THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

1940

* May 27, 28.
* Nov. 18.

AND

THE DOMINION NATURAL GAS COMPANY LIMITED ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Computation of taxable income—Claim for deduction for legal expenses incurred in defending franchise to supply natural gas—Income War Tax Act, R.S.C., 1927, c. 97, s. 6 (a) (b)—"Expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income"—"Payment on account of capital."

Respondent company supplied natural gas to inhabitants in parts of the city of Hamilton. Its right to do so was attacked in an action in which there were claimed against it a declaration that it was wrongfully maintaining its mains in the streets, etc., in said city and wrongfully supplying gas to the inhabitants, an injunction against its continuing to do so, a mandatory order for removal of its mains, and damages. Respondent defended the action and was successful, at trial and on appeals. Its legal expenses of the litigation were $48,560.94 (after crediting all sums recovered against the other party as taxed costs). The question now in dispute was whether that sum, which respondent paid in 1934, should be allowed as a deduction in computing respondent's taxable income for that year under the *Income War Tax Act*, R.S.C., 1927, c. 97.

Held: The sum was not deductible in computing respondent's taxable income. (Judgment of Maclean J., [1940] Ex. C.R. 9, reversed).

Per the Chief Justice and Davis J.: In order to fall within the category "disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" (s. 6 (*a*) of said Act), expenses must be working expenses; that is to say, expenses incurred in the process of earning "the income"; and the expenditure in question did not meet that requirement. *Lothian Chemical Co. Ltd.* v. *Rogers*, 11 Tax Cases 508, at 521; *Robert Addie & Sons' Collieries Ltd.* v. *Inland Revenue Commissioners*, 1924 S.C. 231, at 235; *Tata Hydro-Electric Agencies* v. *Income Tax Commissioner*, [1937] A.C. 685, at 695-6; *Ward & Co. Ltd.* v. *Commissioner of Taxes*, [1923] A.C. 145, at 149). Further, the expenditure in question was a capital expenditure. It was incurred "once and for all" and was incurred for the purpose and with the effect of procuring for respondent "the advantage of an enduring benefit" within the sense of Lord Cave's language in the criterion laid down in *British Insulated* v. *Atherton*, [1926] A.C. 205, at 213. (*Van den Berghs Ld.* v. *Clark*, [1935] A.C. 431, at 440; *Moore* v. *Hare*, 1914-1915 S.C. 91, also cited). Though in the ordinary course legal expenses are simply current expenditure and deductible as such, yet that is not necessarily so (as example, reference to *Thomson* v. *Batty*, 1919, S.C. 289).

Per Crocket J.: The expenditure in question cannot be said to have been wholly and exclusively made by respondent "as part of the process

PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

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of profit earning" according to the test formulated (on statutory provisions not distinguishable in effect, as regards the present case, from those now in question) in the *Addie* case (*supra*), 1924 S.C. 231, at 235, which test was expressly adopted and applied by the Judicial Committee of the Privy Council in the *Tata* case (*supra*), [1937] A.C. 685, at 696, and therefore is binding on this Court.

Per Kerwin and Hudson JJ.: The test stated in the *Addie* case (*supra*), 1924 S.C. 231, at 235, and approved in the *Tata* case (*supra*), is applicable to the case at bar, and the expenditure in question was not one "laid out as part of the process of profit earning" within the requirement of that test. It was a "payment on account of capital," as it was made "with a view of preserving an asset or advantage for the enduring benefit of a trade" (*British Insulated* v *Atherton,* [1926] A.C. 205, at 213).

APPEAL by the Minister of National Revenue from the judgment of Maclean J., President of the Exchequer Court of Canada (1), allowing the present respondent's appeal from the decision of the Minister of National Revenue affirming the disallowance of the sum of $48,560.94, paid by the respondent in the year 1934 for certain legal expenses, as a deduction in computing the respondent's taxable income for that year under the *Income War Tax Act,* R.S.C., 1927, c. 97. The material facts of the case are sufficiently stated in the reasons for judgment in this Court now reported. The appeal to this Court was allowed, and the assessment of respondent (with said deduction disallowed) restored, with costs throughout.

F. P. Varcoe K.C. and *A. A. McGrory* for the appellant.

R. C. H. Cassels K.C. for the respondent.

The judgment of the Chief Justice and Davis J. was delivered by

THE CHIEF JUSTICE—The point in issue in this appeal is whether certain legal costs incurred in the litigation about to be mentioned and paid in the year 1934 are deductible from the profits, or gains, of the respondent company for the purpose of assessing such profits, or gains, as income under the *Income War Tax Act* for that year.

The respondent company since 1904 had continuously supplied the Township of Barton and its inhabitants with natural gas under a by-law of that township granting perpetual rights for that purpose, and before and after that

(1) [1940] Ex. C.R. 9; [1940] 2 D.L.R. 357.

date has been developing gas fields and supplying gas to the inhabitants of other municipalities. Since 1904 parts of the township have been at different times annexed to the City of Hamilton. The respondent company has continued to supply the annexed territory with natural gas as before annexation. The United Company had since the year 1904 been supplying the City of Hamilton, as it was before the annexations, and its inhabitants with manufactured gas under authority granted to it by by-laws of the City. About the year 1930 the United Company advanced a claim under these by-laws that it had the exclusive right to sell gas in the City of Hamilton including the annexed districts, and that the respondent company had no competing rights.

Pursuant to authority conferred by an agreement made between the City of Hamilton and the United Company dated March 24th, 1931, which agreement was confirmed by Statute of the Province of Ontario (21 Geo. V, Chap. 100), the United Company in the year 1931 took action in its own name as well as in the name of the City of Hamilton, in the Supreme Court of Ontario, against the respondent claiming:—

(*a*) a declaration that the respondent was wrongfully maintaining its mains in the streets, public squares, lanes and public places in the City of Hamilton, and wrongfully supplying gas to the inhabitants of the said City;

(*b*) an injunction restraining the respondent from continuing to so use the said streets, public squares, lanes and public places, and from continuing to supply gas to the inhabitants of the City of Hamton;

(*c*) a mandatory order requiring the respondent to remove its mains and other property from the streets, public squares, lanes and other places of the City of Hamilton;

(*d*) damages;

(*e*) further and other relief.

The respondent company defended this action and in due course it came on for trial and was dismissed (1). An appeal was then taken by the United Company from the

(1) [1932] O.R. 559.

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judgment of the trial Judge to the Court of Appeal for Ontario, which appeal was dismissed (1). The United Company then appealed to His Majesty in Council, which appeal was also dismissed (2). The costs of this litigation paid by the respondent company in the year 1934 amounted to $48,560.94 after crediting all sums recovered against the United Company as taxed costs.

In its Income Tax return for 1934 the respondent company deducted from its taxable income this sum of $48,560.94, returning a taxable income of $202,326.86. This deduction was disallowed and the respondent company's assessment was increased accordingly. The respondent appealed to the Minister of National Revenue who dismissed the appeal, and thereupon appealed to the Exchequer Court of Canada and this appeal was allowed (3). The Minister now appeals from that judgment.

The relevant statutory provisions are:—

Deductions not allowed.

6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of:—

Expenses not laid out to earn income.

(*a*) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income;

Capital outlays or losses, etc.

(*b*) any outlay, loss or replacement of capital or any payment on account of capital or any depreciation, depletion or obsolescence, except as otherwise provided in this Act.

[There are two broad grounds upon which I think the Minister is entitled to succeed. First, in order to fall within the category "disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income," expenses must, I think, be working expenses; that is to say, expenses incurred in the process of earning "the income."] The judgment of Lord Clyde in *Lothian Chemical Co. Ltd.* v. *Rogers* (4) seems to point to the material distinction. The passage is pertinent, because the words Lord Clyde is applying are more comprehensive than those of sec. 6 (*a*). He says:

> The question, and the only question it seems to me that arises in the present case, is this. Was the expenditure of the original £4,000 an expenditure which was part of the working expenses of the business carried on by this Company, that is to say, expenditure laid out in the

(1) [1933] O.R. 369.
(2) [1934] A.C. 435.
(3) [1940] Ex. C.R. 9; [1940] 2 D.L.R. 357.
(4) (1926) 11 Tax Cases 508, at 521.

process of manufacture and of sale by which the Company expected to make profit from year to year? Or, on the other hand, was this expenditure which was necessary to acquire the disposal of property, buildings or plant, the use of which was necessary for conducting the processes of the manufacture and sale of the Company, so long as those processes were carried on? My Lords, if those two alternative questions fairly state the question here, there can be no doubt whatever upon which side the expenditure in question falls. It was not part of the working expenses of the Company, and it cannot be so represented. It was expenditure which was made for the purpose of acquiring the disposal of property or plant which was to be used in the business of the Company, namely, the manufacture of some chemical products and, in this case, of one chemical product in particular, and which was to be so used, not for the purpose of making profit in any particular year, but for the purpose of such manufacture so long as that manufacture might be carried on.

Similar language is used by Lord Clyde in *Addie's* case (1) and was approved and applied by Lord Macmillan in delivering the judgment of the Judicial Committee in *Tata* v. *Income Tax Commissioner* (2). Under s. 10, sub-s. 2, of the Indian Income-tax Act the profits or gains of any business carried on by the assessee are to be computed after making allowance for "(ix) any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains." Lord Macmillan said at pp. 695-696:—

> Their Lordships recognize, and the decided cases show, how difficult it is to discriminate between expenditure which is, and expenditure which is not, incurred solely for the purpose of earning profits or gains. * * * In short, the obligation to make these payments was undertaken by the appellants in consideration of their acquisition of the right and opportunity to earn profits, that is, of the right to conduct the business, and not for the purpose of producing profits in the conduct of the business. * * * * * In the case of *Robert Addie & Sons' Collieries, Ld.* v. *Commissioners of Inland Revenue* (1), the Lord President (Clyde), dealing with corresponding words in the British Income-tax Act, says: "What is 'money wholly and exclusively laid out for the purposes of the trade' is a question which must be determined upon the principles of ordinary commercial trading. It is necessary, accordingly, to attend to the true nature of the expenditure, and to ask oneself the question, Is it a part of the Company's working expenses; is it expenditure laid out as part of the process of profit earning?" Adopting this test, their Lordships are of opinion that the deduction claimed by the appellants is inadmissible as not being expenditure incurred solely for the purpose of earning the profits or gains of the business carried on by the appellants.

The distinction is also explained in the judgment of the Court of Appeal for New Zealand in a passage approved by the Judicial Committee in *Ward & Co. Ltd.* v. *Commissioner of Taxes* (3).

(1) *Robert Addie & Sons' Collieries Ltd.* v. *Inland Revenue Commissioners*, 1924 S.C. 231, at 235.
(2) [1937] A.C. 685.
(3) [1923] A.C. 145, at 149.

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"We find it quite impossible to hold that the expenditure was incurred exclusively, or at all, in the production of the assessable income. It was incurred not for the production of income, but for the purpose of preventing the extinction of the business from which the income was derived, which is quite a different thing. It was contended by the Company that it was illogical that while legitimate expenses incurred in the production of the income are deductible, similar expenses incurred for the much more important purpose of keeping the profit-making business alive are not deductible, and, further, that it was inequitable that the Legislature should, on the one hand, force a certain class of traders into a struggle for their very existence, and, on the other hand, treat the reasonable expenses incurred in connection with such struggle as part of the profits assessable to income tax. These aspects of the matter are clearly and forcibly set out in the contentions of the Company as embodied in the correspondence with the Commissioner contained in the case, but they raise questions which can only be dealt with appropriately by the Legislature. This Court, however, cannot be influenced by such considerations, being concerned only with the interpretation and application of the law as it stands."

Their Lordships agree with this reasoning. * * * The expense may have been wisely undertaken, and may properly find a place, either in the balance sheet or in the profit-and-loss account of the appellants; but this is not enough to take it out of the prohibition in s. 86, subs. 1 (*a*), of the Act.

Again, in my view, the expenditure is a capital expenditure. It satisfies, I think, the criterion laid down by Lord Cave in *British Insulated* v. *Atherton* (1). The expenditure was incurred "once and for all" and it was incurred for the purpose and with the effect of procuring for the company "the advantage of an enduring benefit." The settlement of the issue raised by the proceedings attacking the rights of the respondents with the object of excluding them from carrying on their undertaking within the limits of the City of Hamilton was, I think, an enduring benefit within the sense of Lord Cave's language. As Lord Macmillan points out in *Van den Berghs Ld.* v. *Clark* (2):

Lord Atkinson indicated that the word "asset" ought not to be confined to "something material" and, in further elucidation of the principle, Romer L.J. has added that the advantage paid for need not be "of a positive character" and may consist in the getting rid of an item of fixed capital that is of an onerous character: *Anglo-Persian Oil Co.* v. *Dale* (3).

The character of the expenditure is for our present purposes, I think, analogous to that of the expenditure in question in *Moore* v. *Hare* (4), where promotion expenses incurred by coalmasters in connection with two parlia-

(1) [1926] A.C. 205 at 213.
(2) [1935] A.C. 431, at 440. (3) [1932] 1 K.B. 146.
(4) 1914-1915 S.C. 91.

mentary bills giving authority to construct a line to serve the coalfield were held to be capital expenditures. Lord Skerrington at p. 99 says:—

> One can figure a case where a firm of coalmasters in the position of the appellants might incur Parliamentary or other preliminary expenses with a view to constructing a railway which was to be the private property of the firm, and which when constructed would be useful and would in fact be used wholly and exclusively for the purposes of their trade as coalmasters. Such expenditure would be of the same legal character as the actual cost of building the railway. It would be capital employed in the firm's trade as coalmasters, and therefore would not be a legitimate deduction from profits.

I do not perceive any distinction between expenditures incurred in procuring the company's by-laws authorizing the undertaking and the expenses incurred in their litigation with the City of Hamilton.

In the ordinary course, it is true, legal expenses are simply current expenditure and deductible as such; but that is not necessarily so. The legal expenses incurred, for example, in procuring authority for reduction of capital were held by the Court of Sessions not to be deductible in *Thomson* v. *Batty* (1).

The appeal should be allowed and the assessment restored with costs throughout.

CROCKET J.—In 1931 the United Gas and Fuel Company of Hamilton, Limited, and the City of Hamilton brought an action in the Supreme Court of Ontario to restrain the respondent from continuing to supply natural gas to the inhabitants of those portions of the City of Hamilton, which prior to the year 1904 formed part of the Township of Barton and subsequently became part of that city. The United Company claimed that by its franchise it had the exclusive right to supply gas in the City of Hamilton, including the annexed districts, and that the by-law of Barton Township granting the respondent a perpetual franchise to supply its inhabitants with natural gas, as it had been doing since 1904, gave it no right to supply gas to the annexed districts or their inhabitants subsequent to their incorporation in the city. The respondent defended the action, which was dismissed by the trial judge. The United Company appealed to the Court of Appeal for Ontario, which confirmed the trial judgment. A further

(1) *Archibald Thomson, Black & Co., Ltd.* v. *Batty*, 1919 S.C. 289.

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appeal to the Judicial Committee of the Privy Council was dismissed in 1934, and in that year the respondent expended the sum of $48,560.94 as costs and expenses in connection with this litigation.

In its income tax return for 1934 the respondent computed its taxable income at $202,326.80 after deducting the said legal expenses. The taxing authorities disallowed this deduction. The respondent appealed to the Minister of National Revenue, who affirmed the disallowance, and then to the Exchequer Court from the Minister's decision, with the result that the appeal was allowed (1).

The respondent contended before the learned President, who heard the appeal in the Exchequer Court, that the amount in question was wholly, exclusively and necessarily expended for the purpose of earning its income, and was not an outlay, loss or replacement of capital or any payment on account of capital, and therefore did not fall within either the prohibition (*a*) or (*b*) of s. 6. The learned President sustained this contention, and the Minister now appeals from that decision.

If we were free to decide this appeal on considerations of practical business sense and equity, or to deduce from decided cases the governing rule, which should be applied in determining whether the respondent was or was not entitled, under the formula prescribed by s. 6 of the Canadian *Income War Tax Act,* to the deduction claimed in computing its assessable profits or gains for the year 1934, I should have no hesitation in adopting the conclusion at which the learned President of the Exchequer Court arrived and the reasons he has given therefor. We are confronted, however, with a recent judgment of the Judicial Committee of the Privy Council in the case of the appeal of *Tata Hydro-Electric Agencies, Ltd., Bombay,* v. *Commissioner of Income Tax, Bombay Presidency and Aden* (2), in which a test, formulated in 1924 by Lord President Clyde of the Scottish Court of Session in the case of *Robert Addie & Sons' Collieries, Ltd.* v. *Commissioners of Inland Revenue* (3), for determining whether a deduction is allowable under practically identical provisions of the English *Income Tax Act, 1918,* is expressly adopted and applied. The English Act of 1918, ch. 40, 8 & 9 Geo. V,

(1) [1940] Ex. C.R. 9; [1940] 2 D.L.R. 357.

(2) [1937] A.C. 685.

(3) 1924 S.C. 231.

by rule 3 of Schedule "D," prohibits deductions in respect of "any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession, employment or vocation," or in respect of "any capital withdrawn from, or any sum employed or intended to be employed as capital in such trade," etc., as well as other specified capital expenditures for improvements and the like, the effect of which, as regards this case, it seems to be impossible to distinguish from the prohibitions (*a*) and (*b*) of s. 6 of the Canadian Act. I apprehend, therefore, that the test so distinctly adopted by the Judicial Committee in the *Tata* case (1) is binding upon us. In delivering judgment in the *Addie* case (2), the Lord President of the Court of Sessions said:—

> What is "money wholly and exclusively laid out for the purposes of the trade" is a question which must be determined upon the principles of ordinary commercial trading. It is necessary, accordingly, to attend to the true nature of the expenditure, and to ask oneself the question, Is it a part of the Company's working expenses; is it expenditure laid out as part of the process of profit earning?

Lord Macmillan in delivering the judgment of the Judicial Committee in the *Tata* case (3) quoted this passage and immediately added:

> Adopting this test, their Lordships are of opinion that the deduction claimed by the appellants is inadmissible as not being expenditure incurred solely for the purpose of earning the profits or gains of the business carried on by the appellants.

It should perhaps here be pointed out that in the *Tata* case (4) the deduction claimed was for an amount equal to 25% of the commission earned and received by the appellants as managing agents of the Tata Power Co. Ltd. and of three other electric power companies in India, which proportion of the commission they were required to pay to certain parties under the terms of the agreement by which they had acquired the agency from their predecessors.

The attention of the learned President of the Exchequer Court does not seem to have been called to this case. He did not refer to it in his printed reasons. No mention of it is made either in the appellant's nor in the respondent's factum, though Mr. Varcoe cited it in his argument before us. The learned President discussed the New Zealand case

(1) [1937] A.C. 685.
(2) 1924 S.C. 231, at 235.
(3) [1937] A.C. 685, at 696.
(4) [1937] A.C. 685.

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of *Ward* v. *Commissioner of Taxes* (1), and other cases, on which the appellant had relied in the hearing before him. He quoted extensively from the judgment of Romer, L.J., in *Anglo-Persian Oil Co.* v. *Dale* (2), and seems to have based his judgment that the expenditure in question was deductible under s. 6 of the Canadian Act as a proper charge against revenue rather than against capital upon the law as laid down by Romer, L.J., in the Appeal Court in that case and by Lord Loreburn, L.C., and Lords Macnaghten and Atkinson in *Strong & Co. Ltd.* v. *Woodifield* in the House of Lords (3). In the last named case the House of Lords held that a payment by a brewery company to satisfy a judgment recovered against it for damages and costs for personal injury sustained by a customer sleeping in an inn, owned by the brewery company, owing to the negligence of the company's servants, could not be deducted in computing the company's profits for the purpose of income tax, the loss not being connected with or arising out of the trade and the moneys not having been wholly and exclusively laid out and expended for the purposes of the trade. Lord Loreburn in his speech in support of this judgment used the following language at p. 452 of the report:—

> In my opinion, however, it does not follow that if a loss is in any sense connected with the trade, it must always be allowed as a deduction; for it may be only remotely connected with the trade, or it may be connected with something else quite as much as or even more than with the trade. I think only such losses can be deducted as are connected with in the sense that they are really incidental to the trade itself. They cannot be deducted if they are mainly incidental to some other vocation or fall on the trader in some character other than that of trader. The nature of the trade is to be considered. * * * In the present case I think that the loss sustained by the appellants was not really incidental to their trade as inn-keepers, and fell upon them in their character, not of traders, but of householders.

Lord Macnaghten and Lord Atkinson concurred in the Lord Chancellor's opinion as thus expressed, which, as I read it, lays down the rule that the test as to whether an expenditure is allowable under the English *Income Tax Act* (which was then of the same import as now) is, not whether it was made "as part of the process of profit earning," but whether it was "really incidental to the

(1) [1923] A.C. 145. (2) [1932] 1 K.B. 124.
(3) [1906] A.C. 448.

trade." Lord Davey in his speech in the same case, however, laid down the principle that:—

> It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits.

Singularly enough, it was apparently upon this dictum of Lord Davey, and not that of the Lord Chancellor, concurred in by Lords Macnaghten and Atkinson, that Lord President Clyde of the Court of Session in the *Addie* case (1) formulated the test, which the Judicial Committee adopted 13 years later in the *Tata* case (2). See Lord Clyde's judgment in the Court of Session, Session Cases (1924), at the bottom of p. 235.

In any event, we must now recognize the rule as expressly affirmed by the Judicial Committee of the Privy Council, and determine whether the expenditure in question in this appeal was wholly and exclusively made by the respondent as part of the process of profit earning. Being unable to convince myself that the expenditure falls within this strict formula, I have reluctantly concluded that the appeal must be allowed.

The judgment of Kerwin and Hudson JJ. was delivered by

KERWIN J.—This is an appeal from a judgment of the Exchequer Court (3) allowing an appeal by the Dominion Natural Gas Company Limited from a decision of the Minister of National Revenue whereby the latter disallowed the sum of $48,560.94 claimed by the company as a proper deduction from its income. This sum represents the company's solicitor and client costs in connection with an unsuccessful action brought against it by the United Gas and Fuel Company of Hamilton, Limited. As to that action, it is sufficient to state that the Dominion Company had been supplying gas to the inhabitants of the City of Hamilton for some years and the United Company attacked its right to continue so to do. If the claim had succeeded, the Dominion Company would have lost the franchise it had enjoyed and would have been prevented from earning any income from that part of its assets.

(1) 1924 S.C. 231. (2) [1937] A.C. 685.
(3) [1940] Ex. C.R. 9; [1940] 2 D.L.R. 357.

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Kerwin J.

The determination of the present dispute depends upon whether certain well-known provisions of the *Income War Tax Act* apply to the payment of the solicitor and client costs. Section 9 of the Act is the charging section and by it a tax is to be assessed, levied and paid upon "income" which by section 3 is defined as meaning "the annual net profit or gain * * * being profits from a trade or commercial or financial or other business or calling." By section 6:—

> In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of
>
> (*a*) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income;
>
> (*b*) any outlay, loss or replacement of capital or any payment on account of capital or any depreciation, depletion or obsolescence, except as otherwise provided in this Act.

The appellant does not deny that the costs were properly and reasonably incurred but contends that the payment falls within the prohibitions of both clauses (*a*) and (*b*) and that it must not be considered in fixing the annual net profit or gain.

The cases referred to on the argument deal with expressions used in other statutes and certainly, so far as clause (*a*) is concerned, I have been unable to derive any assistance from them. *Ward and Company, Limited* v. *Commissioner of Taxes* (1) was determined on the wording of the New Zealand Act there in question "in the production of the assessable income." In view of the fact that that wording is less liberal and comprehensive than the wording in our statute "laid out or expended for the purpose of earning the income," the decision is, I think, inapplicable.

However, as to the other two contentions, there are three decisions that may usefully be referred to. The first of these is *Robert Addie & Sons' Collieries Ld.* v. *Commissioners of Inland Revenue* (2), where the Lord President stated (3):—

> What is "money wholly and exclusively laid out for the purposes of the trade" is a question which must be determined upon the principles of ordinary commercial trading. It is necessary, accordingly, to attend to the true nature of the expenditure, and to ask oneself the question, Is it a part of the Company's working expenses; is it expenditure laid out as part of the process of profit earning?

(1) [1923] A.C. 145.
(2) 1924 S.C. 231.
(3) At p. 235.

The second is the decision in the House of Lords in *British Insulated and Helsby Cables Ltd.* v. *Atherton* (1). In that case a sum had been irrevocably set aside out of profits as a nucleus of a pension fund, but it was held that the expenditure could not be deducted from the profits. Viscount Cave pointed out that an expenditure though made once and for all may nevertheless be treated as a revenue expenditure but he then added (2):—

> But 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.

This speech of Viscount Cave has been referred to a number of times and particularly in two decisions in the English Court of Appeal, *Mitchell* v. *Noble* (3), and *Anglo-Persian Oil Company* v. *Dale* (4), but it is unnecessary to consider the applicability of either of these.

The third case is *Tata Hydro-Electric Agencies* v. *Commissioner of Income Tax* (5),—valuable, in the present instance, not so much for the actual decision as for the fact that their Lordships quoted with approval the extract from the judgment of the Lord President in *Addie's* case (6) set out above. The test established by him is applicable to the case at bar, and I have concluded that the payment of the costs was not an expenditure laid out as part of the process of profit earning. It was a "payment on account of capital," as it was made (to use Viscount Cave's words) "with a view of preserving an asset or advantage for the enduring benefit of a trade."

The appeal should be allowed and the decision of the Minister re-instated, with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *W. S. Fisher.*

Solicitor for the respondent: *Hon. George Lynch-Staunton.*

(1) [1926] A.C. 205.
(2) At p. 213.
(3) [1927] 1 K.B. 719.
(4) [1932] 1 K.B. 124.
(5) [1937] A.C. 685.
(6) 1924 S.C. 231, at 235.