SPECIAL BENCH.

Before Mr. Victor Murray Coutts Trotter, Chief Justice, and Mr. Justice Wallace.

1924, March 21.

THE COMMISSIONER OF INCOME-TAX, MADRAS, REFERRING OFFICER,

v.

THE NEDUNGADI BANK, LTD., CALICUT, BY ITS SECRETARY, RESPONDENT.*

Income-tax Act (XI of 1922), sec. 10 (2), cl. (9)—Business allowance—Madras District Municipalities Act (V of 1920), sec. 92—Tax on companies—Assessment of income under the Income-tax Act—Tax on companies under the Municipalities Act, whether can be deducted as a business allowance under the Income-tax Act.

Tax on companies levied under section 92 of the Madras District Municipalities Act (V of 1920) should be deducted as a business allowance under section 10 (2) of the Income-tax Act in assessing income under the latter Act.

Tax on companies levied under the former Act is not an income or profession tax but is a compulsory toll on trading companies without which they are not permitted to carry on their trade, and the payment of which is an expenditure incurred solely for the purpose of earning profits or gains.

Smith v. *Lion Brewery Company*, [1911] A.C., 150, and *Usher's Wiltshire Brewery, Limited* v. *Bruce* [1915] A.C., 433, followed; *The Chief Commissioner of Income-tax, Madras* v. *The Eastern Extension Australasia and China Telegraph Co. (Ltd.)* (1921) I.L.R., 44 Mad., 489, *Ward & Co.* v. *Commissioner of Taxes*, [1923] A.C., 145, and *Board of Revenue* v. *Muniswami Chetti* (1924) I.L.R., 47 Mad., 653, distinguished.

CASE stated under section 66 (2) of the Income-tax Act by the Commissioner of Income-tax, Madras, for the decision of the question

"Whether the company's tax levied under section 92 of the Madras District Municipalities Act (V of 1920) must be

* Referred Case No. 10 of 1923.

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deducted as a business allowance under section 10 (2) of the Income-tax Act."

The material facts appear from the memorandum of the Income-tax Commissioner sent up with his letter of reference to the High Court. The material portion of the memorandum of reference was to the following effect:—

The Collector and Income-tax officer, Malabar, assessed the Nedungadi Bank (Ltd.) during the current financial year on its income earned in the year 1922-23. He calculated that income to be Rs. 79,721. The Bank has its head office at Calicut and branches in various other towns. It therefore fell within the scope of the section 92 of the Madras District Municipalities Act (V of 1920) and was assessed to a municipal tax of Rs. 1,923 under that Act. The Bank claims that an allowance equal to this amount of the tax should be granted under section 10 (2) (ix), of the Indian Income-tax Act, 1922. The Income-tax officer held that any municipal taxation allowed must fall within the terms of section 10 (2) (viii) of the Indian Income-tax Act, 1922, and that the expenditure was not incurred solely for the purpose of earning the profits or gains of the business. He accordingly disallowed the claim. The point was raised on appeal before the Commissioner and was also disallowed. The assessee is dissatisfied with this decision and has claimed a reference on the following terms:—"Whether the Company's tax levied under section 92 of the Madras District Municipalities Act (V of 1920), must be deducted as a business allowance under section 10 (2) of the Income-tax Act. The point in issue is the interpretation of clause (ix) of sub-section (2) of section 10 of the Indian Income-tax Act and is admittedly a point of law. The point is referred accordingly for the decision of the High Court.' The Commissioner was of opinion, inter alia, that the only municipal tax that could be deducted as an allowance under the Income-tax Act was that specified in section 10 (2), clause (viii), and was limited to the municipal taxes in respect of such part of the premises of a business as was used for the purpose of the business, that the company's tax, not levied in respect of business premises, could not fall under clause

(viii), that the company's tax in question was not "an expenditure solely incurred for the purpose of earning such profits or gains" within the terms of clause (ix) of section 10 (2) of the Income-tax Act, and that consequently the deduction claimed by the company (Bank) should not be allowed under the Act.

The Government Pleader (*C. V. Anantakrishna Ayyar*) for the Referring Officer.

T. V. Muttukrishna Ayyar and *S. Chinnaswami* for the respondent.

JUDGMENT.

1. This is a reference under section 66 (2) of the Income-tax Act, and the question for decision is whether tax on companies levied under section 92 of the Madras District Municipalities Act, V of 1920, may be deducted as a business allowance under section 10 (2), clause (9), of the Income-tax Act. According to section 92 of the District Municipalities Act, under notification of the Chairman every company transacting business within the municipality for profit shall pay a half-yearly tax known as "Tax on Companies" on the scale shown in Schedule IV, provided it has transacted business for more than 60 days in the half-year. Section 16 of Schedule IV lays down the method of assessment, from which it is clear that the assessment is made on the paid-up capital of the company, although in certain cases if the head office or a branch or principal office of the company is not in the municipality, and it is able to show certain figures of gross income, the tax on the paid-up capital is to some extent reduced. The penalty for non-payment of this tax is set out in section 30 and subsequent sections of Schedule IV. It appears quite clear that this is a tax or a toll, not on profits or on income or on profession, since it is based not on the amount of profit or salary earned, but on the paid-up

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capital. It is, therefore, in no sense, an income or profession tax. It is a compulsory toll on such trading companies without which they are not permitted to carry on their trade for more than 60 days in any half-year. It is not strictly a licence fee, but it is nearer in analogy to that than it is to an income-tax.

2. That being the nature of the tax or toll levied, the question is whether it is a species of expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning profits or gains. It is clearly not in the nature of capital expenditure, since it is not met out of capital and does not diminish the capital. Is it then an expenditure for any other purpose than for the purpose of earning profits or gains? We are of opinion that it is not. It is not a tax on profits or income but a necessary condition precedent to any earning of profits. It is an impost without paying which the firm cannot trade within the municipality.

3. Arguments by analogy from the fact that income-tax may not be deducted in calculating the income assessable to Indian income-tax are not of any help in this case, since this is in no sense an income-tax. The case quoted by the Government Pleader, viz., *The Chief Commissioner of Income-tax, Madras* v. *The Eastern Extension Australasia and China Telegraph Co., Ltd.*(1), is therefore of no assistance. Another case quoted by him appears to us equally not in point. It is *Ward & Co.* v. *Commissioner of Taxes*(2). There it was held that money spent by a brewery company in printing and distributing anti-prohibition literature was not "expenditure exclusively incurred in the production of the assessable income," and therefore

(1) (1921) I.L.R., 44 Mad., 489. (2) [1923] A.C., 145.

the company was not entitled to make the deduction, the ground of the decision being that such expenditure was not incurred in the production of the assessable income but was expended with a view to influencing public opinion against taking a step which would have partly destroyed the earning of profit. In the case in *Board of Revenue* v. *Muniswami Chetti*(1), a Bench of this Court, to which one of us was a party, held that expenses for legal advice in a dispute between Government and the assessee regarding excess profits duty and in drawing up an income-tax return, could not be legitimately deducted. This case also does not seem to us to assist the decision of the present case. The only useful cases quoted before us are two English cases, *Smith* v. *Lion Brewery Company, Limited*(2) and *Usher's Wiltshire Brewery, Limited* v. *Bruce*(3), both of which support the assessee. These were cases decided under the English Income-tax Act of 1842 where a phrase not dissimilar to the phrase which we are now seeking to interpret had to be interpreted, namely, "Money wholly and exclusively laid out or expended for the purposes of such trade." In the former case a brewery company had, in order to extend their business, acquired certain licensed houses which they let out to tenants who covenanted to retail the company's beer. By thus becoming landlords of those licensed premises the company had to pay a statutory levy imposed by the Licensing Act of 1904, section 3, and the question was whether such payment could legitimately be deducted in the estimate of the balance of profits and gains. The House of Lords which consisted of four learned Lords was equally divided and the decision of the Court of Appeal in favour of allowing the deduction was

(1) (1924) I.L.R., 47 Mad. 653. (2) [1911] A.C., 150.
(3) [1915] A.C., 433.

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affirmed. One of the learned Judges, the EARL OF HALSBURY, in that case lays down as a deciding factor in the case that a person engaging in such a business "must, if he carries on that business, pay this tax; it is the Act of the Legislature which makes him pay it, and it is not a thing that is open to his own will or option." Another learned Judge, Lord ATKINSON, called it a compulsory levy and described it as an impost which "must necessarily be paid in order to set up the system which is found to be vital to their trade prospects to set up." In the second case, *Usher's Wiltshire Brewery Company, Limited* v. *Bruce*(1), all the five learned Judges composing the House followed the former case. That case is even stronger in the assessee's favour than the 1911 Appeal Cases case. It was another instance of a brewery company acquiring and letting licensed houses to tied tenants, and it was there laid down that even expenses in respect of premiums on fire insurances over these houses and premium on insurance against the loss of their licences for the sale of liquor were legitimate deductions in arriving at the assessable income. These were both cases of expenses, properly though voluntarily, incurred in the extension of the trade. The companies thought it necessary for the extension of their trade that they should become themselves the landlords of the retailing houses and thereby subjected themselves to the compulsory compensation levy. The present case seems to us an even stronger one. The payment of the compulsory levy to the municipality by way of the tax on companies is not merely for the purpose of extension of trade but is a condition precedent to the exercise of the trade at all within the municipal boundaries.

(1) [1915] A.C., 433.

4. We are, therefore, clear that the payment of companies' tax compulsorily levied on this company by the municipality is wholly and exclusively for purposes of the trade and that the object which that payment accomplishes is the same. The answer to the Reference, therefore, is that the expenditure is incurred solely for the purpose of earning profits and gains, and we answer accordingly.

5. Costs of the Reference will be taxed as on the Original Side. The assessee will get his costs from Government.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Devadass.

PANNAI ANANTHANARAYANA AYYAR (FIRST PETITIONER), APPELLANT,

1923, August 13.

v.

SANKARANARAYANA AYYAR AND OTHERS (SECOND PETITIONER AND RESPONDENTS), RESPONDENTS.*

Provincial Insolvency Act (V of 1920), ss. 53, 54, 68 and 75—Alienation by insolvent—Application by creditor to set aside—Refusal by Official Receiver to take action under section 53 or 54—Right of creditor to move District Court on refusal by Official Receiver—Remedies of creditor—Duty of Receiver to take action on indemnity by creditor—Appeal against order of District Judge dismissing application of creditor to take action—Creditor, whether a party "aggrieved" by order—Appeal without leave—Leave, subsequently applied for—Limitation—Delay, excuse of.

There is no rule that the Official Receiver alone, and nobody else, can move the District Court to annul an alienation by the insolvent under section 53 or 54 of the Provincial Insolvency Act (V of 1920).

* Appeal against Order No. 90 of 1922.