PETITIONER:
NATIONAL CEMENT MINES INDUSTRIES, LTD.

Vs.

RESPONDENT:
COMMISSIONER,OF INCOME-TAX, WEST BENGAL, CALCUTTA.

DATE OF JUDGMENT:
17/01/1961

BENCH:
SHAH, J.C.
BENCH:
SHAH, J.C.
KAPUR, J.L.
HIDAYATULLAH, M.

CITATION:
1961 AIR 1032 1961 SCR (3) 502

ACT:
Income-tax-Conveyance with reservation of rights-Category of-Receipts under the conveyance, if income or capital.

HEADNOTE:
The appellants were carrying on the business of cement and lime manufacture and supply thereof. By a deed dated May 7' 1935, the appellants conveyed to the Associated Cement Ltd. the rights which had vested in them under an earlier conveyance made in their favour by a company known as Karanpura Cod Under the deed the appellants reserved to themselves the right to receive from the Associated Cement Company a sum equal to thirteen annas in respect of every ton of cement sold by it which shall have been manufactured from the limestone won by it from the lands transferred and comprised in the leases and agreements.
Pursuant to this stipulation in the year of account, the appellants I received from the Associated Cement Ltd. Rs. 77,820. The Income-tax Officer included this amount in the total assessable income of the appellants in the assesment year and his order was confirmed by the Appellate Assistant Commissioner and by the Income-tax Appellate Tribunal. The contention of the appellants before the High Court in a reference under s. 66 of the Indian Income-tax Act that on a proper construction of the deed and on the facts and circumstances of the case the sum of Rs' 77,820 did not represent receipt of a revenue nature in the hands of the appellants and was not assessable as such, was negatived.
Held, that the deed did not incorporate a transaction of either sale or lease. The conveyance was subject to several restrictions and the appellants retained in part, rights in the land conveyed. The transaction was substantially a transaction for sharing the profits of the commercial activities of the Associated Cement Ltd. and the receipt under cl. 1 of the deed was of the nature of income and not capital and as such assessable to tax.
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Foley v. Fletcher, (1858) 3 H. & N. 769, Secretary of State in Council of India v. Andrew Scoble, [1903] A.C. 299, Oswald v.. Kirkcaldy Magistrates, [1910] S.C. 147, Commissioners of Inland Revenue v. N Ramsay, (1935) 20 T.C.

79, State of Bihar v. Sir Kameshwar Singh, [1952] 21 I.T.R. 382, Captain Maharajkumar Gopal Saran v. Commissioner of Income-tax, Bihar & Orissa, [1935] 3 I.T.R. 237 (P.C.) and Chadwick v. Pearl Life Assurance CO., [1905] 2 K.B. 507, considered and applied.

In assessing the true character of the receipt for the purpose of the Income-tax Act, inability to ascribe to the transaction a definite category is of little consequence. It is not the nature of the receipt under the general law but in commerce that is material. It is often difficult to distinguish whether an agreement is for payment of a debt by instalments or for making annual payments in the nature of income. The court has, on an appraisal of all the facts, to assess whether a transaction is commercial in character yielding income or is one in consideration of parting with property for repayment of capital in instalments. No single test of universal application can be discovered for solution of the problem. The name which the parties may give to the transaction which is the source of the receipt and the characterization of the receipt by them are of little moment, and the true nature and character of the transaction have to be ascertained from the covenants of the contract in the light of the surrounding circumstances. The decision of the question is however not left to the application of any arbitrary standards. There are certain broad principles which guide the determination of the character of the receipt. The distinction between a capital receipt and revenue receipt though fine is real. The dividing line may be thin, and often at first sight imperceptible.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 84 of 1958.

Appeal by special leave from the judgment and order dated December 22/23, 1955, of the Calcutta High Court in I.T.R. No. 24 of 1953.

N. C. Chatterjee, D. P. Pal and D. N. Mukherjee for the appellant.

Hardayal Hardy and D. Gupta, for the respondent.

1961. January 17. The Judgment of the Court was delivered by

SHAH, J.-Messrs. National Cement Mines Industries Ltd.-hereinafter referred to as the appellants-are a public limited company incorporated to " carry on the

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business of cement and lime manufacture and also of limestone supply and for the purposes of such businesses to acquire rights and concessions pertaining to limestone, coal and surface lands from the Dewar khand Karanpura Mines and Industries Ltd." and also to " work mines or quarries and to find, win, get, work, etc. or otherwise deal with clay and bauxite."

Dewarkhand Karanpura Mines and Industries Ltd. hereinafter called the " Karanpura Company "-had obtained three leases on November 29, 1930, first for mining limestone from Maharaja Pratap Narain Udai Nath Shah Deo from limestone beds in certain villages in Dewarkhand, second from Maharaj Kumar Nand Kishore Nath Shah Deo of the surface rights neces. sary to exercise the powers and privileges in respect of the first lease and the third from Maharaj Kumar Raj Kishore Nath Shah Deo of surface rights in respect of Hoyer village. The period in each of the three leases was thirty years. On March 17, 1932, the Karanpura Company conveyed

the rights and options under the three leases to the appellants. On September 30, 1934, the appellants acquired the limestone and surface rights in respect of limestone beds in village Umedanda for 95 years from Maharaja Pratap Narain Uday Nath Shah Deo and Maharaj Kumar Raj Kishore Nath Shah Deo. On the same date, the appellants entered into two agreements, one with Maharaja Pratap Narain Uday Nath Shah Deo which is called the ,bauxite option agreement " thereby acquiring the first option to take a lease or leases of any area or areas of bauxite deposits in certain villages, and another from the said Maharaja for the first option to take a lease or leases of limestone beds in the Tori District. By a fourth agreement also dated September 30,1934, between the Karanpura Company, Maharaja Pratap Narain Udai Nath Shah Deo acting with the consent of Maharaj Kumars Raj Kishore Nath Shah Deo and Nand Kishore Nath Shah Deo, the royalties reserved under the original deeds dated November 29, 1930, were reduced and the periods of the leases were extended to 99 years from the date of the original leases,

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By deed dated May 7,1935, the appellants conveyed to Dewarkhand Cement Company Ltd. (which later came to be known as Associated Cement Ltd. and will be referred to hereinafter by that name) the benefits of the four leases and the two agreements for the unexpired periods. By this deed, for a present consideration of Rs. 25,000 " for trouble and expenses in obtaining the leases and agreements " and for further payment under several covenants which will be presently set out, the appellants conveyed the rights vested in them subject to certain reservations. In the year of account June 1, 1944, to May 31, 1945, the appellants received from the Associated Cement Ltd. under the first covenant of the deed, Rs. 77,820 being the amount computed at the rate of 0-13 As. per ton of cement manufactured from limestone won from the lands and sold by the company. The Income-tax Officer, Companies District 1, Calcutta, included this amount in the total assessable income of the appellants in the assessment year 1946-47. This order was confirmed in appeal by the Appellate Assistant Commissioner and by the Income-tax Appellate Tribunal. At the instance of the appellants, the Tribunal referred the following question with another not material for this appeal to the High Court of Judicature at Calcutta:

> " Whether on a proper construction of the Deed of Assignment dated 7th of May, 1935, and on the facts and in the circumstances of this case, the Tribunal was right in holding that, the sum of Rs. 77,820 represented a receipt of a revenue nature in the hands of the Applicant and assessable as such

The following facts were held proved by the Tribunal. The principal objects of incorporation of the appellants were to carry on the business of manufacturing cement and lime and sale of limestone and the appellants were formed with the object of acquiring the rights and concessions of the Karanpura Company. By their Memorandum of Association, the appellants were authorised to sell or dispose of the undertakings or any part thereof as they thought fit,

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and to sell, lease, mortgage, dispose of, turn to account or otherwise deal with all or any part of their property and rights and in pursuance of these objects the rights and concessions of the Karanpura Company were acquired and extension of leases and concessions were obtained and were transferred to the Associated Cement Ltd. The appellants

were therefore carrying on in the year of account 1944-45 the business for which they were incorporated.

After reciting the prefatory clauses, it was stated in the deed:

> "WHEREAS it was agreed inter alia that the Purchaser should pay to the Vendor the sum of Rupees twenty five thousand for trouble and expenses in obtaining the leases and agreements dated the thirtieth day of September one thousand nine hundred and thirty four hereinbefore recited and hereinafter expressed to be hereby transferred and Whereas the Purchaser hath paid to the Vendor the said sum of rupees twenty five thousand as the Vendor doth hereby acknowledge NOW THIS INDENTURE WITNESSETH that in con. sideration of the covenants on the part of the Purchaser hereinafter contained the Vendor hereby grants assigns and transfers unto the Purchaser and the Karanpura Company at the request and by the direction of the Vendor hereby grants assigns transfers and confirms unto the Purchaser:".

The deed then proceeds to set out the description of the various leases and concessions and agreements and the covenants which the Associated Cement Ltd. undertook in favour of the appellants. These covenants are:

(1) That it will pay to the Vendor a sum equal to thirteen annas in respect of every ton of cement sold by it which shall have been manufactured from the limestone won by it from the lands hereby transferred and comprised in the hereinbefore recited leases and agreements.

(2) That it will not sell any Fluxstone won by it from the said lands to the Tata Iron and Steel Company Ltd., at a price less than Rupees one and annas

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fourteen per ton F. O. R. the siding nearest to the quarry or place from which it shall be won without the consent of the Vendor.

(3) That it shall pay to the Vendor one-half the profit(if any) which it shall make by selling Fluxstone to the Tata Iron & Steel Company Ltd.,or to any other person such profits to be ascertained after deduction from the price received all costs, charges and expenses including the royalty payable to the Maharaja in respect thereof but before educting overhead charges. Such accounts to be closed and adjusted on the thirtieth day of June and the thirty-first day of December in each and every year.

(4) That it will not grant to the Tata Iron & Steel Company Ltd., the right to quarry and remove Fluxstone from the lands hereby transferred at a royalty of less than ten annas per ton, and will pay to the Vendor one-half of any royalty so charged and received.

(5) That in the event of the payments made under clauses one, three and four above in any one year not amounting to the minimum hereinafter set out the Purchaser shall pay in lieu and in full discharge there for the following minimum:

> (a) During the first year to be computed from the first day of January one thousand nine hundred and thirty-five, rupees ten thousand.
> (b) During the second year rupees thirty thousand.
> (c) During every subsequent year rupees fifty thousand.

Out of the above minimum payment of rupees fifty thousand

per year for the purposes of account, the sum of rupees twenty thousand shall be deemed to have been paid in respect of payment under clause three above.
(6) That the Purchaser or the persons deriving title under the Purchaser will at all times from the date hereof duly pay all rents, royalties and payments becoming due under the (four) hereinbefore recited Indenture of Lease (,subject as regards the Limestone lease to the modifications effected by the agreement for
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reduction of royalty dated the thirtieth day of September one thousand nine hundred and thirty-four hereinabove recited) in respect of the premises agreements options rights or benefits hereby assigned and transferred and observe and perform the covenants agreements stipulations and conditions therein contained and henceforth on the part of the Lessee or grantee to be observed and performed in respect of the aforesaid premises or under the said Bauxite agreement or under the said Tori Option agreement or under the said agreement for reduction of royalty And also will at all times from the date hereof save harmless and keep indemnified the Vendor its successors and assigns from and against all proceedings costs claims and expenses on account of any omission to pay the said rent, royalty or payments or any breach of any of the said covenants agreements stipulations and conditions.
(7) That the Purchaser will not work raise remove or use stone or clay in the properties comprised in the leases and agreements hereby transferred to it for making lime.
(8) That the Purchaser shall not by any of its actions or omissions cause leases and agreements, mentioned above and in respect of properties hereby transferred, to be determined, or the rights thereunder, including the right of renewal, to be prejudiced.
(9) That in areas comprised in the leases and agree. ments hereinabove expressed to be hereby assigned and not containing limestone the Vendor's rights under leases and agreements from the Maharaja of Chotanagpur or Maharaj Kumar Nand Kishore Nath Shah' Deo other than the leases and agreements above referred to shall not be jeopardised or affected by this Indenture.
(10) That the clay and shales lying within areas, which do not contain Limestone, can be removed and utilised by the Vendor for all purposes except that of cement manufacture.
The deed then proceeded after setting out certain other covenants:
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> " AND IT IS HEREBY EXPRESSLY AGREED AND DECLARED that if the Limestone within the areas comprised in the Leases hereby transferred available for manufacturing cement is exhausted the Purchaser will be entitled to determine this Indenture on giving to the Vendor six months' notice in writing in which case the Purchaser, if so required, will retransfer the leases and agreements aforesaid."

By clauses (1), (3) and (4), the Associated Cement Ltd. undertook to make certain payments to the appellants. By cl. (1) they agreed to pay 0-13 As. for every ton of cement manufactured from the limestone won from the lands and sold; by el. (3), the Associated Cement Ltd. agreed to pay half the profits which they made by selling Fluxstone to the Tata Iron & Steel Co., or to any other person; and by el. (4), they agreed to pay half the royalty received from the Tata

Iron & Steel Company for the right to quarry and remove fluxstone from the lands. By clause (5), provision was made for minimum payment in the event of the aggregate under cis. (1), (3) and (4) not reaching the sums specified therein. Clauses (2), (4), (7), (8) and (9) were in the nature of restrictive covenants. By cl. (2), the Associated Cement Ltd. were prohibited from selling any fluxstone won from the lands to the Tata Iron & Steel Company for less than Re. 1-14 As. per ton F. O. R. By cl. (4), an obligation not to convey the right to quarry and remove fluxstone for royalty less than 0-10 As. per ton was imposed. By el. (7) the Associated Cement Ltd. undertook not to remove or use or allow any one to raise work, remove or use stone or clay in the lands. By cl. (8), the Associated Cement Ltd. undertook not to do any acts or omissions causing the leases and agreements to be determined or the rights thereunder to be prejudiced. By cl. (9), rights of other persons under leases and agreements in lands not containing limestone were not to be affected. By el. (10), the right of the appellants to utilise clay and shale lying within the areas not containing limestone except for the purpose of manufacturing cement was retained, There were certain exceptions
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to this and the ninth clause whereby the Associated Cement Ltd. were entitled to excavate, use or remove all kinds of clays in and from the areas within the boundary lines marked in the plan and they were also authorised to make permanent structures and use certain strips of lands. By el. (6) the Associated Cement Ltd. agreed to pay rent stipulated under the original leases and agreements and also undertook to keep indemnified the appellants from and against all proceedings, costs, claims and expenses on account of any omission to pay the rent royalty or payments or any breach of any of the covenants agreements and the leases.
There was also the covenant authorising the Associated Cement Ltd. to terminate the deed in the event of limestone in the land comprised in the leases being exhausted. The appellants undoubtedly did not part with all their rights in favour of the Associated Cement Ltd. by this deed dated May 7, 1935. The consideration under the deed consisted of a fixed component and annual payments fluctuating with the business activity of the Associated Cement Ltd. A fixed amount of Rs. 25,000 was paid " for trouble and expenses in obtaining the leases and agreements " and additional payments were to be made under cls. (1), (3) and (4) subject to the minimum prescribed by el. (5). It is difficult to categorise a transaction of this character. It is not a conveyance of all the rights of the appellants nor can it be regarded as a sale even of the rights which were conveyed. Numerous restrictions were imposed by the deed upon the rights of the transferee which were inconsistent in their very nature with the character of a sale, and the covenant authorising termination of the deed in the event of the limestone being exhausted removes all doubt in that behalf. Nor is it a lease : it is not a transfer of a right to enjoy property for a certain time in consideration of periodical payments. It also does not evidence a transaction in the nature of a joint venture between the appellants and the Associated Cement Ltd. Cement was to be manufactured by the Associated Cement Ltd, out of limestone to be won from the lands
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and in consideration of the rights conveyed, payments at specified rates were agreed to be made out of the price to be obtained by sale of cement, fluxstone and limestone. The

appellants had no control over the production of limestone and manufacture of cement, or on the sale of fluxstone and limestone. But in assessing the true character of the receipt for the purpose of the Income-tax Act, inability to ascribe to the transaction a definite category is of little consequence. It is not the nature of the receipt under the general law but in commerce that is material. It is often difficult to distinguish whether an agreement is for payment of a debt by instalments or for making annual payments in the nature of income. The court has, on an appraisal of all the facts, to assess whether a transaction is commercial in character yielding income or is one in consideration of parting with property for repayment of capital in instalments. No single test of universal application can be discovered for solution of the problem. The name which the parties may give to the transaction which is the source of the receipt and the characterization of the receipt by them are of little moment, and the true nature and character of the transaction have to be ascertained from the covenants of the contract in the light of the surrounding circumstances. The decision of the question is however not left to the application of any arbitrary standards. There are certain broad principles which guide the determination of the character of the receipt. The distinction between a capital receipt and revenue receipt though fine is real. The dividing line may be thin, and often at first sight imperceptible.

Where capital is repaid in instalments, it is not liable to income-tax; for instance when a person sells his property and agrees to receive the price stipulated in instalments, by whatever name such instalments are called, they are not liable to income-tax-see Foley v. Fletcher (1), Secretary of State in Council of India v. Andrew Scoble (2), Oswald v. Kirkcaldy Magistrates and Commissioners of Inland Revenue v. Ramsay (4).

(1) (1858) 3 H. & N. 769?
(2) [1903] A.C. 299
(3) [1919] S.C. 147.
(4) (1935) 20 T.C. 79.

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But where property is conveyed in consideration of what in truth is annuity payable for a definite or a definable period, the annuity is not payment on capital account and is taxable-see State of Bihar v. Sir Kameshwar Singh (1), Captain Maharajkumar Gopal Saran v. Commissioner of Income-tax, Bihar and Orissa (2), Chadwick v. Pearl Life Assurance Co. (3).

Again, if property is conveyed in consideration of periodical payments, the payment being a share of profits of a business or profession-(William John) Jones v. Commissioners of Inland Revenue(4), or a mineral royalty depending upon the quantity of minerals raised Raja Bahadur Kamakshya Narain Singh of Ramgarh v. Commissioner of Income-tax, Bihar and Orissa (5), or computed on sales of manufactured articles-Commissioners of Inland Revenue v. 36149 Holdings, Ltd. (6), or a percentage of gross profits made in the exploitation of a secret process-Delage v. Nugget Polish Co., Ltd. (7), is income and taxable.

Counsel for the appellants submitted that the receipt under clause (1) of the terms of the deed dated May 7, 1935, was in the nature of capital payment and relied upon certain decisions in support of that submission.

In Minister of National Revenue v. Catherine Spooner(8), decided by the Judicial Committee of the Privy Council in an

appeal from the Supreme Court of Canada, the respondent Catherine Spooner had sold her rights, title and interest in land owned by her in freehold to a company in consideration of a certain sum in cash, besides shares of the company, and an agreement to deliver 10% of oil produced from the land on which the company covenanted to carry out drilling and, if oil was found, pumping operations. These were described as royalties. Oil was struck in the lands and the respondent was paid 10 of the gross proceeds of the oil produced in lieu of oil. The

(1) [1952] 21 I.T.R. 382. (5) (1943) L.R. 70 I.A. 180.
(2) [1935] 3 I.T.R. 237 (P.C.). (6) (1943) 25 T.C. 173.
(3) [1905] 2 K.B. 507. (7) (1906) 2r Times Law Reports 454.
(4) (1919) 7 T.C. 3 10 (8) [1933] A.C. 684.
[1920] 1 H.B. 711,

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Supreme Court of Canada held that the sum so received was not an annual profit or gain within the meaning of s. 3 of the Income War Tax Act, but a receipt of a capital nature and therefore not chargeable to tax. According to the Judicial Committee, there was between the respondent and the company no relation of lessor or lessee: the transaction was one of sale and purchase, and the transaction had taken the form which it did because of the uncertainty whether oil would be found by the purchaser. As the value of the land depended on this contingency, the price, not unnaturally was made to depend in part on the event of oil being struck. The judgment lays down no new principle; it proceeded merely upon interpretation of the document in the light of the circumstances.

In Trustees of Earl Haig v. Commissioners of Inland Revenue (1), the question which fell to be determined was whether a share of the royalties received in consideration of allowing the use of the diaries of the late Earl Haig for writing his biography were, in the hands of the trustees under the will of Earl Haig, capital receipts. That was undoubtedly a case in which payments received by the trustees were dependent upon the professional activities of the author and the proceeds derived from the sales of the biography he wrote. By the agreement, the author was authorised to extract and publish from the diaries what he thought fit. The diaries were undoubtedly an asset, and after they were used by the author for publication of the biography, their value as an asset was, if not wholly, largely exhausted and their future value was negligible. The agreement was therefore regarded as conveying an asset in its entirety to the author in consideration of a share in the royalties and the receipt of this share was regarded as receipt of capital. That decision proceeded upon the special character of the agreement and the nature of the asset transferred and did not seek to lay down any general principle.

In Nethersole v. Withers (2), N who had acquired under an agreement the exclusive right to dramatise

(1) (1939) 22 T.C. 725.
(2) (1948) 28 T.C. 501.

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a novel of Rudyard Kipling received under an agreement with the widow of the author, a third share of a lump sum for which the sound and film rights were granted exclusively to a film company for a period of ten years. The film right of a comprehensive character having been granted by the legal representative of the author against payment of the sum stipulated, the question arose whether the payment received by N was taxable under the Income Tax Act under Case II of Schedule D or under case VI of Schedule D. It was held that

N having ceased to be the owner of the portion of the copyright she had assigned, the proceeds were not annual profits or gains within the meaning of Schedule D, Case VI. That was a case in which N had wholly sold and disposed of a part of the property and the amount received by her was the price paid in lump and was not in the nature of income. That case also proceeded upon the special character of the transaction.

The case of The Commissioners of Inland Revenue v. The Marine Steam Turbine Co., Ltd. (1) on which reliance was sought to be placed by counsel for the appellants needs no detailed consideration. In that case, a company which was on the facts found not carrying on a trade or business was held not assessable to Excess Profits Duty, because the condition of liability was the carrying on of trade or business.

The appellants had however not sold the entirety of the rights acquired by them from the Karanpura Company. The conveyance was subject to several restrictions and the appellants retained in part rights in the land conveyed. The transaction was substantially a commercial transaction for sharing the profits of the commercial activities of the Associated Cement Ltd. The High Court was therefore right in holding that the transaction dated May 7, 1935, was a commercial transaction and the payment under cl. (1) thereof at the rate of 0- 13 as. 'per ton of cement sold was of the nature of income and not capital.

In that view of the case, the appeal fails and is dismissed with costs.

Appeal dismissed.

(1) (1919) 12 T.C. 174; [1920] I K.B. 193.

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