According to this proviso, the intention of the Legislature is quite clear that where the tenancy is for a fixed period, the landlord would not be able to apply for the eviction of the tenant under this sub-section before the expiry of the tenancy period, but he can do so only under one condition, i.e. if his case is covered by sub-paragraph (i-a), which reads thus :—

> "In the case of a residential building, if the landlord is a member of the armed forces of the Union of India and requires it for the occupation of his family and if he produces a certificate of the prescribed authority, referred to in Section 7 of the Indian Soldiers (Litigation) Act, 1925, that he is serving under special conditions within the meaning of section 3 of that Act."

(14) It means that the Legislature intends that in a tenancy for a fixed period, the tenant can be evicted if his case falls under the provisions of section 13(2) of the Act. If, however, his case comes within the provisions of sub-section (3) of section 13, then the tenant cannot be evicted before the expiry of the tenancy period, except under one condition, that is, if the landlord can bring his case within section 13(3)(a)(i-a). In the instant case, the landlord has been able to prove the ground of subletting, which comes under section 13(2) and, therefore, the tenant can be evicted even before the termination of the tenancy. This contention of the counsel also fails.

(15) The result is that this petition succeeds the order of the Appellate Authority is reversed and that of the Rent Controller restored. In the circumstances of this case, I leave the parties to bear their own costs throughout. The tenant is, however, given two months' time to vacate the premises in question.

B. S. G.

INCOME TAX SIDE

Before D. K. Mahajan and Bal Raj Tuli, JJ.

SILVER SCREEN ENTERPRISES,—*Appellant*

versus

THE COMMISSIONER OF INCOME TAX, PATIALA,—*Respondents.*

Income Tax Reference No. 10 of 1968.

December 9, 1970.

Income Tax Act (XLIII of 1961)—Sections 10(2)(ii), 10(2)(v) and 10(2)(xv)—Capital and revenue expenditure—Distinction between—Test

of—Stated—Replacement of wooden chairs by steel chairs in a Cinema hall by its lessee—Amount spent for—Whether capital expense.

Held, that it is difficult to formulate a test which will always suffice to discriminate between expenditure which is not capital and expenditure which is capital. As a working rule, what has to be seen is whether the expense incurred brings into existence as asset not necessarily a tangible asset, for the enduring benefit of trade. But 'enduring' cannot be termed as 'everlasting'. It is also risky to decide one case on the analogy of another. The correct rule is to examine closely the facts of a given case and then keeping in view the thin dividing line between capital and revenue, a solution has to be found whether the expense claimed is capital or revenue. Whatever a businessman spends for the purpose of forming a basis of his profit-earning machinery pertakes of the nature of capital expenditure. In the case of a lessee, it may not be everlasting. But that is not the test. Capital expense with regard to a short-term venture, such as a lease for a period, has to be viewed in the context of that lease, namely its purpose coupled with its duration.

Held, that replacing the old wooden chairs by steel chairs in a Cinema hall attracts larger and better custom. This is an outlay for the purpose of earning profit or, in other words, for the purpose of better business. It is not an expense which is of a recurring nature and, therefore, it can be safely said that the lessee of the Cinema hall brings into being an asset of enduring nature. Undoubtedly it is an improvement. Hence the replacement of wooden chairs by steel chairs in the Cinema hall by the lessee being an improvement of enduring nature, the amount spent on it is capital expense.

Reference under section 256(1) of the Indian Income Tax Act, 1961, made to this Court by the Income Tax Appellate Tribunal, Delhi Bench A.—vide his order dated 27th March, 1968, in R.A. No. 606 of 1967-68, for opinion on the following question of law arising out of I.T.A. No. 8381 of 1966-67 regarding the assessment year 1959-60:

> *"Whether on the facts and in the circumstances of the case, the whole or any portion of the total expenditure of Rs. 49,097 was an expenditure in the nature of repairs and replacement?"*

BHAGIRATH DASS, B. K. JHINGAN AND S. K. HIRAJEE, ADVOCATES, for the appellant.

D. N. AWASTHY AND B. S. GUPTA, ADVOCATES, for the respondent.

JUDGMENT

Has the amount of Rs. 49,097 been rightly held by the Tribunal as an expenditure of a capital nature? That is the question involved. The assessee claims this amount as an expenditure exclusively incurred by him for the purpose of his business. The Tribunal has held it to be of capital nature.

The assessee is a registered firm. Its business is that of a distributor of films. It too runs a cinema house. In order to exhibit films, it had taken on lease the cinema house known as 'Ashok Cinema'. This building was taken along with its equipment, furniture, fittings, fixtures etc. In the assessment year 1959-60, for which the accounting year ended on 31st August, 1958, an amount of Rs. 49,097 was claimed by the assessee as having been solely expended for purposes of its business. The case of the assessee before the Income-tax Officer was "that the building was very old and in view of the change in the outlook as well as the standard of living of the public at large and also to attract the foreigners etc., it became very necessary for the assessee firm to give the cinema building a modern shape and to improve it with all types of modern amenities." With this end in view the lessor of the building agreed to reimburse the assessee to the extent of Rs. 16,000. A sum of Rs. 6,000 had already been received by the assessee in the year relevant to the immediately preceding assessment year. During the relevant previous year, the assessee had to receive a further sum of Rs. 10,000. He, however, was only paid Rs. 5,000. Regarding the balance, the dispute was taken to law Courts. The break-up of the amount claimed as capital amount is as follows :—

		Rupees.
(i) Cost of frames for chairs	...	14,971.00
(ii) Cost of cloth etc. for chairs including Rs. 600 for cloth, rexin and sewing charges of screen	...	2,478.00
(iii) Cost of sanitary fittings	...	6,415.00
(iv) Cost of electricity fitting	...	885.00
(v) Cost of oils and paints	...	3,955.00
(vi) Cost of cement, Bajri and other expenses	...	20,393.00
Total :	...	49,097.00

The Income-tax Officer rejected the assessee's contention that the above amount was an expenditure of a revenue nature. He treated the same as capital expenditure.

The assessee preferred an appeal to the Appellate Assistant Commissioner. The said Commissioner held that out of this amount an expense to the extent of Rs. 4,555 had been incurred for current repairs and was, therefore, admissible as deduction. The break-up of this amount is as follows :—

	Rupees.
"(i) Cost of oils and paints etc., for painting the cinema-building specially hall ...	3,955.00
(ii) Cost of cloth and sewing charges of screen ...	600.00
Total : ...	4,555.00

Thus, only a sum of Rs. 44,542 was held to be expenditure of capital nature.

The assessee was dissatisfied with the order of the Appellate Assistant Commissioner. A further appeal was preferred to the Income-tax Appellate Tribunal. The Tribunal, after going through the various items of expense found some others as permissible deducton. The Tribunal increased the deduction from Rs. 4,555 to Rs. 6,555. Thus, only the balance of Rs. 42,542 was held as expenditure of a capital nature.

The assessee was not satisfied with the order of the Tribunal. An application was made under section 256(1) of the Income-tax Act, 1961, to refer the following question of law for our opinion :—

> "Whether on the facts and in the circumstances of the case, the whole or any portion of the total expenditure of Rs. 49,097 was an expenditure in the nature of repairs and replacement ?"

There is no dearth of decided cases wherein the controversy whether certain expenditure is capital or revenue fell for determination. Some of these decisions have tried to lay down certain

principles which are merely aids to the determination of such controversy. Yet, it must be recognised that those tests are not the conclusive tests. It is difficult to formulate a test which will always suffice to discriminate between expenditure which is not capital and expenditure which is capital. As a working rule, what has to be seen is whether the expense incurred brings into existence as asset, not necessarily a tangible asset, for the enduring benefit of trade. But 'enduring' cannot be termed as 'everlasting'. It is also risky to decide one case on the analogy of another. The correct rule is to examine closely the facts of a given case and then keeping in view the thin dividing line between capital and revenue, a solution has to be found whether the expense claimed is capital or revenue. The decided cases are only useful for they help one to clear one's mind. It may be that sometimes they also tend to confuse the issue. However, we may refer to a few decisions which, in our opinion, are relevant to solve the present tangle.

Lord Macmillan in *Rhodesia Railways Ltd.* v. *Income Tax Collector, Bechuanaland Protectorate,* (1) approved the following passage at page 488 in *Highland Railway* v. *Special Commissioner of Income Tax,* (2):—

> "It must be kept in view that this is not a mere relaying of line after the old fashion. It is not taking away rails that are worn out or partially worn out and renewing them in whole or in part along the whole line. That would not alter the character of the line; it would not affect the nature of the heritable property possessed by the company. But what has been done is to substitute one kind of rail for another—steel rails for iron rails. Now, that is a material alteration, and a very great improvement in the *corpus* of the heritable estate belonging to the company, and so stated, surely is a charge against capital. All that is done, it will be observed from the details given with reference to this matter, is to charge the price of the rails and chairs—that is to say, the weight in addition to what was the original weight of the rails and chair. That is the whole charge, and that is a charge made entirely for the improvement of the property—the

(1) (1933) 1 I.T.R. 227.
(2) 2 Tax Cases 485.

permanent improvement of the property. Now, how that can be anything but a charge against capital, I am unable to see."

In the case with which Lord Macmillan was dealing, a part of the railway track was replaced by similar types of rails because the old rails had been worn out and the question arose whether the expense so incurred was of a capital nature or of a revenue nature. In that context the noble Lord observed as follows:—

"The contrast between the cost of relaying the lines so as to restore it to its original condition and the cost of relaying the line so as to improve it is well brought out in the passage just quoted, and while the former is recognised as a legitimate charge against income, the extra cost incurred in the latter case in the improvement of the line is equally recognised as a proper charge against capital. In the present instance the renewals effected constituted no improvement; they merely made good the line so as to restore it to its original state."

In *Assam Bengal Cement Co. Ltd* v. *Commissioner of Income Tax*, (3), Bhagwati J. approved the principles laid down in a Full Bench decision of Lahore High Court *in re Benarsidas Jagannath* (4), and summarised the law as under :—

"In cases where the expenditure is made for the initial outlay or for extension of a business or a substantial replacement of the equipment, there is no doubt that it is capital expenditure. A capital asset of the business is either acquired or extended or substantially replaced and that outlay, whatever be its source, whether it is drawn from the capital or the income of the concern, is certainly in the nature of capital expenditure. The question however arises for consideration where expenditure is incurred while the business is going on and is not incurred either for extension of the business or for the substantial replacement of its equipment. Such expenditure can be looked at either from the point of view of what is acquired or from the point of view of what is the source from which the expenditure is incurred. 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

(3) (1955) 27 I.T.R. 34.
(4) (1947) 15 I.T.R. 185.

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. If any such asset or advantage for the enduring benefit of the business is thus acquired or brought into existence, it would be immaterial whether the source of the payment was the capital or the income of the concern or whether the payment was made once and for all or was made periodically. The aim and object of the expenditure would determine the character of the ex-expenditure. The source or the manner of the payment would then be of no consequence. It is only in those cases where this test is of no avail that one may go to the test of fixed or circulating capital and consider whether the expenditure incurred was part of the fixed capital of the business or part of its circulating capital."

Reference may also be made to the observations in *Henriksen (Inspector of Taxes)* v. *Grafton Hotel Ltd.*, (5) wherein Du Parcq Lord Justice referred to the following test laid down by Lord President Clyde :—

"Are the sums in question part of the trader's working expenses, are they expenditure laid out as part of the process of profit-earning ? Or, on the other hand, are they capital outlays, are they expenditure necessary for the acquisition of property or rights of a permanent character the possession of which is a condition of carrying on the trade at all ?

and observed :—

"It is true that the period for which the right was acquired in this case was three years and no more, and a doubt may be raised whether such a right is of 'enduring benefit' or 'of permanent character'. These phrases, in my opinion, were introduced only for the purpose of making it clear that the 'asset' or 'right' acquired must have enough durability to justify its being treated as a capital

(5) (1943) 11 I.T.R. (Supp.) 10.

asset. This is borne out, so far as Lord Clyde's judgments are concerned, by the fact that in *Adam's case*, the duration of the right acquired was eight years, and that his Lordship there spoke of its 'relatively permanent character'. 'Permanent' is indeed relative term, and is not synonymous with 'everlasting'. In my opinion the right to trade for three years as a licensed vitualler must be regarded as attaining to the dignity of a capital asset, whereas the payment made for an excise license is no doubt properly regarded as part of the working expenses for the year."

In the present case, it must be examined as to what is the assessee's case with regard to the expenditure in question. Before the Appellate Assistant Commissioner, the assessee's case was that "the assessee had replaced its old wooden chairs with new iron cushioned chairs and the sum of Rs. 16,849 was spent towards the cost of these chairs. The assessee had during the previous year, constructed one verandah, one office, side room and three bath rooms in terms of the arrangement arrived at between the lessor and the lessee". Before the Appellate Tribunal, it seem that there was no dispute as to the amount spent on the verandah, office, side room and bath rooms, but the dispute seems to have centred round the new chairs. We say so because there is no discussion in the order of the Tribunal about the aforesaid items excepting the chairs. With regard to the chairs, the Appellate Tribunal observed :—

"In the instant case, the old and worn out chairs were taken out from the Cinema Hall and brand new chairs were put in,"

and thereafter held as follows :—

"Repairs and replacements are only those which restore the asset to its original condition or near about that. If the entire asset is replaced by new one, it cannot be a case of replacement or repair."

The only relief that the Tribunal gave to the assessee was in the enhancement of permissible deduction, that is from Rs. 4,555 to Rs. 6,555.

We may further observe that in basing its decision on *in re. L. H. Sugar Factories and Oil Mills Limited,* (6), the Tribunal went off the mark. We have already observed that cases like the present cannot be decided on the analogy of other decided cases. However, in spite of this, the Tribunal came to a correct decision. It cannot be denied that the amount spent for the construction of the verandah, office room, side room and bath rooms brought into existence an asset of an enduring nature. It is no-one's case that only the existing verandah, office, side room or bath rooms were repaired. What appears is that these constructions were brought into being for the purpose of modernising the cinema hall. Therefore, the amount spent for the construction of the same can in no sense be treated as revenue expenditure. The asset that was brought into being was an asset of an enduring nature in the true sense of the word.

However, the main controversy centred round the replacement of chairs. In this connection one has to keep in mind that a businessman for the purposes of his business incurs two types of outlays, i.e. capital and revenue. Whatever he spends for the purpose of forming a basis of his profit-earning machinery would, in our opinion, pertake of the nature of capital expenditure. In the case of a lessee, it may not be everlasting. But that is not the test. Capital expense with regard to a short-term venture, such as a lease for a period; has to be viewed in the context of that lease, namely its purpose coupled with its duration. The objection of the assessee in replacing the old wooden chairs by steel chairs was to attract larger and better custom. This was in fact an outlay for the purpose of earning profit or, in other words, for the purpose of better business. It was not an expense which was of a recurring nature, and therefore, it can be safely said that the lessee brought into being an asset of an enduring nature. Undoubtedly, it was an improvement. The wooden chairs were replaced. No evidence has been led that the wooden chairs had become useless and could not be used for seating the cinema-goers. On the other hand, the stand taken is that the whole object was to modernise the cinema house to bring it in line with the modern show-business. Therefore, whatever was done, so far as certain permanent fixtures were concerned, was done with that

(6) 21 I.T.R. 325.

object in view. The replacement was an improvement of an enduring nature and not mere replacement.

Mr. Bhagirath Dass strongly relied upon *Regal Theatre* v. *Commissioner of Income-tax, New Delhi,* (7). This case is distinguishable from the facts of the present case as would appear from the observations that I made in that judgment at pages 455-56 :—

> "We are also constrained to observe that the observation of the Tribunal that the wooden panels were put by the assessee to avoid reconstruction of the walls is also unjustified. The assessee could not reconstruct the walls in view of the terms of the lease. The reconstruction of a part of the building was within the powers of the landlord, as was also the case in the matter of repairs. The assessee had to carry on his business—the business being show business—and in order to attract customers, the cinema house had to be kept in certain presentable condition, particularly in keeping with its locality and the clientele. It was essential to keep the building in a tip-top condition. To achieve this object, which is certainly a business object *vis-a-vis* the assessee, he had to incur the expense in connection with the wooden panels and this expense, in the very nature of things, cannot be said to be an expense of a capital nature, particularly when the assessee's lease was for a short duration and the life of the panels was not such as could be treated as an asset of an enduring nature, for at the end of the lease, the assessee could remove the same, and, on the admitted facts; the wooden panels on removal will not be of much value. It was not disputed before us that if the assessee had whitewashed the building, it would be a 'revenue expenditure' and so also, if he has replastered the walls and applied plastic emulsion to the walls. How does the nature of the expense change when to achieve the same object and also for the same purpose, the wooden panels are fixed. We can see no distinction in putting the wooden panels in a different category than painting the walls with a cheap material or an expensive one."

(7) 59 I.T.R. 449.

This was the nearest case on which the learned counsel placed his reliance for his contention that the expense in question is revenue and not capital expenditure. Mr. Bhagirath Dass then relied upon *Commissioner of Income -tax, Delhi*, v. *S. B. Ranjit Singh*, (8), *Commissioner of Income-tax, Punjab etc.* v. *Sheikhupura Transport Co. Ltd.* (9) *Hanuman Motor Service* v. *Commissioner of Income-tax, Mysore*, (10), *Commissioner of Income-tax* v. *Coimbatore Motor Transport Co-operative Society for Ex-servicemen* (11) and *Greaves Cotton & Crompton Parkinson Ltd.*, v. *Commissioner of Income-tax, Bombay*, (12). It is not necessary to individually deal with these cases for they have all proceeded on their own peculiar facts.

After giving our careful consideration to this vexed question, we have come to the conclusion that the expenditure incurred by the assessee to the tune of Rs. 42,542 is an expenditure of a capital nature and it brought into being an advantage of an enduring nature and thus, it has been rightly treated as such by the Tribunal.

Before parting with this judgment, we may mention that at one stage there was a controversy before us whether the assessee was entitled to a deduction only under section 10(2) (ii), 10(2)(v) and not under section 10(2)(xv). However, the learned counsel for the Department made it clear that the case before the Department all through was on these three heads and not only on the first two heads. We have not been unmindful of the provisions of section 10(2)(xv). We have kept the same in view and have come to the conclusion that the expenditure in question is of a capital nature. We may also mention that for the reasons best known to the assessee, the lease-deed was not produced right upto the stage of the Tribunal. It has also not been made a part of the statement of this case. At the stage of arguments before us, an attempt was made to persuade us to bring it on the record but in view of the clear pronouncement of the Supreme Court in *Keshav Mills Co. Ltd.* v. *Commissioner of Income-tax, Bombay North, Ahmedabad* (13), *and Commissioner of Income-tax, West Bengal* v. *Indian Molasses Co. P. Ltd.* (14), we are unable to do so. No additional evidence can be let in

(8) 28 I.T.R. 14.
(9) 41 I.T.R. 336.
(10) 66 I.T.R. 88.
(11) 70 I.T.R. 165.
(12) 70 I.T.R. 181.
(13) (1965) 56 I.T.R. 365.
(14) (1970) 78 I.T.R. 474.

at the stage of reference. Therefore, we have declined the contention of the assessee's counsel that we should ask the Tribunal to send a supplementary statement of the case after taking on record the lease-deed.

For the reasons recorded above, we answer the question, referred to us, in the negative, that is in favour of the Department and against the assessee, except to the extent of the amount found by the Tribunal being on account of repairs. There will be no order as to costs.

K.S.K.

INCOME TAX REFERENCE

Before Prem Chand Pandit and S. S. Sandhawalia, JJ.

THE COMMISSIONER OF INCOME-TAX.—*Appellant.*

versus

THE SARASWATI INDUSTRIAL SYNDICATE, YAMUNANAGAR,—*Respondents.*

Income Tax Reference No. 54 of 1965.

December 16, 1970.

Indian Income-tax (XI of 1922)—Section 10(2)(xv)—Professional-tax paid by an assessee—Whether an allowable deduction as business expenditure.

Held, that under clause (xv) of section 10(2) of the Income-tax Act, 1922, only that expenditure is covered which the assessee has spent or laid out exclusively for the running or betterment of its business. If a tax is imposed simply because a person is carrying on a particular business, that is not covered by this clause, because the tax is the result of that person's doing the business. If he had not done, that business, the tax would not have been levied on him. The professional tax paid by an assessee is the outcome of his carrying on the business. That, however, does not mean that the said tax is an expenditure which has been incurred by the assessee for the purpose of its business. Hence professional-tax paid by an assessee in respect of his business is not an allowable deduction under section 10(2)(xv) of the Act as business expenditure.

(Para 6)

Reference under Section 66(1) of the Income-tax Act, 1922 made by the Income-tax Appellate Tribunal, Delhi Bench,—vide *his award dated 9th*