PETITIONER:
ALEMBIC CHEMICAL WORKS CO. LTD.

Vs.

RESPONDENT:
COMMISSIONER OF INCOME TAX, GUJARAT

DATE OF JUDGMENT31/03/1989

BENCH:
VENKATACHALLIAH, M.N. (J)
BENCH:
VENKATACHALLIAH, M.N. (J)
PATHAK, R.S. (CJ)

CITATION:
1989 AIR 1913 1989 SCR (2) 302
1989 SCC (3) 329 JT 1989 (2) 122
1989 SCALE (1)885

ACT:
Income Tax Act, 1961: Section 37--Tests to determine whether Capital or Revenue Expenditure--'Once for all' and 'enduring benefit' tests--Not conclusive--Object and effect of the expenditure to be looked into--'Once for all payment' made by manufacturer to a foreign company for supply of technical know-how etc. for increasing production improvisation in the process and technology supplemental to existing business--No new venture--Whether the payment made is a revenue expenditure qualifying for deduction.

HEADNOTE:
The appellant-assessee, a company engaged in the manufacture of penicillin, in order to increase its production, entered into an agreement with a Japanese firm (Meiji) for supply of sub-cultures of penicillin producing strains, technical know-how, training, written description of the process on a pilot plant, design and specifications of the main equipment in such pilot plant, and to advise the assessee in the largescale manufacture of penicillin for a limited period of two years.

As per the agreement, the assessee paid Rs.2,39,625 to Meiji and claimed the same as revenue expenditure in its Income tax assessment for the assessment year 1964-65. Disallowing the claim the Income Tax Officer held that the expenditure was for the acquisition of an asset or advantage of an enduring benefit and thus a capital outlay. The Appellate Assistant Commissioner confirmed the order of the Income Tax Officer.

The further appeal of the assessee was dismissed by the Income Tax Appellate Tribunal holding that the payment made to Meiji was 'once for all payment' made for the acquisition of a capital asset.

At the instance of the assessee, the Tribunal referred to the High Court, the question as to whether the sum paid to Meiji was a revenue expenditure. The High Court answered the question in the negative. The present appeal is against that order of the High Court.

The assessee also moved an application before the High Court
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seeking a direction to the Tribunal to refer another ques-

tion of law as to whether a new plant was obtained or installed by the assessee consequent upon the agreement. Declining to interfere, the High Court observed that the Tribunal has not recorded a finding to the effect that a completely new plant was obtained by the assessee and the Tribunal's decision that the assessee, had obtained a new process and a new technical know-how from Meiji was not without evidence.

Against the above order of the High Court, the assessee preferred an appeal to this Court, which was formally disposed of with a direction to the Tribunal to draw up a supplementary statement of the case and refer for the opinion of this Court, the further question of law as sought for by the assessee; and such a question to be considered in the present appeal.

On behalf of the assessee, it was submitted that the Tribunal was influenced by an erroneous assumption that the agreement, envisaged the setting up of a new plant, whereas the objective of the agreement was only to increase the yield of penicillin in the existing plant itself.

The Revenue contended that there was a new venture based on a new technology and know-how of unlimited duration which required a new plant for its commercial exploration.

Allowing the appeal,

HELD: 1. The financial outlay under the agreement was for the better conduct and improvement of the existing business 'and should, therefore, be held to be a revenue expenditure. 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. The rapid strides in science and technology in the field should make this Court a little slow and circumspect in too readily pigeon-holing an outlay, such as this, as capital. The circumstance that the agreement in so far as it placed limitations on the right of the assessee in dealing with the know-how and the conditions as to non-partibility, confidentiality and secrecy of the know-how incline towards the inference that the right pertained more to the use of the know-how than to its exclusive acquisition. [319A, B-C; 317D-E]

CIT v. CIBA of India Ltd., [1968] 2 SCR 696; CIT, Bombay v. 304

Associated Cement Co. Ltd., JT 282 (2) 287, relied on.

2. 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. [313C]

Herring v. Federal Commissioner of Taxation, [1946] 72 CLR 543, referred to.

3. In computing the income chargeable under the head "Profits and Gains of Business or Profession", section 37 of the Income-tax Act enables the deduction of any expenditure laid-out or expended wholly and exclusively for the purpose of the business or profession, as the case may be. The fact that an item of expenditure is wholly and exclusively laid-out for purposes of the business, by itself, is not sufficient to entitle its allowance in computing the income

chargeable to tax. In addition, the expenditure should not be in the nature of a capital-expenditure. In the infinite variety of situational diversities in which the concept of what is capital expenditure and what is revenue arises it is well nigh impossible to formulate any general rule, even in 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 out-lay in any particular case might reasonably be held to fail. These tests are generally efficacious and serve as useful servants; but as masters they tend to be over-exacting. The question in each case would necessarily be whether the tests relevant and significant in one set of circumstances are relevant and significant in the case on hand also. [310C-F; 312G]

City of London Contract Corporation v. Styles, [1887] 2 TC 239; Vallambrosa Rubber Co. v. Farmer, [1910] 5 TC 529; British Insulated Helsby Cables Ltd. v. Atherton, [1926] AC 205; Assam Bengal Cement Co. Ltd. v. Commissioner of Income-tax, [1955] 27 ITR 34; Sitalpur Sugar Works Ltd. v. Commissioner of Income-tax, [1963] 49 ITR (SC) 160; Lakshmiji Sugar Mills Co. Ltd. v. Commissioner of Income-tax, [1971] 82 ITR 376 (SC); Travancore-Cochin Chemicals Ltd. v. Commissioner of Income-tax, [1977] 106 ITR 900 (SC); Sun News Papers
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Ltd. & Associated News Papers Ltd. v. Federal Commissioner of Taxation, [1938] (61) CLR 337; Regent Oil Co. Ltd. v. Strick, [1966] AC 295 and B.P. Australia v. Commr. of Taxation of the Commonwealth of Australia, [1966] AC 224; referred to.

4. The improvisation in the process and technology in some areas of the enterprise was supplemental to the existing business and there was no material to hold that it amounted to a new or fresh venture. The further circumstance that the agreement pertained to a product already in the line of assessee's established business and not to a new product indicates that what was stipulated was an improvement in the operation of the existing business and its efficiency and profitability not removed from the area of the day-to-day business of the assessee's established enterprise. [318G-H]

5. There was no material for the Tribunal to record the finding that the assessee had obtained under the agreement a 'completely new plant' with a completely new process and a completely new technical know-how from Meiji. Indeed, the High Court recognised the fallacy in this assumption of the Tribunal that a completely new plant was obtained by the assessee, though, however, the High Court attributed the inaccuracy to what it considered to be some inadvertence or misapprehension on the part of the Tribunal in that regard. But the High Court was inclined to the view that a completely new process and technical know-how was obtained from Meiji under the agreement. Certain assumptions fundamental to, and underlying, the approach of the High Court are that the agreement envisaged a new process and a new technology so alien to the extent infra-structure, equipment, plant and machinery in the assessee's enterprise as to amount to an entirely new venture unconnected with and different from the line of assessee's extant business. It is in that sense that the expense was held not incurred for the purposes of the day-to-day business of the assessee but for acquiring a new capital asset. But mere improvement in or updating of the fermentation-process would not necessarily be inconsistent

with the relevance and continuing utility of the existing infra-structure, machinery and plant of the assessee. [315A-D; 317B]

The New Encyclopaedia Britannica, Micropaedia, Vol. II; Encyclopedia of Chemical Technology, Kirk Othmen, 3rd Edn. Vol. 2, referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 43(NT) of 1975.

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From the Judgment and Order dated 23.1.1974 of the Gujarat High Court in Income Tax Reference No. 78 of 1970.

T.A. Ramachandran, Mrs. J. Ramachandran and S.C. Patel for the Appellant.

C.M. Lodha, M.N. Tandon and Ms. A.S. Subhashini, for the Respondent.

The Judgment of the Court was delivered by

VENKATACHALIAH, J. This appeal by the assessee, The Alembic Chemicals Works Co. Ltd., arises out of and are directed against the judgment dated 23.1.1974, of the High Court of Gujarat in Income Tax Reference 78 of 1970, answering in favour of the Revenue a question of law referred to it under Section 256(1) of the Income Tax Act, 1961, (Act) by the Income Tax Appellate Tribunal.

2. On 8.6.1961, the assessee, a company engaged in the manufacture of antibiotics and pharmaceuticals was granted licence for the manufacture, on its plant, of the well-known antibiotic, penicillin. In the initial years of its venture the assessee was able to achieve only moderate yields from the pencillin-producing strains used by it which yielded only about 5000 units of penicillin per millilitre of the culturemedium.

In the year 1963, with a view to increasing the yield of penicillin, the assessee negotiated with M/s. Meiji Seika Kaishna Limited ("Meiji" for short), a reputed enterprise engaged in the manufacture of antibiotics in Japan, which agreed to supply to the assessee the requisite technical-know-how so as to achieve substantially higher levels of performance of production--of more than 10,000 units of penicillin per millilitre of 'cultured--broth'--with the aid of better technology and process of fermentation and with better yielding penicillin-strains developed by Meiji. The negotiations culminated in an agreement dated 9.10.1963, whereunder Meiji, in consideration of the 'once for all' payment of 50,000 U.S. dollars (then equivalent to Rs.2,39,625) agreed to supply to the assessee the "sub-cultures of the Meiji's most suitable penicillin producing strains", the technical information, know-now and written-description of Meiji's process for fermentation of penicillin alongwith a flow-sheet of the process on a pilot plant; the design and specifications of the main equipments in such pilot-plant; arrange for the visits to and training at assessee's expense,

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of technical representatives of the assessee to Meiji's plant at Japan and to advise the assessee in the large scale manufacture of penicillin for a period limited to 2 years from the effective date of the agreement. It was also stipulated that the technical know-how supplied by Meiji was to be kept confidential and secret by the assessee which was prohibited from parting with the technical know-how in favour of others or to seek any patent for the process.

3. In the proceedings for assessment to Income-tax for the assessment-year 1964-65 the assessee claimed that Rs.2,39,625 paid under the agreement to 'Meiji' was one laid out wholly and exclusively for the purpose of the business and claimed its deduction as a revenue expenditure. The Income-tax Officer, on the view that the expenditure was for the acquisition of an asset or advantage of an enduring benefit, held it to be a capital outlay and declined the deduction. This view was affirmed by the Appellate Asst. Commissioner in the assessee's first appeal.

The Income-tax Appellate Tribunal, Ahmedabad Bench, dismissed the further appeal of the assessee holding that the arrangements with Meiji envisaged the setting-up of a large commercial plant for the production of the antibiotic modelled on the lines of the pilot-plant and that, therefore, the out-lay could not be treated as an expenditure laid-out on and for purposes of the existing business, but must be regarded as one incurred for a new venture on a new process with a new technology on a new type of plant. The Tribunal held that the payment was 'once for all payment' and was made for the acquisition of a capital asset. The Tribunal inter-alia held:

> "The sub-cultures and the information design and flow sheet etc., were to be furnished once for all. Meiji also agreed to advise the assessee in respect of any difficulty the assessee may encounter in applying the subcultures and informations obtained by the assessee from Meiji to the large scale manufacture of penicillin. It is apparent from the agreement and the correspondence which has been made available to us that Meiji agreed to give the designs etc., not only for a pilot plant but for the manufacture of penicillin according to Meiji's process on commercial scale. The assessee has to put in a larger plant modelled on the pilotplant."
>
> " ..... It is in consideration for Meiji's agreeing to
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>
> supply the assessee with complete details of the technical know-how, the design, subcultures, flow sheet and written descriptions of the process once for all that the assessee paid to Meiji the stipulated sum of $ 50,000."
>
> " ..... It would thus appear that the payment was made for acquiring a capital asset in the shape of technical know-how and other allied information. It was not made in the course of carrying out of an existing business of the assessee but was for the purpose of setting up a new plant and a new process. It would, therefore, appear that the revenue authorities have rightly treated the payment as of capital nature."
>
> " ..... The process which the assessee took over from Meiji was not the same as it was working heretofore. In the present case the outlay was incurred for a complete replacement of the equipment of the business inasmuch us a new process with a new type of plant was to be put up in place of old process and old plant ....."
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> (Underlining Supplied)

4. At the instance of the assessee the

Tribunal stated a case and referred the following question of law for the opinion of the High Court:

"Whether the sum of Rs.2,39,625 was a revenue expenditure admissible to the assessee for the purpose of computation of its total income?"

The High Court by the judgment under appeal answered the question in the negative and against the assessee. This part of the judgment is assailed by the assessee in CA 43 of 1975.

5. The reasoning of the High Court in support of its conclusion was on the following lines:

" .... It is true that the expenditure was manifestly laid out for the purpose of obtaining benefits and advantages such as sub-cultures of penicillin producing strains, design of a pilot and exchange of technical personnel with a view to acquiring know-how. But the finding of the Tribunal, as we

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read it, is that all the benefits which assessee received under the agreement were as a part of the transaction which was undertaken with the ultimate view of a setting-up a new plant and a new process. In view of the findings recorded by the Tribunal, no conclusion other than that the expenditure was incurred once and for all with a view to bringing into existence an asset or advantage for the enduring benefit of the manufacturing trade of the assessee is possible. The expenditure was incurred for introducing a new process of manufacturing and with a view to installing a new plant, even if not immediately then at a later stage, and on that conclusion the only possible answer to the first question referred to us can be in the negative and against the assessee."

(Emphasis Supplied)

Before the High Court, the assessee also moved an application under Section 256(2) of the Act--ITA No. 24 of 1971--for a direction to the Tribunal to refer another question of law, also stated to arise out of the order of the Tribunal. The question of law respecting which the supplementary reference was sought was this:

"Whether there was any evidence or material before the Tribunal to hold that (1) a completely new plant with a completely new process and new technical know-how was obtained by the assessee from Messrs Meiji under the said agreement, dated 9.10.1963; and (2) to work out that process separate plant or machinery had to be designed, constructed, installed and operated?

The High Court dismissed this application observing that the Tribunal had no where recorded a finding to the effect that a completely new plant was obtained by the assessee from Meiji and that the finding of the Tribunal that under the agreement the assessee had obtained a new process and a new technical know-now from Meiji was not without evidence.

Against the dismissal of ITA 24 of 1971 by the High Court, the assessee has preferred Civil Appeal No. 44 of 1975.

6. On 24.2.1987, this Court while directing the Tribunal to draw up a supplementary statement of the case and refer for the opinion of this Court the further question of law which, according to the assessee, arose out of the Tribunal's order and which was the subject-matter of the assessee's appeal in C.A. 44 of 1975, however, disposed of that
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appeal formally, leaving the question of law arising out of the supplemental reference to be considered in the present appeal i.e. CA No. 43 of 1975. The Tribunal has since submitted the supplementary statement of the case and has referred that question of law also. This is how both the questions of law, are now before us. While in regard to the first question the correctness of the opinion rendered by the High Court requires to be examined, the second question has to be answered for the first-time as the reference is called by this court directly.

7. We have heard Shri T.A. Ramachandran, learned Senior Counsel for the assessee and Shri Lodha, learned senior counsel for the revenue.

In computing the income chargeable under the head "Profits and Gains of Business or Profession", section 37 of the 'Act' enables the deduction of any expenditure laid-out or expended wholly and exclusively for the purpose of the business or profession, as the case may be. The fact that an item of expenditure is wholly and exclusively laid-out for purposes of the business, by itself, is not sufficient to entitle its allowance in computing the income chargeable to tax. In addition, the expenditure should not be in the nature of a capital-expenditure. In the infinite variety of situational diversities in which the concept of what is capital expenditure and what is revenue arises it is well nigh impossible to formulate any general-rule, even in 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 out-lay in any particular case might reasonably be held to fall. These tests are generally efficacious and serve as useful servants; but as masters they tend to be over-exacting.

One of the early pronouncements which serves to indicate a broad area of distinction is City of London Contract Corporation v. Styles, [1887] 2 T.C. 239 where Bowen, L.J. indicated that the out-lay on the "acquisition of the concern" would be capital while an outlay in "carrying-on the concern" is revenue. In Vallambrosa Rubber Co. v. Farmer, [1910] 5 TC 529 Lord Dunedin suggested as 'not a bad criterion' the test that if the expenditure is 'once for all' it is capital and if it is 'going to recur every year it is revenue. In the oft quoted case on the subject, viz, British Insulated Helsby Cables Ltd. v. Atherton, [1926] AC 205 Viscount Cave L.C. said:

"But when an expenditure is made, not only once and for
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> all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

.8. In Assam Bengal Cement Co. Ltd. v.

Commissioner of Income-tax, [1955]27 ITR 34, this Court observed:

"If the expenditure is made for acquiring or bringing into existence an asset or advantage for the enduring benefit of the business it is properly attributable to capital and is of the nature of capital expenditure. If on the other hand it is made not for the purpose of bringing into existence any such asset or advantage but for running the business or working it with a view to produce the profits, it is a revenue expenditure."

"The aim and object of the expenditure would determine the character of the expenditure whether it is a capital expenditure or a revenue expenditure."

In Sitalpur Sugar Works Ltd. v. Commissioner of Income-tax, [1963] 49 ITR (SC) 160; Lakshmiji Sugar Mills Co. Ltd. v. Commissioner of Income-tax, [1971] 82 ITR 376 (SC) and in Travancore-Cochin Chemicals Ltd. v. Commissioner of Income-tax, [1977] 106 ITR 900 (SC) the enunciation made in Assam Bengal Cement Company's case [1955] 27 ITR 34, which in turn, referred with approval to Lord Cave's dictum was affirmed.

In Sun News Papers Ltd. & Associated News Papers Ltd. v. Federal Commissioner of Taxation, [1938] 61 CLR 337 Dixon J while indicating that the distinction between revenue and capital corresponds with the distinction between the "business entity, structure or organisation set up or established for the earning of profit" on the one hand and "the process by which such an organization operates to obtain regular returns" on the other, however, went on to say that:

"The business structure or entity or organization may assume any of an almost infinite variety of shapes and it may be difficult to comprehend under one description all the forms in which it may be manifested .... "

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The learned judge further observed:

" ..... There are, I think, three matters to be considered, (a) the character of the advantage sought, and in this its lasting qualities may play a part, (b) the manner in which it is to be used, relied upon or enjoyed, and in this and under the former head recurrence may play its part and (c) the means adopted to obtain it; that is, by providing a periodical reward or outlay to cover its use or enjoyment for periods commensurate with the payment or by making a final provision or payment so as to secure future use or enjoyment ..... "

9. In Regent Oil Co. Ltd. v. Strick, [1966] AC 295 Lord Reid emphasised the futility of a strict application of and exclusive dependence on any single principle in the search for the true-position and pointed out the difficulty arising from taking too literally the general statements made in earlier cases and seeking to apply them to a different case which their authors certainly did not have in mind. The Learned Lord also identified as another source of difficulty the tendency in some cases to treat some one criterion as paramount and to press it to its logical conclusion without proper regard to the other factors in the case. Lord Reid further said:

"So it is not surprising that no one test or principle or rule of thumb is paramount. The

question is ultimately a question of law for the court, but is a question which must be answered in the fight of all the circumstances which it is reasonable to take into account, and the weight which must be given to a particular circumstance in a particular case must depend rather on common sense than on strict application of any single legal principle."

The question in each case would necessarily be whether the tests relevant and significant in one set of circumstances are relevant and significant in the case on hand also. Judicial metaphors, it is truly said, are narrowly to be watched, for, starting as devices to liberate thought they end often by enslaving it. The non-determinative quality, by itself, of any particular test is highlighted in B.P. Australia v. Commr. of Taxation of the Commonwealth of Australia, [1966] AC 224. Lord Pearce said:

"The solution to the problem is not to be found by

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any rigid test or description. It has to be derived from many aspects of the whole set of circumstances some of which may point in one direction, some in the other. One consideration may point so clearly that it dominates other and vaguer indications in the contrary direction. It is a common sense appreciation of all the guiding features which must provide the ultimate answer .... "

(Emphasis Supplied)

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 judical fetish. What is capital expenditure and what is revenue are not eternal varities 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. The words of Rich J. in Herring v. Federal Commissioner of Taxation, 1946.72 CLR 543, dealing with an analogous provision in sec. 51 of Income-tax Assessment Act of Australia may be recalled.

" ..... Lord Cave L.C., in using the phrase 'enduring benefit' in British Insulated and Helsby Cables Ltd. v. Atherton, 1926 A.C. 205,213 (HL), was not thinking of advantages that are permanent. There is a difference between the lasting and the everlasting. The time over which the thing 'endures' is a matter of degree and one element only to be considered. Horses in the old days and motor trucks in these days are plant and their acquisition for the purpose of transport in business usually involves a capital expenditure. But the horses were not immortal any more than the trucks have proved to be ..... "

10. Shri Ramachandran submitted that the approach to the question by the Tribunal was influenced by an erroneous assumption that Meiji's agreement envisaged the imperative of a totally new plant, for the exploitation of Meiji's improved fermentation technology. Learned counsel invited our attention to the

following passage in the order of the Tribunal where this postulate is found:

"On the other hand, a completely new plant with a completely new process and a completely new technical know-how was obtained by the assessee from Meiji and it

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was in consideration of obtaining this technical know-how that the assessee made the payment of $ 50,000."

Shri Ramachandran submitted that the Tribunal had failed to take into account that even before the agreement, the assessee had set up a plant for the production of penicillin at an out-lay of more Rs.66 lakhs and that the purpose of the agreement with Meiji was only to increase the yield; of penicillin and that no new venture envisaging the setting up of a new plant was ever intended by the assessee. The production of penicillin which was the established line of business of the assessee, says learned counsel, was to be improved upon with the use of an improved process of fermentation with new penicillin producing strains isolated and developed by Meiji so as to increase the unit yield of penicillin per milli-litre of the culture-medium. The supply of the technical know-how and the flow sheet of the process and the written description of the specifications of the pilot plant from Meiji were incidental to and for the effective exploitation of the high penicillin yielding strains of the culture to be supplied by Meiji. Learned counsel submitted that the whole range of the operations envisaged by the agreement, pertained to the area of the "profit earning process" and not the "profit earning machinery or apparatus". The cost relationship between what was involved in the improvisation of the process and the investment on the plant did, says counsel, indicate that the extant "profit earning machinery" was not sought to be supplanted. Learned counsel also urged that there was no material for the Tribunal to hold that the use of new process and technology from Meiji amounted to a new venture not already in the line of the assessee's existing business or that it required the erection of a new plant discarding and supplanting the huge investment already existing. Learned counsel submitted that it was no body's case that with the introduction of the Meiji process of fermentation with improved penicillin strains the existing plant and machinery of over Rs.66 lakhs had become obsolete and irrelevant or that the assessee had had to set up an altogether new plant to work out the improvised Meiji-process of fermentation.

Learned counsel for the Revenue, however, sought to maintain that all the criteria relevant to the question indicated that the assessee had acquired a new technical know-how for a new process which required the setting-up of a new plant. There was, according to Shri Lodha, a new venture based on a new technology and know-how of unlimited duration which required a new plant for its commercial exploitation. There were, according to Shri Lodha, both the acquisition of

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an enduring asset, and the commencement of a new venture.

11. On a consideration of the matter we are persuaded to hold that there was no material for the Tribunal to record the finding that the assessee had obtained under the agreement a 'completely new plant' with a completely new process and a completely new technical know-how from Meiji. Indeed, the High Court recognised the fallacy in this assumption of the Tribunal that a completely new plant was obtained by the

assessee, though, however, the High Court attributed the inaccuracy to what it considered to be some inadvertence or misapprehension on the part of the Tribunal in that regard. But the High Court was inclined to the view that a completely new process and technical know-how was obtained from Meiji under the agreement. Certain assumptions fundamental to, and underlying, the approach of the High Court are that the agreement dated 9.10.1963 envisaged a new process and a new-technology so alien to the extant infrastructure, equipment, plant and machinery in the assessee's enterprise as to amount to an entirely a new venture unconnected with and different from the line of assessee's extant business. It is in that sense that the expense was held not incurred for the purposes of the day to day business of the assessee but for acquiring a new capital asset.

12. The business of the assessee from the commencement of its plant in 1961, it is undisputed, was the manufacture of penicillin. Even after the agreement the product manufactured continued to be penicillin. The agreement with Meiji stipulated the supply of the "most suitable sub-cultures" evolved by Meiji for purposes of augmentation of the unit-yield of penicillin milli-litres of the culture-medium. Scientific literature on the bio-synthesis of penicillin indicates that penicillin is derived from a fermentation process. Some penicillins are obtained from direct fermentation and some others by a combination of fermentation and subsequent chemical manipulation of the fermentation product. The manufacturing process, it is stated, consists of four processes: Fermentation, isolation, chemical modification and finishing. Referring to the common basis of commercial production of penicillin in the New Encyclopaedia Britannica, (Micropaedia, Vol. VII) it is mentioned:

> "penicillin, antibiotic, the discovery of which in 1928 by Sir Alexander Fleming marked the beginning of the antibioticera. Fleming observed that colonies of Staphylococcus aureus (the pus-producing bacterium) failed to grow in those areas of a culture that had been accidentally contaminated
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> by the green mold Penicillium notatum. After isolating the mold, he found that it produced a substance capable of killing many of the common bacteria that infect human beings. This antibacterial substance, to which Fleming gave the name penicillin, was liberated into the fluid in which the mold was grown. This process is the basis of all commercial production of penicillin ..... "
>
> (p. 850)
>
> (Emphasis Supplied)
>
> In Encyclopedia of Chemical technology (Kirk Othmer) III Edn. Vol. 2 it is found mentioned:
>
> " .... The specific characteristics of the industrial microbial strains, media, and fermentation conditions cannot be described in detail since these facts are considered trade secrets. The origin of strains, and general principles of culture maintenance, fermentation equipment, innoculum preparation, media, and fermentation conditions for penicillin and cephalosporin production, are public knowledge and are reviewed here.

.....

> Fleming's original strain of P. notatum provided only low yields of penicillin ..... Superior penicillin producing strain of P. chrysogenum have since been obtained by random screening of variant strains following mutation induction. All of the present day high-yielding industrial strains are descendants of the NRRL 1951 strain....."
>
> "Once a high-yielding strain has been isolated, it is essential that the organism be maintained so that it remains viable and capable of producing the antibiotic at its original rate (54) ..... Under suitable conditions highyielding strains can be preserved for many years without loss of viability or antibiotic-producing ability ..... "
>
> (p. 899-90)

We are inclined to agree with Shri Ramachandran that there was no material for the Tribunal to hold that the area of improvisation was not a part of the existing business or that the entire gamut of the
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existing manufacturing operations for the commercial production of penicillin in the assessee's existing plant had become obsolete or inappropriate in relation to the exploitation of the new sub-cultures of the high yielding strains of penicillin supplied by Meiji and that the mere introduction of the new bio-synthetic source required the erection and commissioning of a totally new and different type of plant and machinery. Shri Ramachandran is again fight in the submission that the mere improvement in or updating of the fermentation-process would not necessarily be inconsistent with the relevance and continuing utility of the existing infra-structure, machinery and plant of the assessee.

13. It would, in our opinion, be unrealistic to ignore the rapid advances in Researches in antibiotic medical microbiology and to attribute a degree of endurability and permanance to the technical know-how at any particular stage in this fast changing area of medical science. The state of the Art in some of these areas of high priority. research is constantly updated so that the know-how cannot be said to be the element of the requisite degree of durability and nonephemerality to share the requirements. and qualifications of an enduring capitalasset. The rapid strides in science and technology in the field should make us a little slow and circumspect in too readily pigeon-holing an outlay, such as this as capital. The circumstance that the agreement in so far as it placed limitations on the right of the assessee in dealing with the know-how and the conditions as to non-partibility, confidentiality and secrecy of the know-how incline towards the inference that the right pertained more to the use of the know-how than to its exclusive acquisition.

In the present case, the principal reason that influenced the option of the High Court was that the initiation and exploitation of the new-process brought in their wake a new venture requiring an altogether new plant. We are afraid, this view may not be justified. Clauses 2, 4 and 6 of the agreement provide:

> "(2) For and in consideration of the subcultures, design, flow sheet and written description to be furnished by Meiji to ALEMBIC PURSUANT to paragraph (1) hereof, Alembic

shall pay to MEIJI in advance and in lump sum, such as amount as MEIJI is able to collect Fifty thousand U.S. Dollars ($ 50,000) net in Tokyo after deducting any taxes and charges to be imposed in India upon MEIJI with respect to the said payment to MEIJI."

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"4. MEIJI will give advice, to the extent considered necessary be MEIJI, on any difficulty ALEMBIC may encounter in applying the subcultures and informations obtained by ALEMBIC from MEIJI to the large scale manufacture. The above provision shall be in force after MEIJI's receipt of the amount set forth in paragraph (2) hereof until the end of two (2) years from the effective date of this agreement ..."

"(6) Any of the subcultures and informations obtained by ALEMBIC from MEIJI shall be regarded as strictly confidential by ALEMBIC and its personnel and shall be used by ALEMBIC only in its Penicillin G plant in India, and shall not be disclosed to any other person, firm or agency, governmental or private. Alembic shall take all reasonable steps to ensure that such subcultures and information will not be communicated. ALEMBIC shall take all possible precautions against the escape from its premises of the strain obtained from MEIJI of propagated therefrom.

ALEMBIC shall not apply for any patent to any country in relation to any of the subcultures and information obtained by ALEMBIC from MEIJI."

As notified earlier the Tribunal in the course of its order, held:

" ..... Meiji agreed to give the designs etc., not only for a pilot plant but for the manufacture of penicillin according to Meiji's process on commercial scale. The assessee has to put in a larger plant modelled on the pilotplant."

(Emphasis Supplied)

Having regard to the terms of Clause 4 of the agreement, this conclusion is non-sequitur.

The improvisation in the process and technology in some areas of the enterprise was supplemental to the existing business and there was no material to hold that it amounted to a new or fresh venture. The further circumstance that the agreement pertained to a product already in the line of assessee's established business and not to a new product indicates that what was stipulated was an improvement in the operations of the existing business and its efficiency and profitability not removed from the area of the day to day business of the assessee's established enterprise.

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14. It appears to us that the answer to the questions referred should be on the basis that the financial outlay under the agreement was for the better conduct and improvement of the existing business and should, therefore, be held to be a revenue expenditure. Reference may also be made to the observations of this Court in C.I.T.v. CIBA of India Ltd., [1968] 2 SCR 696 at 705.

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. In Commissioner of Income-tax, Bombay v. Associated Cement Co. Ltd., (JT 282 2 287 at 290) this Court said:

> " ..... As observed by the Supreme Court in the decision in Empire Jute Co. Ltd. v. Commissioner of Income-Tax, [1980] 124 I.T.R.S.C.p. 1 that there may be cases where expenditure, even if incurred for obtaining an advantage of enduring benefit, may, none the less, be on revenue account and the test of enduring benefit may break down. It is not every advantage of enduring nature acquired by an assessee that brings the case within the principles laid down in this test. 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 expenditure would be disallowable on an application of this test ..... "

15. In the result, for the foregoing reasons the appeal succeeds and is allowed and the question of law referred to the High Court for its opinion in Income Tax Reference No. 78 of 1970 is answered in the affirmative and against the revenue. The judgment under appeal is set-aside.,

Likewise, the supplementary question of law raised in ITA 24 of 1971 before the High Court and now constituting the subject-matter of the supplementary reference made by the Tribunal to this Court is answered in the negative and against Revenue.

The appeal is accordingly allowed, but with no order as to costs.

G.N. Appeal allowed.

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