IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : SPECIAL BENCH : NEW DELHI

BEFORE SHRI G.E. VEERABHADRAPPA, HON'BLE VICE PRESIDENT,
SHRI I.P. BANSAL, JUDICIAL MEMBER
AND
SHRI R.C. SHARMA, ACCOUNTANT MEMBER

ITA No.3759/Del/2003
Assessment Year : 1998-99

Tecumseh India Private Limited, 56, WHS Area, Furniture Block, Kirthi Nagar, New Delhi. PAN : AAA-CT-4183-E	Vs.	Addl. Commissioner of Income-Tax, Special Range-5, Present Jurisdiction – ACIT, Circle 16 (1), New Delhi.
(Appellant)		(Respondent)

Assessee by : Shri V.S. Rastogi, Advocate & Shri Tarandeep Singh, CA
Revenue by : Smt. Suruchi Aggarwal, Sr. Standing Counsel, Shri Manish Gupta, Sr. DR & Shri D.N. Kar, CIT, DR

M/s Hindustan Coca-Cola Beverages Pvt. Ltd. - Intervener

Intervener by : Shri Ajay Vohra, Advocate & Shri Sachit Jolly, Advocate

M/s Reed Elsevier India (P) Ltd. - Intervener

Intervener by : Shri S.D. Kapila, Advocate

ORDER

PER I.P. BANSAL, JUDICIAL MEMBER

This Spl. Bench is constituted by the order of Hon'ble President dated 2nd September, 2008 to decide the following questions: -

1. "That on the facts and circumstances of the case and in law the CIT(A)-IXI, New Delhi [hereinafter referred to as CIT(A)] erred in upholding disallowance of Rs. 2,65,00,000/-being the non-compete fee paid to M/s Whirlpool of India Ltd.,

1.2 That on the facts and circumstances of the case and in law in upholding disallowance of Rs. 2,65,00,000/- paid to M/s Whirlpool of India Ltd., CIT(A) erred in holding that by entering into non-competition agreement appellant acquired benefit of enduring nature and, as such, the expenditure was capital expenditure.

2. That on the facts and circumstances of the case and in law, the CIT(A) erred in upholding the addition of Rs. 39,90,120/- being the fee paid to Registrar of Companies.

3. That on the facts and circumstances of the case in law, the CIT(A) erred in upholding disallowance of Rs. 20,00,000/- being professional fee paid to the Architect.

3.1 That without prejudice and in alternative, CIT(A) erred in not allowing benefit of depreciation though the fee paid to Architect was in connection with acquisition of capital asset."

2. Accordingly the present appeal was fixed for hearing before Spl. Bench. M/s Hind Coca Cola Beverages P. Ltd., Gurgaon through ITA No. 1890/D/07 and M/s Reed Elsevier through ITA No. 4297/D/07 have joined as interveners as in these appeals the question regarding non-compete fees is involved.

3. Facts in the case of Tecumseh India P. Ltd. (ITA No. 3759/D/03): -

These facts as emerged from the assessment order, order of CIT (A) and from the documents enclosed in the paper books are that the assessee is wholly owned subsidy of Tecumseh Product Company Michigan, USA (for short "Tecumseh-USA"). Tecumseh-USA being a global compressor manufacturer was interested in entering the Indian Compressor Market. In the process, Tecumseh-USA entered into an agreement called Memorandum of Understanding (MOU) with Whirlpool of India Ltd., a public limited company incorporated under the laws of India at New Delhi, (for short called "Whirlpool-India") and Whirlpool Corporation, a public company incorporated under the laws of State of Delaware with its office at Missigan USA, (for short called "Whirlpool-USA"). Through the MOU Whirlpool-India had decided to sell the compressor and related operations owned by it in Faridabad and Ballabgarh. Whirlpool-India is stated to be one of India's leading Refrigerator manufacturer and it is mentioned in the MOU that Tecumseh-USA being a leading global compressor

manufacturer is interested in purchasing such compressor and related operation and entering the Indian Compressor Market and both the parties have come to an understanding that both of them will enter into an "asset purchase agreement", whereby Tecumseh-USA through its "to be an established local Indian entity" shall purchase all compressor machinery, equipment and tooling located at Whirlpool-India's Faridabad facility as well as related compressor component assets located at Whirlpool-India's Ballabgarh facility (including laminations, Via Drawings, centralized tool room, overload protectors and relays).

4. It was also agreed in the MOU that Tecumseh shall also purchase all raw and work in progress inventory for the compressor division and component operation. It was agreed that all assets and machinery currently used in the compressor repair business shall also be included in the asset purchase agreement. Similarly, it was agreed that subject matter of asset purchase agreement will cover all the related drawings, routings, bill of material, know-how, trade secrets, patents, copy rights and other technical information and intellectual property, all leases, contracts, purchase orders and other agreements relating to compressor division.

5. The MOU also states about the land owned by Whirlpool India situated at Ballabgarh along with building structure on it which was stated to be approximately 26 acres and it was stated therein that out of that land some area approximately 5 acres was subject to acquisition proceedings and purchase of the same will be subject to those acquisition proceedings and then in clause 3 it is stated about the amount to be paid as "purchase price" and the total consideration has been referred to as the purchase price of the compressor division assets which were described in article 1 and the Ballabgarh land and building referred to in article 1 and 2 for a total sum of Rs. 52.5 crores.

6. According to rider provided in clause 3.5 of the MOU, it is mentioned that Tecumseh purchase of raw materials and work in progress pursuant to Clause. 1.2 (the condition for purchasing all raw and work in progress inventory of the

compressor division and component operation), the agreed base lying for such purchase will be Rs. 5.25 crores and any adjustment to that amount (up or down) shall be based upon a physical inventory at closing date and will be reimbursed locally by the appropriate party.

7. In the said MOU, it is also agreed that Tecumseh will assume 600 Whirlpool employees currently engaged in the compressor division operations at Faridabad or component operations at Ballabgarh and list of such employees was to be provided by Whirlpool India to Tecumseh. In the said MOU a mention is made of manufacturing and production plan by the Tecumseh on acquisition of such assets and it is also mentioned that Tecumseh shall supply to Whirlpool certain quantity of compressors from year 1997 to 2001 and prices of those compressors is also stated therein. Clause 12.1 of the MOU states about non-compete agreement which reads as under: -

> ***"Non-Compete Agreement***
>
> *12.1 Whirlpool and Whirlpool Corporation (including its wholly owned subsidiaries) agree not to manufacture or repair compressors during the term of the Global Sourcing Agreement with Tecumseh. However, Whirlpool shall be free to sell refrigerator compressors to service partners (purchased from Tecumseh subject to the provisions of sec. 6.1."*

8. To implement the MOU, Tecumseh-USA, incorporated Tecumseh-India Pvt. Ltd. (for short Tecumseh India) which entered into an agreement on 2nd July, 1997 with Whirlpool- India. Copy of such agreement is placed at pages 1 to 27 of the paper book.

9. The total land owned by "Whirlpool-India" measuring 105983 sq. metres, was subject to transfer to Tecumseh-India and it was distributed into three parcels. Main parcel was free from acquisition proceedings and other two parcels, namely, "Seven Acre Parcel" and "Five Acre Parcel" were subject to acquisition proceedings. All the three parcels were agreed to be transferred on different agreed prices. An aggregate amount of Rs.49.85 crores was mentioned

to be paid with respect to various assets. The detail of which described in the agreement is as follows:-

Sl.No.	Description	Clause of the agreement	Amount
1.	The price payable for the sale and purchase of compressor division and related operations and facilities executing the raw materials, work in progress and the land and building at Ballabgarh was agreed.	Sec. 2	19.50 crore
2.	Purchase price for inventory i.e. raw material and work in progress.	Sec. 5	5.25 crores
3.	Main parcel of land at Ballabgarh which includes buildings and improvement located therein	Sec. 6	15.61 crore
4.	7 acre parcel	Sec. 6	6.48 crore
5.	5 acre parcel	Sec. 6	3.01 crore
Total			49.85 crore

10. It may be mentioned here that Clause 9 which is headed as "transfer on closing", under clause (j) the following stipulation is laid down: -

> *j. "Whirlpool shall sign and deliver to Tecumseh India, against the receipt of full consideration specified therein, a Non-Compete Agreement in the form as contained in Appendix "M" undertaking not to compete with Tecumseh India in the manufacture, sale or repair of compressors in India, except that Whirlpool shall be entitled to sell and install compressors purchased from Tecumseh India to persons under its service arrangements, subject to the provisions of the supply agreements."*

11. Before AO copy of annexure "M", as mentioned in Section 9(j), is not filed. However, a copy of non-competence agreement was filed which is dated 10th July, 1997. Copy of Annexure "M" is also not filed before us. Therefore, the non-compete agreement entered into by the assessee with Tecumseh-India can be considered to be the same as appendix "M" attached to the agreement. The amount mentioned in non-compete agreement is Rs.2.65 crores. If the same is

added to the aforesaid aggregate sum of Rs. 49.85 crore then the total amount paid by the assessee to Whirlpool India will be an amount of Rs. 52.50 crore which is the total sum agreed to be paid by the assessee for whole of the transaction as per MOU.

12. It is that amount of Rs. 2,65,00,000/- which has been claimed by the assessee to be paid as non-compete fees being revenue expenditure by separating the said amount from the main agreement.

13. The main issue involved in the present appeal is regarding the allowability or otherwise of the aforementioned sum of Rs. 2.65 crore being non-compete fees. The issue was argued at length by both the parties. On the basis of arguments advanced during the course of hearing, both the parties have submitted written synopsis.

Arguments of Shri V.S. Rastogi, Advocate

14. According to ld. Counsel of the assessee, the admitted facts as per record are: -

(i) That Tecumseh India was incorporated on 30.01.1997 and it is fully owned subsidiary of Tecumseh USA.

(ii) As per agreement dated 2nd July, 1997 between Tecumseh India and Whirlpool India, Tecumseh India had purchased undertaking of Whirlpool India's "compressor division" and "related operations" as a running business. The copiy of the agreement is filed at pages 1 to 27 of paper book II.

(iii) On 2nd July, 1997 Tecumseh India entered into an agreement styled as "compressor supply agreement" with Whirlpool India effective for 5 years from 14th July, 1997 under which Whirlpool India will make a long term commitment to purchase operation of its requirement of certain compressors from Tecumseh India and the volume forecast was mentioned in para 2.4 of the agreement. He submitted that para 9 of the said agreement gave an option to both the parties to terminate the

agreement at any time by mutual agreement and if parties fails to agree then the agreement could be terminated upon written notice of termination providing at lease 120 days in advance of the effective date of such termination unless shorter period is agreed to by the parties (copy of para 2.4 is filed at page 23 of Paper Book I and full agreement was filed during the course of hearing).

(iv) A non-compete agreement styled as "non-competition agreement" was executed on 10th July, 1997 by the Whirlpool USA and Whirlpool India both constituting parties of one part in favour of Tecumseh India and copy of such non-competition agreement is filed at pages 17 to 22 of the paper book no. 1.

(v) MOU had earlier been entered into on 4.11.1996 between Whirlpool India and Whirlpool USA being parties of the one part and Tecumseh USA being party of the other part. It was contended by ld. Counsel that incidentally Tecumseh India had not even been incorporated as the same was incorporated on 30.01.1997 (reference in this regard was made to MOU copy of which is placed at pages 28 to 36 of paper book no. III.

15. Ld. AR submitted that the AO and Ld. CIT (A) both have accepted the fact that the non-compete agreement dated 10th July, 1997 was a stand-alone agreement and thus, the payments of Rs. 2.65 crore was treated as non-compete fees simplicitor and from that stand point it has to be seen that whether the expenditure is capital or revenue in nature.

16. It was pleaded that the three agreements envisaged three different subject matters and were executed on and were to be effective from different dates; they are also not with the same parties. To describe more particularly it was submitted as under:

a) The Purchase Agreement was executed on 2.7.97 between Tecumseh India and Whirlpool and contained the terms of purchase of the 'Compressor Division' and 'Related Operations' of Whirlpool.

b) The non-compete agreement was between Whirlpool Corporation USA and Whirlpool of India Ltd., New Delhi as Promissors and Tecumseh India and was executed on 10.07.97 after the purchase was effected on 2.7.97. (according to Ld. AR Department's allegations fail here itself, because no business of Whirlpool USA was acquired by the assessee – this fact itself negates initial outlay theory).

c) The 'Compressor Supply Agreement' though executed on 2.7.97 was to be effective from 14.7.97 – the agreement being between Tecumseh India and Whirlpool."

17. It was submitted that non-compete agreement cannot be considered to be the part of earlier agreements and the same has to be considered on stand alone basis for the following reasons:-

1) Both the AO & CIT(A) have accepted the factual sub-stratum that the payment of Rs. 2.65 crore was towards non-compete fee and they have considered the allowability or otherwise of the said expenditure on that stand point. The cases relied upon by the AO and CIT(A) also related to the question whether non-compete fee is an expenditure by way of capital or revenue and there is no whisper in the order of AO and CIT(A) that there was any doubt that amount was not spent for non-compete fee but towards cost of acquisition. In fact the AO has written in his order that the expenditure was shown as deferred revenue expenditure in the books of account.

2) That "compressor division" and "related operations" were acquired by the assessee as running business vide agreement dated 2nd July, 1997. Therefore, it has to be appreciated that at the time of taking over a business, the question of entering into a non-compete agreement cannot arise. The person who is acquiring the business can enter into a non-competing fee only after the same has actually been acquired. The entering into a non-compete agreement has necessarily to be a subsequent event and not coterminous

with the process of acquiring the business. What had actually happened was that the business was acquired on 2nd July, 1997 and non-compete agreement was signed and made effective from 10th July, 1997.

3) It is true that in the preamble of purchase agreement dated 2nd July, 1997, according to clause E(iii) it is stated that a non-compete agreement as per clause 9(j)would be entered. However, clause 9(j) specifically states that Whirlpool India shall sign and deliver to Tecumseh India against the receipt of full consideration "specified therein" a non-compete agreement. Reading of the preamble and such clause shows that it speaks of an event yet to take place after the acquisition of undertaking by the assessee. Non-compete agreement is specifying the application of the Whirlpool India, the period, the consideration and the relevant clauses which are yet to be done subsequently after the business was taken over on 2nd July, 1997.

3.1 In similar manner, the preamble E(iv) speaks of supply agreement which does not give details of the said agreement and which also has yet to see the light of the day subsequently after the purchase which was made effective from 14th July, 1997

3.2 Thus, it will be incorrect to plead that there was only one agreement and subsequent agreements dated 10th July, 1997 was not a non-compete agreement but was to be dovetailed into a purchase agreement by construing the payment of Rs. 2.65 crore towards the initial cost of acquisition of the business.

18. It was further pleaded that law in respect of interpretation of agreements is stated in the provisions of law and in judicial pronouncements as under:-

- Section 91 of the Evidence Act, 1872 expressly lays down that when the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such

contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

- In CIT Vs. Motors and General Stores (P) Ltd. 66 ITR 692 (SC) it was held that in the absence of any suggestion of bad faith or fraud the true principle is that a taxing statute has to be applied in accordance with the legal rights of the parties to the transaction. When the transaction is embodied in a document the liability to tax depends upon the meaning and content of the language used in accordance with the ordinary rules of construction.
- In D.S. Bist & Sons Vs. CIT 149 ITR 276 (Delhi) it was held by the Hon'ble Jurisdictional High Court that the I.T. Act does not clothe the taxing authority with any power or jurisdiction to rewrite the term of an agreement entered into…… Under, the taxing system it is up to the assessee to conduct his business in his wisdom. The assessee may enter into commercial transactions with another party who is ad idem with the assessee as to the terms and conditions.
- In State Bank of India and another Vs. Mula Sahakari Sarkar Karkhana Ltd. [2006] Comp. Cases 565 (SC) it was held:

> *"A document, as is well known, must primarily be construed on the basis of the terms and conditions contained therein. It is also trite that while construing a document the court shall not supply and words which the author thereof did not use. Surrounding circumstances are relevant for construction of a document only if any ambiguity exists therein and not otherwise. It is one thing to say that the nature of a transaction would be judged by the terms and conditions together with the surrounding and/or attending circumstances in a case where the document suffers from some ambiguities but it is another thing to say that the Court will have recourse to such a course, although no such ambiguity exists". (copy enclosed)*

- Apex Court in DDA Vs. Durga Chand AIR 1973, 2609 has held:

"In construing document one must have regard, not to the presumed intention of the parties but to the meaning of the words they have used. If two interpretations of the document are possible, the one which would give effect and meaning to all its parts should be adopted and for the purpose, the words creating uncertainty in the document can be ignored (page 2609)".

- In Delta International Ltd. Vs. Shyam Sunder Ganeriwala (1999) 4 SCC 345 it was held:

i. Where terms of the agreement are vague or having double meaning one which is lawful should be preferred. (page 545)

ii. *Where the parties were capable of understanding their rights fully, expressly agreed that the document should be construed one way, no interference should be drawn so as to construe it in a different way. (page 545).*

19. It was submitted by Ld. AR that non-compete fees is not in the nature of capital and reliance was placed on the following decisions:-

"7. (i) Assam Bengal Cement Co. Ltd. Vs. CIT 21 ITR 34 (SC) [pages 1 to 15 PB No. VI]. In this decision, the Hon'ble Court at page 9 has observed as under:-

"The distinction was thus made between acquisition of an income earning asset and the process of the earning of the income. Expenditure in the acquisition of that asset was capital expenditure and expenditure in the process of the earning of the income was revenue expenditure."

At page 11 their Lordships formulated one of the principles as under:

"If what is got rid of by a lumpsum payment is an annual business expenses chargeable against revenue, the lump sum payment should equally be regarded as a business expense, but if the lump sum payment brings in a capital asset, then that puts the business on another footing altogether."

This proposition was endorsed by the Supreme Court in subsequent judgment of CIT Vs. Coal Shipments P. Ltd. 82 ITR 902 (SC) [pages 16 to 27 of the PB No. 6] at page 909 as under:

"The character of the payment can be determined, it was added (in case of Assam Bengal Cement Co. Ltd.), by taking at what is the true nature of the asset which has been acquired……..."

In Assam Bengal Cement Co.'s case assessee had acquired from Govt. of Assam, lease of limestone quarries for the purpose of carrying on the manufacture of cement. In addition of rent and royalties, tow sums were paid as protection fees by which lessor agreed not to grant any lease, permit or prospecting licence to any other party without a condition that no limestone should be used for the manufacture of cement.

On these facts the Court held thus at page 47 (P.B. page 14):

"The asset which the company had acquired in consideration of this recurring payment was in the nature of a capital asset, the right to carry on its business unfettered by any competition from outsiders within the area. It was a protection acquired by the company for its business as a whole. It was not a part of the working of the business but went to appreciate the whole of the capital asset and making it more profit yielding. The expenditure made by the company in acquiring this advantage which was certainly an enduring advantage was thus of the nature of capital expenditure and was not an allowable deduction u/s 10(2)(xv) of the Income Tax Act."

The rationale of the judgment was that the payment went on to appreciate the capital asset and was not towards the process of the earning of the income. The payment directly related to the acquisition of asset i.e., the right to carry on the business.

ii. CIT Vs. Coal Shipment P. Ltd. 82 ITR 902 (SC) (page 16 of PB Part VI)

The agreement in that case was between the assessee and M/s H.V. Low and Co. Ltd. which was an oral agreement which did not provide for a certainty of duration and the agreement could be terminated or revoked at any time. Though the arrangement ran for

5 years it automatically came to an end when Govt. of Burma made some other arrangement for its coal requirement.

At page 909 the following observations from the judgment of Assam Bengal Cement Co. Ltd. Vs. CIT 27 ITR 34 (SC) were quoted:

"The character of payment can be determined by looking at what is the true nature of assets which has been acquired….."

The judgment in this case may be taken to have been decided on two specific aspects propounded by Mr. Palkiwala based on the facts of the case, to which the Court agreed –

a. *There was no certainty of the duration of the arrangement, the same can be revoked at any time and, therefore, the advantage cannot be said to be of the enduring character and expenditure cannot be held to be of capital nature; and*

b. *The payment was related to quantum of coal shipped in the course of trading activity and not connected with the capital value of the assets.*

The judgment may be taken to have been decided on the facts of the case. Nevertheless, the Court made following observations at page 910.

"Although we agree that payment made to ward of competition in business to a rival dealer would constitute capital expenditure if the object of making that payment is to derive an advantage by eliminating the competition over some length of time, the same result would not follow if there is no certainty of the duration of the advantage and the same can be put to an end at any time. How long the period of contemplated advantage should be in order to constitute enduring benefit would depend upon the circumstances and the facts of each individual case."

For the cases where the period was mentioned, the Court left the matter open, as the last line reproduced above would show.

iii. Empire Jute Co. Ltd. Vs. CIT 124 ITR 1 (SC) dated 9.5.80 [pages 25 to 42 of PB VI]

Wherefrom the case of Coal Shipment (supra) was left it was taken forward in this case.

The question of advantage of enduring nature was considered in detail. At page 10 the Court stated thus:

"There may be cases where expenditure, even if incurred for obtaining 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 bring the case within the principle 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. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. The test of enduring benefit is, therefore, not a certain or conclusive test and it cannot be applied blindly and mechanically without regard to the particular facts and circumstances of a given case. But even if this test were applied in the present case, it does not yield a conclusion in favour of the revenue. Here, by purchase of loom hours no new asset has been created. There is no addition to or expansion of the profit making apparatus of the assessee. The income-earning machine remains what was prior to the purchase of loom hours. The assessee is merely enabled to operate the profit making structure for a longer number of hours. And this advantage is clearly not of an enduring nature."

It is important to note the following rules laid down by the Court:

a. It is not every advantage of enduring nature acquired by an assessee that brings the case within the principle laid down in the test;
b. It is only where the advantage is in the capital field that the expenditure would be disallowable on an application of the test of enduring nature;

c. If the advantage consists merely in facilitating the assessee's trading operations of enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably the expenditure would be revenue even though the advantage may endure for an indefinite future.

d. By purchase of loom hours no new asset has been created. There is no addition to or expansion of the profit making apparatus of the assessee.

iv. CIT Vs. Associated Cement Companies Ltd. 172 ITR 257 (SC) dated 4.5.1988 (pages 43-49 of P.B. VI)

In this case the argument of the revenue was that advantage of not being liable to pay municipal rates, taxes etc. which the assessee company secured by reason of making the expenditure in question was for a period of 15 years and was an advantage of an enduring nature and accordingly should be regarded as capital expenditure. At page 262 onwards the court applied the judgment in Empire Jute Company Ltd. (supra). Quoting extensively from that judgment it was held that the advantage secured was in the filed of revenue. There was no addition to the capital assets of the company and change in its capital structure. The pipelines etc. which came into existence as a result of the expenditure did not belong to the assessee but to the municipality.

v. Alembic chemical Works Ltd. Vs. CIT 177 ITR 377 (SC) dated 31.3.1989. Both the judgments in the case of Empire Jute Co. Ltd. (supra) [Pages 50 to 65 of PB VI] and Associated Cement Companies Ltd. (supra) were applied.

vi. CIT Vs. Madras Auto Service (P) Ltd., 223 ITR 468 (SC) dated 12.08.98 (pages 73 to 79 of PB VI).

Another contour of the term benefit of enduring nature was dealt with by the apex court in this case. One test which was

propounded by the Supreme Court in Assam Bengal Cement Co. Ltd. Vs. CIT 27 ITR 34 (SC) was referred to as under:

> *"Expenditure may be treated as properly attributable to capital when it is made not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade…. If what is got rid of by a lump sum payment is an annual business expense chargeable against revenue, the lump sum payment should equally be regarded as a business expense, but if the lump sum payment brings in a capital asset, then that puts the business on another footing altogether."*

The importance of this test is that for adjudging the question whether the expenditure is capital on the ground that it brings advantage of enduring nature one aspect to be seen is whether it brings in a capital asset. Taking the test framed the Court in the case of Madras Auto held that the benefit did arise to the assessee for 39 years but the expenditure cannot be held as capital because the expenditure, though did result in creation of an asset, but it did not belong to the assessee. Four earlier judgments of the Supreme Court were cited at pages 474 & 475.

It was held that the decisive factor was not the period of advantage but whether expenditure resulted in creation of a capital asset in the hands of the assessee.

vii. CIT Vs. Eicher Ltd., 302 ITR 249 (Del.) [Pages 66 to 72 of PB VI]

Helpfully, we have the benefit of the judgment of Eicher's case (supra) on two counts viz.-

(i) that this is a judgment of the jurisdictional High Court,

(ii) that it has dealt with the following four cases of the Apex Court:

(a) Assam Bengal Cement Co. Ltd. Vs. CIT (supra)

(b) CIT Vs. Coal Shipments P. Ltd. (supra)

(c) Alembic Chemical Works Ltd. Vs. CIT (supra)

(d) CIT Vs. Madras Auto Service P. Ltd. (supra)

The Hon'ble Court agreed with the following submissions made before the CIT(A) and ITAT (para 7 page 252 of ITR):

- The payment of Rs. 4 crores was made to protect the assessee's business interests, its market position and profitably.
- No new asset is created by spending Rs. 4 crores.
- Profit making apparatus was not expanded or increased
- There was no loss or diminution or erosion in the capital asset of the assessee.

After referring to the judgment in CIT Vs. Coal Shipments P. Ltd. (supra) the relevant portions of which were reproduced, the Hon'ble Court made following observations –

- The length of time for which the competition was eliminated was important but that is not always so (para 10, page 52 of ITR)
- What is more necessary to appreciate is the purpose of the payments and its intended object and effect (para 10 and page 252 of the ITR)
- However, it is necessary to know whether the advantage derived by the prayer is of an enduring nature, and for this one of the considerations is the length of time for which non-complete agreement would operate although that is not decisive. (Para 10 page 253 of the ITR).

After citing the judgments in the cases of Alembic Chemical Works Ltd. (supra) and Madras Auto Service P. Ltd. (supra) the Hon'ble Bench concluded by holding thus, (para 17, page 255):

- The assessee did not acquire any capital asset by making the payment of non-compete fee
- There is nothing to show that the amount of Rs. 4 crores was drawn out of the capital of the assessee.
- While the period during which the restrictive convenant was to last was not clear from the record, yet his Lordships held that the

competition in the two wheeler business was eliminated for a while, holding that it was neither permanent nor ephemeral. This observation goes to show that the period of restrictive convenant was not held decisive, because as already held at page 252 in para 10, to quote at the cost of repetition, 'what is more necessary to appreciate is the purpose of the payment and its intended object and effect.' Indubitably, in this regard the Court had earlier concurred with the arguments raised before the lower authorities viz., to quote again at the cost of repetition 'the payment is to project the assessee's business interests, its market position and profitably.'

8. Finally it was submitted that if the aforesaid proposition of law is considered and applied to the facts of the present case, the position will be as under-

(i) The payment of Rs. 2.65 crores was made by way of non-compete fees as per a specific agreement executed on 10.7.97. No new asset was created thereby nor assessee's profit making apparatus was expanded or increased. The assessee did not acquire any capital asset by making the payment of non-compete fee. The assessee did not suffer any loss or diminution or erosion in capital assets. The expenditure was recorded in the books of account as deferred revenue expenditure. [Reference Eicher Ltd. (supra)].

(ii) Assessee having not acquired any capital asset in view of above, the expenditure incurred could not be treated as capial expenditure [reference Assam Bengal Cement Co. (supra) as applied by Madras Auto Service P. Ltd.]

(iii) Payment towards non-compete fee was to 'project the assessee's business interests, its market position and profitability [reference Eicher Ltd. (supra)]. The expenditure incurred was merely for facilitating assessee's trading operations and to conduct

the business more profitably leaving fixed capital untouched [reference Empire Jute Co. Ltd. (supra)].

(iv) The duration of non-compete agreement was 5 years. The agreement itself was dependent upon the subsistence of the Supply Agreement (kindly see clause 1a(i) of non-compete agreement (page 18 of PB No. 1). The Supply Agreement also, though having a term of 5 years, could be terminated at any time by mutual agreement (kindly see para 9 of the Agreement reproduced above). In the eventuality of the Supply Agreement being terminated the non-compete agreement would also fall in view of second part of clause 1a(i) (page 18 of PB No. 1) of the non-compete agreement. The period of 5 years as per the non-compete agreement thus, was not sacrosanct, fixed unchangeable or permanent.

(v) After referring to the case of Coal Shipments it was held in Eicher's case that the length of time for which the competition was eliminated was important but that is not always so. What is more necessary to appreciate is the purpose of the intended object and effect. In the present case Whirlpool was not eliminated. In fact as per Supply Agreement Whirlpool became a strategic and key buyer of the compressors manufactured. The purpose and object of the non-compete agreement was twofold. Firstly, by not competing with the manufacturing activity, the assessee's production increased and by appointing Whirlpool as strategic purchaser of compressors the sales increased. Both these advantages were 'advantages in commercial sense' and not in 'capital field' as these terms are sued in the judgment of Empire Jute Co. Ltd.

(vi) The judgment of Assam Bengal Cement Co. Ltd. in fact helps the assessee. In that case payment of protection fee ensured that the very profit making apparatus, i.e., right to carry on its business continued to operate unfettered. Under these

circumstances the payment was related to the profit earning apparatus and was thus, held in capital filed. In the case of the assessee, right to carry on the business of manufacture and sale of compressors was already acquired by purchasing the undertaking on 2.7.97. Later, when a non-compete agreement was executed on 10.7.97 it was for the purpose of carrying on the business more profitably and not for enabling the assessee to carrying on the business."

Arguments of Shri Ajay Vohra in the case of Hindustan Coca Cola Beverages Pvt. Ltd. (Intervener).

20. Shri Vohra submitted that facts of his case are as under:-

"1. The appellant is a private limited company engaged in the manufacture and sale of aerated soft drinks.

2. The appellant had acquired running business of various bottlers and had made certain payments referred to as non-compete fees to the acquired bottling companies over and above the consideration for purchase of business of the bottlers.

3. The non-compete fees was paid to the shareholders/proprietors, etc. of companies/firms whose business was taken over by the appellant to prevent the said persons from using or sharing know-how in respect of the business (a) within a specific territory, and (b) for a maximum period of 5/10 years, as specified in the agreements executed in connection therewith. Clause 1 (a) of the agreement.

4. Know-how has been defined to mean 'all information (including that comprised in or derived from manuals, instructions, catalogues, booklets, data disks, tapes, source codes, formula cards and flowcharts) relating to the Acquired Business and the services provided or products manufactured by the Acquired Business. Clause (1) (c) of the agreement.

5. The agreement could be terminated at the instance of either of the parties during the term of the agreement. Clause 10 of the agreement."

21. He submitted that according to general principle what can be recognized as revenue expenditure is stated in Section 37 which read as under:-

"37. General

(1) Any expenditure (not being expenditure of the nature described in sections 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly and exclusively for the purposes of business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession……."

22. It was submitted that in terms of aforementioned section, expenditure which is incurred wholly and exclusively for the purpose of business is allowed as deduction in computing the income chargeable under the head 'Profits and gains of business'. The exceptions of such rule are that those expenditure should not be in the nature of: (a) personal expenses; (b) expenses defined u/s 30 to 36 of the Act; and (c) capital expenditure. He submitted that in determining whether the expenditure is on revenue account or on capital account, the following tests have been laid down by the courts:-

(a) Once and for all/enduring benefit : The House of Lords in Atherton v. Insulated and Helsby Cables (1925) : 10 TC 155 has held that where the expenditure is made 'once and for all' and that such expenditure brings into existence an asset or advantage for the enduring benefit of trade, such expenditure would be of capital nature and not allowable as deduction

(b) Fixed capital vs. Circulating capital: The house of Lords in Johns Smith & Sons v. Moore (1921) : 12 TC 266 has held that if the expenditure is incurred out of fixed capital, then, such expenditure would be in the nature of capital expenditure. Conversely, if the expenditure is incurred out of circulating capital, then, such expenditure would be admissible revenue deduction.

23. It was submitted that since then there has been substantial change in the judicial thinking as Hon'ble Supreme Court in the case of Empire Jute & Co. Ltd. vs. CIT, 124 ITR 1 after considering the aforesaid judgements of the House of Lords and the various tests discussed therein has held that in certain situations

or circumstances the test of enduring benefit may fail and may not be applicable universally. Thus, it was submitted that enduring benefit alone cannot be a criteria to hold that whether expenditure is in the nature of capital or revenue. It was submitted that if the benefit merely facilitates in carrying on the business more profitably and efficiently, then, it can be in the nature of revenue. Reference was made to the following observations:-

> "The decided cases have, from time to time, evolved various tests for distinguishing between capital and revenue expenditure but no test is paramount or conclusive. There is not all embracing formula which can provide a ready solution to the problem; no touchstone has been devised. Every case has to be decided on its own facts, keeping in mind the broad picture of the whole operation in respect of which the expenditure has been incurred. But a few tests formulated by the courts may be referred to as they might help to arrive at a correct decision of the controversy between the parties. One celebrated test is that laid down by Lord Cave L.C. in Atherton v. British Insulated and Helsby Cables Ltd. [1925] 10 TC 155, 192 (HL), where the learned Law Lord stated:
>
> > "……. When an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is every 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."
>
> This test, as the parenthetical clause shows, must yield where there are special circumstances leading to a contrary conclusion and, as pointed out by Lord Radcliffe in Commissioner of Taxes v. Nchanga Consolidated Copper Mines Ltd. [1965] 58 ITR 241 (PC), it would be misleading to suppose that in all cases, securing a benefit for the business would be, prima facie, capital expenditure so long as the benefit is not so transitory as to have no endurance at all. <u>There may be cases where expenditure, even if incurred for obtaining 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 principle 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. If the advantage consists merely in</u>

> facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account even though the advantage may endure for an indefinite future. The test of enduring benefit is, therefore, not a certain or conclusive test and it cannot be applied blindly and mechanically without regard to the particular facts and circumstances of a given case. But even if this test were applied in the present case, it does not yield a conclusion in favour of the revenue. Here by purchase of loom hours no new asset has been created. There is no addition to or expansion of the profit-making apparatus of the assessee. The income-earning machine remains what it was prior to the purchase of loom hours. The assessee is merely enabled to operate the profit making structure for a longer number of hours. And this advantage is clearly not of an enduring nature. It is limited in its duration to six months and, moreover, the additional working hours per week transferred to the assessee have to be utilized during the week and cannot be carried forward to the next week. It is, therefore, not possible to say that any advantage of enduring benefit in the capital field was acquired by the assessee in purchasing loom hours and the test of enduring benefit cannot help the revenue.
>
> [Emphasis supplied]"

24. It was submitted that aforementioned test was reiterated by the Apex Court in Alembic Chemical Works Co. Ltd. vs. CIT 177 ITR 377 wherein it was held that 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. They should be flexible so as to respond to the changing economic realities of the business. The expression "asset" or "advantage of enduring benefit" was evolved to emphasize the element of sufficient degree of durability appropriate to the context.

25. It was submitted that non-compete payment is made by one party to another to restrain the second party from competing with the first party (the payer) in a specified territory for a specified period. The second party accepts the negative covenant of not carrying on competing business for a specified number of years in the specified territory. The purpose of non-compete payment is to maintain/protect the profitability of the business of the payer by insulating

the same from the risk of competition, if similar competing business was to be carried on by the second party.

26. He submitted that applying the test laid down by Hon'ble Supreme Court in the case of Empire Jute & Co. (supra) it is to be appreciated that payment of non-compete fee only facilitates the carrying on of the business more efficiently and profitably and such payment does not result in creation of any new asset and it does not result in any addition to the profit earning apparatus. He submitted that the enduring benefit, if any, by restricting a potential rival in the business is not in the capital field. Therefore, even if the payment results in an enduring advantage, it should be treated as deductible revenue expenditure.

27. It was submitted that length of time cannot be determinative of the nature of expenditure as long as enduring advantage is not in the capital field. Where the advantage merely facilitates in carrying on the business more efficiently and profitably, leaving the fixed assets untouched, the payment made to secure such advantage would be allowable business expenditure irrespective of the period for which the advantage may accrue to the assessee by incurring such expenditure.

28. Shri Vohra referred to the decision of Hon'ble Supreme Court in the case of CIT v. Madras Auto Services 233 ITR 468 where the assessee tenant had incurred expenditure on demolition and construction of a new building which was to vest in the landlord and the assessee tenant was entitled to use the premises for 39 years at reduced rent. The cost was claimed as revenue expenditure and the Tribunal and High Court accepted the contention of the assessee and on further appeal Hon'ble Supreme Court observed that the nature of expenditure has to be looked into from a commercial point of view. The assessee did not get any advantage in constructing a building which belonged to somebody else. The assessee only got a long lease of the building constructed which was suitable to the business of the assessee at a concessional rate. The expenditure was made in order to secure a long lease, a new and more suitable business premises at a lower rent. The assessee could not claim depreciation. The expenditure was in

the nature of revenue. Ld. Counsel invited our attention towards the following observations of the Hon'ble Supreme Court from the said decision:-

> "All these cases have looked upon expenditure which did bring about some kind of an enduring benefit to the company as a revenue expenditure when the expenditure did not bring into existence any capital asset for the company. The asset which was created belonged to somebody else and the company derived an enduring business advantage by expending the amount. In all these cases, the expenses have been looked upon as having been made for the purpose of conducting the business of the assessee more profitably or more successfully. In the present case also, since the asset created by spending the said amounts did not belong to the assessee but the assessee got the business advantage of using modern premises at a low rent, thus saving considerable revenue expenditure for the next 39 years, both the Tribunal as well as the High Court have rightly come to the conclusion that the expenditure should be looked upon as revenue expenditure."

29. He submitted that the aforesaid proposition also can be found in the decision of Karnataka High Court in the case of CIT vs. HMT Ltd. 203 ITR 820.

30. Shri Vohra further submitted that in following cases, applying the aforementioned principles, the courts have held that payment made by the assessee to the State Electricity Board for laying of electricity lines upto the assessee's factory, which was property of Electricity Board, was deductible business expenditure, even though by incurring such expenditure, the assessee had indefinitely secured uninterrupted power supply to its factory:-

i) CIT vs. Excel Industries Limited 122 ITR 995 (Bom)

ii) Hindustan Times Ltd. vs. CIT [1980] 122 ITR 977

iii) Sarabhai M. Chemicals Pvt. Ltd. vs. CIT 127 ITR 74 (Guj)

iv) CIT vs. Panbari Tea Company Limited 151 ITR 726 (P&H)

v) CIT vs.Karam Chand Prem Chand (P) Ltd. 200 ITR 281 (Guj)

vi) CIT vs. Saw Pipes Limited 208 CTR 476 (Del)

31. Referring to these arguments it was submitted that mere existence of an advantage of enduring benefit in itself does not fulfill the criteria to make the expenditure on capital account and what is material to consider is whether the enduring benefit is in the capital field or revenue field. He submitted that considering the facts of the case of the assessee any expenditure to avoid competition or for the purpose of protecting the business already acquired by the assessee can only be classified as revenue expenditure since the non-competition fees does not bring into existence any new asset/enduring advantage in the capital field, but only seeks to protect the already existing asset/advantage.

32. Shri Vohra further referred to the decision of Hon'ble Supreme Court in the case of CIT vs. Coal Shipment Ltd. (supra) wherein the Apex Court has held that if the payment is made to ward off competition in business with an object of deriving advantage by eliminating competition over some length of time, the said expenditure would be in the nature of capital expenditure and it was also held that how long the period of contemplated advantage should be in order to constitute enduring benefit would depend upon the facts and circumstances of each case. Therefore, Ld. Counsel argued that the decision in the case of Coal Shipment Ltd. does not lay down any rigid rule that all expenditure relating to warding off competition would constitute capital expenditure. It is only when the expenditure brings into existence a benefit of enduring nature would such payment of non-compete fees be treated as capital expenditure and not otherwise.

33. He submitted that on reading of the decision in the case of Coal Shipment Ltd. (supra) in juxtaposition with the later decision of the Hon'ble Supreme Court in Empire Jute Mills (supra), it can be gathered that only when the expenditure incurred by the assessee brings into existence benefit of enduring nature in the capital field, would such payment of non-compete fees be treated as capital expenditure and not otherwise.

34. Ld. Counsel referred to the decision of Hon'ble Delhi High Court in the case of CIT vs. Eicher Ltd. (supra) wherein non-compete fees was held to be allowable business deduction and he submitted that Hon'ble Delhi High Court has held that by making payment of non-competition fees, the assessee did not acquire any capital asset and, therefore, such expenditure could not be treated as capital expenditure. He submitted that SLP filed by the revenue against the said decision has been dismissed by Hon'ble Supreme Court vide order dated 20th January, 2009.

35. Shri Vohra referred to the decision of Privy Council in Nchanga Consolidated Copper Mines Ltd. 58 ITR 241 (PC) wherein it was held by the Privy Council that the payment made by Nchanga to Bancroft was not for initial outlay, but only to carry on and earn profit out of assets already in existence and, therefore, in the nature of revenue expenditure

36. Shri Vohra referred to the decision of Hon'ble Madras High Court in the case of CIT vs. Late G.D. Naidu and Ors 165 ITR 63 (Mad) where payments made by the firm to the assessee for not carrying on and/or for not competing with the firm in the business of plying buses for five years was held to be in the nature of revenue expenditure and it was held by the court that there was no acquisition of any business by payment of amount referable to the restrictive covenant and that no benefit of enduring nature was acquired by the firm by making such a payment. To the same effect reference was made to the decision of Hon'ble Karnataka High Court in the case of DCIT vs. McDowell & Co. Ltd. 291 ITR 107 (Kar).

37. Shri Vohra also referred to the following decisions:-

i) Hon'ble Calcutta High Court decision in the case CIT vs. Lahoty Bros 19 ITR 425 (Cal) to contend that for allowability of an expenditure as revenue expenditure it must be an expenditure incurred in the accounting year, the expenditure must be in respect of a business which was carried on by the assessee in the

accounting year and the profit of which are to be computed and assessed, it should not be in the nature of personal expenses of the assessee, it should not be in the nature of capital expenditure and it must have been laid out or expended wholly and exclusively for the purpose of such business.

ii) Hon'ble Bombay High Court decision in the case of Champion Engineering Works Ltd. vs. CIT 81 ITR 273 (Bom) wherein Rs.50,000/- paid by the assessee to one Shri P.V. Shah for restraining him from taking up private practice was held to be in the nature of revenue expenditure as the assessee did not acquire any asset or advantage of enduring nature by making such payment.

iii) Hon'ble AP High Court decision in the case of CIT vs. Bowrisankara Steam Ferry Co. (1973) 87 ITR 650 (AP) where a sum of Rs.21,600/- paid by the assessee to 16 individuals who were prospective bidders at an auction to prevent them from competing was held to be in the nature of revenue as the amount paid to the prospective bidders had reduced the lease amount which was to be paid by the assessee to run its ferries.

iv) The following decisions of Tribunal:

(a) Padhare Dhru and Co. vs. ACIT (1995) 54 ITD 746 (Mum) wherein the payment made to retiring partner of a law firm to restrain him from starting his individual practice for 2 years was held to be revenue expenditure.

(b) Modipon Ltd. vs. Inspecting Asstt. Commissioner 52 TTJ (Del) 477 wherein lumpsum payment to retiring employee to restrain him from entering into any independent business which could be detrimental to assessee was held to be revenue in nature.

(c) Smartchem Technologies Ltd. vs. ITO (2005) 97 TTJ (Ahd) 818 wherein payment as non-compete fees was claimed u/s 37 of the Act. In the said case the assessee had purchased VBC's plant for manufacturing nitric acid and ammonium nitrate and paid Rs.6 crore as non-compete fees the deduction of which was claimed u/s 37 of the Act. The Assessing Officer treated the said expenditure as capital. The Tribunal held that the expenditure satisfied both assessee's necessity and commercial expediency. The benefit procured by the assessee was for a period of five years, hence, could not be said to be of enduring nature.

(d) USV Ltd. vs. JCIT (2007) 106 TTJ (Mum) 535 wherein similar payment made to restrict the other party for not supplying data, details and scientific and marketing know how relating to formulation made from bulk drug Nitroglycerine to any third party for a period of at least three years from the date of agreement was held to be made for facilitation of profit earning process and, thus, was held to be revenue in nature.

(e) Adsteam Agency (India) Ltd. vs. DCIT 16 SOT 44. In the said case, the assessee who had purchased shipping businesss claimed that amount paid against non-competition fees should be allowed as revenue expenditure in the year of payment and, in the alternative, the same may be spread over for a period of five years for which the non-competition covenant was there and it was held by the Tribunal that it was a temporary arrangement made with the vendor in order to settle down new business of shipping and to derive benefit out of it to enhance its profitability only. The covenant was executed for a period of five years and that too only for Indian territory, therefore, the assessee should derive benefit for limited period of five years only and such expenditure was to be

spread over a period of five years and corresponding expenditure in every year was held to be allowed.

38. He further submitted that the decisions relied upon by Department are distinguishable both on facts and in law.

38.1 His submissions in that regard are described as below:

Referring to the decision of Hon'ble Supreme Court in the case of Assam Bengal Cement Ltd. vs. CIT (supra) on which reliance was placed by Sr. Standing Counsel that in that case the issue was whether the payment made by the assessee to the Government of Assam for ensuring that nobody else get the rights of mining in the quarries situated in Khashi and Jayanti Hills would be in the nature of revenue or capital expenditure and Hon'ble Supreme Court in that case has rightly held that such expenditure eliminated any kind of competition and ensured monopoly rights of the assessee in that area. Therefore, such expenditure was capital in nature. As against that in the present case by making non-compete payments, the assessee did not acquire any monopoly rights in order to eliminate any competitor. The payment was made to protect an already acquired business. Therefore, the decision in Assam Bengal Cement Ltd. is not applicable to the facts of the assessee's case.

38.2 Referring to the decision in the case of CIT vs. Coal Shipment Pvt. Ltd. (supra), it was submitted that nowhere in the said decision it is described that enduring benefit refers to a fixed tenure. It was submitted that on the contrary it has been held that what would constitute enduring benefit would depend upon facts and circumstances of each case and it was held that where the agreement could be terminated at the volition of the parties, as in the present case, the payment would be on revenue account. Thus, it was submitted that rather the said case advances the proposition canvassed by the assessee.

38.3. It was submitted that in the case of Empire Jute Mills (supra) it has been held that merely because an expenditure results in a benefit of enduring nature

would not, by itself, lead to the conclusion that the expenditure was capital in nature, unless it is proved that the enduring benefit was on capital account.

38.4 The decision of HP High Court in the case of Mohan Meakin Breweries Ltd. vs. CIT 227 ITR 879 (HP) cannot be applied to the facts of the intervenor's case as the question before the High Court was whether one time licence fee paid to the Government to ensure monopoly and exclusive right would be allowable revenue deduction or would constitute capital expenditure and on those facts it was held that licence fee paid by the assessee was in the nature of capital expenditure. The said case could not also be applied to the facts of the assessee's case as the payment did not create any monopoly.

38.5 The decision of Madras High Court in the case of Sree Meenakshi Mills Ltd. vs. CIT (supra) also cannot be applied to the facts of the present case as in that case the issue was whether expenditure incurred by the assessee on litigation before the courts and costs paid to the Government for violation of the terms of the agreement were in the nature of commercial loss and under those facts it was held that the expenditure was due to willful action of the assessee in engaging in frivolous litigation for which it had to pay costs to the Government and, thus, not allowable as revenue expenditure.

38.6 The decision in the case of Arvind Mills vs. CIT (supra) was also submitted to be not applicable to the facts of the present case since the Apex Court was required to decide whether expenditure incurred by the assessee for betterment of title in a piece of land owned by the assessee would be in the nature of capital or revenue expenditure. As against that non-compete fees in the present case is paid only to protect the profitability of the business already in existence.

38.7 The decision in the case CIT v. Hindustan Pilkington Glass Works (supra) supports the case of the assessee rather than supporting the case of the revenue. It was submitted that in that case the issue was whether the expenditure incurred by the assessee to prevent total annihilation of its business

would be capital or revenue expenditure and Hon'ble Calcutta High Court concurred with its earlier decision in the case of Assam Bengal Cement Ltd. It was submitted that in the present case by making non-compete payment the assessee has not eliminated any competitor and the claim of the assessee falls within the category for which the payment was held to be allowable by the Calcutta High Court.

39. The decision of Allahabad High Court in the case of Neel Kamal Talkies vs. CIT (supra) also could not be applied to the case of his client as in that case by incurring the expenditure the assessee had ensured complete monopoly over the business of exhibiting films in Bijnore. As against that, in the present case, there is no question of any monopoly being created by the assessee. He pleaded that Ld. DR has placed lot of emphasis on the decisions of the Madras High Court in Chelpark v. CIT, 199 ITR 249, decision of the Madhya Pradesh High Court in Grover Soaps Pvt. Ltd., 220 ITR 299 and that of the Madras High Court in Tamil Nadu Dairy Development Corpn., 239 ITR 142. In this regard it is submitted that all the three decisions relied upon by the Ld. Sr. DR proceeded on a finding by the Tribunal that by incurring the expenditure in dispute, the assessee had acquired benefit of enduring nature. However, in the present case it is for this Special Bench to first adjudicate whether payment of non-competition fee brought into existence an asset/advantage of enduring benefit. The next question which would have to be considered is that whether the benefit, so acquired by the assessee, is on capital account or revenue account? It is only after such finding is recorded, would the ratio of the decisions quoted by the Ld. Sr. DR be of any relevance.

40. Concluding his arguments, Ld. Counsel submitted as follows:-

- If the expenditure is for the initial outlay or for acquiring or bringing into existence an asset or advantage of an enduring benefit in the capital field to the business that is being carried on, or for extension of the business that is going on, or for a substantial replacement of existing business assets, it would be capital expenditure.

- If, on the other hand, the expenditure, although for the purpose of acquiring an advantage of enduring nature, is for running of the business with a view to produce profit, or increase efficiency, or increase profitability, it would be revenue expenditure. In other words, an expenditure which brings into existence an advantage of enduring benefit may still be revenue expenditure if the advantage, so obtained, is in the revenue field. [Refer Empire Jute Mills (supra)]

- The most important distinguishing feature in the deciding whether an expenditure is capital or revenue is the purpose and intended object of incurring such expenditure.

- It is the intention and object with which the asset is acquired, that determines the nature of the expenditure incurred over it, and not the method or the manner in which the payment is made, or the source of such payment.

- The length of time over which the competition is eliminated/benefit accrues is not the decisive factor in determining whether an expenditure is on capital or revenue account. [Refer Madras Auto (supra) and Eicher Ltd. (supra).

- In the present case the appellant had paid 'non-compete fees' to the covenanter for not sharing their knowledge/know-how for a period of 5 years. It did not bring into existence any asset or benefit of enduring nature, in the capital field but merely facilitated the carrying on of business more efficiently and profitably.

- The payment for acquisition of asset/business was different from payment of non-compete/non-divulgence of information.

- The agreement was not indefinite and could be terminated by either of the parties.

- The gestation period of 5 years was necessary since the appellant had returned to the Indian markets after approx 20 years.

- The bottlers were free to carry on other businesses and, in fact, did carry on such business.

- No new profit earning apparatus was acquired by the appellant."

Arguments of Shri S.D. Kapila

41. It was submitted by Ld. Counsel that a particular expense whether it is capital or revenue has to be examined on the basis of facts of each case and those facts are to be seen from the view point of the payer and not from the view point of payee. He submitted that it is not necessary that the expenditure is paid by separate agreement which can be defined in one agreement and paid by another agreement. He submitted that duration of restriction is not material and purpose and object of it will be material.

42. He contended that how it can be determined has been enunciated in two examples which are extreme on both sides. He referred to the decision of Hon'ble Allahabad High Court in the case of Neel Kamal Talkies v CIT(1973) 87 ITR 691(All) where the assessee being the owner of cinema house at Bijnore had entered into an agreement with another cinema owner whereby a sum of Rs.600/- per month was paid for five years for non-exhibition of any film in the other cinema. Exhibition monopoly was created and competition was completely eliminated and, thus, it was held that the payment was of a capital nature.

43. Then, he referred to another situation where one agreement of acquisition is executed and another agreement is made in respect of non-competition. The amount for non-competition is not drawn from capital and the payment is made on the basis of profit/turnover and in that case there will be no nexus between the capital/acquisition, then, it will be the expenditure on revenue account.

44. He submitted that in a case where the assessee purchase business assets and then enter into a covenant with an entity and its employees to preserve the purchased business and that will be a case where business purchased is preserved and protected. For this proposition he referred to the decision of Calcutta High Court in the case of CIT vs. Piggot Chapman & Co. 17 ITR 317 (CAL) where the assessee firm, which was engaged in the activity of exchange brokers, entered into an agreement with one 'M'who was also engaged in the similar activity for transfer of four seats in Calcutta Stock Exchange

Brokers Association and also entered into an agreement for non-competition where such amount was held to be allowable as revenue expenditure as the expenditure related to preservation and protection of business.

45. Then, he referred to the decision of Hon'ble Supreme Court in the case of CIT vs. Coal Shipments Pvt. Ltd. (supra) and contended that elimination of competition means complete elimination.

46. Concluding his arguments he submitted that in the first case the expenditure will be capital and in the second case it will depend upon the object of the payment and in the third case where it is contingent on profit, it is revenue.

Arguments advanced by Mrs. Suruchi Aggarwal, Sr. Standing Counsel for revenue: -

47. It was submitted by ld. Standing Counsel that the arguments of revenue are two fold namely:

(i) the entire transaction/contract resulting into payment of Rs. 2.65 crores as non-compete fee must be read as a whole. The payment of Rs. 2.65 crore cannot be treated in isolation. All the agreements/contracts executed between assessee and its parent company being on one part and M/s Whirlpool India and its parent company on the other part have to be read as part of the same transaction. She contended that from reading of all these agreements/contracts the payment of Rs. 2.65 crores is also a part of the payment made towards initial outlay and would constitute capital expenditure.

(ii) The analysis of several tests laid down in the judgments of Hon'ble Supreme Court as well as several High Courts for determination as to whether the payment is for capital or revenue will reveal that test has to be applied to the particular facts and circumstances of each case

and it has to be determined whether the expenditure/payment is part of the company's working expenses or it is an expenditure laid down as a part of process of profit earning or on the other hand, it is a capital lay out, being an expenditure necessary for acquisition of property or of right of a permanent character the possession of which is a condition of carrying on its trade at all?

48. Referring to aforesaid test Mrs. Aggarwal referred to the decision of Hon'ble Supreme Court in the cases of Assam Bengal Cement Co. Vs. CIT 27 ITR 34 (SC) & CIT Vs. Coal Shipment P. Ltd. 82 ITR 902. She contended that the payment of Rs. 2.65 crore is a part of huge payment to the extent of 45crore made by the assessee to M/s Whirlpool for the acquisition of the complete Compressor Division of Whirlpool, sans the land, factory building, plant & machinery, transfer of work force/employees, contracts and other assets and hence comprises initial outlay. Such payment was necessary for the acquisition of rights of a permanent character and is not a part of the company's working expenses. The said payment has only been given a colour of revenue expenditure but actually it is a capital expenditure.

49. Ld. Counsel argued that all agreements executed between the assessee and its parent company on the one part and Whirlpool and its parent company on the other part should be read as composite whole.

50. It was submitted that the assessee has relied upon sec. 90(1) of Indian Evidence Act to contend that contract between the parties alone should be referred to for the true import of the meaning and substance of the clause as against such contention it will be important to note that an entire contract must be viewed as a whole. The construction of a contract must depend upon the import of the words used and not upon what the parties choose to say afterwards. She submitted that even subsequent conduct of the parties in the performance of the contract can affect the true effect of the clear and unambiguous words used in the contract. The intention of the parties must be ascertained from the language

used in the contract. The nature and purpose of the contract should be the important guide in ascertaining the intention of the parties. Reference was made to the decision of Hon'ble Supreme Court in the case of Bank of India Vs. K. Mohandas, 2009(5) SCC 313, in which it was observed by their lordships as under: -

> *"It is also a well-recognized principle of construction of a contract that it must be read as a whole in order to ascertain the true meaning of its several clauses and the words of each clause should be interpreted so as to bring them into harmony with the other provisions if that interpretation does no violence to the meaning of which they are naturally susceptible. [(The North Eastern Railway Company vs. L. Hastings) (1900 AC 260)]."*

51. Referring to these observations it was submitted that while deciding the issue the below mentioned three agreements should be read together to arrive at the true character and import of the agreements and the nature of the transactions and payments made pursuant thereto: -

a) Memorandum of Understanding dated 4.11.1996.
b) Agreement dated 2.7.1997 between Whirlpool of India and Tecumseh India Pvt. Ltd.
c) The non-competition agreement dated 10.7.1997.

52. Referring to each of the agreements, ld. Standing Counsel submitted that the relevant facts which imports the consideration for a proper determination of the nature of the payment towards non-compete fee are as under: -

"Memorandum of Understanding on 4.11.1996

a) The M/s Tecumseh Product Co. of Michigan, a leading global compressor manufacturer entered into a Memorandum of Understanding on 4.11.1996 with M/s Whirlpool of India Ltd. and Whirlpool Corporation, and expressed its interest in purchasing the Compressor Division of M/s Whirlpool of India Ltd., wherein Tecumseh was to become a strategic and key supplier to Whirlpool for compressors. The two companies had agreed to the framework by which the said transaction was to be accomplished.

b) Tecumseh and Whirlpool were to enter into an Asset Purchase Agreement whereby Tecumseh was to purchase all compressor machinery, equipment and tooling located at Whirlpool Faridabad facility as well as related compressor component assets located at Whirlpool Ballabgarh facility,

c) Tecumseh was also to purchase all raw and work-in-progress inventory for the Compressor Division and component operations,

(d) all assets and machineries currently used in the compressor repair business were to be included in the asset purchase agreement,

(e) Tecumseh was entitled to all drawings, routings, bill of material, knowhow trade secrets, patents, copyrights and other technical information and intellectual property as part of Compressor Division asset purchase,

(f) Tecumseh was to purchase land and building located at Whirlpool Ballabgarh site against the purchase price

(g) Whirlpool was also to transfer to Tecumseh 1600 Whirlpool employees currently engaged in the Compressor Division operations at Faridabad or component operations at Ballabgarh. Tecumseh was to assume responsibility for maintaining the various benefit plans covering the employees,

(h) Tecumseh was to initially to continue to produce compressor at the Faridabad facility, but was later to relocate all compressors, machineries and equipment from Faridabad to Ballabgarh within two years.

i) The said Memorandum of Understanding also envisaged a compressor supply agreement for a term of five years whereby Tecumseh was to provide compressors to Whirlpool.

j) There was also a provision in clause 12 in Memorandum of Understanding for a non-compete agreement whereby Whirlpool agreed not to manufacture or repair compressors during the term of the global sourcing agreement with Tecumseh. A copy of the Memorandum of Understanding dated 4.11.1996 is annexed hereto as Annexure – 1.

5. Agreement dated 2.7.1997

The significant clauses of the Agreement dated 2.7.1997 are as follows :

i) The recital of the said agreement clearly states that Tecumseh India is a wholly owned subsidiary of Tecumseh Product Co. which had entered into Memorandum of Understanding with M/s Whirlpool of India Ltd. for the acquisition of the compressor Division of the said company.

ii) The recital clause (e) that Whirlpool and Tecumseh India (a wholly owned subsidiary of Tecumseh Product Co.) have negotiated for the acquisition of the Compressor Division and related operations of Whirlpool, and that Tecumseh India would engage in the business of manufacture, sale and repair of compressors and further that Whirlpool would not compete with Tecumseh India in the manufacture, sale and repair of compressors as per clause 9(j) of the Agreement.

iii) Clause 9(j) is extracted herein below :

"Whirlpool shall sign and deliver to Tecumseh India against the receipt of full consideration specified therein : (a) Non-Compete Agreement in the form as contained in Appendix (M) undertaking not to compete with Tecumseh India in the manufacture, sale or repair of compressors in India except that Whirlpool shall be entitled to sell and install compressors purchased from Tecumseh India to persons under its service arrangement, subject to the provisions of the Supply Agreement."

iv) It is submitted that the said agreement also envisaged the purchase of the Ballabgarh land measuring 105,983 sq. mtrs. and building and facilities situated at Ballabgarh where the entire operations of the Compressor Division were to be established. Tecumseh was also enjoying the liberty that, in the event Tecumseh India conveys its interest in the main parcel of land, Tecumseh may transfer the licence to the person or entity to whom the main parcel is conveyed. Besides the land, the entire assets, employees and workers were also transferred.

6. Agreement dated 10.7.1997

Though, by virtue of the Agreement dated 10.7.1997 Whirlpool had agreed not to compete with Tecumseh India in the

manufacture, sale, repair of compressors for a period of five years commencing from the date of the agreement for a consideration of sum of Rs.2.55 crores, yet, the non-compete Agreement read together with the other Agreements is a Non-Compete Agreement in perpetuity.

i) Clause 4 of the Non-Compete Agreement states as follows : Benefit and Binding Effect :

"This Agreement shall be binding upon the promissors and their respective successors and the assigns and shall inure to the benefit of Tecumseh India and the respective successors and assigns. This agreement has been entered into for the benefit of and may be enforced by the Tecumseh India and Tecumseh and their respective successors and assigns only and is not intended to benefit, be enforceable by, or create any remedy or right of action in favour of any other person."

7. By virtue of a combined reading of the above said three Agreements, it is evident that the amount of Rs.2.65 crores has been spent by M/s Tecumseh India in pursuance of the intention of Tecumseh Product Co. of Michigan to acquire the Compressor Division of M/s Whirlpool India including land, factory, employees, technical know how, buildings etc. and thus, forms part of expenditure made for the initial outlay and hence constitutes capital expenditure.

It is submitted that the expenditure of Rs.2.65 crores ostensibly made towards non-compete fee agreement is in fact for the purpose of acquiring an appreciated capital asset which would no doubt make the capital asset more profit yielding. The period of five years as stipulated in the non-compete agreement does not make any difference to the nature of the acquisition as the acquisition was an advantage of enduring nature which endured not only for the benefit of whole business for full period of five years but was in perpetuity in view of the acquisition of the entire Compression Division along with the employees. The entire business of the Compressor Division of Whirlpool was eliminated as no manufacture of compressors could be carried out by Whirlpool India and the sale of such compressors by Whirlpool India was confined to the supply of such compressors by M/s Tecumseh India to Whirlpool."

53. Then ld. Standing Counsel referred to the various judicial pronouncements, wherein several tests have been laid down: -

"Analysis of the several tests laid down in the judgments of the Supreme Court as well as several High Courts

(1) The Supreme Court has in several decisions held that in order to decide whether the expenditure is of revenue or capital nature one has to look at the expenditure from the commercial point of view. Though, the asset acquired being of enduring nature is one of the age old tests, yet in the judgment of the Hon'ble Supreme Court in the case of Assam Bengal Cement Co. Ltd. vs. CIT (1955) 27 ITR 34 (SC) the relevant tests are as follows:

(a) Expenditure may be treated as properly attributable to capital when it is made not only once and for all but with a view to bringing into existence an asset or advantage for an enquiring benefit of the trade. If what is got rid of by a lump sum payment is an annual business expense chargeable against revenue, the lump sum payment should equally be regarded as a business expense, but if the lump sum payment brings in a capital asset, then, that puts the matter on another footing altogether.

(b) Whether for the purposes of expenditure, any capital was withdrawn or in other words whether the object of incurring the expenditure was to employ what was taken in as capital of business. Again, it is to be seen whether the expenditure incurred was part of the fixed capital of the business or part of its circulating capital.

c) The aforesaid judgment of Assam Bengal Cement Co. Ltd. Vs. The Commissioner of Income-Tax, West Bengal, approves certain broad tests in support of the proposition that the expenditure in the acquisition of the concern would be capital expenditure, and the expenditure in carrying on the concern would be revenue expenditure.

(i)One of the earliest tests, is indicated in the following observations of Bowen L.J. in the course of the argument in City of London Contract Corporation Vs. Styles (1887) 2 TC. 239, 243 :

"You do not use it 'for the purpose of' of your concern, which means, for the purpose of carrying on your concern, but you use it to acquire the concern. "

(ii) The Privy Council in Tata Hydro-Electric Agencies Ltd., Bombay Vs. Commissioner of Income-Tax, Bombay Presidency and Aden (1937) L.R. 64 I.A. 215] pronounced at page 226 :

"What is 'money wholly and exclusively laid out for the purposes of trade' is a question which must be determined upon the principles of ordinary commercial trading. It is necessary accordingly, to attend to the true nature of the expenditure and to ask oneself the question, is it a part of companies working expenses; is it expenditure laid out as part of process profit earning ? "

(iii) Dixon, J., expressed a similar opinion in Sun Newspapers Limited and the Associated Newspapers Limited vs. The Federal Commissioner of Taxation (1938) 61 C.L.R. 337) at page 360:

"But in spite of the entirely different forms, material and immaterial, in which it may be expressed, such sources of income or consist in what has been called a 'profit yielding subject' the phrase of Lord Blackburn in United Collieries Ltd. v. Inland Revenue Commrs. 1930 SC 215 at p. 220. As general conceptions it may not be difficult to distinguish between the profit-yielding subject and the process of operating it. In the same way expenditure and outlay upon establishing, replacing and enlarging the profit yielding subject may in a general way appear to be of a nature entirely different from the continual flow of working expenses which are or ought to be supplied continually out of the returns of revenue. The latter can be considered, estimated and determined only in relation to a period or interval of time, the former as a point of time. For the one concerns the instrument of earning profits and the other the continuous process of its use or employment for that purpose".

(2) In the case of Commissioner of Income-Tax Vs. Coal Shipment Pvt. Ltd. – (1971) 82 ITR 902 W, the Hon'ble Supreme Court has approved the following :

(i) In the case of Robert Addie and Sons' Collieries Ltd. v. Commissioner of Inland Revenue ([1924] 8 T. C. 671, 676.), Lord President Clyde gave the following test:

" It is necessary accordingly to attend to the true nature of the expenditure, and to ask one's self the question, is it a part of the company's working expenses ? Is it expenditure laid out as part of the process of profit earning ?-or, on the other hand, is it a capital outlay ?-is it expenditure necessary for the acquisition of property or of rights of a permanent character, the possession of which is a condition of carrying on its trade at all ? "

ii) Further the Judges approved the dictum:

The expression " once and for all " used in the dictum laid down in Atherton's case (1) was referred to by Bhagwati J., speaking for this court in the case of Assam Bengal Cement Co. Ltd. v. Commissioner of Income-tax (2), and it was observed that the expression was used to denote an expenditure which is made once and for all for procuring an enduring benefit to the business as distinguished from a recurring expenditure in the nature of operational expenses. The character of the payment can be determined, it was added, by looking at what is the true nature of the asset which has been acquired and not by the fact whether it is a payment in a lump sum or by instalments. It is also an accepted proposition that the words "permanent" and "enduring" are only relative terms and not synonymous with perpetual or everlasting.

iii) The Hon'ble Supreme Court has held that although an enduring benefit need not be of an ever-lasting character, it should not, at the same time, be so transitory and ephemeral that it can be terminated at any time at the volition of any of the parties. Any other view would have the effect of rendering the word "enduring" to be meaningless.

Although it is true that payment made to ward off competition in business to a rival dealer would constitute capital expenditure if the object of making that payment is to derive an advantage by eliminating the competition over some length of time, the same result would not follow if there is no certainty of the duration of the advantage and the same can be put to an end at any time. How long the period of contemplated advantage should be in order to constitute enduring benefit would depend upon the circumstances and facts of each individual case.

(c) The facts of the said case are however distinguishable from the facts of the present case.

In the said case of Coal Shipment, as payments made to M/s. H. V.Low & Co. Ltd. were related to the actual shipment of coal in the course of the trading activities of the respondent and had no relation to the capital value of the assets and the payments were not related to or tied up in any way to any fixed sum agreed to between the parties and hence were held to be revenue in nature."

54. Concluding her arguments it was submitted that 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 the capital expenditure. The asset which the company had acquired irrespective of the fact whether the consideration paid was a recurring payment or was in lumpsum would be in the nature of capital asset. She submitted that by making payment of so called non-compete fee the assessee had acquired protection for its business as a whole as it took over the entire compressor division of Whirlpool. It was not a part of the working of the business but went to appreciate the whole of the capital asset and it was part of initial outlay and to make it more profit yielding. The advantage derived by the assessee was certainly an enduring advantage and thus, was of the nature in capital expenditure and was not allowable u/s 37 of the Act.

55. The obligation to make payment was undertaken by the assessee in consideration of their acquisition of the right and opportunity to earn profit, i.e. of the right to conduct the business and not for the purpose of producing profit in the conduct of the business. The distinction has to be made between the expenditure incurred for acquisition of an income earning asset and the expenditure incurred in the process of the earning of the income. The expenditure in the acquisition of that asset is capital expenditure and expenditure in the process of earning of profit was revenue expenditure. She contended that such test really is akin to one laid down by Bowen Ld. Judge City of London Contract Corporation Ltd. v. Styles [(1887) 27 C.239].

Argument by Shri Manish Gupta, Sr. DR: -

56. It was submitted by Sh. Gupta that according to clause 12 of MOU dated 4.11.1996 the Whirlpool and its parent company agreed that they will not manufacture or repair compressor during the term of global sourcing agreement subject to the condition that Whirlpool shall be free to sell refrigerator, compressor to service partners. He submitted that pursuant to the MOU parent company of Tecumseh floated one fully owned subsidiary namely, the assessee, on 30.1.1997 which company entered into an agreement with Whirlpool India Ltd. in connection with the transfer of compressor division and related operation along with non-compete agreement as stated in MOU. He referred to the agreement dated 30.1.1997, wherein as per clause (E) Whirlpool and assessee were stated to have negotiated an arrangement broadly stated as under: -

> *(i) "Whirlpool will sell its undertaking the "compressor divisions and related operations" to Tecumseh India.*
> *(ii) Tecumseh India will engage in the business of manufacture, sale and repair of compressors, CFC and non-CFC:*
> *(iii) Whirlpool will not compete with Tecumseh India in the manufacture, sale or repair of compressors as provided in clause 9(j) herein"*

57. Shri Gupta submitted that as per agreement the purchase price of various items were stated as under which was capitalized in the books of account of the assessee company: -

(i) Equipment:	*19.50 Cr.*
(ii) Inventory:	*5.25 Cr.*
(iii)Real Estate:	*25.10 Cr.*
Total	*49.85 Cr.*

58. Then Sh. Gupta referred to clause 9(j) of the agreement dated 2nd July, 1997 which read as under:-

> *"Whirlpool shall sign and deliver to Tecumseh India, against the receipt of full consideration specified therein a Non-Compete agreement in the form as contained in Appendix "M" undertaking not to compete with Tecumseh India in the manufacture, sale or repair of compressors in India, except that Whirlpool shall be*

entitled to sell and install compressors purchased from Tecumseh India to persons under its service arrangements, subject to the provisions of the supply agreements."

59. It was submitted that this clause provides for non-compete agreement and no time limit has been provided for and there is no stipulation regarding revocation of the same. Thus, it was submitted that the nature of non-compete agreement is a perpetual along with purchase of factory, land, machine, buildings, employees, know-how, etc. and no scope whatsoever has been left for future business to Whirlpool India Ltd.

60. Ld. DR submitted that non-compete agreement dated 10th July, 1997 is the fall out of earlier agreements in the shape of MOU dated 4th November, 1996 and agreement dated 2nd July, 1997. It was submitted that in Clauses C and D of non-compete agreement it was provided as under:-

"C. In terms of the Purchase Agreement, the Promisors have agreed not to compete with Tecumseh India in the manufacture, sale and repair of compressors as a condition of the sale and purchase of the Compressor Division and Related Operations, subject to payment of Compensation for the same.
D. The execution and delivery of this Agreement is a condition precedent to Tecumseh India's obligation to consummate the transactions described in the Purchase Agreement."

61. Then, Ld. DR referred to Clause (a) of the Non-compete and Non-disclosure Agreement which read as under:-

"The Promisors hereby acknowledge and recognize the highly competitive nature of the business in which Tecumseh India proposes to engage. Accordingly the Promisors hereby agree that during for the period commencing with the date of this Agreement ending on the date that is five (5) years after the date of this agreement, the Promisors will not, directly or indirectly……."

He submitted that Clause (b) read as under:-

"The Promisors hereby acknowledge that the trade secrets, private or secret processes of Tecumseh India and information concerning products, development, technical information, procurement and sales activities and procedures, promotion and pricing techniques and credit and financial data concerning customers of Tecumseh India are valuable, special and unique assets. In light of the highly

> competitive nature of the industries in which Tecumseh India conducts businesses, the Promisors further agree that all knowledge and information described in the preceding sentence shall be considered confidential information. In recognition of this fact, the Promisors will not disclose any of such secrets, processes or information to any person, firm, corporation, association or other entity for any reason or purposes whatsoever and the Promisors will not make use of any such secrets, processes or information for their own benefit or the benefit of any other person or other entity under any circumstances."

62. Referring to these clauses it was submitted that while clause E (a) (pg.18) of Non-Competition Agreement, the erstwhile owners agreed not to compete for a period of 5 years with the Assessee, under Cl. (b) (pg. 19)they agreed "not to disclose trade secrets, processes, and information to any party nor to use such trade secrets, processes or information for their own benefit under any circumstances" without any time limit. This way again the non-compete agreement virtually became a "perpetual non-compete agreement", notwithstanding time limit of 5 years provided in Cl.(a).

63. It was further submitted that as per settled law, the terms of agreement should be read as a whole in order to construe its proper meaning. Reference was made to Explanation to Section 91 of the Indian Evidence Act, 1872 to contend that when the contracts, etc. are contained in more than one document, all the documents containing the contract should be properly gone through. It was submitted that Section 91 of Indian Evidence Act provide as under:-

> "91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of documents.-*When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or such matter, except the document itself, or secondary evidence of its content in cases in which secondary evidence is admissible under the provisions hereinbefore contained.*
>
> *Explanation* 1 *–This section applies equally to cases in which the contracts grants or dispositions of property referred to are contained in*

one document, and to cases in which they are contained in more documents than one."

64. Reference was made to Section 6 of Indian Evidence Act to contend that Court must take notice of the facts which formed part of the same transaction although they occurred at different times and place. Section 6 of the Evidence Act read as under:-

"6. Relevancy of facts forming part of same transaction.—*Facts which, though not issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places".*

65. Referring to these provisions of law it was submitted that the original MOU dated 4.11.96, the purchase agreement dated 2nd July, 1997 and non-compete agreement dated 10th July, 1997 are forming part of the same transaction. To look at that as different agreement will be to ignore the obvious. The MOU as well as purchase agreement both contained the clauses to the effect that a non-compete agreement would be separately entered into.

66. It was submitted that the first objection of the Ld. AR is to treat the non-compete transaction as separate transaction. It was submitted that the said contention is far from truth. It was submitted that the Assessing Officer has discussed the entire issue beginning with the signing of MOU on 04.11.96 in the assessment order and he has also discussed the factum of Rs.46.25 crore as having been paid towards the purchase consideration of the Compressor Division and related operations. The assessee has also capitalized the said expenses of Rs.46.25 crores in its books and, thus, applying the same logic the non-compete fees also shall have the character of "initial outlay" of the new undertaking and, therefore, should be capitalized.

67. He submitted that even if it is assumed that the Assessing Officer has not treated the payment of "non-compete fee" as part of the same transaction of initial outlay, the ITAT being highest fact finding authority is not debarred from going into the factual aspects of the matter brought before it and it will not be

proper to overlook the facts which are clear from the record. To contend that ITAT has such power, Ld. DR has relied upon the following decisions:-

(i) Kapur Chand Shrimal Vs. CIT 131 ITR 451 (SC) :

" It is well known that an appellate authority has the jurisdiction to correct all errors in the proceedings under appeal and issue, if necessary, appropriate directions to the authority against whose decision the appeal is preferred to dispose of the whole or any part of the matter afresh, unless forbidden from doing so by any statute".

(ii) CIT Vs. Manohar Glass Works 232 ITR 302 (All) :

*"The Appellate Tribunal, being the last fact finding body, is under a legal obligation to record a correct finding of fact and as and when it finds some difficulty in recording a correct finding of fact on account of contradictions in the factual position, it may remand the matter back to the A.O to the lower authority to state correct facts".*A-13

68. Replying to the arguments of Ld. AR, that various agreements are executed between different parties, Ld. DR submitted that initial MOU could not have been signed by the assessee, since it came into existence as a subsidiary of the foreign parent company, which was a signatory to the MOU. A common thread was running between these agreements/contracts which could not be ignored.

69. It was submitted that as per the claim of the assessee non-compete agreement was executed after 8 days of the purchase agreement, therefore, these two transactions should be considered to be separate transactions. He submitted that the assessee is conveniently ignoring the clause E(iii) and Clause 9(j) of the purchase agreement dated 2nd July, 1997 specifically provided for non-competition by the erstwhile owners in favour of the assessee. Thus, it was submitted by Ld. DR that according to Explanation 1 to Section 91 and the principle of *res gaeste* (same transaction) in Section 6 of the Indian Evidence Act shall come into play.

70. It was submitted that as per settled principles of law the sum and substance of an agreement should be gathered by construing all the relevant provisions of the agreement and it is the "substance" rather than "form" that

should guide the court. It was submitted that if examined from such angle, the non-compete agreement signed in the present case is in fact a perpetual one. Thus, it was submitted by Ld. DR that the entire issue is required to be considered in its proper perspective and has to be treated as one common transaction entered through two separate agreements, but the common principle underlying is that it is a slump sale of the entire compressor unit along with non-compete commitment from the erstwhile owners and, in this manner, the expenditure of Rs.2.65 crore should be treated as part and parcel of the initial cost of acquisition of the undertaking and should be disallowed as capital expenditure.

71. In the alternative, it was submitted that the expenditure otherwise is capital as the assessee itself had treated the said expenditure as deferred revenue expenditure in its books of account and the expenditure has been spread over five years and 1/5th of the expenditure is debited to the Profit & Loss Account in the year under consideration.

72. Reference was made to the following two decisions of the Hon'ble Supreme Court:-

(i) Assam Bengal Cement Co. Ltd v CIT:27ITR 34(SC) – A decision rendered by 4-Judge Bench.

(ii) CIT vs Coal Shipment Pvt Ltd: 82 ITR 902(SC) - A decision rendered by 3-Judge Bench.

73. It was submitted that in Assam-Bengal Cement Company's case the assessee had acquired from Government of Assam lease right of lime stone quarry for the purpose of carrying on manufacture of cement. In addition to rent and royalties two sums were paid as protection fees by the lessor, agreed not to grant any lease, permit or prospecting licence to any other party without a condition that no lime stone should be used for the manufacture of cement and on these facts the observations of Hon'ble Court were as under:-

"*The asset which the company had acquired in consideration of this recurring payment was in the nature of a capital asset, the right to*

carry on its business unfettered by any competition from outsiders within the area. It was a protection acquired by the company for its business as whole. It was not a part of the working of the business but went to appreciate the whole of the capital asset and making it more profit yielding. The expenditure made by the company in acquiring this advantage which was certainly an enduring advantage was thus of the nature of capital expenditure and was not an allowable deduction under section 10(2)(xv) of the income Tax Act".

74. In the case of CIT vs. Coal Shipment Pvt. Ltd. (supra) the observations of the Hon'ble Supreme Court were as under:-

"*Although we agree that payment to ward of competition in business to a rival dealer would constitute capital expenditure if the object of making that payment is to derive an advantage by eliminating the competition over some length of time, the same result would not follow if there is no certainty of the duration of the advantage and the same can be put to an end at any time. How long the period of contemplated advantage should be in order to constitute enduring benefit would depend upon the circumstances and the facts of each individual case".*

75. Referring to these two decisions it was submitted that Apex Court has unequivocally made it clear that the payment made to avoid competition by obtaining a commitment from a rival dealer not to pursue the same line of business over some length of time, would constitute capital expenditure. It was submitted that till date there is no other decision of Hon'ble Supreme Court directly touching the issue and that being so the attempt has been made by the assessee to gather indirect support from other cases such as Empire Jute & Co. Ltd. vs. CIT, 124 ITR 1, CIT vs. Associated Cement Companies Ltd., 172 ITR 257 (SC), Alembic Chemical Works Co. Ltd. vs. CIT 177 ITR 377, CIT vs. Madras Auto Services, 233 ITR 468 (SC).

76. It was submitted that these decisions cannot obliterate the effect of the direct decision on the subject.

77. Distinguishing the decision of Hon'ble jurisdictional High Court in the case of CIT vs. Eicher Ltd. (supra), it was submitted by Ld. DR as under:-

"Facts in Eicher case :

- Payment of Rs.4 crores was made by the assessee to a retiring employee and the company which he wanted to help set up a rival business.

- It was an existing business and the non-compete agreement did not specify the time period over which the payee would not engage in the asseesee's line of business.

Decision of the High Court

- According to High Court , the payment is made towards protecting the assessee's business interests, its market position & profitability.

- The assessee did not acquire any capital asset by making the payment of non-compete fee.

- From the record, it is not known how long the non-compete agreement was to last, hence the advantage is not enduring in nature.

- There was nothing to show that it was drawn out of the capital of the assessee.

AFORESAID PROPOSITIONS AS APPLIED TO THE FACTS OF THE PRESENT CASE AND WHY THE SAME WOULD NOT BE APPLICABLE:

a. Payment of Rs. 2.65 Crore was made by way of non-compete fees as per MOU and subsequent agreements. The time limit prescribed as per the agreement was for a maximum period of "Perpetuity " and a minimum period of 5 years as noted in the agreements.

b. It is not the case of the Revenue that the assessee acquired any capital asset. Rather according to the Revenue, what the assessee has acquired was an "enduring advantage ",as held in the cases of Assam Bengal Cement Co. Ltd v CIT:27ITR 34(SC) & CIT Vs. Coal Shipment Pvt. Ltd. 82 ITR 902(SC).

c. "Enduring advantage" does not mean that an advantage should last forever. Apparently the assessee's argument appears to

be that an "enduring benefit" should be synonymous with "Perpetual" and "everlasting". The Revenue has already shown that on a correct interpretation of the terms of both the agreements, it is seen that it is a perpetual agreement without any time limit and even if 5 years time frame is taken as the outer limit of the non-compete agreement, it still becomes an "enduring benefit". While clarifying the meaning of enduring benefit, the Supreme Court in the case of Assam Bengal Cement Co. Ltd v CIT:27ITR 34(sc) at pg 44 has held :

> *"The expressions 'enduring benefit' or "of a permanent character' were introduced to make it clear that the asset or the right acquired must have enough durability to justify its being treated as a capital asset".*

Similarly, the Supreme Court also quoted with approval at pg 47 the observations made in Sun Newspapers Ltd.. V Federal Commissioner of Taxation, an English case.:

> *"When the words 'permanent' or 'enduring' are used in this connections it is not meant that the advantage which will be obtained will last for ever. The distinction which is drawn is that between more or less recurrent expenses involved in running a business and an expenditure for the benefit of the business as whole".....eg.....-" enlargement of the goodwill company"-"Permanent improvement in the material or immaterial assets of the concern."*

Thus, Supreme Court has held that the word "enduring" does not mean "permanent" or "everlasting". In the light of the above, it is thus evident that the above advantage of non-competition is an "enduring" one for the appellant and hence should be held as a 'capital expenditure'."

78. It was submitted that there are several other decisions of Hon'ble High Courts which have held that non-compete fees to restrain competition for five years and more would be held to be giving an "enduring advantage" and, thus, capital expenditure and reference was made to the following decisions:-

(i) Neel Kamal Talkies v CIT(1973) 87 ITR 691(All) (pg 8 of Departmental Paper Book)

(ii) CIT v Hindustan Pilkington Glass works (1983) 139 ITR 581(Cal) (pg 11 of Departmental Paper Book)

(iii) Grover Soap Pvt. Ltd. Vs. CIT (1996) 221 ITR 299 (MP) (pg 23 of Departmental Paper Book)

(iv) Chelpark Co. Ltd. Vs. CIT (1991) 191 ITR 249 (Mad.) (pg 43 of Departmental Paper Book)

(v) Tamilnadu Diary Development Corpn. Ltd. Vs. CIT (1996) 239 ITR 142.(MAD) (pg 26 of Departmental Paper Book)

79. It was submitted that the decision of Hon'ble Delhi High Court in the case of CIT vs. Eicher Ltd. (supra) shall not be applicable to the assessee's case since in that case the period of validity of the restrictive covenant was not specified whereas in the present case agreement shows it is either perpetual or effective at least for five years.

80. It was submitted that assessment year under consideration is assessment year 1998-99 and the assessee company has not been able to show any proof that the agreement has not lasted its full term of five years i.e., upto 2004. Mere claim that agreement could be terminated at will is in sharp contrast to Clause 4 of non-compete agreement which mentions the benefit and binding effect as under:-

> *"This Agreement shall be binding upon the promissors and their respective successors and the assigns and shall inure to the benefit of Tecumseh India and the respective successors and assigns. This agreement has been entered into for the benefit of and may be enforced by the Tecumseh India and Tecumseh and their respective successors and assigns only and is not intended to benefit, be enforceable by, or create any remedy or right of action in favour of any other person."*

81. It was submitted that the reading of above clause would show that there is no provision for termination of non-compete agreement, hence, the facts of the present case are different from the facts in the case of CIT vs. Eicher Ltd. (supra).

82. It was submitted that as per settled law the decision of Hon'ble Supreme Court is the law of land under Article 141 of the Constitution and if prima facie, there appears to be some dichotomy between the decision of Supreme Court and High Court, it is the decision of the Supreme Court which would have precedent and binding effect over all High Courts, Tribunals within the territory of India. To raise such contention Ld. DR referred to the decision of Hon'ble Supreme Court in the case of Suganthi Suresh Kumar vs. Jagdeeshan AIR 2002 (SC) 681 wherein their Lordships observed as under:-

> *"It is impermissible for the High Court to overrule the decision of the apex court on the ground that Supreme Court laid down the legal position without considering any other point. It is not only a matter of discipline for the High Courts in India, it is the mandate of the Constitution as provided in Article 141 that the law declared by the Supreme Court shall be binding of all courts within the territory of India. It was pointed out by this Court in Anil Kumar Neiotia Vs. Union of India (AIR 1988 SC 1353) that the High Court cannot question the correctness of the decision of the Supreme Court even though the point sought before the High Court was not considered by the Supreme Court".*

83. Ld. DR referred to the decision of Hon'ble Gujarat High Court in CIT vs. Vallabhdas Vithaldas (2002) 253 ITR 543 (Guj) in which it has been held as under:-

> *"Once there is a pronouncement of the Highest Court of the land, the same is binding on all courts, Tribunals and all authorities in view of article 141 of the Constitution and it is not open to distinguish the same by referring to certain words of those provisions which were very much before the Supreme Court merely on the ground that some other arguments could have been urged which were not considered by the Supreme Court".*

84. He also referred to the decision of Hon'ble Supreme Court in the case of Virtual Software Systems Ltd. vs. CIT (2007) 287 ITR 83 (SC) in which Hon'ble Supreme Court has laid down a general proposition on precedent, holding that where the predominant majority of the High Courts have taken a certain view of the interpretation of a certain provision, the Supreme Court would lean in favour of the predominant view. The same view should be applied in this case as well

since majority of High Courts have held non-compete fee to be "capital" in nature.

85. It was submitted that benefit derived by the assessee is in the "capital field", since this amount is paid from the same "capital" out of which the payment for land, building, machinery, etc. of the "Compressor Division" and its related operations amounting to Rs.46.25 crore was paid for and duly capitalized in its books.

86. In rebuttal of the argument of Shri Ajay Vohra, Ld. DR submitted as follows:-

> "1. Shri Ajay Vohra, the Ld. Counsel for the Interveners, Hindustan Coca Cola Beverages Pvt. Ltd., has emphasised a lot in his arguments that there has been substantial change in the judicial thinking ever since the days of (1) **Assam Bengal Cement Ltd. Vs. CIT 27 ITR 34 (SC)and (2) CIT Vs. Coal Shipment Pvt. Ltd. 82 ITR 902 (SC).** In this connection, he cited the ratio of cases of **Empire Jute & Co., Ltd., Vs. CIT 124 ITR 1** and **Alembic Chemical Works Co. Ltd. Vs. CIT 177 ITR 377(SC).** There is no truth in such claim for the following reasons :
>
> (a) The decision of the **Assam Bengal Cement Ltd. Vs. CIT 27 ITR 34 (SC)** was rendered by a Bench of 4 Judges. Similarly decision in the case of **CIT Vs. Coal Shipment Pvt. Ltd. 82 ITR 902 (SC)** was rendered by a Bench of 3 Judges whereas **Empire Jute & Co., Ltd., Vs. CIT : 124 ITR 1(SC)** and **Alembic Chemical Works Co. Ltd. Vs. CIT 177 ITR 377(SC)** case was rendered by three & two Judges Benches respectively. Looking at the Bench-strength, it cannot be said that the decision of the Hon'ble Supreme Court rendered in the cases of **Assam Bengal Cement Ltd. Vs. CIT 27 ITR 34 (SC) or CIT Vs. Coal Shipment Pvt. Ltd. 82 ITR 902 (SC) have either been overridden or reversed subsequently.** These decisions still hold the field.
>
> (b) Subsequent to the decision of **Empire Jute & Co., Ltd., Vs. CIT 124 ITR 1 and Alembic Chemical Works Co. Ltd. Vs. CIT 177 ITR 377(SC),** the Supreme Court has passed another order in the case of **Arvind Mills Pvt. Ltd. Vs. CIT 197 ITR 422 (SC)**, in which it was held that the improvement effected on the land acquired by the assessee company under the Town Planning Scheme of Bombay Municipality is a "Capital Expenditure" even though such expenditure resulted in providing better facilities for carrying on the

business of the assessee. The Hon'ble Supreme Court further laid down the following ratio:

> *"In our view, learned counsel for the respondent is justified in submitting that the capital expenditure incurred in connection with the business activities ultimately results in efficiently carrying on the business and, by that process gives aid in the running of the day-to-day business more efficiently but simply on that score, a capital expenditure does not become a revenue expenditure".*

(c) If the argument of the Counsel of the Intervener were to be accepted, no expenditure could ever be termed as "capital" since all expenses are ultimately incurred for facilitating the carrying on of the business more profitably and efficiently. In that case one limb of the Sec. 37 that no expenditure of "capital" nature should be allowed in computing the income chargeable under the head "profits & gains of business or profession", would become otiose. It is again a settled law that any interpretation which makes a section of statute otiose should be avoided.

2 The Counsel of the Intervener also relied on the decision of the Supreme Court in **CIT V. Madras Auto Service : 233 ITR 468 (SC)** to argue that in the current judicial thinking, the length of time over which the enduring advantage may enure, is not determinative of the nature of the expense as long as the advantage is not in the capital field.

In this connection, it is brought to the notice of the Hon'ble Bench that the decision in the above case related to the expenditure incurred by the assessee on a tenanted building which was to go back to the landlord at the end of the period of tenancy and the landlord allowed the benefit of reduced rent to the assessee. In those peculiar circumstances, the expense was held to be "revenue" in nature. Hence the ratio of the said case is not applicable to the present one.

3. Shri Vohra also relied on the decision of **CIT Vs. Late G.D. Naidu (1987) 165 ITR 63(Mad.)** But the said decision has been impliedly over ruled by the later decision of the same High Court in **Chelpark Co. V. CIT(1991) 191 ITR 249 (Mad.).**

4 He also sought strength from the fact that the Department's SLP in Supreme Court against Delhi High Court's order in the case of **CIT Vs. Eicher Ltd : 302 ITR 249 (Del)** has been dismissed, and therefore, Delhi High Court's view now has become final.

The above assertion is not correct. First of all, the facts of the present case relates to an understanding taken over newly whereas in **CIT Vs. Eicher Ltd : 302 ITR 249 (Del)** case, non-compete fee was paid in an existing business. Secondly, when an SLP is dismissed by Supreme Court without entering into the merits of the case, it does not create a binding precedent. The Hon'ble Calcutta High Court has referred to 3 such decisions of Supreme Court on this matter in **CIT Vs. Ruby Traders & Exporters Ltd. (2003) 263 ITR 300 (Cal).** The relevant portion is reproduced here under:

> *"Having regard to the order dismissing the SLP, we find that it was purely on a question of fact the Supreme Court did not interfere. That such a decision has no binding effect under article 141 of the Constitution would be apparent from the decisions in* ***Municipal Corporation of Delhi Vs. Gurnam Kaur, AIR 1989 SC 38 (para 11); Gangadharan Vs. Janardhana Mallan, AIR 1996 SC 2127 (para 9); Director of Settlement Vs. M.R. Apparao (2002) 4 SCC 638, 650, (para . 7)*** *relied upon by Mr. Deb. In these decisions, it was held that the decisions by the apex court dismissing the SLP without entering into the merits of the case would not be binding under article 141. If the SLP is dismissed by a non-speaking order, it does not lay down any law. Article 141 is not applicable on a statement of fact and matters other than law".*

5. In view of the above, it is earnestly urged that the dismissal of SLP in **CIT Vs. Eicher Ltd : 302 ITR 249 (Del)** does not tie the hands of this Hon'ble Tribunal since if an SLP is dismissed by a non-speaking order, it does not lay down a law.

6. The Counsel of the Intervener in the case of **Reid Elsiever Ltd. Vs. DCIT.** Shri S.D. Kapila contended that Allahabad High Court's decision in the case of **Neel Kamal Talkies Vs. CIT (1973) 87 ITR 691 (All)** was correct since the assessee, a cinema hall owner, could ensure complete monopoly status in Bijnore Town by making payment to the other theatre owner. This argument is wholly fallacious since the assessee could not have stopped any other new cinema-hall to come up in that town through such non-compete agreement. Freedom to profess a business or profession is a fundamental right and any number of new theatres can come up in any town. Thus what the assessee got is reprieve from competition by an existing competitor, not complete monopoly status. Therefore, his argument that only in a case where a monopoly is created, such

expense should be treated as “capital” expenditure & otherwise not, falls flat.”

DECISION

87. We have carefully considered the rival submissions in the light of the material placed before us. The first contention of Ld. Counsel of the assessee is that non-compete agreement, for the purpose of allowability or otherwise of the non-compete amount, should be considered separately from what was paid by the assessee to acquire the business activity of transformers and its related facilities from Whirlpool India Ltd. For contending so, the reliance has been placed on the fact that the Assessing Officer and CIT (A) both have considered the said agreement on stand alone point. In other words, the contention of Ld. Counsel is that the payment made with regard to non-compete agreement should be considered separately from the other payments made by the assessee with regard to acquisition of assets relating to activity of manufacturing and trade of compressors.

88. The facts have already been set out in the earlier part of this order. The parent company of the assessee company being leading manufacturer of compressors worldwide, had desired to enter the Indian market for that activity and, for the purpose of effectuating such desire that company entered into an agreement called MOU with the Whirlpool India Ltd. and its parent company in which it was clearly stated in clause 1.1 that Tecumseh and Whirlpool shall enter into an asset purchase agreement whereby Tecumseh (through a to be established local Indian entity) shall purchase all compressor, machinery, equipment and tooling located at Whirlpool’s Faridabad facility as well as related compressor component assets located at Whirlpool’s Ballabhgarh facility [including laminations, wire drawings, central tool room, overhead protectors and relays] and all such assets were to be fully identified in such asset purchase agreement or other appropriate local Indian documentation required to detail such sale and purchase. Similarly, in clause 12 and 12.1 the mention is made

regarding non-compete agreement whereby Whirlpool India and Whirlpool USA (including its wholly owned subsidiaries) agreed not to manufacture or repair compressors during the term of global sourcing agreement with Tecumseh. However, Whirlpool has been given right to sell refrigerator compressors to service partners purchased from Tecumseh subject to provisions of clause 6.1 of the agreement. The purchase price is mentioned in clause 3 and 3.1 whereby it is stipulated as under:-

> "3. Purchase Price.
>
> 3.1 Tecumseh shall pay to Whirlpool as the total purchase price for the Compressor Division assets referred to in Article 1 and the Ballabhgarh land and buildings referred to in Article 2 hereof, Rs.525 million (52.5 crores)."

89. As per clause 3.4 of MOU, it is stated as under:-

> "3.4 Parties shall meet to determine the proper allocation of purchase price for various assets."

90. Looking into the above clauses of MOU it can be observed that principally both the parties had agreed to pass on a total consideration of 52.5 crores and allocation of purchase price for various assets was to be determined at the further meeting of the parties and according to clause 3.5 the base price retained for purchase of raw materials and work in progress was kept at 5.25 crores being 10% of the total purchase price agreed. Though clause 3 of the MOU has reference to Article 1 and Article 2, but copy of the same has not been furnished in the paper book filed before us.

91. To ascertain that for what the total payment of Rs.52.5 crores was made, one has to look into the agreement dated 2nd July, 1997 which was entered into in furtherance of MOU by the 'to be established local Indian entity', namely, Tecumseh India and Whirlpool India Ltd. wherein a total sum of Rs.49.85 crores was determined for the various assets. More particularly, these allocated payments are described in para 9 of this order.

92. Broadly stated, the purchase price paid for the sale and purchase of Compressor Division and related operation and facilities excluding the raw materials, work in progress and the land and building at Ballabhgarh was a sum of Rs.19.50 Crore (Clause 2 of the Agreement) purchase price for inventory i.e., raw material and work in progress was Rs.5.25 crores (Section 5 of the agreement), purchase price of the land (called as "main parcel", "seven acre parcel" and "five acre parcel") for an aggregate amount of Rs.25.10 crores which made the total of these assets at Rs.49.85 crore. If a further sum of Rs.2.65 crore paid on account of non-compete fee is added to the same, the total will come to Rs.52.50 crore.

93. Thus, it will be incorrect to say that the non-compete agreement should be considered on stand alone basis as the reference of non-compete agreement is not coming for the first time in the agreement dated 2nd July, 1997, but it originated from the MOU dated 4th November, 1996 wherein as per clause 12 it is clearly stated that these parties shall enter into non-compete agreement and aggregate amount of transfer of all these assets was stated to be Rs.52.50crore. All the further events have proceeded on the basis of MOU only as there is no significant change in what was stated in MOU as a total consideration for whole of the transaction and what was subject to transfer.

94. While considering the facts and arriving at a legal conclusion from those facts, it is necessary to go into the entire transaction for proper appreciation of the facts as well as law.

95. From the facts, it is clear that for entire transaction which included non-compete agreement an aggregate sum of Rs.52.5 crore was agreed to be paid as per clause 3.1 of the MOU which is reproduced in para 88 of this order. As per clause 3.4 of the MOU parties were to meet for determining the proper allocation of the purchase price for various assets. The allocation of price for

various assets has been described above which include a sum of Rs.2.65 crore being called as "non-compete fee". Therefore, the very basis of payment of so-called non-compete fees cannot be detached from the Memorandum of Understanding being part and parcel of the initially aggregated agreed purchase price. Clause `C' & `D' of Non-compete agreement have already been reproduced in Para 60 of this order. Clause D clearly states that execution & delivery of non-compete agreement is a condition precedent for assessee's obligation to consummate the transaction described in the purchase agreement. Therefore, all these agreements form one transaction which are interwoven by a common thread. These agreements are not mutually exclusive so as to say that one could be fulfilled without fulfilling the other. Thus, there is no force in the contention of the Ld. Counsel of the assessee that the non-compete fees payment should be considered and viewed on stand alone basis. The same is hereby rejected.

96. It will also be incorrect to say that the Assessing Officer has considered such payment on stand alone basis as all the agreements namely; MOU, final agreement, non-compete agreement and supply agreement were produced before the Assessing Officer and he has discussed all these agreements in the assessment order. It is mentioned by the Assessing Officer in the assessment order that the assessee company was incorporated on January 30, 1997 and it is a fully owned subsidiary of a non-resident company known as M/s Tecumseh Products Company, Michigan, USA. The company started business of acquiring the Compressor Division of M/s Whirlpool India Ltd. in the month of July, 1997. For such purchase, the assessee entered into an MOU on 4th November, 1996 and a final agreement was executed on 2nd July, 1997 according to which an amount of Rs.46.25 crore was paid to M/s Whirlpool India Ltd. for various items like inventory, building, land and plant and machinery. It is further stated by the Assessing Officer that included in that amount was a sum of Rs.2.56 (actual amount is Rs.2.65 crore) according to item No. 9(j) of the agreement and M/s Whirlpool was to sign a non-compete agreement after receiving full consideration in the form contained in Appendix-M. It is further stated by the Assessing Officer

that the assessee did not file Appendix-M, but filed a non-compete agreement dated 10th July, 1997. Therefore, it cannot be held that the Assessing Officer has considered the payment of non-compete fee on stand alone basis. The consideration thereof was for the purpose of determining the allowability or otherwise thereof from income-tax point of view as other payments were never claimed by the assessee being on revenue account. But that does not mean that the Assessing Officer has considered non-compete agreement on stand-alone basis.

97. As pointed out earlier, to arrive at a proper conclusion, it is necessary to go into the entirety of facts and even if it is the case of the Ld. Counsel that the Assessing Officer and CIT (A) both have considered the non-compete agreement on stand alone basis, even then the Tribunal is not precluded from going into the MOU and main agreement to decide the question relating to allowability or otherwise of such claim of the assessee. Therefore also the contention of Ld. Counsel appearing on behalf of the assessee that non-compete agreement should be considered on stand alone basis cannot be accepted.

98. On the issue of allowability or otherwise of a sum of Rs.2.65 crore, both the parties have submitted elaborate argument in their favour. Both the parties and the learned counsels of interveners have also relied upon catena of judicial pronouncements to contend that the issue lies in their favour. All these cases are described in detail while recording their arguments. All of them may not be discussed in detail while recording our conclusion on the issue but that does not mean that these cases have not been taken into consideration or kept in mind while considering the issue.

99. AR while arguing that the payment of non-compete fees is not in the nature of capital has firstly placed reliance on the decision in the case of Assam Bengal Cement Company vs. CIT (supra). In that case the assessee had acquired from the Government of Assam a lease of limestone quarries for a period of 20 years for the purpose of carrying on the manufacture of cement in

consideration of payment of yearly rents and royalties. In addition, the assessee agreed to pay two further sums as protection fees which was in lieu of lessor giving an undertaking not to grant lease, permit or a prospecting licence with regard to limestone to any other party without a condition that the limestone given will not be used for the purpose of manufacturing cement.

99.1 Their Lordships, referring to various decisions, have come to the conclusion that under clause 4, the lessors undertook not to grant any lease permit or prospecting licence regarding limestone to any other party in respect of the group of quarries called the Durgasil area without a condition therein that no limestone shall be used for the manufacturing of cement. The consideration of Rs.5000/- per annum was to be paid by the assessee company to the lessor during the whole period of the lease and such advantage or benefit was to inure for the whole period of lease. It was held to be enduring benefit of the whole of the business of the company and, thus, falling within the Viscount Cave's test though the amount was not a lumpsum payment but was spread over the whole period of the lease and it was a recurring payment.

99.2 It was held that the fact that it was a recurring payment was immaterial because one had to look to the nature of payment which in turn will be determined by the nature of assets which the company had acquired. It was observed that the asset which was acquired by the company in consideration of such recurring payment was in the nature of capital asset i.e., the right to carry on its business unfettered by any competition from outsiders within the area. It was a protection acquired by the company for its business as a whole. It was observed to be not a part of the working of the business, but it appreciated the whole of the capital asset which was made more profit yielding. The expenditure was considered to be made for acquiring such addition, which was an enduring advantage and, thus, was held to be in the nature of capital expenditure. Recurring payment was considered as an appreciation to the lease to the considerable extent, and it was so held for second protection fees of Rs.35,000/-

for the year which was also considered to be acquisition of an advantage of enduring nature which inured for the benefit of the whole of the business for the full period of the lease unless terminated by the lessor by notice as prescribed in the last part of the clause.

100. Here, in the present case, as per the submission of the assessee, the compressor supply agreement has termination clause according to which supply agreement, which was to take effect from 14th July, 1997 and was to end at the close of the business on 31st December, 2002, could be terminated by the mutual written agreement upon written notice of termination providing at least 120 days in advance of the effective date of such termination. That too unless shorter period is agreed to by the parties. But the provision of termination of supply agreement has nothing to do with the non-compete clause as the so called termination clause does not affect the entire transaction in principle which includes non-compete agreement as well. In the case of Assam Bengal Cement Company vs. CIT (supra) also there is reference of such termination of non-protection clause in the lease agreement itself, but even then the payment made by the assessee in that case was held to be capital in nature.

101 Now, coming to the decision in the case of Coal Shipment Pvt. Ltd. (supra). In that case the assessee was one of the companies which exported coal from India to Burma before the Second World War. The shipment of coal to Burma Railways before the war was the subject of open tender. After the cessation of hostilities in 1946, it became possible to resume the export of coal to Burma. In order to overcome the difficulties in the conduct of trade, following the war, the principals of coal trade in Bengal formed an association styled as “Coal Exporters and Charters Association” of which the assessee company as well as M/s H.V. Low & Co. Ltd. were two of the major members of the Association. When M/s H.V. Low & Co. Ltd. learnt the resumption of the coal export to Burma by the assessee company in 1946, they also expressed an intention to export coal to Burma. There upon the two companies came to an understanding and arrived at a mutual arrangement on the following lines:-

(i) M/s H.V. Low & Co. Ltd. would not export coal to Burma during the subsistence of the agreement.

(ii) M/s H.V. Low & Co. Ltd. would assist the respondent in procuring coal for shipment to Burma.

(iii) The respondent would carry on the coal shipping business and pay M/s H.V. Low & Co. Ltd. at 5 as per the ton (subsequently raised to Rs.1-5-0 per ton) of coal shipped to Burma.

101.1 In pursuance of the above mutual agreement, the assessee made certain payments to M/s H.V. Low & Co. or its nominee which were claimed to be revenue expenditure. The Assessing Officer held that these were payments made to secure monopoly, therefore, cannot be allowed as revenue expenditure. AAC upheld the order of Assessing Officer. However, the Tribunal reversed the order of AAC and held that the payments made by the assessee were revenue in nature. The Hon'ble High Court also held that the payment made by the assessee were not such as was likely to have an enduring benefit effect. In the opinion of the High Court, there was no certainty of duration and the arrangement could be terminated or revoked at any time. The consideration was not paid "once for all", but was related to uncertain shipments to be made. It did not create any monopoly or bring about any capital advantage to the assessee and, thus, assessee was held entitled to get deduction of expenditure u/s 10(2) (XV).

101.2. The Hon'ble Apex Court has observed that the Tribunal has recorded a finding of fact that the payments made by the assessee to M/s H.V. Low & Co. were to assist the respondent in procuring coal for shipment to Burma and were themselves not to export coal to Burma during the subsistence of the agreement. It was further observed that judicial decisions on the issue have, from time to time, laid down some broad principles in order to determine whether an expenditure is of capital nature or revenue nature. But despite the enunciation of those principles, it is not always easy to decide the question in the context of the circumstances of an individual case and considerable difficulty is

experienced in border line cases and for this proposition their Lordships have referred to the decision in the case of Abdul Kayoom vs. CIT 44 ITR 689.

101.3. Thereafter, their Lordships have considered broad tests for determination of the question that whether a particular expenditure is revenue or capital. Reference was made to the decision in the case of Atherton vs. British Insulated (supra) and Helsby Cables Ltd. (supra) to explain about the test where the expenditure is made not only "once and for all," but with a view to bringing into existence an asset or advantage for the enduring benefit of the trade which in general circumstances can be properly attributable not to revenue, but to capital.

101.4 In that case the House of Lords dealt with a fund which was created by the respondent company as a nucleus of a pension fund for its employees. After handing over the money to trustees for the employees, the company claimed that the money should be charged to revenue. Such claim of the assessee was rejected on the ground that the payment of money created for itself an enduring benefit or advantage which was of a capital nature. Thus, it was observed by their Lordships that while deciding a question that whether a particular expenditure is in the nature of revenue or capital, the courts have to bear in mind that whether it was an expenditure forming "part of the cost of income earning machine or structure" as opposed to part of "the cost of performing the income-earning operations."

101.5 Then, their Lordships referred to the decision in the case of Robert Addie and Sons' Collieries Ltd. v. Commissioner of Inland Revenue, 1924 8 TC 671 wherein the test of true nature of expenditure was laid out and it was observed that while determining such question one has to ask oneself the question that whether it is a part of the company's working expenses and it is an expenditure laid out as part of the process of profit earning or, on the other hand, it is a capital outlay. Another question is that whether that expenditure is

necessary for acquisition of property or of rights of a permanent character, the possession of which is a condition of carrying on its trade at all.

101.6 Then, their Lordships referred to the Assam Bengal Company Ltd.'s case wherein the expression "once and for all" was considered and it was held that the character of payment can be determined by looking at what is the true nature of the asset which has been acquired and not by the fact whether it is a payment in lumpsum or by instalments. It was observed that the words "permanent" and "enduring" are only relative terms and not synonymous with perpetual or everlasting.

101.7 Then, their Lordships referred to the tests like those of "fixed capital" and "circulating capital" for determining the nature of the expenditure and it was observed that an item of disbursement can be regarded as capital expenditure when it is referable to fixed capital and it will be revenue when it can be attributed to the circulating capital. It was observed that the case set up by the revenue was that the object of making the payment was to eliminate competition of a rival exporter, the benefit which inured to the respondent was of an enduring nature, hence, the payment should be treated as capital expenditure. Their Lordships did not agree with such contention of the revenue on the ground that the agreement between the assessee and M/s H.V. Low & Co. was not for a fixed period, but could be terminated at any time at the volition of any of the parties. Their Lordships observed that though an enduring benefit need not be of an everlasting character, it should not, at the same time, be so transitory and ephemeral that it can be terminated at any time at the volition of any of the parties and any other view would have the effect of rendering the word "enduring" to be meaningless.

101.8 Then, their Lordships referred to the decision in the case of Commissioner of Taxes vs. M.C. Nchanga Consolidated Copper Mines Ltd. 58 ITR 241 wherein the assessee company together with two other companies, namely Bhokana Corporation Ltd. and Bancroft Mines Ltd. formed a group for

carrying on business of copper mining. Due to steep fall in copper prices, they decided voluntarily to cut their production by 10%. It was agreed that Bancroft Mines Ltd. should cease production for one year and the respondent company and Bancroft Mines Ltd. should undertake between them the whole group programme for the year reduced by the overall cut of 10% and, in turn, agreed to pay a sum to Bancroft Mines Ltd. to compensate it for the abandonment of the production for the year and the question arose that whether such expenditure would be capital in nature. It was held by the court that the compensation paid was an allowable deduction. It was held that the expenditure was not for the purpose of acquiring a business or a benefit of long-term or enduring contract and their Lordships observed as follows:-

> "Although we agree that payment made to ward off competition in business to a rival dealer would constitute capital expenditure if the object of making that payment is to derive an advantage by eliminating the competition over some length of time, the same result would not follow if there is no certainty of the duration of the advantage and the same can be put to an end at any time. How long the period of contemplated advantage should be in order to constitute enduring benefit would depend upon the circumstances and the facts of each individual case."

102. In the case of Empire Jute Company (supra), the assessee company was carrying on the business of manufacture of jute and was a member of Indian Jute Mills Association. The association was formed with the object of, *inter alia*, protecting the trade of its members, making restrictive conditions on the conduct of the trade and achieving the production of the mills of these members. A working time agreement was entered into between the members restricting the number of working hours per week for which the mills were entitled to work their looms. According to clause 4 of the working time agreement, no signatory could work for more than 45 hours per week and according to clause 6 (b) signatories were entitled to transfer, in part or whole, their allotted hours of work per week to any one or more of the other signatories. Under that clause the assessee purchased "loom hours" from four other mills for an aggregate amount of Rs.2,03,255/- and claimed those expenditure as revenue expenditure. The

Tribunal held that those expenditure were in the nature of revenue. The Hon'ble High Court reversed the order of the Tribunal and held them as capital expenditure. The decision of Hon'ble High Court was reversed by Apex Court and it was observed that the expenditure incurred by the assessee was for the purpose of removing a restriction on the number of working hours for which it could operate its looms with a view to increase its profits and, thus, was revenue in nature. By purchase of loom hours no new asset was created and there was no addition to or expansion of the profit making apparatus of the assessee. The acquisition of additional loom hours did not add to the fixed capital of the appellant; the permanent structure of which the income was the product or fruit remained the same.

103. In the case of CIT vs. Associated Cement Companies Ltd. (supra), the assessee company being a manufacturer of cement was running a cement factory at Shahabad. The factory premises of the assessee was included in the limits of Shahabad Municipality and a tripartite agreement was entered into between the Government of Hyderabad, the Municipality and the assessee whereby the company undertook: (i) to supply water to the Municipality and provide water pipelines; (ii) to supply electricity for street lighting in the municipality and put up a transmission line therefore; and (iii) to create the main road from the factory to the Railway Station. In return, the respondent was not liable to pay Municipal rates and taxes for a period of 15 years. During the year under consideration a sum of Rs.2,09,459/-was expended towards installation of water pipelines and accessories outside the factory premises which were to belong to and be maintained by Municipality and which also came under the ownership of Municipality and such expenditure was held to be revenue in nature. It was held by the Apex Court that since the installation and accessories were the assets of the Municipality and not of the assessee, the expenditure did not result in bringing into existence any capital asset for the company. The advantage secured by the assessee by incurring the expenditure was absolution or immunity from liability to pay municipal rates or taxes for a period of 15 years

and if liabilities had to be paid the payment would have been on revenue account and, thus, the advantage secured was in the form of revenue and not capital.

104. In the case of Alembic Chemical Works Co. Ltd. vs. CIT 177 ITR 377, the assessee company which was in the business of manufacturing of penicillin with a view to increase the yield entered into an agreement with Meiji, a reputed Japanese enterprises, and made payment to the said concern of Rs.2,39,625/- for supply of "sub-cultures of Meiji's most suitable penicillin producing strains" in a pilot plant, the technical information, know how and written description of Meiji's process for fermentation of Penicillin along with a flow sheet of the process in the pilot plant and the design and specifications of the main equipment in such pilot plant and to arrange for the training of the assessee's representatives in Meiji's plant in Japan at the assessee's expenses and advised the assessee in large-scale manufacture of penicillin for a period of two years. The assessee was to keep technical know how confidential and secret and was not to seek any patent for the process. Such payment was claimed as revenue expenditure. Upto the level of High Court, the expenditure was categorized as capital in nature. It was held by the Hon'ble Apex Court that:

(a) it will be unrealistic to ignore the rapid advances in research in antibiotic medical microbiology. The rapid strides in science and technology in the field should make us a little slow and circumspect in too readily pigeon holding an outlay, such as this, as capital.

(b) In the indefinite variety of situational diversities in which the concept of what is capital expenditure and what is revenue arises, it will neigh impossible to formulate any general rule, even in generality of the cases, sufficiently accurate and reasonably comprehensive, to draw any clear line of demarcation, however, some broad and general test have been suggested from time to time to ascertain on which side of the line the outlay in any particular case might reasonably be held to fall. These tests are generally efficacious

and serve as useful servants; but as masters they tend to be overexacting.

(c) The idea of "once for all" payment and "enduring benefit" are not to be treated as something akin to the 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 enduring nature" was evolved to emphasise the element of a sufficient degree of durability appropriate to the context.

(d) What is relevant is the purpose of the deal and it is intended to do and effect, considered in a commonsense way having regard to the business realities and in a given case, the test of "enduring benefit" might breakdown.

105. In the case of CIT Vs. Madras Auto Service (P) Ltd., 223 ITR 468 (SC) the assessee had obtained premises on lease for 39 years. Under the lease agreement assessee demolished existing construction and constructed new building to suit its business at its own expenses. The assessee in no circumstances was entitled for any compensation on account of putting up new construction and it should be treated as tenant subject to payment of rent lower than the rent prevailing in the market. The expenses incurred on construction were claimed as revenue expenditure and these were held allowable on the ground that the asset created by such expenditure did not belong to the assessee and what the assessee had got was only business advantage of using modern premises at a low rent, thus saving considerable revenue expenditure for the next 39 years.

106. The Hon'ble Delhi High Court in the case of CIT vs. Eicher Ltd. 302 ITR 249 in a case where the ex-employee of the assessee called Vishwanathan had acquired during the course of his employment special knowledge of technology in

the two-wheeler industry as well as of managing the dealership of the market place and other specialized knowledge relating to the two-wheeler business, had entered into an agreement with another company called VCPL to the effect that he would promote the other company and collaborate with it to set up manufacturing facilities for two-wheelers upon his retirement from the assessee.

106.1 Upon coming to know such things, the assessee negotiated a non-compete agreement with VCPL and Vishwanathan whereby a sum of Rs.4 crore was paid to VCPL, so that VCPL and Vishwanathan would not carry out any business activity with regard to two-wheelers and such amount paid was held to be allowable as revenue expenditure after considering various judicial pronouncements, namely,

i. *Neel Kamal Talkies v CIT(1973) 87 ITR 691(All)*

ii. CIT Vs. Coal Shipments P. Ltd. 82 ITR 902 (SC)

iii. CIT vs. Late G.D. Naidu and Ors 165 ITR 63 (Mad)

iv. *Alembic chemical Works Ltd. Vs. CIT 177 ITR 377 (SC)*

v. *CIT Vs. Madras Auto Service (P) Ltd., 223 ITR 468 (SC)*

106.2 After referring to the aforementioned decisions it was observed by the Hon'ble Delhi High Court that applying all these principles laid down in the aforementioned judicial decisions a few facts stand out quite clearly. The assessee did not acquire any capital asset by making the payment of non-compete fee. It merely eliminated competition in the two-wheeler business, for a while. It was observed that from the records, it was not clear how long restrictive covenant was to last, but it was neither permanent nor ephemeral. In that sense the advantage was not of an enduring nature. It was observed that there was nothing to show that the amount of Rs.4 crore was drawn out of the capital of the assessee and on cumulative appreciation of these facts it was held that the CIT (A) and the Tribunal did not err in concluding that the payment of non-compete fees by the assessee was a business expenditure and not a capital expenditure

and in this view of the situation it was held that no substantial question arises for consideration.

107. If we peruse all the aforementioned decisions which have laid down various tests to consider a question that whether a particular expenditure will be capital or revenue, one thing is clear that the line of demarcation between the capital expenditure and revenue expenditure is very thin. Therefore, it is not desirable for any court to do that which the Parliament has abstained from doing – i.e., to formulate precise rules for the guidance or embarrassment of businessmen in the conduct of business affairs. Justice Bhagwati while describing such situation in the decision of Assam Bengal Cement Company (supra) has referred to the quotation of *Lord Macnaghten in Dovey v. Cory (1901) AC 477 at p.488*. Similarly, the observations of Rowlatt, J. from the decision in the case of *Countless Warwick Steamship Co. Ltd. vs. Ogg (1924) 2 K.B. 292 at p.298* have been reproduced where it is stated that it is very difficult to lay down any general rule which is both sufficiently accurate and sufficiently exhaustive to cover all or even a great number of possible cases, and any attempt was refused to be made to lay down any such rule.

108. Justice Bhagwati in the said decision has then referred to the broad tests, which are laid down in earlier judgments and the earliest one was found in the decision in the case of City of London Contract Corporation vs Styles (1887) 2 Tax Cas. 239 at p.243 wherein the basic rule was laid down as under:-

> "You do not use it for the purposes of your concern, which means, for the purpose of carrying on your concern, but you use it to acquire the concern.'

109. In other words the above rule states that the expenditure in the acquisition of the concern would be capital expenditure; the expenditure in carrying on the concern would be revenue expenditure. Thereafter, in the case of *Vellambrosa Rubber Co. v. Farmer [1910] 5 Tax Cas. 529* Lord Dunedin has evolved the test of expenses incurred once and for all vis-à-vis income expenditure i.e., going to recur every year. This test was further adopted by *Rowlatt, J. in Ounsworth*

(Surveyor of Taxes) v. Vickers Limited [1915] 6 Tax Cas. 671 which apart from the test of "once and for all" has suggested another point of view which was of "enduring expenditure." Thereafter, Viscount Cave, L.C., in Atherton's case [1925] 10 Tax Cas 155 regarding enduring benefit was further elaborated the test regarding "enduring benefit" by quoting Lord Dunedin who spoke about enduring expenditure.

110. Thereafter, in J*ohn Smith & Son v. Moore (Inspector of Taxes) [1920] 12 Tax Cas. 266 at p. 282* another test was suggested which was the test of fixed or circulating capital. It was observed that it was not necessary to draw an exact line of demarcation between the fixed and circulating capital and it was stated that fixed capital can be defined as what the owner turns to provide by keeping it in his own possession and circulating capital as what he makes profit of by parting with it and letting it change masters. This test was adopted by Lord Hanworth, M.R in Anglo-Persian Oil Co. vs. Dale [1932] 1 K.B. 124 at 128.

111. Lord Cave's test that where money is spent for enduring benefit, it is capital, had left some doubt as to what is meant by "enduring". For determining that the expression "enduring benefit" or of a "permanent character" their Lordships of Hon'ble Supreme Court in the case of Assam Bengal Cement Company Ltd. (supra) have referred to the Full Bench decision of Lahore High Court in the case of Benarsidas Jagannath [1947] 15 ITR 185 wherein it was observed as under:-

> "2. Expenditure may be treated as properly attributable to capital when it is made not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade : vide Viscount Cave, .C., in Atherio vs. British Insulated and Helsby Cables Ltd. If what is got rid of by a lump sum payment is an annual business expense chargeable against revenue, the lump sum payment should equally be regarded as a business expense, but if the lump sump payment brings in a capital asset, then that puts the business on another footing altogether. Thus, if labour saving machinery was acquired, the cost of such acquisition cannot be deducted out of the profits by

> claiming that it relieves the annual labour bill, the business, has acquired a new asset, that is, machinery.
>
> The expressions 'enduring benefit' or 'of a permanent character' were introduced to make it clear that the asset or the right acquired must have enough durability to justify its being treated as a capital asset."

112. It is also observed that the Viscount Cave's test has been adopted almost universally in India vide following decisions:-

> "Viscount Cave's test has also been adopted almost universally in India. Vide Munshi Gulab Singh and Sons v. Commissioner of Income Tax, Commissioner of Income Tax, Bombay v. Century Spinning, Weaving & Manufacturing Co. Ltd., Jagat Bus Service, Saharanpur vs. Commissioner of Income Tax, Bombay vs. Finlay Mills Ltd. "

113. Their Lordships after analyzing history of all these judicial decisions for addressing the question that whether a particular expenditure will be capital or revenue, have referred to the principles which emerges out from these authorities.

114. It was observed that where the expenditure is made for initial outlay or for expansion of business or a substantial replacement of equipment, the expenditure will be capital in nature. It was observed that a capital asset of the business is either acquired or extended to be 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 the expansion of the business or for the substantial replacement of its equipment and 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. In such circumstances, if the expenditure is made for acquiring or bringing into existence an asset or advantage for the enduring benefit of the business, then it will be properly attributable to capital and, on the other hand, if it is made not for the

purpose of bringing into existence any asset advantage, but for running the business or working it with a view to produce the profit, then, it will be in the nature of revenue.

115. It was observed that if any such asset or advantage for the enduring benefit of the business is acquired or brought into existence, then 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 aims and object of the expenditure would determine the character of the expenditure whether it is a capital expenditure or a revenue expenditure. The source or the manner of the payment would then be of no consequences.

116. It was observed that it is only in those cases where the above 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. In that circumstances, if the expenditure was part of the fixed capital of the business, then, it would be of a nature of capital expenditure and if it was the part of the circulating capital then it will be in the nature of revenue expenditure. It will be useful to reproduce the following observations of their Lordships from Assam Bengal Cement Company (supra)'s case:-

> "This synthesis attempted by the Full Bench of the Lahore High Court truly enunciates the principles which emerge from the authorities. 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 capital expenditure. If on the other hand it is made not for the purpose of bringing into existence any such asset advantage but for running the business or working it with a view to produce the profits it is 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 expenditure whether it is a capital expenditure or a revenue expenditure. The source or the manner of the payment would then be of no consequence. It is only in those cases where the test if 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. If it was part of the fixed capital of the business it would be of the nature of capital expenditure and if it was part of its circulating capital it would be of the nature of revenue expenditure."

117. It may be mentioned here that one should not confuse himself with the variety of tests laid down in the end number of judicial pronouncements to consider the question of determination of the nature of expenditure that whether it is `capital' of `revenue'. The answer to the question can well be found in the decision of Hon'ble Supreme Court in the case of Assam Bengal (supra) wherein their Lordships have observed that these tests are mutually exclusive and have to be applied to the facts of each particular case in the manner indicated above. It was observed that in the great diversity of human affairs and the complicated nature of business operations it is difficult to lay down a test which would apply to all situations and, thus, one has to apply these criteria one after the other from the business point of view and come to the conclusion whether on a fair appreciation of the whole situation the expenditure incurred in a particular case is of the nature of capital expenditure or revenue expenditure. The question is a question of fact to be determined by the IT authorities of an application of the broad principles laid down above and the Courts of Law would not ordinarily

interfere with such findings of fact if they have been arrived at on a proper appreciation of those principles. Reference can be made to the following observations of their Lordships from the said decision:

> "These tests are thus mutually exclusive and have to be applied to the facts of each particulars case in the manner above indicated. It has been rightly observed that in the great diversity of human affairs and the complicated nature of business operations it is difficult to lay down a test which would apply to all situations. One has therefore got to apply these criteria one after the other from the business point of view and come to the conclusion whether on a fair appreciation of the whole situation the expenditure incurred in a particular case is of the nature of capital expenditure or revenue expenditure in which latter event only it would be a deductible allowance under section 10(2)(xv) of the Income Tax Act. The question has all along been considered to be a question of fact to be determined by the Income Tax authorities on an application of the broad principles laid down above and the Courts of Law would not ordinarily interfere with such findings of fact if they have been arrived at on a proper application of those principles."

118. General proposition canvassed by Shri Vohra cannot be accepted that in all cases of payment of non-compete fee, the purpose of making such payment is to maintain/protect the profitability of the business by insulating the same from the risk of competition, therefore, it has to be considered to be expenditure on revenue account. Such argument cannot be accepted in view of clear decision of Hon'ble Supreme Court in the case of Assam Bengal (supra) where their Lordships have clearly held that protection fees paid by the assessee was an acquisition of an asset or advantage of an enduring nature for whole of the business for the full period of lease unless terminated by the lessor by notice as prescribed in the last part of the clause. This protection fees paid was considered to be in the nature of capital expenditure. The aforesaid decision of Hon'ble Supreme Court has been referred in almost all the cases touching this issue and till date the said decision has not been shown to be overruled. The case of Empire Jute (supra), as argued by Shri Vohra, also cannot be applied as general proposition that non-compete fee only facilitate the carrying on of the business as the facts in that case were totally different and it was found by the Apex Court that the payment made by the assessee was for getting more

utilization of production capacity as without making such payment assessee could not work for more loom hours. As against that in the case of protection fee the assessee has been held to have acquired an asset or advantage as per decision of Hon'ble Supreme Court in the case of Assam Bengal (supra).

119. It may be true that a particular length of time may not be determinative of deciding whether a particular expenditure can be termed to have provided enduring benefit but according to the aforementioned decisions it does neither mean permanent nor ephemeral. But at the same time if the restrictive covenant is to last for 5 years that has also been held to be giving enduring benefit in the case of Assam Bengal.

120. The ratio of decision in the case of Madras Auto Services (supra) is also of no avail in the cases of non compete payments as in that case the incurring of expenses did not create any asset as against that it has been clearly held by the Hon'ble Supreme Court in the case of Assam Bengal (supra) that protection fee paid by the assessee had acquired an asset or advantage of an enduring nature which enured for the benefit of the whole of the business. Similar is the position of other decisions relating to laying down electricity lines, which did not become the property/asset of the assessee and therefore, the expenditure was held to be in the nature of revenue.

121. It may be mentioned here that the test of enduring benefit has not lost its importance even in the context of the present situation. To contend that the test of enduring benefit is no more in force will be contrary even to the recent judicial pronouncements. Reference in this regard can be made to the later decision of the Hon'ble Delhi High Court in the case of CIT vs. J.K. Synthetics Ltd. 309 ITR 371 (Del) which is a decision rendered after the decision in the case of CIT vs. Eicher Ltd. (supra) wherein after examining the available judicial pronouncements it was stated that the following broad principles were forced over the years which required to be applied to the facts of each case. The relevant observations are as under:

"Broad principles which emerge on reading of various authorities

55. An overall view of the judgments of the Supreme Court, as well as, of the High Courts would show that the following broad principles have been forged over the years, which require, to be applied to the facts of each case:-

(*i*) the expenditure incurred towards initial outlay of business would be in the nature of capital expenditure, however, if the expenditure is incurred while the business is on going, it would have to be ascertained if the expenditure is made for acquiring or bringing into existence an asset or an advantage of an enduring benefit for the business, if that be so, it will be in the nature of capital expenditure. If the expenditure, on the other hand, is for running the business or working it, with a view to produce profits, it would be in the nature of revenue expenditure;

(*ii*) it is the aim and object of expenditure, which would, determine its character and not the source and manner of its payment;

(*iii*) the test of 'once and for all' payment *i.e.,* a lump sum payment made, in respect of, a transaction is an inconclusive test. The character of payment can be determined by looking at what is the true nature of the asset which is acquired and not by the fact whether it is a payment in 'lump sum' or in an instalment. In applying the test of an advantage of an enduring nature, it would not be proper, to look at the advantage obtained, as lasting forever. The distinction which is required to be drawn is, whether the expense has been incurred to do away with, what is a recurring expense for running a business, as against, an expense undertaken for the benefit of the business as a whole;

(*iv*) an expense incurred for acquisition of a source of profit or income would in the absence of any contrary circumstance, be in the nature of capital expenditure. As against this, an expenditure which enables the profit making structure to work more efficiently leaving the source or the profit making structure untouched, would be in the nature of revenue expenditure. In other words, expenditure incurred to fine tune trading operations to enable the management to run the business effectively, efficiently and profitably leaving the fixed assets untouched would be an expenditure of a revenue nature even though the advantage obtained may last for an indefinite period. To that extent, the test of enduring benefit or advantage could be considered as having broken down;

(*v*) expenditure incurred for grant of License which accords 'access' to technical knowledge, as against, 'absolute' transfer of technical knowledge and information would ordinarily be treated as revenue expenditure. In order to sift, in a manner of speaking, the grain from the chaff, one would have to closely look at the attendant circumstances, such as:—

(*a*) the tenure of the Licence.

(*b*) the right, if any, in the licensee to create further rights in favour of third parties,

(*c*) the prohibition, if any, in parting with a confidential information received under the License to third parties without the consent of the licensor,

(*d*) whether the Licence transfers the 'fruits of research' of the licensor, 'once for all',

(*e*) whether on expiry of the Licence the licensee is required to return back the plans and designs obtained under the Licence to the licensor even though the licensee may continue to manufacture the product, in respect of, which 'access' to knowledge was obtained during the subsistence of the Licence.

(*f*) whether any secret or process of manufacture was sold by the licensor to the licensee. Expenditure on obtaining access to such secret process would ordinarily be construed as capital in nature;

(*vi*) the fact that assessee could use the technical knowledge obtained during the tenure of the License for the purposes of its business after the agreement has expired, and in that sense, resulting in an enduring advantage, has been categorically rejected by the courts. The Courts have held that this, by itself, cannot be decisive because knowledge by itself may last for a long period even though due to rapid change of technology and huge strides made in the field of science, the knowledge may with passage of time become obsolete;

(*vii*) while determining the nature of expenditure, given the diversity of human affairs and complicated nature of business; the test enunciated by courts have to be applied from a business point of view and on a fair appreciation of the whole fact situation before concluding whether the expenditure is in the nature of capital or revenue.

122. It can be seen from the above tests that broadly the basic test to determine the nature of an expenditure remain same even in the context of modern situation and these tests are the test of initial outlay of the business, the

aim and object of the expenditure, enduring benefit test and the test of fixed and circulating capital.

123. Applying the aforementioned principles to the facts of present case, it may be stated that the so-called `non-compete agreement' is part & parcel of the entire transaction. The assessee had acquired a business concern in India with its outlay (more particularly described elsewhere in this order) and the entire transaction was outlined in the MOU dated 4th November, 1996. The relevant portion of clause 3 of MOU which regulates "the purchase price" of the transaction has already been reproduced in para 88 and 89 of this order wherein aggregate amount of Rs.52.5 crore was determined as the total purchase price for the Compressor Division assets referred to in Article 1 and the Ballabgarh land and building as referred to in Article 2. The purchase price itself states that the amount of Rs.52.5 crore was to be paid as a total purchase price for the Compressor Division assets and Ballabhgarh land and building.

124. The MOU was implemented through agreement dated 2nd July, 1997 which also states about execution of non-compete agreement in clause 9 (j) which read as under:-

> *j. "Whirlpool shall sign and deliver to Tecumseh India, against the receipt of full consideration specified therein, a Non-Compete Agreement in the form as contained in Appendix "M" undertaking not to compete with Tecumseh India in the manufacture, sale or repair of compressors in India, except that Whirlpool shall be entitled to sell and install compressors purchased from Tecumseh India to persons under its service arrangements, subject to the provisions of the supply agreements."*

124.1 Thus, it can be seen that non-compete agreement was made Appendix 'M' to the agreement dated 2nd July, 1997 and was, thus, part and parcel of the main agreement the signing and execution whereof was a condition precedent (Clause D of non-compete agreement reproduced in para 60 of this order) for the completion of the transaction.

125. It can be mentioned here that the total purchase price of Rs.52.5 crores envisaged in MOU vide clause 3 was including a sum of Rs.2.65 crore to be paid for non-compete agreement. The other sum of Rs.49.85 crore was to be paid in respect of various assets as described in para 9 of this order. If we aggregate these two sums then, the total amount will come to Rs.52.5 crores which was the agreed purchase price. The assessee company was incorporated for the purpose of effectuating the transactions agreed in the MOU. The purpose of the assessee company for which it was incorporated was that "Tecumseh USA" being a leading global compressor manufacturer was interested in purchasing compressor related operations of Whirlpool India for Indian compressor market. Thus, the very intention and purpose was to establish business in India by taking over the compressor and related operations of Whirlpool India in India. The non-compete agreement was part and parcel of the whole transaction and cannot be treated to be a separate transaction.

126. The case of the assessee will fall under the first test which describes that if the expenditure is made for the initial outlay or for the expansion of business or a substantial replacement of the equipment, then, it will fall under the capital expenditure. It was not an expenditure incurred while the business was carrying on. Though it has been the contention of the assessee that non-compete agreement was executed subsequent to the date of main agreement, but such contention of the assessee cannot be accepted as in the main agreement itself the non-compete agreement was appended as 'M' without which the transaction was not complete as by including the amount paid for non-compete agreement the purchase price as stated in MOU could be arrived at.

127. The incurring of expenditure also brought an enduring benefit to the assessee if the same is examined from the proposition of law laid down in the case of Assam Bengal Cement Company Ltd. (supra) wherein their Lordships have considered the period of five years as providing enduring advantage to the assessee irrespective of the fact that the payment was to be made annually. Their Lordships have observed that the asset which the company had acquired in

consideration of such recurring payment was in the nature of capital asset which was the right to carry on its business unfettered by any competition from outsiders within the area. The protection acquired by the company was for its business as a whole. It was not a part of the working of the business, but went to appreciate the whole of the capital asset and make it more profit yielding. The relevant observations of their Lordships from the said decision are as under:-

> *"The asset which the company had acquired in consideration of this recurring payment was in the nature of a capital asset, the right to carry on its business unfettered by any competition from outsiders within the area. It was a protection acquired by the company for its business as a whole. It was not a part of the working of the business but went to appreciate the whole of the capital asset and making it more profit yielding. The expenditure made by the company in acquiring this advantage which was certainly an enduring advantage was thus of the nature of capital expenditure and was not an allowable deduction u/s 10(2)(xv) of the Income Tax Act.*
>
> *The further protection fee which was paid by the company to the lessor under clause 5 of the deed was also of a similar nature. It was no doubt spread over a period of 5 years, but the advantage which the company got as a result of the payment was to inure for its benefit for the whole of the period of the lease unless determined in the manner provided in the last part of the clause. It provided protection to the company against all competitors in the whole of the Khasi and Jaintia Hills District and the capital asset which the company acquired under the lease was thereby appreciated to a considerable extent. The sum of Rs.35,000 agreed to be paid by the company to the lessor for the period of 5 years was not a revenue expenditure which was made by the company for working the capital asset which it had acquired. It was no part of the working or operational expenses of the company. It was an expenditure made for the purpose of acquiring an appreciated capital asset which would no doubt by reason of the undertaking given by the lessor make the capital asset more profit yielding. The period of 5 years over which the payments were spread did not make any difference to the nature of the acquisition. It was none the less an acquisition of an advantage of an enduring nature which enured for the benefit of the whole of the business for the full period of the lease unless terminated by the lessor by notice as prescribed in the last part of the clause. This again was the acquisition of an asset or advantage of an enduring nature for the whole of the business*

and was of the nature of capital expenditure and thus was not an allowable deduction under section 10(2) (xv) of the Act."

128. Ld. Counsel appearing on behalf of the assessee has distinguished the decision in the case of Assam Bengal Cement Company Ltd. (supra) on the grounds that in that case the right acquired by the assessee was to carry on its business unfettered by any competition from outsider within the area, but in the case of the assessee there were several competitors and what the assessee had got only the non-compete agreement from one party, namely, "Whirlpool India" from which it had purchased the manufacturing related facilities. This proposition of the assessee also cannot be accepted as it is not necessary that the assessee should acquire monopoly rights while warding off the competition. Reference in this regard can be made to the following observations of Hon'ble Supreme Court from the decision in the case CIT vs. Coal Shipment Pvt. Ltd. (supra) where it was observed that even in a case where payment is made to ward off competition in business to a rival dealer would constitute capital expenditure:-

"Although we agree that payment made to ward off competition in business to a rival dealer would constitute capital expenditure if the object of making that payment is to derive an advantage by eliminating the competition over some length of time, the same result would not follow if there is no certainty of the duration of the advantage and the same can be put to an end at any time. How long the period of contemplated advantage should be in order to constitute enduring benefit would depend upon the circumstances and the facts of each individual case."

129. According to above observations it can be seen that warding off competition in business even to a rival dealer will constitute capital expenditure and to hold them capital expenditure it is not necessary that non-compete fee is paid to create monopoly rights.

130. The assessee also cannot get any help from the decision of Hon'ble Delhi High Court in the case of CIT vs. Eicher Company Ltd. (supra) as in that case their Lordships have clearly found from the record that it was not clear that how long the restrictive covenant was to last and what the assessee had done was

that it eliminated the competition in the two-wheeler business for a while. Their Lordships have also found that the benefit received by the assessee in that case was neither permanent nor ephemeral. Therefore, the said decision is not applicable to the facts of the present case as in the case of assessee the non-compete agreement is applicable for 5 years, which period has been considered to be sufficient to give enduring benefit in the case of Assam Bengal (supra).

131. With these observations we hold that the expenditure of Rs.2.65 crore claimed by the assessee in pursuance of non-compete agreement dated 10th July, 1997 are capital expenditure, the deduction of which cannot be granted to the assessee as revenue expenditure. The main issue is decided against the assessee and in favour of the revenue.

132. Now, we take up the cases of interveners. Although in all these cases the issue of non-compete fee is involved, but, as we understand from the discussions during hearing, the issue is basically one purely based on appreciation of facts of each case, and we could see in our initial impression at the stage of arguments that the facts of the case of interveners are not entirely similar to the facts of the main appellant. It is, therefore, necessary for us to go into the facts of those cases thoroughly before applying the law as we have tried to determine in the case of the assessee. We, therefore, are of the view that the cases of the interveners should be better allowed to be framed and appreciated by the Division Bench before applying the principle laid down here in this case to the facts of those cases (unless the facts fall in line). So, without making any detailed discussion, we restore the cases of the interveners to the Division Bench to be decided only after ascertaining the facts as also the similarity of the facts with those discussed in the case of the present assessee. Therefore, the cases of the interveners be placed before the Division Bench to be decided in accordance with the law after bringing out the facts on record.

133. So far as it relates to ground No.2 the issue is discussed by the Assessing Officer in para 3 of the impugned assessment order. The assessee has increased its authorized share capital and for that purpose it has incurred an expenditure of Rs.39,90,120/- being on account of fee paid to Registrar of Companies. The Assessing Officer relying on the following decisions of Hon'ble Supreme Court has disallowed this amount:-

i) Punjab State Industrial Development Corporation Ltd. vs. CIT 225 ITR 792;

ii) Brook Bond India Ltd. vs. CIT 225 ITR 798 (SC).

134. Before Ld. CIT (A) it was pleaded that company's investment in working capital as on 31st March, 1998 was Rs.24,79,41,453/- and investment in fixed assets as on 31st March, 1998 was Rs.44,52,68,614/- and it was submitted that even if ROC fees of Rs.39,90,120/- is apportioned in the ratio of working capital to fixed capital, then, the amount attributable to working capital will come to Rs.14,54,876/- and attributable to fixed assets will be an amount of Rs.25,35,244/-. The amount attributable to working capital at Rs.14,54,876/- out of Rs.39,90,120/- is expenditure on revenue account and qualifies for deduction as a revenue expenditure and another amount may be treated as capital expenditure. However, the Ld. CIT (A) did not accept such submission of the assessee, and, referring to the decision of Hon'ble Supreme Court in the case of Punjab State Industrial Development Corporation Ltd. vs. CIT (supra) he upheld the action of the Assessing Officer. The assessee is aggrieved, hence, in appeal.

135. The submissions made before the CIT (A) were reiterated before us. The learned AR relied upon the unreported decision of Delhi ITAT in the case of GE Capital Transportation Services Ltd. vs. DCIT, order dated 4th May, 2007 in ITA No.2036/Del/2002 a copy of which is placed at pages 119 to 123 and reliance was placed on para 16 to 21 of the order, which, for the sake of convenience are reproduced below:-

"16. Grounds no. 4 of the appeal is directed against disallowance of Rs. 50,80,172/- on account of expenses incurred in connection with the issue of equity shares for augmenting the working capital by treating the same as capital expenditure.

17. The brief facts of the case are that during the year the assessee incurred expenses of Rs. 50,80,172/- in connection with fresh issue of equity shares. The Assessing Officer relying on the decision of the Hon'ble Supreme Court in Brook Bond (India) Ltd. vs. C.I.T. [225 ITR 798 (SC)] held the expenses to be capital expenditure and disallowed the claim for deduction to the assessee.

18. The Learned C.I.T.(A) observed that a similar issue was in appeal before the Tribunal in the case of the assessee for the assessment year 1990-91 wherein the issue was decided against the assessee. Hence, he confirmed the order of the Assessing Officer .

19. The learned A.R. of the assessee has argued that the expenditure was incurred for augmenting of working capital. Relying on the decision of the Chennai Bench of the Tribunal in Laxmi Auto Components Ltd. vs. DCIT [101 ITD (Chennai) 209 (TM) it was submitted that the expenditure should be allowed.

20. The learned D.R. on the other hand supported the orders of the lower authorities.

21. We have heard the rival submissions and perused the orders of the lower authorities and the materials available on record. We find that the Assessing Officer has disallowed the deduction claimed by the assessee of Rs. 50,80,172/- in connection with the issue of equity shares following the decision of the Hon'ble Supreme Court in Brooke Bond (India) ltd. vs. C.I.T. [225 ITR 798]. The contention of the assessee is that the increase in the share capital was to meet the needs for working capital. It is the submission of the assessee that the Tribunal in Laxmi Auto Components Ltd. (Supra) has observed that where the expenses were incurred for increasing the share capital which was in to meet the need for working capital then the expenditure was allowable as revenue expenditure. We find that both the lower authorities has not brought on record the entire facts of the case whether the increase in the share capital by the assessee was for working capital or for fixed capital. Further, we find that the learned C.I.T.(A) has observed in his order that for the assessment year 1990-91 a similar issue had arisen and the claim for deduction of

> the assessee was disallowed. In these facts and circumstances we are of the considered opinion that the issue should be restored back to the file of the Assessing Officer for deciding the same afresh after verifying the facts of the case and considering the decision of the Tribunal in the case of Laxmi Auto Components Ltd. (supra). We therefore, set aside the order of the Assessing Officer and the Ld. Commissioner of Income Tax (Appeals) and remand the matter back to the file of the Assessing Officer for deciding the issue afresh in the light of the observations made above and after affording proper opportunity of hearing to both the parties. This ground of appeal is allowed for statistical purposes."

136. Ld. DR, however, relied upon the order of the Assessing Officer and CIT (A).

137. On this issue we have heard both the parties. The fact is undisputed that the fee has been paid by the assessee for increasing the authorized capital. Hon'ble Supreme Court in the case Punjab State Industrial Development Corporation Ltd. vs. CIT (supra) has held that the fee paid to the Registrar for expansion of the capital base of the company was directly related to capital expenditure incurred by the company and although incidentally that would certainly help in the business of the company and may also help in profit making, it still retain the character of capital expenditure since the expenditure was directly related to the expansion of the capital base of the company, thus, it was not an expense in the nature of revenue. The argument of Ld. AR of proportionate allocation of the expenditure between working capital and fixed assets is rightly rejected by the CIT (A) as no such benefit can be availed by the assessee in view of aforementioned decision of Hon'ble Supreme Court which is squarely applicable to the facts of the present case. We dismiss this ground.

138. Apropos ground No.3, this issue is discussed by the Assessing Officer in para 4. It was observed by the Assessing Officer that in the details filed for legal and professional charges a sum of Rs.20 lac was found debited and details in this regard has shown that amount was paid to Shri C.P. Kukreja Associates,

Architects. Since that payment was made to an Architect, the same was held to be capital expenditure and accordingly added to the income of the assessee.

139. Before Ld. CIT (A), Ld. AR of the assessee did not dispute about the nature of the expenditure and the claim of the assessee was regarding depreciation and it is observed by the CIT (A) that in the absence of details the claim of the assessee even regarding depreciation could not be accepted. The assessee is aggrieved, hence, in appeal.

140. Ld. AR also did not submit any details before us as the same was specifically asked for and in the absence of such details, after hearing both the parties on this issue we decline to interfere in the findings of the CIT (A) vide which such addition has been upheld and benefit of depreciation is denied. This ground of the assessee is also dismissed.

141. In the result, the appeal filed by the assessee is dismissed in the manner aforesaid.

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. The order pronounced in the open court on 30.07.2010.

Sd/-	Sd/-	Sd/-
[R.C. SHARMA]	[G.E. VEERABHADRAPPA]	[I.P. BANSAL]
ACCOUNTANT MEMBER	VICE PRESIDENT	JUDICIAL MEMBER

Dated, 30.07.2010.

dk
Copy forwarded to: -
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

TRUE COPY

By Order,

Deputy Registrar,
ITAT, Delhi Benches