement which gave rise to the dispute before the High Court. The assessee's claim was that the agreement arrived in settlement of their dispute was nothing more nor less than a payment to the authors of a compromise sum for 3 years' royalties already approved together with a further sum also estimated by way of compromise to clear up their liability finally for royalties for remaining period. The view of the department was that the payment made to the authors by the assessee was not a

commutation of past and future royalties. The assessee admitted in the argument before the High Court that it had in the early stages of the proceedings, referred to the agreement reached, not as a commutation of royalties, but as a 'purchase of the copyrights' of the book in question. The High Court also found that this point as to the compromise amount being merely a commutation of the royalties was never taken until the case reached the Tribunal. The changes in the arguments, made before the Tribunal for the first time, were not accepted by it. The Tribunal found that the compromise amount paid was a purchase of the copyright and was a capital expenditure. On these facts, the Allahabad High Court held that :

'The question here is one under section 10(2)(xii), whether the expenditure was 'in the nature of capital expenditure. Once the facts have been found that the transaction was a purchase of the copyrights, then, in our judgment, it follows inevitably that it must have been a capital expenditure in the circumstances of this case.'

We appreciate that there may be cases in which the purchase of a substantial asset is not in the nature of capital expenditure. That raises the question of the difference between capital assets and floating or circulating assets. And it will be found that the test lies in the character of the business which the purchaser is carrying on .....'

The Commissioner (Appeals) commented on Cochin Refineries Ltd. case (cited supra) quoted by the assessee on page 12 of his order with following remarks :

'There is no dispute about the proposition laid down by the Kerala High Court in CIT v. Cochin Refineries Ltd. : [1982]135ITR278(Ker) that the provisions of section 35A are applicable only if an expenditure of capital nature is incurred on the acquisition of copyright. It has already been brought on record that the money spent by the appellant for acquisition of audio rights from various producers, as per the sample agreement produced above, was capital in nature in terms of the clear ruling of the Allahabad High Court in the case of Hiralal Phoolchand (1997) 15 ITR 205 . No more discussion is necessary on this issue.'

30. The learned Commissioner (Appeals) distinguished all the Tribunal judgments by holding that nature of expenditure in Tribunal judgments was royalty unlike the assessee's case, therefore, they are not applicable. The orders of Commissioner (Appeals) favourable to the assessee (assessment years quoted above) as they are based on aforesaid orders of the Tribunal which are distinguished by the Commissioner (Appeals) in assessment year 1995-96. The Commissioner (Appeals) further held that M. Subramaniam's case (supra) supports the view taken by the Commissioner (Appeals). In fine, the Commissioner (Appeals) has endeavoured to establish that the introduction of section 35A and its subsequent amendment merging up with section 32 by way of depreciation makes legislative intend very clear that all the copyrights acquisition cases are to be covered by section 35A of the Act. The case of Hiralal Phoolchand (cited supra) clearly establishes that the assessee's act of assignments is capital in nature.

The three Tribunal judgments are not applicable to assessee's case as the nature of payment is royalty unlike the assessee's case. The observations of the Madras Bench in M. Subramaniam's case (supra) supports not the assessee's case but the views of the Commissioner (Appeals) and that the Commissioner (Appeals) favourable order cited above cannot be followed as they are based on three orders of the Tribunal which are distinguished by the Commissioner (Appeals).

31. Regarding the second ground, the learned Departmental Representative supported the order of the Commissioner (Appeals).

32. We have carefully considered the rival submissions and perused the records. The assessing officer held that the audio rights cannot be equated to raw material/stock material and is right in perpetuity on global right basis. The master plate does not become useless after the recording of the series of the cassettes and is capable of manufacturing further cassettes. Therefore, acquiring the audio right is of enduring nature and the same has to be treated as capital in nature applying provisions of section 35A. The assessing officer placed reliance on the orders of the Commissioner (Appeals) of the preceding years against the assessee for assessment years 1990-91 and 1991-92. The observations of the Commissioner (Appeals) in assessment year 1995-96 are quoted hereinabove at

para 29 above and in assessment year 1991-92, the Commissioner (Appeals) has followed his earlier order. Looking at the entire material placed by the revenue the gamut of arguments and evidence revolves around the order of the Commissioner (Appeals) in assessment year 1995-96 and oral submissions of the learned Departmental Representative. The issue of capital versus revenue has been a subject-matter of age-old litigation and by now the general principles to determine the nature have been pronounced by the Hon'ble Supreme Court and High Courts by a plethora of judgments.

33. It is a well established principle of law that the question of expenditure being of capital nature or revenue nature will depend on the facts and circumstances of each case. No strict norms can be petted to decide the issue in a particular case. The same is to be decided in the peculiarities and circumstances of that case on application of relevant general principle pronounced by the higher Courts from time to time. The Empire Jute Mill Co.'s case and Alembic Chemicals's case (both cited supra) cited by the assessee and dealt by the Commissioner (Appeals) in assessment year 1995-96 becomes two cases of importance for both the sides. The general principles which emerge from these two Supreme Court judgments are :

(i) there may be cases where expenditure, even if incurred for obtaining an advantage of enduring benefit, may, nevertheless, be on revenue account and the test of enduring benefit may break down;

(ii) it is not every advantage of enduring nature acquired by an assessee that brings the case within the principle laid down in the enduring benefit test;

(iii) if the advantage consists of merely in facilitating the assessee's trading operations or enabling the management or conduct of assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite period;

(iv) the test of enduring benefit is not conclusive test and cannot be applied blindly and mechanically without regard to particular facts and circumstances of a given

case;

(v) outgoings on account of capital or revenue depends on effectively on practical and business point of view rather than upon juristic classification of the legal rights, if any, secured, employed or exhausted in the process and the question must be viewed in the larger context of business necessity or expediency;

(vi) in the infinite variety of situational diversities in which the concept of what is capital expenditure and what is revenue arises, it is wellnigh impossible to formulate any general rule, even in the generality of cases, sufficiently accurate and reasonably comprehensive, to draw any clear line of demarcation. However, some broad and general tests have been suggested from time to time to ascertain on which side of the line the outlay in any particular case might reasonably be held to fall. These tests are efficacious and serve as useful servants; but as masters they tend to be overexacting;

(vii) judicial metaphors are narrowly to be watched, for, storing as devices to liberate thought they end often by enslaving it;

(viii) the idea of 'once for all' payment and 'enduring benefit' are not to be treated as something akin to statutory conditions, nor are the notions of 'capital' or 'revenue' a judicial fetish. What is capital expenditure and what is revenue are not eternal verities but must needs be flexible so as to respond to the changing economic realities of business. The expression 'asset or advantage of an enduring nature' was evolved to emphasise the element of a sufficient degree of durability appropriate to the context; and

(ix) there is also no single definitive criterion which, by itself, is determinative whether a particular outlay is capital or revenue. The 'once for all' payment test is also inconclusive. What is relevant is the purpose of the outlay and its intended object and effect, considered in a common sense way having regard to the business realities. In a given case, the test of 'enduring benefit' might break down.

34. By these general principles, their Lordships have given directions and cautions while deciding the issue of capital and revenue and the issue needs to be

examined in the light of this guiding principles.

35. Now we turn to the Tribunal judgments of Bombay, Delhi Calcutta and Madras Benches relied on by the assessee. In all these cases, admittedly, the assessees were carrying on business activities similar to that of the assessee. The payment of consideration in some cases is based on sales; periodical payments, partly lumpsum and partly periodic, and lumpsum payment. We consider that mode of regulation of payment is merely utilising the consideration in manner suitable to both the parties and may have a very little effect on the substantive terms of contract or agreement which, in effect, decide the nature of transaction. In Super Cassettes' case (cited supra), the payment is termed as royalty. The master plate was treated as basic raw material. The royalty was paid partly in shape of fixed sum initially and partly by way of percentage of the sale value of the tapes and gramophone records. It was held that for every producer from whom master plate was acquired, the plate was different. The product of the assessee was not the master plate but a recorded version of that and was different from the master plate. For every series of item of music sound that was being made, the basic raw material was different and was never uniform. In view of these facts it was held that the contents of master plate was a design, the formula, the raw material all embedded into one and in these circumstances, the plate could not be termed to be of capital nature. The initial payment of lumpsum also did not change its basic character and the recording payment was held to be dependent upon certain happenings and cannot be on capital account. In Gramophone Co.'s case, the Tribunal held that in normal course of its business, the assessee requires music as its raw material which was obtained through various sources. One source was EMI from whom the assessee obtained the right over the material for the purpose of reproducing the music's contained in them by recording them either in gramophone records or in music cassettes. The Tribunal considered other sources also, i.e., in-house production and payments were made to artistes, film producers and authors of songs, etc. The agreements entered into were for 3 to 5 years. The Tribunal was conscious of the fact that during the period of agreement it was quite conceivable that there may be no demand for a particular music or the work of a particular artiste and the assessee may not have occasion to reproduce the recording more than once. The enduring benefit theory made its presence here

and it was held that every advantage of enduring nature cannot be disallowed. What was disallowable was in capital field and not in the revenue field. Since the assessee's business consisted of reproducing and selling recorded music, the royalty payment for the purpose of original music should formulate raw material, was an expenditure incurred out of business necessity. The payment was royalty to the conduct of assessee's business that it must be regarded as an integral part of the profit-earning process and not for acquisition of any asset or any right of permanent character. In nutshell, the Tribunal held that the assessee was a dealer of music and the nature of capital or revenue vis-a-vis various expenditure has to be considered on this point. Since the assessee was dealer in music, the master plate or in turn the rights which enable the assessee to obtain the master plate (assignment of copyrights) become raw material of the assessee. The assessee sells music purchased on master plate and transmits on a different device called cassette or record. The raw material, i.e., master plate is integral part of the profit earning process and not the capital field. Under these circumstances, the Tribunal held the same to be revenue in nature.

36. Coming to Mumbai Benches decision in the case of Venus Records (cited supra) which has relied on Empire Jute Co. and Alembic Chemicals' case (both cited supra), the Tribunal has considered various terms and conditions of the agreement. The word used for payment is royalty here and the same is made in lumpsum. The Tribunal, following the judgments on Super Cassettes, M. Subramaniam and Gramophone Co. (all cited supra) has held that expenditure incurred by the assessee in acquisition of re-recording rights was on revenue account and allowable as a deduction. We see that in all these three judgments, the principles laid down by Empire Jute Co. and Alembic Chemicals as enumerated above have been followed and these judgments have been given accordingly. By and large, the assessee's business activity, modus operandi are similar to these three cases. Regarding use of royalty instead of payment and some other minor changes we shall comment later.

37. Turning to M. Subramaniam case, (supra) which the Commissioner (Appeals) claims that it supports the view of the revenue, we find that in this case, the Tribunal held that the songs which were permitted to be recorded in the cassettes

was in the nature of basic raw material and the production of recorded cassettes could not be complete unless the music was recorded in the cassette and together it forms the finished product. The royalty paid, therefore, was price paid for the raw material embedded in the cassette. The recurring payment of royalty was dependent on the production and sale of the cassettes recording that particular song and the liability was uncertain and variable. In effect, the Tribunal has held that master plate to be a raw material and the royalty as a licence fee for the duration of copyright time and the nature of payment as revenue nature. It seems the Commissioner (Appeals) has taken up an alternative suggestion given by the Tribunal which is not derogatory to the above findings that the master plate is raw material in nature. This finding is if the assessee had stepped into the shoes of the original owner as an assignee and earned income by granting licences of the copyright, then it would have been a capital outlay. But as the assessee itself manufactured the cassettes and paid royalty depending upon the quantity of cassettes manufactured, the outlay was only for the income earning operation. The learned Commissioner (Appeals) seems to have taken a wrong interpretation of this alternative finding of the Tribunal. The observation of the Commissioner (Appeals) on these basis are as under :

'The extracts of paras 8 and 12, shown in italics above, distinguish the case of the appellant from the case before the Tribunal. Admittedly, the appellant had become the owner of the copyright and consequently entitled to the royalty from any person who produces the records in terms of section 52(1)(j). The agreement entered by the appellant with any producer was not a licence. Therefore, even as per this order of the Madras Bench of the Tribunal, the appellant's expenditure for acquiring audio rights of films was capital in nature because the appellant had stepped into the shoes of the original owner as an assignee.'

The Commissioner (Appeals) has held that because of these remarks, the facts of M. Subramaniam's case judgment are not favourable to the assessee but supports the view taken in the order of the Commissioner (Appeals).

38. We have given a careful consideration to all the four Tribunal judgments and find that all the judgments in uncertain terms have held that the assessee's

business is to sell the music and the master plate is the raw material for carrying on the business. The master plate is obtained on the basis of assignment of copyrights by way of agreement. Consequently, the payment towards assignment of copyrights is nothing but payments for procuring raw material and to ensure its uninterpreted and smooth supply as per the provisions of law, business conventions and the trade and practices of the market. The term of 'payment' may differ from royalty to payment and its mode may change from lumpsum to periodical or partly lumpsum or partly periodical, but we are reminded by the observations of their Lordships of the Supreme Court in above judgments that the matter is to be viewed from commercial sense and not to be fettered by picking judicial metaphors. The matter is to be viewed not from the juristic classification of legal rights, but in the larger context of business necessity and expediency. The nature of advantage is to be considered in commercial sense. The matter is to be flexible so as to respond to the changing economies of business. Therefore, the finding of the Commissioner (Appeals) is that because the nature of payment is referred to in three Tribunal judgments distinguishes the assessee's case from these decisions is not well founded. We find that the facts of the cases dealt in the above three Tribunal judgments are similar to assessee's case except variation in periodicity of payment or user of particular word to denote the payment. In view of the above general guidelines of the Supreme Court we find that this trivial issues have no bearing on the matter. All the Tribunal judgments have rightly considered the core issue, i.e., to scrutinise what is the raw material of the assessee, what is the income earning apparatus of the assessee and to analyse the effective use of master plate and assigned copyrights in the entire set up. All these judgments have thoroughly examined this issue from these important angles and not from narrow technicalities. The unambiguous finding is that the assessee is a dealer and manufacturer of music and to operate this business, the assessee needs music as raw material and for this purpose it needs a regular legal and smooth supplies as prompted by the trade and market conditions. Consequently, the accepted way is to procure assigned copyrights for obtaining the raw material and the master plate is what the assessee gets in hand after undertaking the entire exercise of agreements for payments and various relevant laws. We are convinced that the finding of the Tribunal in above cases that the master plate and, in turn,

the assigned copyrights represents the raw material of the assessee's business and are essential ingredients for income-earning apparatus of the assessee's business. We find that M. Subramaniam's case (cited supra) also is on similar lines only and the Commissioner (Appeals) has taken up an alternative submission, the facts whereof are not present in assessee's case and has used the same as a finding negativing the assessee's claim and supporting the Commissioner (Appeals)'s order. We find that the Commissioner (Appeals) has not given any justifiable reasons to bring home such distinction. We hold that M. Subramaniam's case also supports the assessee's case and it does not create any fetter in the way.

39. Now we turn to Hiralal Phoolchand's case (cited supra) which has been heavily relied on by the Commissioner (Appeals). At the outset we must mention that the Supreme Court has been consistently dealing with the matter of laying down the test to determine the principle governing capital and revenue expenditure. The judgments of Empire Jute Mills and Alembic Chemicals (both cited supra) are much later and mainly emphasise on the situational diversities, economic realities, commercial sense, liberal and flexible approach while deciding the matter and at the same time have cautioned to take a practical and business point of view rather than based on juristic classification of legal rights secured, employed or exhausted in the process. A further caution what judicial metaphors are narrowly to be watched because they may appear to liberate thoughts, but they end in enslaving them. The facts of the Hiralal Phoolchand's case (supra) are narrated above at page 34. The judgment was rendered on payment consequent to a dispute between the assessee and two authors of school books. The dispute was resolved in the accounting year and the character of this agreement gave rise to the dispute before the High Court. The assessee's claim was that the agreement was product of a settlement of dispute for payment of authors of a compromised sum of three years' royalties already approved with a further estimated sum by way of compromise to clear up their liability finally for royalties for remaining period. The assessee changes its argument before the High Court that it was not as a commutation of royalties as pleaded in earlier stages of proceedings but was on account of purchase of copyright of the book in question. It was found that the point as to compromised amount being merely a commutation of royalty was never

taken until the case reached the Tribunal, With this background, the Allahabad High Court held that once the fact have been found that the transaction was a purchase of copyright, then in our judgment, it follows inevitably that it must be a capital expenditure in the circumstances of the case. The Commissioner (Appeals) has consequently held that every amount spent as copyright has inevitably to be held as capital expenditure in nature. We are of the view that the Commissioner (Appeals) has not properly analysed the judgment as delivered by their Lordships. The ending words are In the circumstances of the case'. The same is further followed by the observation that 'we appreciate that there may be cases in which purchase of a substantial asset is not in the nature of capital expenditure'. That raises the question of difference between capital asset and floating a circulating asset and it would be found that the test lies in the character of the business which the purchaser is carrying on. This High Court judgment has in advance adopted the principles as enunciated by the Supreme Court in later judgments cited supra that the finding that the expenditure is capital in nature is 'in the circumstances of this case'. Besides, the High Court has held that there may be instances where substantial asset is not in the nature of capital expenditure and that the real test lies in character of the business which the purchasers is carrying on. We find that the Commissioner (Appeals) has not looked into this crucial aspects of the judgment, which was rendered in peculiar circumstances and that too, in the background of changed plea of the assessee. If the Commissioner (Appeals) ought to have considered the facts of this judgment properly to the effect that the issue revolved around dispute between the assessee and two other writers then, the facts of the case cannot be totally comparable to the assessee's case. Besides, the publishing of the books cannot be equated with the fast changing music industry. In the instant case, the books were text-book approved by the State Governments and the assessee as well as those writers knew in advance that the books will be repeated year after year being text-books. The payment was made in settlement of a dispute and not by an agreement in normal circumstances. The case pertains to payments in the year 1937 and the case was decided in 1947. In commercial parlance, the treatment of copyrights of a book more so, a school text book cannot be equated with the facts of a case which pertains to musical industries and assignment of copyrights in the year 1992-93,

where in commercial parlance it is seen that the life of the master plate in market is very shortlived and the observation of the above Tribunal judgments that the master plate is nothing but raw material makes all the difference. Consequently we hold that the facts of this case are different from the assessee's controversy and the heavy reliance placed by the Commissioner (Appeals) on this case is not well founded.

40. In view of the foregoing we view this case in the guidelines and cautions enunciated by their Lordships of the Supreme Court in above judgments which are very pertinent to the issue. Based on these judgments, the above four Tribunal judgments have been delivered. The facts of the assessee's case are similar in nature. We have discussed the facts and issues extensively above. Respectfully following these four Tribunal judgments, we hold that the assessee is a manufacturer of music and the raw material is master plate Which can be obtained only by way of assignment of copyrights. Since the assignment of copyrights and the amount paid therefor is for procuring raw material and to ensure its smooth and legal supply as understood in the commercial parlance, the expenditure incurred is revenue in nature. The revenue has treated the in-house expenses of production of similar items as revenue in nature and the same is found in accordance with the findings arrived at hereinabove. The assessee has claimed such expenses as revenue which is correct and as a logical consequence, has treated the further assignment of export rights of such music under sales and while valuing the closing stock of finished product has included the element of copyright cost in the cost worked out. With these observations, we revert to Commissioner (Appeals) findings in para 29 and dealt in para 37 above wherein the Commissioner (Appeals) on nine findings has disallowed the claim of the assessee.

41. Since we have held the expenditure to be revenue in nature, points 1, 2, 3,4 and 6 of the Commissioner (Appeals)'s order cannot be upheld as they all pertain to holding the expenditure as capital in nature. Point No. 5 deals with Hiralal Phoolchand's case (cited supra) holding that the amount spent is for copyright and is capital in nature has been distinguished by us. The same, cannot, therefore, be upheld. Point No. 7 says that since the amount referred to in Tribunal judgments is

royalty and assessee's agreement does not term the payment as 'royalty' the Tribunal judgments are not applicable, also cannot be upheld, as it is the nature of the payment which has to be seen and not the term only. We find that in sum and substance, the nature of payments in four Tribunal judgments and assessee's case are of similar nature and character and, therefore, merely because a particular word is used, the Tribunal judgments cannot be distinguished. The Supreme Court has repeatedly cautioned that it is not the juristic word which has to be seen but it is the sum and substance which has to be seen. Point No. 8 says that the Commissioner (Appeals)'s favourable order cannot be followed because they are based on aforesaid orders of the Tribunal. We hold that the above Tribunal orders are applicable to the assessee's case as the nature of business and rights and liabilities involved are identical and inter alia these judgments are followed. The orders of the Tribunal as available before them and Empire Jute Mills case and Alembic Chemicals case (cited supra) also have been followed.

Since we have held that the Commissioner (Appeals) has not properly distinguished the Tribunal orders, this finding also cannot be upheld. By point No. 9, the Commissioner (Appeals) has made a feeble attempt to distinguish M. Subramaniam's case (cited supra) decided by Madras Bench. We have already held that the case is applicable to assessee's case and the distinction as being sought to be made out by Commissioner (Appeals) is not on proper reasonings. In fine, since the expenditure is not capital in nature, the same cannot be covered in the scope of provisions of section 35A irrespective of the words 'copyrights'. In Cochin Refineries' case (cited supra), their Lordships of Kerala High Court has held that in order to be covered by section 35A, all the three conditions should be satisfied, viz., (i) the expenditure should be capital in nature; (ii) should be incurred on the acquisition of patent rights; and (iii) or copyrights. We have held that the expenditure is not capital in nature. Consequently, the same cannot be covered under section 35A. Therefore, the amortisation of expenses as made in the assessment order, cannot be sustained. We hold that the expenditure being revenue in nature is covered under general provision of allowability of business expenditure and the same is allowable as claimed by the assessee. Consequently we allow the appeal of the assessee on this ground.

42. Coming to second ground of appeal, we find that the assessing officer disallowed 1/3rd expenditure out of motor car expenses and depreciation. The assessee, during the course of assessment proceedings pleaded that the proposal of 1/3rd disallowance was very high and one Maruti Gypsy was entirely used for official purposes for plying between office and Primghar Factory. The assessing officer did not accept the explanation. The Commissioner (Appeals), however, gave a lumpsum relief of Rs. 30,000 only against the disallowance of expenses and the disallowance out of depreciation is retained. We find that the disallowance on expenses and depreciation is excessive and disallowance to the extent of 1/5th will meet the ends of justice. This ground of the assessee is partly allowed.

43. In the result appeal of the assessee is partly allowed.

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