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past possession but to future possession after division of the property or alteration of the existing conditions.

There is only one point remaining. It is admitted by the opposite party that the proceedings were initiated in respect of 39 *bighas* and odd and that the final order that purports to have been passed under section 145 has reference to 82 *bighas*. It is obvious that the Magistrate had no jurisdiction to pass such order in respect of land which was not referred to in the initiatory proceedings.

For these reasons I would set aside the order of the Subdivisional Officer on the ground that it is an order which he had no legal authority to pass.

ADAMI, J.—I agree.

Order set aside.

REFERENCE UNDER THE INCOME-TAX ACT, 1922.

Before Dawson Miller, C.J. and Jwala Prasad, J.

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IN THE MATTER OF K. M. SELECTED COAL COMPANY OF MANBHUM.*

Income-tax Act, 1922 (*Act XI of* 1922), *section* 10(2)(viii) *and* (ix)—"*local rate—in respect of—premises*", *meaning of—Expenditure for the purpose of earning profits, not necessarily voluntary expenditure—Bihar and Orissa Mining Settlement Act*, 1920 (*B. & O. Act IV of* 1920), *section* 23(3)—*Jharia Water-Supply Act*, 1914 (*B. & O. Act V of* 1914), *section* 45.

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 Jharia Water-Supply Act, 1924, by the Jharia Water Board do not fall within section 10(2)(*viii*)

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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.

Raja Jyoti Prasad Singh Deo, In the matter of(1), distinguished.

Such rates being imposed in respect of the annual output and the annual despatches of coal from the mine are not rates imposed in respect of premises within the meaning of clause (*viii*).

Reference under the Income-tax Act, 1922.

The facts of the case material to this report are stated in the judgment of Dawson Miller, C. J.

The assessee, the K. M. Selected Company paid a cess under the Jharia Water-Supply Act and a tax under the Mines Board of Health Act, and claimed that these payments were business expenditure or taxes within the meaning of clause (*viii*) of section 10 of Income-tax Act, 1922, which should be deducted in calculating the profits of the business for the purpose of assessment to income-tax. The income-tax authorities refused to admit the claims and the assessee demanded a reference to the High Court under section 66 of the Act. On this reference—

K. P. Jayaswal, for the assessee: We are entitled to a deduction to the extent of the amount we pay under section 23 (*3*) of the Mines Board of Health Act and under section 45, clause (*1*) of the Jharia Water-Supply Act, by virtue of section 10, sub-section (*2*), clauses (*viii*) and (*ix*). Clause (*viii*) refers to "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." I submit that they are clearly local rates and they are in respect of "premises" including mines. "Premises" is used in a general sense meaning "land" in general. [See *Wharton's Law Lexicon*, 12th edition, page 687.] The method of rating does not matter because that is

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only a method of calculation. The Bengal Municipal Act and the Bihar Municipal Act do not apply to Jharia.

[CHIEF JUSTICE: Do these Acts impose taxes on houses and premises?]

Yes. When they are imposing taxes under the Water-Supply Act and the Mines Board of Health Act, they are discharging the functions of a Municipality. In essence they are taxing the premises, including the mines. The taxes are on the mines calculated on the annual amount of coal raised.

[CHIEF JUSTICE: It is a tax on the owner in respect of the coal raised.]

Every tax is on the owner but in respect of premises. Buildings, excavations, machines, *etc.*, are covered by the term "mines" which is defined in section 3, sub-clause (*l*) in Act VIII of 1921.

If, however, these rates do not come under clause (*viii*), they should be taken to come under clause (*ix*) inasmuch as they are expenditure which is necessary for the earning of my profits. These two rates are rates for work done for which I must pay for the purposes of my business. I do my business in the locality and unless I pay the rates I shall not be allowed to do my business. If the Crown is going to tax my profits, it is reasonable that it must make allowance for what has been spent [*see* Sanders on Income-Tax, 1st edition, page 91]. I am forced to pay the sum. I am not paying the rates out of charity. *In the matter of Raja Jyoti Prasad Singh Deo of Kashimpur in the District of Manbhum* (1) is distinguishable. There the question was whether "royalties" came within the meaning of "business" or "income from other sources" under sections 9 and 11, respectively, of the Income-tax Act. Besides this, a public cess was in question there which is calculated on net profits, *i.e.*, it becomes a part of the profits, while these taxes

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enter the cost of production, they being levied on the output, *i.e.*, before profits accrue.

Moreover, these taxes are paid only because I carry on the business and not on the income. Here it is a condition precedent to my making an income. I cannot sell the coal before I have paid the tax. If the legislature had taxed my net income, as in the case of cess, the matter would have been different. Section 6 of the Cess Act stands on a different footing.

Sultan Ahmed (Government Advocate), for the Crown: The question is simply whether the allowance can be made under section 10, sub-section (*2*), clause (*viii*) or (*ix*). These taxes, under the Jharia Water-Supply Act and the Mines Board of Health Act, are admittedly local rates, but in order that a deduction could be made, it must be in respect of such part of the premises as is used for the purposes of the business. The taxes are neither for the premises, nor any such part of it is used for the purposes of the business. There is no rate levied on the coal which is attached to the premises.

[JWALA PRASAD, J.: Is it not a tax on the mines?]

It is not a tax on the mines. It is a personal tax in respect of the output of the coal. The expense is not a business expense, as it is made under compulsion of statutes. I rely on *In the matter of Raja Jyoti Prasad Singh Deo of Kashimpur in the District of Manbhum* (1).

[CHIEF JUSTICE: That case did not deal with "business" but "income from other sources." It is a tax which you must pay for the coal raised and not on any ascertained income.]

The tax is personal in respect of the coal raised. It is leviable at the time of despatch.

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[CHIEF JUSTICE: But the section says expenses incurred for the purpose of earning profits.]

The Act will certainly make allowance for the expenses which were necessary for the purposes of earning profits. These rates are an expenditure which is incurred after the coal has been taken out and sold. The question is whether these rates are such as are necessary for the earning of profits—I submit, not. It is, therefore, more a matter of interpretation than a question of law.

Jayaswal, in reply: *See* Sanderson's Book on Income-tax, pages 87-91, 2nd edition; also *Usher's Wiltshire Brewery, Limited* v. *Bruce* (1). The whole question is whether the expenses were incurred with the sole intention of earning a profit. I submit these local rates were of such a nature. The Act is to be construed in favour of the subject. The difference between the cess and these two taxes lies in this, that whereas the former is a tax on the profits itself, the latter are leviable even before anything is earned.

S. A. K.

DAWSON MILLER, C.J.—This is a reference under section 66 of the Indian Income-tax Act, 1922, for the opinion of the High Court upon certain questions which arise in relation to the assessment of the taxable income of the K. M. Selected Coal Company, for the year 1921-22. The Company is the proprietor of a colliery in Jharia and claims that in assessing its income for the year in question certain local rates imposed upon the outturn of the coal in the one case and upon the despatches of the coal and coke in the other should be deducted from the taxable income under the provisions of the Indian Income-tax Act, 1922. The question for determination is whether in arriving at the taxable income the local rates, to which I shall refer in greater detail presently, can be deducted under

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the provisions of section 10, clause (*viii*) or (*ix*), of the Income-tax Act, 1922. It is admitted that the income payable by the assessee comes under the head of "business" within the meaning of section 10 and the tax payable in such a case is in respect of the profits or gains of the business carried on by the assessee. The section provides by clause (*2*) that such profits or gains shall be computed after making the following allowances. Then there follow sub-clauses (*i*) to (*ix*) which include amongst other things certain deductions in respect of rent for the premises in which the business is carried on, in respect of repairs in certain cases, in respect of interest of capital borrowed for the purposes of the business, in respect of insurance, repairs to buildings, plant and machinery depreciation and other matters which it is unnecessary to enumerate further. Then follows sub-clause (*viii*) which is in these terms :

(*viii*). "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."

Sub-clause (*ix*) is as follows :

(*ix*) "Any expenditure (not being in the nature of capital expenditure) incurred solely for the purposes of earning such profits or gains."

The rates in question which it is sought to deduct from the taxable income for income-tax purposes are imposed in the one case under the Bihar and Orissa Mining Settlements Act, 1920, clause (*23*), which provides that the Board (that is the Mines Board of Health for the district, established under the Act) shall impose yearly an assessment at rates not exceeding the maximum rates prescribed on all owners of mines in which are employed persons residing in the Mining Settlement, and all persons who receive any royalty, rent or fine from such mines, and the assessment by clause (*3*) of the section shall be based in the case of owners of mines, on the annual output from their mines. In pursuance of that section a rate was imposed upon the assessee in this case upon the annual

output from the mine. The other tax or rate is that imposed by the Jharia Water-Supply Act (Bihar and Orissa Act III of 1914) which by section 45 provides that:

"There shall be formed a fund to be called the Jharia Water Fund which shall be vested in the Water Board and there shall be placed to the credit thereof in the District Treasury or a Sub-Treasury

(1) the proceeds of a tonnage cess on the annual despatches of coal and coke from mines."

Section 54 and the following sections in Chapter VI make provision for the levy of the cesses there named. A cess under these sections was imposed upon the assessee in respect of the annual despatches of coal and coke from the mine. It is in respect of these two rates that a deduction is claimed by the assessee in this case.

It is admitted that these rates are local rates within the meaning of clause (*2*), sub-clause (*viii*), of section 10 of the Indian Income-tax Act, 1922, but it is contended on behalf of the Commissioner of Income-tax that such rate is not a rate in respect of such part of the premises as is used for the purposes of business; that indeed it is not a tax upon the premises at all but is a tax levied upon the owner of the mine in respect not of any buildings or land which may be described as premises but upon the annual output in the one case and upon the annual despatches in the other and therefore that by no straining of the language of clause (*viii*) could you bring the present rates within the scope of that clause. The duties leviable under the two Bihar and Orissa Acts mentioned are not, in my opinion, local rates imposed on such parts of the premises as are used for the purposes of the business within clause (*viii*) of section 10 of the Indian Income-tax Act, 1922. That clause appears to me to contemplate a tax or rate imposed on the premises in the ordinary acceptation of the word, in this connection the buildings and land where the business is carried on or such part thereof as is used for the purpose of carrying on the business, such as offices, workshops, warehouses, *etc.*, as distinguished from private residences unconnected with the business.

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The levy in such cases where the rate is imposed on the premises for municipal purposes is generally assessed on the annual value of the premises and I do not think it can be said that the word premises includes the annual output or the annual despatches of coal from the mines.

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With regard to the second point, namely, whether these rates are included under sub-clause (*ix*) of clause (*2*) of the section the case appears to me to present very much greater difficulty. It must be borne in mind that in assessing a taxable income derived under the head of business it is only the profits or gains of the business that are to be taxed and the question which arises in the present case is whether these profits or gains are to be arrived at after deducting the local rates imposed upon the assessee in the present case. There can be no doubt to my mind that from a commercial standpoint these rates imposed upon the proprietor of the business would be deducted in the Company's balance-sheet before any profits could be shown as the profits of that business. But it is necessary to consider further whether the rates in question can be regarded as an expenditure incurred by the assessee solely for the purpose of earning such profits or gains. It is contended on the one hand, on behalf of the Income-tax Commissioner, that such expenditure must be a voluntary expenditure incurred by the assessee solely for the purpose of making a profit in his business. It is contended on the other hand, on behalf of the assessee, that it is not necessary that he should voluntarily incur this expense if in fact it is an expense incurred by him in the ordinary course of making his profits and before such profits can be ascertained. The case is, to my mind, one not altogether free from doubt. In the case of *Raja Jyoti Prasad Singh Deo* (1) the question arose as to whether cesses imposed on the net annual profits of certain property could properly be deducted under a similar clause in the Income-tax Act of 1918 for the purpose

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of arriving at the taxable income for the purposes of income-tax. In that case the Bench, of which I was a member, came to the conclusion, although it was not absolutely necessary for the purposes of that decision, that road-cess could not be deducted in arriving at the profits of a business taxable as income. But the reason why that view was taken was that before any cess became leviable at all the profits in the case of a business must first be ascertained and that it was upon these profits when they were ascertained that the cess was to be levied and it was upon the same profits that the income-tax was also to be levied. Therefore one could not, in arriving at the taxable amount either for income-tax or for cess, deduct in the one case cess or in the other case income-tax. The present case however appears to me to present different features. The local rates which it is sought to deduct in arriving at the amount taxable are not rates imposed upon the profits of the business. The rates imposed are tonnage rates upon the amount of coal raised or the amount of coal and coke despatched and are in no sense rates levied after the profits of the business have been ascertained. In fact it is necessary in order to carry on this business and, which is important, before any profits at all can be earned that these rates should be paid, in other words that the actual coal raised and the actual despatches made, whether the business shows a profit or not should bear the burden of the rates imposed by the local authorities. That seems to me to take the present case outside the dictum in the earlier case of *Raja Jyoti Prasad Singh Deo* (1). It is true that in one sense the expenditure is not a voluntary expenditure made by the assessee for the purposes of carrying on his business. It is a local rate imposed upon him, possibly against his will, but at the same time when a person enters into the business of a coal-mine proprietor he knows when he undertakes that enterprise that there will be certain expenses connected with the working of the mine which he may not voluntarily incur but which still are part and parcel

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of the working expenses of the mine and connected with the business of the mine and these expenses will have to be taken into account before the actual amount of profit earned can be ascertained. It does not seem to me that in arriving at the profits the expense incurred in earning those profits should necessarily be what may be called voluntary expenses. If in fact the very nature of the business requires that certain expenses should be incurred before the profits can be ascertained then I think that such expenses can fairly be said to come within the meaning of sub-section (*ix*) of clause (*2*) of section 10 of the Act as expenditure incurred solely for the purpose of earning such profits or gains. In my opinion, therefore, the local rates which the assessee claims should be deducted from his taxable income in this case should be deducted before the assessment of his income is made.

No specific question is formulated for our opinion in the reference by the Commissioner of Income-tax but the points upon which he requires an opinion are clearly indicated and the answers to those points appear from the judgment just pronounced. I think that the assessee in this case is entitled to his costs of this reference. We think that the costs should be assessed at Rs. 300.

JWALA PRASAD, J.—I agree with the conclusions which have been arrived at by my Lord the Chief Justice.

APPELLATE CIVIL.

Before Dawson Miller, C. J. and Foster, J.

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v.

SECRETARY OF STATE FOR INDIA IN COUNCIL.*

Land Acquisition Act, 1894 (Act 1 of 1894), sections 9 and 54—service of notice on one of three brothers, effect of—District Judge's order confirming Collector's award, appeal from.

*First Appeal No. 30 of 1921, from a decision of A. E. Scroope, Esq., I.C.S., District Judge of Manbhum, dated the 13th November, 1920.