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has complete control, the provisions of the Act in many respects being inapplicable to awards made under any other Act, whether in England or elsewhere: *Oppenheim's case* (1). There will, therefore, be a decree in this suit in favour of the plaintiffs.

Attorneys for the plaintiffs: *K. Gooding & Co.*

Attorney for the defendants: *C. C. Bose.*

B. M. S.

(1) (1922) I. L. R. 45 Mad. 496.

SPECIAL BENCH.

Before N. R. Chatterjea, C. C. Ghose and Cuming JJ.

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 June 9.

EMPEROR

v.

ISABELLA COAL COMPANY.*

Income-Tax—Road cess and Public Works cess paid by a mine, whether to be deducted in computing the amount assessable to income-tax—Income Tax Act (XI of 1922), s. 10, cl. (viii).

A coal company is entitled to deduct the amount paid as Road and Public Works cess in computing their gains and profits assessable to income-tax under clause (viii) of section 10 (2) of the Indian Income Tax Act, 1922.

Surnomoyee Dabee v. Koomar Purresh Narain Roy (1), *Mahesh Narain v. Nowbat Pathak* (2), and *Manindra Chandra Nandy v. Secretary of State for India* (3), relied on.

In the matter of Raja Jyoti Prasad Singh Deo (4) and *In the matter of K. M. Selected Coal Co.* (5), distinguished.

*Special Bench. Reference No. 9 of 1924.

(1) (1878) I. L. R. 4 Calc. 576, (3) (1910) I. L. R. 38 Calc. 372,
 580. 376.

(2) (1905) I. L. R. 32 Calc. 837, (4) (1921) 6 P. L. J. 62.

849, 852.

(5) (1923) I. L. R. 3 Pat. 295.

REFERENCE under section 66(2) of the Income Tax Act of 1922.

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The Isabella Coal Company was assessed in Calcutta to income-tax. The company claimed deduction of the amount paid on account of Road and Public Works cess in computing the profits and gains assessable to income-tax. This was rejected. The Company appealed to the Assistant Commissioner of Income Tax, claiming, among other things, that under clause (viii) of section 10(2) of the Income Tax Act, allowance should be made for the amounts paid as Road and Public Works cess, as these cesses were "local rates". This claim was rejected. The Company then applied for a reference to the High Court on the point of law—whether Road and Public Works Cess is a "local rate" within the meaning of clause (viii) of section 10(2) of the Income Tax Act of 1922.

The questions of law referred to the High Court by the Commissioner of Income Tax of Bengal for decision were as follows:—

(i) Should an allowance be made to the Isabella Coal Company under section 10(2) (viii) in respect of the amount paid by it on account of Road and Public Works cess on the ground that these sums were paid on account of "local rates" in respect of premises used for the purposes of the business?

(ii) Should an allowance be made to the Isabella Coal Company under section 10(2)(ix), in respect of the amount paid by it on account of Road and Public Works cess on the ground that it is an expenditure incurred solely for the purpose of earning such profits and gains?

The Commissioner of Income-Tax was of opinion that both the questions should be answered in the negative.

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Mr. N. N. Sircar (with him *Mr. U. N. Sen Gupta*), for the firm. The amount of road cess levied for the mine should be allowed in the computation of the income-tax either under section 10 (2) (viii) as "sums" "paid on account of land revenue, local rates or "municipal taxes in respect of such part of the "premises as is used for the purposes of the business" or under section 10 (2) (ix) as "any expenditure (not "being in the nature of capital expenditure) incurred "solely for the purpose of earning such profits or "gains". Under section 5 of the Cess Act, 1880, all immovable property except in Calcutta or within any municipality and except railways and tramways under the Government are liable to payment of Road and Public Works cess. As regards land, section 6 provides that the cess is to be levied on the annual value, but as regards mines and quarries on the annual net profits as calculated under section 72. The cess is a rate not on the person but on the property: *Surnomoyee Dabee v. Koomar Purresh Narain Roy* (1), *Manindra Chandra Nandy v. Secretary of State for India* (2). It is in the nature of a local rate in respect of such part of the premises as is used for the purpose of the business. Under the Cess Act, immoveable property, includes mines and is to be rated.

The Advocate-General (Mr. S. R. Das) with him *Mr. S. M. Bose*, for the Commissioner of Income Tax. Under the Cess Act, in case of mines, they are to be assessed like a business, on the net annual profits. No doubt, the cess is levied in respect of the premises, but it is levied after taking into account the expenses for machinery, labour, depreciation and other elements and not merely in respect of the premises. The cess depends not on the use of the premises, but on the net

(1) (1878) I. L. R. 4 Calc. 576, 580.

(2) (1910) I. L. R. 38 Calc 372, 375.

profits resulting from such use. It is payable, as if the mine were a business, and is not one levied on the premises used for the business: *In the matter of K. M. Selected Coal Company* (1). The cess is not for services rendered as by a municipality. *In the matter of Raja Jyoti Prasad Singh Deo* (2) is in point. In the next place, the cess does not come under section 10 (2) (ix) of the Income Tax Act, as it is not an expenditure incurred solely for the purpose of earning such profits. The net profits of the mines must first be ascertained and then the cess calculated. The payment of cess is not in any sense necessary for the purpose of earning profits.

Mr. Sircar, in reply.

Cur. adv. vult.

CHATTERJEA J. This is a Reference under section 66 (2) of the Income Tax Act, XI of 1922.

The assessee, the Isabella Coal Company, paid Road and Public Work cess in respect of their coal mine, and claimed a deduction of the amount paid by them as cesses, in the computation of the income-tax under clauses (viii) and (ix) of section 10 (2) of the Income-Tax Act, XI of 1922, and the question referred to us, is whether the sums paid by them as cesses should be deducted under clauses (viii) and (ix) of section 10 (2) of the Act.

Section 10 (1) lays down that the "tax shall be payable by an assessee under the head 'business' in respect of the profits or gains of any business carried on by him". (2) "Such profits or gains shall be computed after making the following allowances namely (omitting the other clauses),—

"(viii) any sums paid on account of land revenue; local rates or municipal taxes in respect of such part

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(1) (1923) 1 L R 3 Pat. 295.

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“ of the premises as is used for the purpose of the
 “ business.

“(ix) any expenditure (not being in the nature of
 “ capital expenditure) incurred solely for the purpose
 “ of earning such profits or gains.”

It is not, and cannot be, disputed that the Road
 cess and Public Works cess are “ local rates”. The
 “ question is whether they are local rates “ in respect
 “ of such part of the premises as is used for the purpose
 “ of the business”.

The first point, therefore, is whether a coal mine
 comes within the expression “ premises”. The word
 “ premises” is not defined in the Act. It is used
 with reference to buildings, but it is also used with
 reference to land, and there is nothing to show that
 in law the expression is restricted to buildings. We
 think that the expression is wide enough to cover a
 coal mine.

The next question is whether the coal mine is
 “ used for the purpose of the business”. The assessee
 is a coal company: they raise and sell coal. It is
 contended, however, that so far as the coal taken out,
 in respect of which the cess is levied, is concerned, it
 is not *used* for the purposes of the business, as “ use ”
 does not contemplate the destruction of the thing
 itself. But having regard to the nature of the prop-
 erty (a coal mine) the cutting and taking away coal
 is using the premises for the purposes of the busi-
 ness. “ In the case of mining properties the only
 mode in which they may be profitably used is to take
 from them valuable ores” and the “ taking of ore from
 the mine is rather the use than the destruction of the
 estate”: See *Mahesh Narain v. Nowbat Pathak* (1).
 Cesses paid by the company, therefore, are paid in
 respect of the premises used for the purposes of

the coal business. Section 5 of the Cess Act (IX of 1880 B. C.) lays down that all immovable property (except as otherwise in sections 2 and 8 provided) shall be liable to the payment of a Road and a Public Works cess. Section 6 provides that "the Road cess and Public Works cess shall be assessed on the annual value of lands and on the annual net profits from mines, quarries, tramways, railways and other immovable property ascertained respectively as in this Act prescribed." Cesses, therefore, are payable in respect of all immovable property, and, among others, mines.

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The learned Advocate-General, however, contends that a distinction has been drawn in section 6 of the Cess Act (IX of 1880 B. C.) between land and mines, that in the former the cess is payable on its annual value, whereas in the case of mines, it is payable on the net profits of the mine, and although if the cess were payable on the mine as land, it would be a local rate "in respect of the premises used for the purposes of a business", it is not so as the cess is payable in respect of the *net profits* of a mine. But section 5 lays down that *all immovable* property (except houses, shops and other buildings) shall be liable to the payment of a Road and Public Works cess, and mine is immovable property. It is true that section 6 lays down (so far as mines are concerned) that the cesses shall be assessed on the annual *net profits* from mines. But section 6 merely provides the *mode* of assessment, and does not change the nature of the imposition, which is a tax imposed on all immovable property which includes mines.

It is contended, however, that the cess is not payable on mine but on such part of it from which coal is taken away, and not even on the coal taken out unless there is a profit, and the cess is payable only

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on the net profits. But unless the coal is taken out there would be no profits.

Lastly, it is contended that as cess is payable on the net profits, it is not payable until the net profits are ascertained, and therefore, cannot be deducted. But under section 72 of the Cess Act, the net profits of a mine (and quarries, etc.) are to be calculated on the average of the annual net profits for the *last three years* for which accounts have been made up.

The Commissioner of Income Tax relies upon the case No. 102 of 1920 decided by the Patna High Court *In the matter of Raja Joyti Prasad Singh Deo* (1) and *In the matter of K. M. Selected Coal Company of Mandhum* (2). In the first case it was held that income derived from the rents and royalties of collieries does not fall within income derived from business under section 5(iv) of the Income Tax Act, 1918, but within "income derived from other sources" under clause (vi) of that section, and that in assessing income tax on such income, the amount paid in respect of Road cess and Public Works cess should not be deducted from the taxable income. That case was a Reference (under section 51 of the Income Tax Act of 1918) upon the application of the assessee who did not carry on business, but who received rents and royalties, and the question was whether Road and Public Works cesses paid by him should be deducted in assessing the tax payable by him.

As stated above, it was held that the income derived from rents and royalties of collieries does not come under the head of income *derived from business* and therefore did not fall under section 9 of the Act which provided that the tax shall be payable by an assessee under the head "income derived from business" in respect of the profits of

(1) (1921) 6 P. L. J. 62.

(2) (1923) I. L. R. 3 Pat. 295.

any business carried on by him and then set out allowances which might be deducted in computing the profits. Section 11 of the Act which dealt with income derived from "other sources", made an allowance of expenditure incurred solely for the purpose of making such income or earning such profits. The learned Judges were of opinion that payments made on account of Road cess and Public Works cess cannot be deducted under section 11 in assessing the income-tax. In the view we take of clause (viii) of section 10(2) of Act XI of 1922, it is unnecessary to consider the above question in the present case.

In the second case of *K. M. Selected Coal Company* (1), it was held that a rate on the annual output of a mine imposed on a colliery proprietor under section 23 (3) of the Bihar and Orissa Mining Settlement Act, 1920, by the local Mines Board of Health, and a cess in respect of the annual despatches of coal and coke from a mine imposed on a colliery proprietor under section 45 of the Jheria Water Supply Act, 1924, by the Jheria Water Board, do not fall within section 10(2) (viii) of the Income Tax Act, 1922, but they do fall within clause (ix), and, therefore, should be deducted under the latter clause for the purpose of determining the proprietor's taxable income. The rates payable under those two Acts are no doubt local rates, but not rates imposed on such part of the premises as is used for the purposes of business. The rates are imposed on the owners of mines—on the annual output from their mines under one Act, and on the annual despatches of coal and coke from the mine under the other. The Court there had not to consider the rates imposed by the Cess Act, under which cess is imposed upon all immovable property. So far as clause (viii) of section 10(2) was

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concerned all that was necessary to decide was that the word "premises" does not include the annual output or the annual despatches of coal from the mines, upon which alone the rates were payable under the two Acts mentioned above.

Road cess and Public Works cess, on the other hand, are taxes not against a person but against the property itself. In *Surnomoyee Dabee v. Koomar Purresh Narain Roy* (1), the learned Judges observed that it is a tax upon immovable property and is assessed upon the annual value of that property. They were not considering mines, in which case the mode of assessment is differently laid down. In *Manindra Chandra Nandy v. Secretary of State for India* (2), the Judicial Committee observed that "both in sections 6 and 72 of Cess Act (IX of 1880) 'the net annual profits' have reference to the property and not to the individual."

We are accordingly of opinion that cesses paid by the company are local rates "in respect of such part of the premises as is used for the purposes of the business" within the meaning of clause (viii) of section 2 of the Income Tax Act, and that they are entitled to deduction of the amount of the cesses paid.

In this view it is unnecessary to consider whether the payment comes under clause (ix) of section 10(2) of the Act.

The petitioner company is entitled to the costs of this Reference which is assessed at Rs. 350, including counsel's fee.

C. C. GHOSE J. concurred.

(1) (1878) I. L. R. 4 Calc. 576, 580.

(2) (1910) I. L. R. 38 Calc. 372, 376.

CUMING J. This is a Reference by the Commissioner of Income Tax.

The facts are these: A certain coal company, the Isabella Coal Company, has been assessed to income-tax.

The company contended that they were entitled to deduct first the amount they have paid on account of Road and Public Works cess in computing the amount assessable to income-tax. They contend that their case falls under either section 10(2) (*viii*) or section 10(2) (*ix*).

This claim has been rejected by the Commissioner of Income Tax and on the application of the company this reference has been made to this Court. The case turns on the construction of these two clauses of a section of the Income Tax Act: section 10(2) (*viii*) and (*ix*.)

Section 10(2) (*viii*) runs as follows:—

“Any sums paid on account of land revenue, local rates or municipal taxes in respect of such part of the premises as is used for the purposes of the business.”

It is conceded that Road cess and Public Works cess are local rates.

Mr. Sircar contends on behalf of the company that the tax is leviable on the mine and not on the income (section 5, Cess Act), that it is calculated on the income, no doubt, but this is merely the method of assessment, that the only way of using the mine is by extracting the coal, that a mine is a premises and so the whole of the mine is used for the purpose of the business. Hence the present case comes under section 10(2) (*viii*).

The learned Advocate-General would seem to contend that a mine is not a premises, that the assessment is made really on a business, the business being that

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of cutting coal and that the cess is really paid on account of the business. The cutting of coal is the destruction and not the use of the premises.

The cess is paid on the profit and hence on the business.

I think the company must succeed. I hold that a mine is a premises.

The expression "premises" has never, as far as I know, been legally defined. It has been in one case held to mean a 100-acre park. Popularly, no doubt, premises usually means a building. Legally I do not think it does. We often hear the expression "house and premises" which clearly shows that the premises are not the house only. I am of opinion that a colliery is a premises.

Then the whole colliery is used for the purpose of the business. The colliery is used by digging the coal out of the seams, bringing it to the surface and selling it. The learned Advocate-General would contend that this is destroying the colliery, not using it.

As Mookerjee J. points out in *Mahesh Narain v. Nawbat Pathak* (1), the taking of ore from a mine is rather the use than the destruction of the estate, the partial exhaustion being but the incidental consequence of the use.

As far as I am aware, there is no other way of using a colliery or mine except by digging the coal or minerals out of it.

The learned Advocate-General would contend that in the case of a mine it is really a cess levied on a business, because the Road cess and Public Works cess is assessed on the annual net profit. This argument confuses the thing, if I may say so, which is liable to pay the tax and the method of arriving at the amount to be paid in any case.

(1) (1905) 1. L. R. 32 Calc. 837, 852.

Section 5 of the Cess Act states that all immovable property shall be liable to the payment of a Road cess and Public Works cess. A business cannot be said to be immovable property.

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Section 6, on which the learned Advocate-General has relied, merely prescribed the method for determining the amount of cess to be paid, in the case of land on the annual value and in the case of mines on the annual profit. No doubt the extraction and selling of coal is a business, but Road cess and Public Works cess is assessable not on the business but on the immovable property owned by the person or persons carrying on the business. It is the property that is liable, not the person (*see* section 5).

I am, therefore, of opinion that a colliery is a premises, that it is used for the purpose of the business, which business is the extraction and sale of coal and that the Road cess and Public Work cess is a local rate.

That being so, the Isabella Coal Company are entitled to deduct the amount paid as Road and Public Works cess in computing their gains and profits assessable to income-tax.

In this view of the case, it is not necessary to consider whether the case falls under section 10 (2) (*ix*) of the Income Tax Act.

S. M.