(22) I must accordingly hold that the suit in the present case was governed by the second part of the 3rd column of article 97 in the Schedule to the Act and that the provisions of section 30 of the Punjab Pre-emption Act never came into play with regard to it. It is conceded that if this be so, the period for which defendant No. 1 remained absent from India must be excluded in computing the period of limitation for the suit in pursuance of the provisions of sub-section (5) of section 15 of the Act. Contention (d) is, therefore, over-ruled.

(23) Contention (e) is easily disposed of. According to the deposition of the next friend of the plaintiffs, which stands wholly unrebutted, defendant No. 1 left India in November/December, 1965, and remained absent therefrom till after the suit was instituted. The objection taken by Mr. Bahl is that the words "November/December, 1965" make the deposition vague and, therefore, unacceptable in proof of the fact that defendant No. 1 really left India in December, 1965, as was claimed in the plaint. The objection has no merit. The next friend of the plaintiffs could not be expected to have remembered with precision the time of departure from India of defendant No. 1 after a period of about two years and a half thereof, and his testimony cannot be construed as indicative of that departure having taken place after the suit was instituted. In my opinion the Courts below were fully justified in relying upon that testimony or coming to the conclusion that defendant No. 1 left India some time in December, 1965, and that he returned to it after the suit was instituted.

(24) No other point has been urged before me and for the reasons stated, I dismiss the appeal with costs.

B. S. G.

INCOME TAX REFERENCE

Before D. K. Mahajan and Bhopinder Singh Dhillon, JJ.

THE COMMISSIONER OF INCOME-TAX,—*Petitioner*

versus

M/S. GOYAL OIL MILLS, LUDHIANA,—*Respondent.*

Income Tax Reference No. 48 of 1965.

May 7, 1970.

Income Tax Act (XI of 1922)—Sections 10(2(ii) and 10(2)(XV)—Assessee taking factory on lease and undertaking to bear expenses of repairs to

the building and machinery—Fire destroying part of the premises and machinery—Assessee incurring expenses to repair the damage—Expenses on repair of the premises—Whether permissible deduction under section 10(2) (ii)—Word "premises"—Whether covers machinery—Expenses on repair of machinery—Whether permissible under section 10(2) (XV)—Such expenses—Whether capital expenditure.

Held, that section 10(2) (ii) of the Income-Tax Act, 1922, covers the case of the assessee who is tenant of the premises. From the language of the section, it is clear that whereas in the case of an owner of premises, he can claim exemption only in respect of current repairs, but in the case of a lessee, whose case is covered by this section, he can claim exemption for all types of repairs which he has undertaken to effect in the premises on lease. Hence where the assessee takes a factory on lease and undertakes to bear expenses of repairs to the building, the expenses so incurred by him is covered by the provisions of section 10(2) (ii) of the Act and is a permissible deduction. (Para 5)

Held, that the word 'premises' means the building or its adjunctures. Machinery, which is a movable property, cannot be said to be an adjuncture to the building. The provisions of section 10(2) (ii) of the Act cannot be construed so as to mean the building as well as the machinery of the factory. Therefore, the repairs to the machinery of the factory is not covered by the provisions of section 10(2) (ii) and there being no other direct section on the point, the provisions of section 10(2) (XV) of the Act will be applicable and the expenses so incurred will be permissible. The expenditure on the repair of the machinery, which machinery ultimately belongs to the owners and not to the assessee, cannot be said to be in the nature of capital expenditure. (Para 6)

Reference under section 66(1) of the Indian Income Tax Act 1922 by the Income Tax Appellate Tribunal Delhi Bench ('B') for decision of the following questions of law arising out of I.T.A. No. 5478/63-64, regarding assessment year 1961-62:—

"1. *Whether on the facts and circumstances of the case, the expenditure of Rs. 16,954 incurred by the assessee in repairing the building was a permissible deduction ?*

2. *Whether, on the facts and in the circumstances of the case, the expenditure of Rs. 5,995 incurred by the assessee after the repairs to the plant and machinery was a permissible deduction ?*

D. N. Awasthy and B. S. Gupta, Advocates, for the petitioner.

Bhagirath Dass, S. K. Hirajee, B. K. Jhingan and S. K. Pipat, Advocates, for the respondent.

JUDGMENT

B. S. DHILLON, J.—(1) This Income Tax Reference is before us at the instance of Commissioner of Income Tax, Punjab, Jammu and Kashmir and Himachal Pradesh. The brief facts are that the factory, which consists of a building as well as the oil plant and machinery, was purchased by four individuals, namely, (1) Sadhu Ram, (2) Madhav Lal, (3) Ram Dayal and (4) Nathu Ram in equal shares. Sadhu Ram and Madhav Lal, two out of four owners of the factory took on lease half share in the factory from Ram Dayal and Nathu Ram, the other two co-owners, on an annual rent of Rs. 3,000/-. This was done by these two partners with a view to lease out the whole of the factory to the assessee firm which they in fact did. The assessee firm came into existence on the 9th of November, 1957, and consists of four partners, namely, (1) Sadhu Ram, (2) Madhav Lal, (3) Sohan Lal son of Nathu Ram, and (4) Mangal Sain brother of Sadhu Ram. Thus it would be seen that Ram Dial and Nathu Ram are not the partners of the assessee firm, although Sohan Lal son of Nathu Ram is the partner of the said firm. The terms and conditions on which the factory was leased out to the assessee firm are incorporated in the partnership deed of the assessee firm executed on 9th November, 1957. Clauses 17, 18 and 19 of the partnership deed are as follows :—

"17. The partnership firm shall pay a sum of Rs. 6,000/- per annum as lease money for the said machinery and buildings to its owners, i.e., Rs. 3,000/- as annual lease money to L. Nathuram son of L. Bijailal and L. Ramdayal son of L. Ganesh Narain in equal half, and the balance Rs. 3,000/- to its owners the parties of the first and the second parts in equal shares, i.e., overall lease money of Rs. 6,000/- shall be payable by the firm to its owners, as mentioned above.

18. That all expenses of all kinds, i.e., in respect of repairs to the machinery, breakages of its parts, accessories and machinery of all kind and electricity charges and rent shall be borne by the partnership business.

19. That on dissolution of the partnership the possession of the buildings, machinery and the complete factory shall be restored in working order to the parties of the first and second parts."

(2) Fire broke out in the factory on 11th May, 1960, causing damage to the two rooms of the factory and the machinery installed therein. The assessee firm spent Rs. 16,954/- in putting the building in the original position and Rs. 5,995/- in repairing the damage to the machinery. Besides this, it had incurred some expense for repairing the building as well as machinery prior to 11th May, 1960.

(3) The assessee firm claimed the entire expenses incurred after the repairs of the factory as a permissible deduction. The Income-tax Officer rejected the assessee's claim for repairs to the building on the ground that the expense was not incurred actually for repairs but was incurred for the construction of the building and was as such of a capital nature. He also rejected the assessee's claim regarding the expenses incurred on machinery, on the same ground. The appeal of the assessee firm before the Appellate Assistant Commissioner was dismissed holding that both the expenses were of a capital nature. The assessee firm's contention before the Tribunal that both the expenses were permissible deductions under sections 10(2)(ii) and 10(2)(xv) of the Income Tax Act were upheld. It is in this situation that the following two questions have been referred to us for our opinion :—

"(1) Whether on the facts and circumstances of the case, the expenditure of Rs. 16,954/- incurred by the assessee in repairing the building was a permissible deduction ?

(2) Whether, on the facts and in the circumstances of the case, the expenditure of Rs. 5,995/- incurred by the assessee after the repairs to the plant and machinery was a permissible deduction ?"

(4) The learned counsel for the appellant, Mr. Awasthy, contended that the provisions of section 10(2)(ii) of the Income Tax Act would not cover the item of a sum of Rs. 16,954/- spent on repairing the building of the factory by the assessee firm. His contention is that expenses on the repair of the building and that on the machinery are both in the nature of capital expenditure and cannot fall under sections 10(2)(ii) and 10(2)(xv) of the Act. He further contended that the words 'premises' used in section 10(2)(ii) would also include the machinery and there being the specific section applicable, the provisions of general section 10(2)(xv) would not be applicable.

(5) After examining the contentions of the learned counsel and after going through the provisions of section 10 of the Income Tax Act, we are clearly of the opinion that the contentions of the learned counsel for the department are not tenable. There is no manner of doubt that section 10(2)(ii) of the Act covers the exigency in hand. It clearly covers the case of the assessee, who is a tenant of the premises. In the present case the assessee firm is a tenant of the premises who had undertaken to incur all expenses of all kinds, that is, expenses of repairs to the machinery, breakages of its parts, accessories and machinery of all kinds and electricity charges and rent. Further the assessee firm had undertaken to deliver possession of the building, machinery and complete factory in the working order to the original owners. From the language of section 10(2)(v), it is clear that whereas in the case of an owner of premises, he can claim exemption only in respect of current repairs, but in case of a lessee, whose case is covered by section 10(2)(ii) of the Act, he can claim exemption for all types of repairs which he had undertaken to effect in the premises on lease. We have no reason to differ from the reasons given by the Tribunal in coming to the finding that the charge on the repairs of the building of the factory is clearly covered by the provisions of section 10(2)(ii) of the Act.

(6) The second contention of the learned counsel for the department that the premises mentioned in section 10(2)(ii) would include the machinery also, and, therefore, the general provisions made in section 10(2)(xv) of the Act would not be applicable, is again without any force. The word 'premises' would only mean the building or its adjunctures. Machinery, which is a movable property, cannot be said to be an adjuncture to the building. In no sense the provision of section 10(2)(ii) of the Act can be construed so as to mean the building as well as the machinery of the factory. Thus in our opinion, the repairs to the machinery of the factory would not be covered by the provisions of section 10(2)(ii) and there being no other direct section on the point, the provisions of section 10(2)(xv) of the Act will be applicable. The only question to be seen is whether the amounts spent, for which exemption is being claimed for the repairs to the machinery, are not in the nature of capital expenditure or personal expenditure of the assessee. The contention of the learned counsel for the department that the amount spent for the repair of machinery is a capital expenditure, is untenable for the simple reason that the assessee firm, when it dissolves or when the lease expires, has

to give the possession of the factory including the building, machinery and other accessories, to the real owners of the factory. The machinery or any part of the factory cannot be retained by them as their own capital. Thus the expenditure on the repair of the machinery, which machinery ultimately belongs to the owners and not to the assessee, cannot be said to be in the nature of capital expenditure, nor can the same be said to be the personal expenditure of the assessee under the terms of the lease. The assessee firm was bound to get the machinery repaired before it could deliver the possession of the same to the real owners. Thus we are clearly of the opinion that as far as the question of repairs to the machinery is concerned, it is covered by the provisions of section 10(2)(xv) of the Act.

(7) The next contention of the learned counsel for the department that two of the partners of the assessee firm, namely, Sadhu Ram and Madhav Lal, are also the owners of the factory in question to the extent of one-half and, therefore, the expenses incurred to the tune of one-half, are in the nature of capital expenditure, is again without any force. The assessee firm is an independent entity, whereas Sadhu Ram and Madhav Lal are its partners. The department is only concerned with the assessee firm as a whole and not with the individual partners of the firm. The assessee firm is bound under the agreement of lease to pay to the real owners a sum of Rs. 6,000 annually as rent of the factory. Under the Income Tax Act, a person can be assessed as an individual person, as a partner of a firm, or as a trustee, in a case where the income of the trust is subject to income tax. The mere fact that two of the partners of the assessee firm are owners, would not lead to the conclusion that half of the expenditure made for repairing the building and machinery is in the nature of capital expenditure. The assessment of the tax has to be made on the firm and not on individual share-holders. Thus this contention of the learned counsel for the department is again without any force. Therefore, we have no reason to differ with the findings given by the Income Tax Appellate Tribunal.

(8) For the reasons recorded above, question No. 1, whether the expenditure of Rs. 16,954/- incurred by the petitioner firm in repairing the building was a permissible deduction, is answered in the affirmative in favour of the assessee. Question No. 2 is also answered in the

affirmative in favour of the assessee. However, keeping in view the circumstances of the case, there will be no order as to costs.

D. K. MAHAJAN, J.—I agree that both the questions have to be answered in favour of the assessee.

N. K. S.

CIVIL MISCELLANEOUS.

Before D. S. Tewatia, J.

M/S. STANDARD DYEING AND FINISHING MILLS,—*Petitioner.*

versus

THE UNION OF INDIA AND ANOTHER,—*Respondents.*

Civil Writ No. 364 of 1970.

May 7, 1970.

Employees' Provident Funds Act (XIX of 1952)—Section 2(i-a) and Explanation (d) to Schedule I—Dyeing of yarn or fabric—Whether a manufacturing process—Profit and loss to the manufacturing establishment—Whether relevant to hold it as such—Establishment engaged in the process of dyeing yarn and fabrics—Whether within the purview of entry "textile" in Schedule I.

Held, that the dyeing of yarn or fabric does not result in a manufactured product, because dyeing of yarn or fabric does involve its treating or adapting with a view to its use. Hence it is a manufacturing process. The definition of the word "manufacture" in section 2(i-a) of Employees' Provident Funds Act makes one fact clear that the incurring of loss or accruing of gain to the establishment in its manufacturing activity is irrelevant to the consideration of the establishment being engaged in the manufacturing activity under this Act. In fact if the industrial activity carried on by the establishment involves the manufacture of required product to bring an establishment within the purview of the Act, it is not necessary that the manufactured product should be further intended for sale by such a manufacturer himself because, under this Act, the requirement is only the manufacture of goods and what happens to the manufactured goods later on is not the concern of this Act. (Para 7)

Held, that the purpose of the legislature to insert Explanation (d) to Schedule I is to clarify the scope of the expression 'textiles'