App + Section f 648 + App. 19
Ref to. 15 ALL. 324.
Ex pl'd at f 648. 21 ALR 59.

Ex pl'd at f 648. 52 ALJR 640.
Ref to 31 FLR 336.
App at f 648. 24 ALR 57.
App. 147 CLR 278.
C. 83 ALR 203
Cons. 91 ALR 53.
Foll 98 ALR 550.
Appl 101 ALR 330.
Appl. 103 ALR 385.
Appl. 110 ALR 29.
Appl. 110 ALR 375.

[HIGH COURT OF AUSTRALIA.]

HALLSTROMS PROPRIETARY LIMITED . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

H. C. OF A. 1946.

SYDNEY, *Aug.* 1, 2.

MELBOURNE, *Oct.* 7.

Latham C.J., Starke, Dixon, McTiernan and Williams JJ.

Ref'd to: 85 L.J.R. 431

Income Tax (Cth.)—Assessable income—Deduction—Costs and expenses incurred in opposing application by trade competitor for extension of patent—Expenditure—Capital or revenue—"Outgoings" (not being "outgoings of capital") "incurred in gaining or producing the assessable income" or "necessarily incurred in carrying on a business"—Appeal—Question of law—Income Tax Assessment Act 1936-1940 (*No.* 27 *of* 1936—*No.* 65 *of* 1940), *ss.* 51 (1), 196.

The E. company, a trade competitor of the appellant, petitioned for an extension of the term of certain letters patent held by it. Such extension, if granted, would have caused heavy losses to the appellant in the conduct of its business both in respect of its trading commitments and in respect of moneys already expended by it on the reorganization of its plant in anticipation of the expiry of the letters patent. The appellant successfully opposed the E. company's petition and in so doing incurred legal costs and expenses amounting to £6,020.

Held, by *Latham* C.J., *Starke* and *Williams* JJ. (*Dixon* and *McTiernan* JJ. dissenting), that the legal costs and expenses so incurred were outgoings of a revenue and not of a capital nature, and, therefore, under s. 51 (1) of the *Income Tax Assessment Act* 1936-1940, were deductible from the taxpayer's assessable income.

APPEAL from the Board of Review.

Hallstroms Pty. Ltd., hereinafter referred to as the taxpayer company, was incorporated in 1937 as a company for the manufacture and sale of refrigerators.

In 1937 Electrolux Pty. Ltd., a company incorporated in New South Wales, which held patent rights in respect of continuous non-electric refrigerators, re-entered the Australian market for the manufacture and sale of such refrigerators. Owing to the strong

competition thus offered by Electrolux Pty. Ltd. the taxpayer company was obliged to review the design of the refrigerator it was then manufacturing. As a result, a new model was designed by the taxpayer company but in doing so, it was advised by its patent attorneys, that the taxpayer company had infringed the patents held by Electrolux Pty. Ltd. These patents were, however, due to expire in Australia on 18th August 1938. Accordingly, despite its patent attorneys' advice, work was continued on the taxpayer company's new model and their manufacture in quantity was commenced before August 1938. That month marked the opening of the selling season for refrigerators and large contracts for delivery of these new models were entered into with various firms throughout Australia.

Upon an *ex parte* application made to it by Electrolux Pty. Ltd. the High Court, on 18th August 1938, made an order extending the time to that company within which to make an application for the extension of the term of the relevant letters patent. The taxpayer company for the first time received notice of this application and extension of time on 13th December 1938, and it thereupon lodged a caveat against the granting of an extension of the term of the letters patent. On 29th December 1938, Electrolux Pty. Ltd. filed a petition in the High Court praying that the term of the letters patent might be extended for a further term of ten years or for such other term as should seem fit to the Court.

The taxpayer company realizing that, if the petition by Electrolux Pty. Ltd. for extension of its patents were successful, it would sustain heavy losses both by way of damages for failure to fulfill its orders for the new models and in respect of the reorganization of its plant necessary for their manufacture, on 29th March 1939 filed objections to the petition lodged by Electrolux Pty. Ltd.

The petition came on for hearing before *Starke* J. in July and September 1939, and, towards the end of December 1939, his Honour intimated to the parties to the petition, at their request, that as the evidence stood at that stage of the proceedings, and if no further evidence were called, he would extend the term of the letters patent for a period of three years subject to certain conditions. The order would have given protection to the taxpayer company in respect of any infringement of the (proposed) new letters patent after 18th August 1938 and before the date of the order, or in respect of the use, employment or sale by any member of the public at any subsequent time of any refrigerator made and sold by the taxpayer company in infringement of the letters patent after the expiration thereof and before the date of the order. A further condition would have

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enabled the taxpayer company to claim compensation in respect of expenses incurred in the bona-fide belief that the letters patent had expired, but such compensation would have been granted only in respect of moneys actually expended by the taxpayer company " and lost or thrown away in manufacturing domestic refrigerators or parts thereof in infringement of the said letters patent between the expiration of the said letters patent " (that is, on 18th August 1938) " and the filing of " its caveat.

Subsequent to that announcement by *Starke* J., further evidence was called by the taxpayer company in relation to the petition, and, on 28th March 1940, the petition was dismissed and the petitioner was ordered to pay the costs of the Commissioner of Patents and certain costs (to be taxed) which had been incurred by the taxpayer company as caveator.

After allowing for sums paid by the petitioners to the taxpayer company for costs pursuant to the above-mentioned order, the taxpayer company incurred the sum of £6,020 3s. for legal costs and expenses in the course of its opposition to the petition, and, for those purposes, paid this sum to its solicitors between 1st July 1939 and 30th June 1940.

The gross income of the taxpayer company in each of the income years commencing 1st July in the year 1939 and succeeding years consisted principally of moneys received from the sale of refrigerators manufactured by it, the manufacture and sale of which would have been unlawful had the term of the letters patent been extended as requested in the petition

The Commissioner for Taxation decided that the said sum of £6,020 3s. was not allowable as a deduction from the taxpayer company's assessable income for the income year ended 30th June 1940, and, consequently, that that sum was not deductible under s. 80 of the *Income Tax Assessment Act* 1936-1940 in the assessment of the taxpayer company's income for the year ended 30th June 1941.

Objections by the taxpayer company against the assessment were disallowed by the Commissioner. The Board of Review confirmed the disallowance of the objections on the ground that the said expenditure was of a capital nature.

An appeal to the High Court against the decision of the Board of Review came before *Rich* J., in the first instance, on admissions of fact with a view to a case being stated, but, as the parties were not agreed on all the facts submitted, evidence was given relating mainly to the financial position of the taxpayer company at the relevant time.

The manager of the taxpayer company stated in evidence that prior to 1938 the taxpayer company did an extensive business in manufacturing and selling, mainly in country districts where electric power or gas was not available, water-cooled refrigerators; that in 1937 the effects of the competition by Electrolux Pty. Ltd. was felt by the taxpayer company; that, based upon refrigerators procured in 1937 from a foreign country, the taxpayer company, in 1938 and succeeding years, produced air-cooled refrigerators; that the manufacture and sale of refrigerators had been the whole of the taxpayer company's business; that if the taxpayer company had not been in a position to manufacture and sell refrigerators it would have gone out of business and that at no time did the taxpayer company contemplate the taking-on of some other line of business; that as the result of the competition the taxpayer company's sales in 1938 and 1939 were not as great as in any other year; that in the year ended June 1939 the liabilities of the taxpayer company were very much greater than its assets; that during the succeeding years ended June 1941, June 1942 and June 1943 respectively, the taxpayer company showed a substantial profit, due to the fact that the taxpayer company was manufacturing and selling refrigerators of the type which had been the subject of the letters patent.

Rich J. directed that pursuant to s. 18 of the *Judiciary Act* 1903-1940 the appeal and the question involved therein be argued before the Full Court.

Relevant statutory provisions are sufficiently set forth in the judgments hereunder.

Mason K.C. (with him *Asprey*), for the appellant. The sum of money under consideration was expended in earning the assessable income. The holder of, and licensees under, the letters patent were not entitled as of right to have extended the term of those letters patent. The legal costs were incurred and paid by the taxpayer company in asserting its right to manufacture the refrigerators. The right was one which the taxpayer company had in common with all other members of the community. The taxpayer company's successful opposition to the petition did not confer upon it any right which was not common to all other members of the community as from August 1938. The legal costs were expended by the taxpayer company, not to acquire any right, but to defend its right, as soon as the letters patent expired, to do what it was entitled to do, that is, to make refrigerators which previously had been the exclusive monopoly of Electrolux Pty. Ltd. (*Kellogg Co. of Canada Ltd.* v. *Minister of National Revenue* (1)).

(1) (1942) Ex.C.R. (Can.) 33; (1943) S.C.R. (Can.) 58.

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It was a very important matter for the taxpayer company that it should be able to establish in the Court that the term of the letters patent should not be extended beyond the date originally specified. There was, at most, a judicial affirmation of the taxpayer company's right to carry on its business in the same manner as it had been carried on previously. Beyond that the expenditure did not produce any asset or advantage of any kind. The petitioners were seeking a new right for themselves ; they were seeking an exclusive right. The whole fallacy underlying the reasons of the Board of Review was that the taxpayer company had acquired something. The taxpayer was compelled to expend the money in order to be able to carry on its business, otherwise it was confronted with the position that, possibly, it would have been prevented from doing something it was entitled to do under the law.

[WILLIAMS J. referred to *Income Tax Commissioner, Bihar and Orissa* v. *Maharajadhiraj Sir Rameshwar Singh of Darbhanga* (1).]

There was no asset of the taxpayer company in question. In the strict sense the money was not expended in order to protect an asset, but was expended simply in the course of the taxpayer company's business in order to promote the business. The subject expenditure comes within the first part of s. 51 (1) of the *Income Tax Assessment Act* 1936-1940, and does not come within any of the exceptions referred to in that sub-section. In *Ward & Co. Ltd.* v. *Commissioner of Taxes* (2) the crucial words were " not exclusively incurred in the production of the assessable income." The word " exclusively " does not appear in s. 51 (1). *Ward's Case* (2) does not show that the expenditure now under consideration was an expenditure of a capital nature. Support for the submissions made on behalf of the taxpayer company is to be found in *Herald & Weekly Times Ltd.* v. *Federal Commissioner of Taxation* (3). The test is : Did the taxpayer company acquire any capital assets ? An application of that test produces an answer in the negative (*Southern* v. *Borax Consolidated Ltd.* (4) ; *Associated Portland Cement Manufacturers Ltd.* v. *Inland Revenue Commissioners* (5)). The facts are not in dispute. Upon those facts there is no evidence which supports the finding of the Board of Review.

Taylor K.C. (with him *Dillon*), for the respondent. The argument that moneys expended for a purpose somewhat similar to the purpose in this case did not produce any asset or advantage to the taxpayer

(1) (1942) 1 All E.R. 362.
(2) (1923) A.C. 145.
(3) (1932) 48 C.L.R. 113.
(4) (1941) 1 K.B. 111, at pp. 116-118, 120 ; 23 Tax Cas. 597, at pp. 602-604, 605.
(5) (1945) 62 T.L.R. 115.

was rejected in *Sun Newspapers Ltd.* v. *Federal Commissioner of Taxation* (1). The bringing into existence of an asset or advantage is immaterial; the test is: What was the purpose or object of the payment? (*British Insulated and Helsby Cables Ltd.* v. *Atherton* (2); *Ward & Co. Ltd.* v. *Commissioner of Taxes* (3); *Sun Newspapers Ltd.* v. *Federal Commissioner of Taxation* (4); *Southern* v. *Borax Consolidated Ltd.* (5)). At the time when the expenditure was incurred the taxpayer company was faced with the position of either going out of business or re-organizing its business on an entirely new footing. The money was expended in relation to the complete re-establishment and re-organization of the business. Payments made in relation to competitors are almost invariably treated as expenditure for the purpose of eliminating competition and, invariably, are regarded as capital payments (*Sun Newspapers Ltd.* v. *Federal Commissioner of Taxation* (6); *Associated Portland Cement Manufacturers Ltd.* v. *Inland Revenue Commissioners* (7)). *Southern* v. *Borax Consolidated Ltd.* (5) is not an authority for the proposition that because nothing is added to one's title it is not a capital payment, or for the proposition that money spent in repelling an attack against a company's title to property is not capital expenditure. What was acquired in *British Insulated and Helsby Cables Ltd.* v. *Atherton* (8) was vague and uncertain but it was sufficient to create an advantage or a benefit to the company; therefore the money there in question was held to be capital expenditure. Money expended to prevent a competitor from obtaining a monopoly in a particular matter confers upon the person so expending the money a greater advantage or benefit than that referred to in *British Insulated and Helsby Cables Ltd.* v. *Atherton* (8). In *Kellogg Co. of Canada Ltd.* v. *Minister of National Revenue* (9) there was not any assault on the structure of the company itself. The legal costs did not constitute an expenditure in connection with the operation of the business of the taxpayer company. It was not a recurring expenditure of the business in any way whatever. Those two factors lead to the conclusion that the expenditure was a capital expenditure.

Mason K.C., in reply. It is clearly shown in *Southern* v. *Borax Consolidated Ltd.* (5) that there is a substantial difference between

(1) (1938) 61 C.L.R. 337.
(2) (1926) A.C. 205, at pp. 212-214.
(3) (1923) A.C., at pp. 149, 150.
(4) (1938) 61 C.L.R., at p. 354.
(5) (1941) 1 K.B. 111; 23 Tax Cas. 597.
(6) (1938) 61 C.L.R., at pp. 353-355, 358-363.
(7) (1945) 62 T.L.R. 115.
(8) (1926) A.C. 205; 10 Tax Cas. 155.
(9) (1942) Ex.C.R. (Can.) 33; (1943) S.C.R. (Can.) 58.

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getting rid of an unsatisfactory servant or a competitor who is unsatisfactory, and the buying-off of a potential competitor. That is the explanation of the decision in *Sun Newspapers Ltd.* v *Federal Commissioner of Taxation* (1).

[DIXON J. referred to *Collins* v. *Joseph Adamson & Co.* (2).]

Cur. adv. vult.

Oct. 7.

The following written judgments were delivered :—

LATHAM C.J. The appellant company was engaged in the manufacture and sale of domestic refrigerators. Electrolux Pty. Ltd. had a patent for a refrigerator which was a great improvement upon that which was sold by the appellant company. The Electrolux patent expired on 18th August 1938. The appellant company made preparations to manufacture and sell refrigerators on the Electrolux model as soon as the field was open by reason of the expiry of the Electrolux patent. On 29th December 1938 the Electrolux Company filed a petition seeking an extension of patent for ten years. The appellant company entered a caveat, opposed the petition, and the petition was dismissed. The appellant company had to bear its own costs of issues upon which it had failed, and these costs amounted to £6,020. The appellant company seeks to deduct this amount from its assessable income in the year ended 30th June 1940 by virtue of s. 51 (1) of the *Income Tax Assessment Act* 1936-1940. Section 51 (1) is in the following terms : " All losses and outgoings to the extent to which they are incurred in gaining or producing the assessable income, or are necessarily incurred in carrying on a business for the purpose of gaining or producing such income, shall be allowable deductions except to the extent to which they are losses or outgoings of capital, or of a capital, private or domestic nature, or are incurred in relation to the gaining or production of exempt income."

The appellant contends that the amount paid in costs was an outgoing incurred in gaining or producing the assessable income and therefore is a proper deduction. The Commissioner, on the other hand, contends that the payment of the costs was a loss or outgoing of capital or of a capital nature and that it was not incurred in relation to the gaining or production of assessable income.

Upon appeal by the company from assessment to income tax the Board of Review held that the expenditure of the sum of £6,020 was made " for the purpose of acquiring a right to manufacture and sell the refrigerators after the judgment of the Court upon the petition for extension during a period of some years in which but

(1) (1938) 61 C.L.R. 337. (2) (1938) 1 K.B. 477.

for its opposition the right could not be expected to arise." Upon this ground the assessment was confirmed; the company appealed to the Court and *Rich* J. directed that the appeal and the question involved therein should be argued before the Full Court.

The leading case upon this subject is *British Insulated and Helsby Cables Ltd.* v. *Atherton* (1). In that case Viscount *Cave* L.C. said: ". . . 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 very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital" (2). See also in this Court *W. Nevill & Co. Ltd.* v. *Federal Commissioner of Taxation* (3) and *Associated Newspapers Ltd.* v. *Federal Commissioner of Taxation* (4).

In my opinion the expenditure by the company was not made for the purpose of acquiring an asset or of adding to the profit-yielding subject which constituted the capital structure of the business but, as Lord *Hanworth* M.R. said in *Mitchell* v. *B. W. Noble Ltd.* (5), the expenditure was made "not in order to secure an actual asset to the company but to enable them to continue, as they had in the past, to carry on" the same business, unfettered by a particular difficulty which had arisen in the course of the year.

When the Electrolux patent expired on 18th August 1938 the appellant had the same right—no more and no less—as every other person to manufacture refrigerators in accordance with the patent. All persons have a right to carry on a lawful business, whether they manufacture refrigerators, boots or anything else. A right enjoyed in common with all persons is not a capital asset of any single person. If the Electrolux patent had been extended the Electrolux Company would have obtained a monopoly which would have prevented the appellant from manufacturing refrigerators according to the Electrolux patent, but the appellant company did not acquire any asset or any right of any character when the petition of the Electrolux Company was dismissed. It simply maintained its position as it already existed.

Nor can it be said that the company, by making the expenditure, gained "an enduring advantage." It gained nothing—it merely succeeded in maintaining an existing position. The prevention or avoidance of a loss is not a gain of anything. The prevention of subtraction is not the same thing as addition. Occasional legal

(1) (1926) A.C. 205; 10 Tax Cas. 155.
(2) (1926) A.C., at pp. 213, 214; 10 Tax Cas., at pp. 192, 193.
(3) (1937) 56 C.L.R. 290.
(4) (1938) 61 C.L.R. 337.
(5) (1927) 1 K.B. 719, at p. 737; 11 Tax Cas. 372, at p. 421.

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Latham C.J.

proceedings are incidental to many businesses. They may result in the acquisition of a new right as, for example, where a person successfully applies for and obtains a patent. But expenditure in the defence of a right enjoyed in common with all His Majesty's subjects is not expenditure incurred in obtaining anything. It is an outgoing of the business incurred in keeping the business going on the same basis as in the past, without any change in the constituent elements of the profit-yielding structure. In *Southern* v. *Borax Consolidated Ltd.* (1), *Lawrence* J. held that a company which incurred costs in defending its title to its land and buildings was entitled in computing the profits of the company for income tax purposes to deduct the costs as expenditure wholly and exclusively laid out for the purposes of the company's trade. This case was approved by the Court of Appeal in *Associated Portland Cement Manufacturers Ltd.* v. *Inland Revenue Commissioners* (2). In the present case the expenditure, in my opinion, was not incurred in relation to anything which can be called a capital asset—either to acquire it or even to protect it—but in order to maintain a common right.

The Commissioner relied upon *Ward & Co. Ltd.* v. *Commissioner of Taxes* (3), where it was held that an expenditure incurred in order to prevent the extinction of the business from which the income was derived was not an expenditure exclusively or at all incurred in the production of the assessable income. That case is distinguishable from the present. If the petition of the Electrolux Company had been granted the business of the appellant company would not have been extinguished, though it would have been seriously diminished during the period of extension. The company was selling other refrigerators and had made some arrangements towards dealing in refrigerators manufactured upon an American design.

In my opinion the expenditure in question was an outgoing incurred in gaining or producing assessable income and was not an outgoing of capital or of a capital nature. The company is therefore entitled to have the expenditure deducted in its assessment to income tax. In my opinion, the appeal should be allowed and the assessment remitted to the Commissioner for the purpose of amending it by allowing the deduction claimed.

STARKE J. Appeal from the decision of a Board of Review constituted under the *Income Tax Assessment Act* 1936-1940 which *Rich* J. pursuant to s. 18 of the *Judiciary Act* 1903-1940 directed

(1) (1941) 1 K.B. 111; 23 Tax Cas. 597.
(2) (1945) 62 T.L.R. 115.
(3) (1923) A.C. 145.

to be argued before the Full Court and also the question involved therein upon the evidence taken before him.

The question is whether a sum of £6,020 or thereabouts, law costs and expenses incurred and paid by the appellant the taxpayer during the income year which ended on 30th June 1940 in opposing the extension of certain letters patent, is an allowable deduction from its assessable income under the *Income Tax Assessment Act* 1936-1940.

The Act provides in s. 51 (1) that " all losses and outgoings to the extent to which they are incurred in gaining or producing the assessable income, or are necessarily incurred in carrying on a business for the purpose of gaining or producing such income, shall be allowable deductions except to the extent to which they are losses or outgoings of capital, or of a capital, private or domestic nature." The expenditure must be incurred in the course of business operations, directed towards the production of income or be " incidental and relevant to the operations or activities regularly carried on for the production of income " (*W. Nevill & Co. Ltd.* v. *Federal Commissioner of Taxation* (1) ; *Sun Newspapers Ltd.* v. *Federal Commissioner of Taxation* (2)). But it must not be an expenditure of capital or of a capital nature. The Act does not define these terms but the cases have attempted various definitions or descriptions of the terms. Thus when 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 " there is very good reason . . . for treating such an expenditure as properly attributable not to revenue but to capital " (*British Insulated and Helsby Cables Ltd.* v. *Atherton* (3)). " In a rough way . . . it is not a bad criterion of what is capital expenditure . . . to say that capital expenditure is a thing that is going to be spent once and for all, and income expenditure is a thing that is going to recur every year " (*Vallambrosa Rubber Co. Ltd.* v. *Farmer* (4)). " The test of circulating as contrasted with fixed capital is as good a test . . . as can be found " (*Golden Horse Shoe (New) Ltd.* v. *Thurgood* (5)). Or again " the distinction between expenditure and outgoings on revenue account and on capital account corresponds with the distinction between the business entity, structure, or organization set up or established for the earning of profit and the process by which such an organization operates to obtain regular returns by means of regular outlay " (*Sun Newspapers Ltd.* v. *Federal Commissioner of Taxation* (6)).

(1) (1937) 56 C.L.R., at p. 305.
(2) (1938) 61 C.L.R. 337.
(3) (1926) A.C., at pp. 213, 214 ; 10 Tax Cas., at pp. 192, 193.
(4) (1910) 5 Tax Cas. 529, at p. 536.
(5) (1934) 1 K.B. 548, at p. 560.
(6) (1938) 61 C.L.R., at p. 359.

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The asset or advantage need not have a tangible existence: thus the acquisition of the goodwill of a business or of restrictive covenants not to compete in business and the promotion of Parliamentary bills and so forth may all involve expenditure of capital or of a capital nature (*Van Den Berghs Ltd.* v. *Clark* (1)).

But none of the so-called definitions or tests or any other definitions or tests suggested by the cases are decisive.

They are all matters which may be considered for the purpose of determining whether the expenditure in question is of a revenue or of a capital nature.

In the end, as in the beginning, the question is one of fact, as was said in the *British Insulated and Helsby Cables Case* (2), which must be determined on the facts of each particular case.

It appears in this case that the taxpayer was the manufacturer of domestic refrigerators. The Electrolux Pty. Ltd. also manufactured domestic refrigerators under letters patent which expired on 18th August 1938. The Electrolux model operated upon a different principle to that upon which the model manufactured by the taxpayer operated and was superior to it for domestic purposes. As soon as the Electrolux patent expired the taxpayer proceeded to manufacture and to take orders for and to sell domestic refrigerators constructed substantially in accordance with the patent specifications of the Electrolux model. And I take it that the taxpayer was put to expense in acquiring plant and in improving the layout of its premises for the manufacture of the new model. The taxpayer was entitled to manufacture the Electrolux model, not because it acquired any right or title from Electrolux Pty. Ltd. or anyone else to do so, but because the patent rights of the Electrolux Co. had expired and were open to the public.

But in December 1938 the Electrolux Pty. Ltd. applied to this Court pursuant to the provisions of the *Patents Act* to extend the term of its patent. The taxpayer opposed this petition and it was dismissed in March of 1940. It was in these opposition proceedings that the taxpayer incurred and paid costs and expenses amounting to the sum of £6,020 or thereabouts that it now claims to deduct from its assessable income. If the taxpayer had manufactured the Electrolux model in its business before the expiration of the patent and been sued for infringement and defended its action upon the ground that the patent was invalid or had not been infringed, clearly, in my judgment, the costs and expenses of so doing would be a loss or outgoing incurred in the course of its business operations

(1) (1935) A.C. 431.

(2) (1926) A.C. 205; 10 Tax Cas 155.

directed towards the production of income, or at least incidental and relevant to those operations, and an allowable deduction.

And so, I think, are the costs and expenses of opposing the extension of the patent. Its opposition to the extension of the patent would enable it, if successful, to carry on the business of manufacturing the Electrolux model and avoid legal proceedings for infringement in the conduct of its business.

In short, in my judgment, the legal costs and expenses incurred by the taxpayer in opposing the extension of the Electrolux patent are in fact outgoings of a revenue and not a capital nature.

The provisions of s. 196 (1) of the Act require notice. "The Commissioner or taxpayer may appeal to the High Court from any decision of the Board which involves a question of law."

In my opinion, the ultimate question in this case is one of fact but if in its conclusion of fact the Board of Review acted upon some principle of law or without any evidence to support it then a question of law is involved in the decision of the Board. The Board of Review in the present case acted, I think, upon a wrong principle of law and without any evidence to support its conclusion. It said that the outgoings were incurred in acquiring a right or an advantage which is a proposition that cannot, I think, be supported in law or in fact. It also said that the outgoings were expended in an intended alteration in the structure of the taxpayer's business. Apart from the indefiniteness of this test and the practical difficulty of its application, I am unable to follow how the manufacture of a new model of refrigerator altered the structure of the taxpayer's business which was to manufacture refrigerators.

The appeal should succeed and the deduction claimed by the taxpayer allowed.

Dixon J. In reference to a question whether a payment belonged to capital or to revenue Lord *Greene* M.R. said in *Inland Revenue Commissioners* v. *British Salmson Aero Engines Ltd.* (1) that there had been many cases where the matter of capital or income had been debated. "There have been" he said, "many cases that fall on the border-line. Indeed, in many cases it is almost true to say that the spin of a coin would decide the matter almost as satisfactorily as an attempt to find reasons." Other judges have been less explicit concerning the barrenness of the attempt to find reasons and instead have described the distinction as amounting to a question of fact. If this be right, there would seem to be no firm ground for interfering with the conclusion of the Board of Review, whose decision cannot be

(1) (1938) 2 K.B. 482, at p. 498.

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appealed from unless it involves a question of law. The reasons given by the members of the Board contain the appropriate citations from the customary authorities and I can discover in them no misapprehension of principle. It is true that in some of the reasons the word " right " is used to describe the liberty to use an invention when a patent expires and the patentee fails to obtain an extension, and it is also true that the successful opposition to the extension is described as a proceeding to acquire the right to carry on business by the use of the invention. But, even if the freedom to use the invention as of common right ought not to be so denominated, it is certain that the Board understood the legal nature of a patent and spoke thus only of the defeat of the attack upon this nascent liberty which the application for an extension of the monopoly threatened.

For myself, however, I am not prepared to concede that the distinction between an expenditure on account of revenue and an outgoing of a capital nature is so indefinite and uncertain as to remove the matter from the operation of reason and place it exclusively within that of chance, or that the *discrimen* is so unascertainable that it must be placed in the category of an unformulated question of fact. The truth is that, in excluding as deductions losses and outgoings of capital or of a capital nature, the income tax law took for its purposes a very general conception of accountancy, perhaps of economics, and left the particular application to be worked out, a thing which it thus became the business of the courts of law to do. The courts have proceeded with the task without, it is true, any very conspicuous attempt at analysis, but rather in the traditional way of stating what positive factor or factors in each given case led to a decision assigning the expenditure to capital or to income as the case might be. It is one thing to say that the presence among the circumstances of a case of a particular factor places the case within a specific legal category. It is another thing to infer that the absence of the same factor from some other case necessarily places that case outside the category and gives it an opposite description. But towards that kind of fallacy human reasoning constantly tends, and the decisions upon matters of capital and income contain much reasoning that is quite human. My own opinions upon the question I have attempted to explain in *Sun Newspapers Ltd.* v. *Federal Commissioner of Taxation* (1) and I shall not re-state them. I shall treat the passage to which I refer as incorporated in this judgment. Once more, however, I shall endeavour to apply what I conceive to be the principles that determine whether an outgoing is on account of capital or of revenue. As a prefatory remark it may

(1) (1938) 61 C.L.R., at pp. 359-363.

be useful to recall the general consideration that the contrast between the two forms of expenditure corresponds to the distinction between the acquisition of the means of production and the use of them; between establishing or extending a business organization and carrying on the business; between the implements employed in work and the regular performance of the work in which they are employed; between an enterprise itself and the sustained effort of those engaged in it.

The facts upon which the case before us must be decided present in a somewhat unusual aspect the elements or factors governing the distinction. The claim is to deduct legal expenses, and legal expenses, we may assume, take the quality of an outoing of a capital nature or of an outgoing on account of revenue from the cause or the purpose of incurring the expenditure. We are, therefore, remitted to a consideration of the object in view when the legal proceedings were undertaken, or of the situation which impelled the taxpayer to undertake them.

The situation of the taxpayer, a company, was briefly this. The business of the company had been the manufacture and sale of household refrigerators. The business had suffered a decline because it had encountered the competition of a different and better kind of refrigerator. The decline was so severe that the company would have had to go out of business or into some other form of manufacture. The rival refrigerator was based upon different principles and involved a quite new construction. It made the taxpayer's refrigerator obsolete and, although much more costly, it rendered the sale of the latter impracticable wherever gas or electric power was available. It was the commercial expression of an invention covered by a patent, but the patent was soon to expire. The company, in anticipation of the date of expiry, re-organized its production in order to manufacture a new refrigerator according to the invention. The company entered into contracts for the supply of the new refrigerator, and, moreover, it went into actual production. Then it was faced with an application on the part of the patentee for an extension of the patent. If an extension had been granted, it would have been unlawful for the company to pursue any part of the programme for which it had undertaken the reorganization of its business and it was only by defeating the application that it was enabled to produce and sell the refrigerator embodying the invention and carry into effect the preparations for the manufacture and sale of the new apparatus.

The purpose of expending the money upon the opposition proceedings was to enable the taxpayer company to complete and carry into

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effect plans for re-organizing its manufacturing and selling business for the production and sale of an entirely different refrigerator. Thus, while a transition was being effected from the one form of product to the other as the subject of the company's business, a question arose whether a legal restriction upon the company's right to carry the change into effect and conduct the business in accordance with the change had come to an end or the restriction was to be extended. The expenditure was directed to ensuring that there should be no renewal of the restriction. This appears to me to go to the character and organization of the profit-earning business and not to be an incident in the operations by which it is carried on. I think that it is an affair of capital.

It is, of course, true that if the acquisition of a proprietary right had been the purpose, as for example the acquisition of the patent, had it been extended, or of a licence thereunder, there could have been no question that the cost of acquisition was a capital expenditure (*Desoutter Bros. Ltd.* v. *J. E. Hanger & Co. Ltd.* (1)). But, otherwise, I do not see wherein lies the importance of the fact that what the company aimed at and secured was the prevention of the prolongation of a monopoly restrictive of what otherwise would be the common right of the company to use the invention.

The use of the invention was a matter of special and lasting importance to the company, and to prevent the revival of the monopoly restricting it meant an economic or business advantage of greater value than the acquisition of an item of intangible property. The reason why the purchase of an asset such as the patent, if extended, would have been so clearly a matter of capital is, I think, only because of the greater ease with which its character and purpose are recognizable, its duration can be measured and its value estimated.

Once there is a clear appreciation of the actual place in the business of the company which the existence, expected termination and threatened extension of the patent took, then I think the difference between, on the one hand, gaining or preserving a freedom to use the invention as of common right and, on the other hand, acquiring the exclusive right of user which the extended patent would have conferred ceases to be significant in deciding whether the expenditure belonged to capital or revenue. What is an outgoing of capital and what is an outgoing on account of revenue depends on what the expenditure is calculated to effect from a practical and business point of view, rather than upon the juristic classification of the legal rights, if any, secured, employed or exhausted in the process. The fact that, on the defeat of the application of the patentee for an extension, it

(1) (1936) 1 All E.R. 535.

was open to others as well as the company to set up as manufacturers of refrigerators embodying the invention was, comparatively speaking, of little moment to the company. At worst it meant the risk of possible future competition with some additional manufacturer. What did matter was that the company should be enabled to place its business on a fresh foundation, by turning over to the production of a refrigerator according to the invention, and thus compete with the proprietor of the expired or expiring patent. It was for that purpose that the expenditure was incurred. The obstacle which was finally removed by the defeat of the application to extend the patent was much more than a hindrance or difficulty in the operations carried on by means of the company's established plant and its selling and general business organization. It was an obstacle to a readjustment affecting the company's plant, its product, its course of selling and its business organization. The legal expenses incurred in the final removal of this obstacle, or in preventing its continuance, ought not, therefore, to be regarded as an outgoing in the course of and as an incident to the carrying on of the profit-earning operations of the business, that is working the plant and organization according to an existing form and arrangement.

To adapt and add to some expressions used by the Chairman of the Board, it is concerned with the reform of or the more effective establishment of the organization by which income will be produced (the profit-yielding subject) and not with the means whereby that organization will be used for that purpose.

I am, therefore, of opinion that the expenditure was an outgoing of a capital nature and that the decision of the Board of Review disallowing the claim to deduct it is right.

The taxpayer placed great reliance upon two cases supporting an opposite conclusion. The first is *Southern* v. *Borax Consolidated Ltd.* (1). In that case the taxpayer carried on a business consisting in the mining, manufacture and sale of borax and other mineral products. A branch of its business, actually conducted in the name of a Nevada corporation, included land in Mormon Island, near Los Angeles, California, upon which for the purposes of the business wharves and buildings had been erected. In order to put itself in a position to require payment of tolls for the use of the wharves, the City of Los Angeles brought an action in the Federal District Court against the taxpayer and the Nevada corporation, claiming that the taxpayer's title to the land and buildings was invalid and that they were in fact the property of the city. Part of the land consisted of foreshore and the city contended that a grant of foreshore was

(1) (1941) 1 K.B. 111; 23 Tax Cas. 597.

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invalid. After six years of litigation a new trial was ordered. It was said that, if the city succeeded, the taxpayer would have to pay tolls amounting to 40,000 dollars per annum, probably retrospectively. A claim was made to deduct the costs of the litigation, up to the order for a new trial, as a business expense, in computing the profits of the taxpayer. The deduction was allowed by the Commissioners and their decision was upheld by *Lawrence* J. Upon the facts as they appear from the case stated set out in the report (1) I do not think that this decision can be supported. The costs were incurred in order to retain a capital asset of the company employed in the business as fixed capital and to avoid the payment, in consequence of its loss, of a charge upon revenue of indefinite duration. Next to the outlay of purchase money and conveyancing expenses in acquiring the title to the land, it would be hard to find a form of expenditure in relation to property more characteristically of a capital nature.

The basis of the decision of *Lawrence* J. may be seen from two passages in his judgment. In the first, his Lordship said: "In my opinion the principle which is to be deduced from the cases is that where a sum of money is laid out for the acquisition or the improvement of a fixed capital asset it is attributable to capital, but that if no alteration is made in the fixed capital asset by the payment, then it is properly attributable to revenue, being in substance a matter of maintenance, the maintenance of the capital structure or the capital assets of the company" (2). The first or positive statement contained in this passage is open to no substantial objection, but the second, the converse and negative proposition that if no alteration is made in the capital asset by the payment it is a revenue expenditure, appears to me to have no foundation in principle or authority. No alteration in a fixed capital asset was effected by the outlay that was in question in what has become the leading case upon the subject (*British Insulated and Helsby Cables Ltd.* v. *Atherton* (3)) and there was none, to take one or two examples only, in *English Crown Spelter Co. Ltd.* v. *Baker* (4); in *Countess Warwick Steamship Co. Ltd.* v. *Ogg* (5); in *Collins* v. *Joseph Adamson & Co.* (6) (at all events as to one of the two payments) and in *Henderson* v. *Meade-King Robinson & Co. Ltd.* (7). The New Zealand decision in *Commissioner of Taxes* v. *Ballinger & Co. Ltd.* (8) seems much in point and is quite opposed to the view of *Lawrence* J.

(1) (1941) 1 K.B., at pp. 111-114; 23 Tax Cas., at pp. 597-599
(2) (1941) 1 K.B., at pp. 116, 117; 23 Tax Cas., at p. 602.
(3) (1926) A.C. 205; 10 Tax Cas. 155.
(4) (1908) 5 Tax Cas. 327; 99 L.T. 353.
(5) (1924) 2 K.B. 292; 8 Tax Cas. 652.
(6) (1938) 1 K.B. 477.
(7) (1938) 22 Tax Cas. 97, at p. 105.
(8) (1903) 23 N.Z.L.R. 188.

The second passage in the judgment of *Lawrence* J. reads thus: "It appears to me that the legal expenses which were incurred by the respondent company did not create any new asset at all, but were expenses which were incurred in the ordinary course of maintaining the assets of the company and the fact that it was maintaining the title and not the value of the company's business does not, in my opinion, make it any different" (1).

It is possible to find in this statement two reasons not necessarily interdependent. One is the lack of any fresh acquisition of assets. That, in my view, does no more than put aside one possible state of facts in which the payment would have certainly been of a capital nature. The other is that the defence of the title against impeachment amounted to maintenance, the costs forming part of the business expenditure in the ordinary course upon maintaining the company's assets. An analogy which suggests itself is the cost of restoring the front door of the business premises after an attempted entrance by bandits. No ground was disclosed in the case stated, as set out in the reports, and none exists in the known customs or propensities of Californian city authorities, for supposing that the company was exposed to regular or recurrent attacks upon the validity of its title. His Lordship probably did not doubt that the purpose of the litigation was to decide once and for all whether the taxpayer had or had not a valid title; but, as appears from the first of the foregoing passages cited from his judgment, his Lordship regarded outlays making no alteration in a fixed capital asset as amounting in substance to a matter of maintenance. I should have thought that the decided cases illustrated the fact that these are not exhaustive alternatives. A decision of the Canadian Supreme Court that is entirely at variance with the view of *Lawrence* J. is the *Minister of National Revenue* v. *Dominion Natural Gas Co. Ltd.* (2).

The second case upon which, during the argument of this appeal, counsel for the taxpayer placed great reliance is *Kellogg Co. of Canada Ltd.* v. *Minister of National Revenue* (3). The legal expenses there in question were those of defending successfully an action against the taxpayer and one of the traders through whom the taxpayer distributed its products. The action was for infringement of the trade marks of the plaintiff, a rival manufacturer, and the defence was the invalidity of the registration. It was held that the costs were deductible as a business expense on account of revenue. The full judgment of *Maclean* J. in the Canadian Exchequer Court

(1) (1941) 1 K.B., at p. 120; 23 Tax Cas., at p. 605.
(2) (1941) S.C.R. (Can.) 19.
(3) (1942) Ex.C.R. (Can.) 33; (1943) S.C.R. (Can.) 58.

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draws the line in accordance with the English authorities which are ordinarily cited in such questions and negatives in the facts the *indicia* of a payment on account of capital commonly looked for. He concluded " That " (the payment of legal expenses) " was an involuntary expense, not a disbursement incurred once and for all, or for the benefit of a trade, within the meaning of such cases as I have earlier discussed. Again, this is not a case of a payment made once and for all in substitution of a ' recurring ' annual payment, as no such payment was ever made by Kellogg, and equally true is it, I think, that the expenses here were not incurred for the purpose of earning future profits " (1).

The gist of the short judgment of the Canadian Supreme Court on appeal is contained in the statement of *Duff* C.J. that " in the ordinary course legal expenses are simply current expenditures and deductible as such. The expenditures in question here would appear to fall within this general rule " (2). I see nothing in this decision but an application of principle to particular facts.

I have dealt with the two foregoing cases at length, not because I think that in the stream of authority they have any special importance, but because the appellant's argument depended so much upon them.

In my opinion the appeal should be dismissed.

McTIERNAN J. In my opinion this appeal should be dismissed. I agree with the reasons of my brother *Dixon* and have nothing to add to them.

WILLIAMS J. The question is whether the sum of £6,020 paid by the appellant to its solicitors for costs should have been allowed as a deduction from the appellant's assessable income derived during the year ended 30th June 1941. The costs were paid during the year ended 30th June 1940, but the appellant made a loss including this sum in this year, and it now claims to deduct the £6,020 under s. 80 of the *Income Tax Assessment Act* 1936-1940 from its assessable income for the subsequent year. The deduction is claimed under s. 51 (1) of the Act as an outgoing incurred in gaining or producing the assessable income which is not of a capital nature. The respondent admits that the sum was a payment made by the appellant without which the assessable income of the company for the year ended 30th June 1940 would not have been earned, so that the dispute is whether it was an outgoing of a revenue or capital nature.

(1) (1942) Ex.C.R. (Can.), at p. 43. (2) (1943) S.C.R. (Can.), at p. 61.

The costs were incurred under the following circumstances. The business of the appellant is the manufacture and sale of refrigerators. In 1937 it was selling a cheap and somewhat out-of-date refrigerator of the water-cooled type operated by kerosene. The Electrolux Company was selling a more expensive and up-to-date refrigerator of the air-cooled type for which it had a patent. In face of this competition the sales of the appellant's refrigerators were confined to country districts where there was no electricity or gas. But the Electrolux refrigerator could also be operated by kerosene, and the Electrolux Company was commencing to compete with the appellant in the country districts. The Electrolux patent expired on 18th August 1938, this date corresponding with the commencement of the season for selling refrigerators. The appellant was prepared to enter the market with a new air-cooled refrigerator embodying the Electrolux invention as soon as the patent expired. For this purpose the appellant had acquired the necessary plant and had manufactured and accumulated a stock of the new refrigerators and had entered into contracts to sell a large number of these refrigerators for future delivery. The Electrolux Company decided to apply to this Court under s. 84 of the *Patents Act* to extend the term of the patent. The company was out of time, but on 18th August 1938 an order was made under s. 84 (7) extending the time within which it might take proceedings. The appellant filed a caveat under s. 84 (2) against the extension. The Electrolux Company presented its petition on 29th December 1938. The hearing of the petition commenced on 10th July 1939, and the petition was finally dismissed on 28th March 1940 on the ground that, while the patent was highly meritorious and of great practical utility, the patentee had been adequately remunerated for the invention. The sum of £6,020 is the balance of costs incurred by the appellant in opposing the petition after deducting certain costs which the petitioner was ordered to pay to the appellant.

The respondent, in contending that the outgoing was of a capital nature, relied principally upon the decisions of the Privy Council in *Ward & Co. Ltd.* v. *Commissioner of Taxes* (1) and *British Insulated and Helsby Cables Ltd.* v. *Atherton* (2). In the first case a New Zealand company expended money in printing and distributing anti-prohibition literature to defeat a poll on the question whether or not prohibition of intoxicating liquors should be introduced. The Privy Council affirmed the decision of the Supreme Court of New Zealand that this expenditure was not exclusively incurred in the production of the assessable income. Viscount *Cave* L.C., in delivering the judgment of the Privy Council, said that:—"The expenditure in question

(1) (1923) A.C. 145. (2) (1926) A.C. 205; 10 Tax Cas. 155.

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was not necessary for the production of profit, nor was it in fact incurred for that purpose. It was a voluntary expense incurred with a view to influencing public opinion against taking a step which would have depreciated and partly destroyed the profit-bearing thing" (1). If the poll had been carried it would have become illegal for the brewery company to carry on its business, so that the money was spent to save the business from extinction.

In the second case it was held that a sum of £31,784 paid by an English company out of current profits to form the nucleus of a pension fund for its clerical and technical salaried staff was not a revenue but a capital expenditure and not a proper debit item to be charged against incomings of the trade when computing the profits. Viscount *Cave* L.C. said : " 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 very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital " (2). It was held that the purpose of creating the fund was to produce contentment amongst the staff, and that in this way an enduring benefit was obtained for the business.

It was contended that the present was an analogous case because the purpose of the expenditure was to defeat the application of the Electrolux Company for an extension of its patent and so bring into existence for the benefit of the appellant the substantial and lasting advantage of being able to manufacture and sell their new refrigerator. But the business of the company would not necessarily have been extinguished. Even if the patent had been extended it would still have been lawful for the appellant to carry on the business of manufacturing and selling refrigerators. For, as Lord *Greene* M.R. said in *Inland Revenue Commissioners* v. *Desoutter Bros. Ltd.* (3) :—" It is merely, in effect, a shield against competition. It is the right to exclude competitors from all operations, whether manufacturing, or vending, or using the patented article in the territory covered by the patents. That is all a patent is."

The appellant could still have manufactured the old type of refrigerator from the sales of which it had made small profits in 1938 and 1939. Mr. Hallstrom, the managing director of the appellant, had been to the United States in 1937 and arranged to import a new and improved type of water-cooled refrigerator, and the new

(1) (1923) A.C., at p. 149.
(2) (1926) A.C., at pp. 213, 214 ; 10 Tax Cas., at pp. 192, 193.
(3) (1945) 174 L.T. 162, at p. 163.

models were arriving early in 1938. The appellant would still have been free to manufacture and sell any type of refrigerator other than types which infringed the Electrolux patent (or any other current patents).

The Electrolux patent expired in August 1938. Subject to a re-grant the appellant had after this date the same right as any other member of the public to manufacture and sell the invention. The application for an extension was an attack upon this right. The defeat of the application did not clothe the appellant with any fresh right. The expenditure was incurred to safeguard an existing right and for the purpose of earning profits from the sale of the new refrigerator and to produce revenue in the conduct of its business. The appellant did not acquire any asset or other advantage from the Electrolux Company. It was still subject to the competition of this company in common with every other member of the public. In this respect the case differs completely from *Sun Newspapers Ltd.* v. *Federal Commissioner of Taxation* (1) and *Associated Portland Cement Manufacturers Ltd.* v. *Inland Revenue Commissioners* (2), where the taxpayers obtained the benefit of a covenant against competition by potential trade competitors and thereby improved the value of their goodwill. *Collins* v. *Joseph Adamson & Co.* (3) was a similar case.

The only advantage which the appellant acquired was, in the words of *Maclean* J. in *Kellogg Co. of Canada Ltd.* v. *Minister of National Revenue* (4), a judicial affirmation of an advantage already in existence and enjoyed by the taxpayer. The words of *Lawrence* J., as he then was, in *Southern* v. *Borax Consolidated Ltd.* (5) are, *mutatis mutandis*, very much in point: "The title of the company, which must be assumed, in my opinion, to have been a good title, remains the same; there is nothing added to the title or taken away, and the title has simply been maintained by this payment." Cf. *Income Tax Commissioner* v. *Singh* (6); *Spofforth* v. *Golder* (7); *Rushden Heel Co. Ltd.* v. *Inland Revenue Commissioners* (8).

The sum of £6,020 was, in my opinion, an outgoing incurred in gaining or producing the assessable income not of a capital nature, and the appellant is therefore entitled under s. 80 to have this sum deducted for the year ended 30th June 1941.

This appeal, which has been directed to be argued before the Full Court pursuant to s. 18 of the *Judiciary Act*, is against a decision by the Board of Review. Such an appeal lies only where the decision

(1) (1938) 61 C.L.R. 337.
(2) (1945) 62 T.L.R. 115.
(3) (1938) 1 K.B. 477.
(4) (1942) Ex.C.R. (Can.) 33; (1943) S.C.R. (Can.) 58.
(5) (1941) 1 K.B., at p. 117; 23 Tax Cas., at p. 602.
(6) (1942) 1 All E.R. 362
(7) (1945) 173 L.T. 77.
(8) (1946) 2 All E.R. 141.

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involves a question of law: *Income Tax Assessment Act*, s. 196. The Board decided that the expenditure was made by the taxpayer in acquiring a right to sell the new refrigerator which it would not have had if the Electrolux patent had been extended, and was therefore of a capital nature. In my opinion this decision was not reasonably open on the evidence so that the Board erred in law. As Viscount *Simon* L.C. said in *Doncaster Amalgamated Collieries Ltd.* v. *Bean* (1), " The borderline between revenue and capital expenditure is sometimes difficult to draw, and there may be cases in which the conclusion is properly reached by the Commissioners as a question of fact which will not be disturbed. But where, as here, the Commissioners find facts which in law must lead to the conclusion that the item falls into one class and not into the other . . . the error can be corrected on appeal."

For these reasons I would allow the appeal.

Appeal allowed with costs. Decision of Board of Review set aside. Assessment remitted to Commissioner for amendment by allowing the deduction of £6,020 3*s. claimed by the appellant.*

Solicitors for the appellant, *Garland, Seaborn & Abbott.*

Solicitor for the respondent, *G. A. Watson*, Acting Crown Solicitor for the Commonwealth.

J. B.

(1) (1946) 1 All E.R. 642, at p. 645.