The Indian Molasses Co. (Private) Ltd vs The Commissioner Of Income-Tax, ... on 5 May, 1959

Equivalent citations: 1959 AIR 1049, 1959 SCR SUPL. (2) 964, AIR 1959 SUPREME COURT 1049

Author: M. Hidayatullah

Bench: M. Hidayatullah, Bhuvneshwar P. Sinha, J.L. Kapur

PETITIONER:
THE INDIAN MOLASSES CO. (PRIVATE) LTD.

Vs.

RESPONDENT:
THE COMMISSIONER OF INCOME-TAX, WESTBENGAL.

DATE OF JUDGMENT:
05/05/1959

BENCH:
HIDAYATULLAH, M.
BENCH:
HIDAYATULLAH, M.
SINHA, BHUVNESHWAR P.
KAPUR, J.L.

CITATION:
1959 AIR 1049 1959 SCR Supl. (2) 964
CITATOR INFO :
R 1964 SC1722 (9)
R 1970 SC2067 (2,6)
D 1986 SC 383 (7)
R 1986 SC 484 (24)

ACT:
Income-tax-Deduction -Business expenditure-Payment of sums for getting annuities to provide pension-Liability depending on contingency-Expenditure, meaning of-Indian Income-tax Act, 1922 (XI Of 1922), S. 10(2)(XV).

HEADNOTE:
With a view to provide a pension to H who was the managing director of the appellant company, after his retirement at the age Of 55 years on September 20, 1955, the company

executed a trust deed on September 16, 1948, in favour of three trustees to whom the company paid a sum of Rs. 1,09,643 and further undertook to pay annually Rs. 4,364 for six consecutive years. The trustees undertook to hold the said sums upon trust to spend the same in taking out a Deferred Annuity Policy with an Insurance Society in the name of the trustees but on the life of H under which a certain sum of money was payable annually to H for life from the date of his superannuation. It was also provided in the deed that notwithstanding the main clause the trustees would, if so desired by the company, take out instead a different kind of policy for the benefit of both H and his wife, with a further provision for His wife should H die before he attained the age Of 55. On January 12, 1949, the trustees took out a policy, wherein the amount of Deferred Annuity to be paid per annum was fixed according as whether both H and his wife were living on September 20, 1955, or one of them died earlier. The policy also contained, inter alia, two clauses: " (i) Provided the contract is in force and unseduced, the Grantees (i. e., the trustees) shall be entitled to surrender the Annuity on the Option Anniversary (i.e., Sept. 20, 1955) for the Capital sum of pound 10,169 subject to written notice of the intention to surrender being received by the Directors of the Society within the thirty days preceding the Option Anniversary. (2) If both the Nominees shall die whilst the Contract remains in force and unreduced and before the Option Anniversary the said funds and Property of the Society shall be liable to make repayment to the Grantees of a sum equal to a return of all the premiums which shall have been paid under this Contract without interest after proof thereof and subject as hereinbefore provided."

The appellant company paid the initial sum and the yearly premia for some years before H died. For the assessment years 1949.50, 1950.51, 1951-52 and 1952-53, the appellant claimed a deduction of these sums from its profits or gains under s. 10(2)(XV)

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of the Indian Income-tax Act, 1922, but the Income-tax authorities disallowed the claim on the ground that the sums claimed did not amount to expenditure within the meaning of the section. The appellant's contention was that payment of pension was an expenditure of a revenue character and so also the payment of a lump sum to get rid of a recurring liability to pay such pension and that expenditure on insurance was not contingent, because though the contingency related to life and depended on it, the probabilities were estimated on actuarial calculations and, that the expenditure was, therefore, real.

Held, that expenditure which is deductible for the purposes of income-tax under s. 10(2)(xv) of the Indian Income-tax Act, 1922, is one which must be towards a liability actually existing at the time, but the putting aside of money which

may become expenditure on the happening of an event is not expenditure.
In the present case, on the terms of the deed of trust, money was placed in the hands of trustees for the purchase of annuities of different kinds, if required, but to be returned if the annuities were not bought, and the clauses in the policy taken out by the trustees showed that till September 20, 1955, the appellant had dominion through the trustees over the premia paid. The payment to the trustees was therefore towards a liability depending on a contingency. Consequently, the amount claimed was not liable to be deducted as an expenditure under S. IO(2)(XV) Of the Act.
Cases on English Income-tax law reviewed.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 395 of 1957. Appeal by special leave from the judgment and order dated December 21, 1955, of the Calcutta High Court in Income-tax Reference No. 15 of 1954.

A. C. Sampath Iyengar, Dipak Dutta Choudhury and B. N. Ghosh, for the appellant.

M.C. Setalvad, Attorney-General for India, R. Ganapathy Iyer, B. H. Dhebar and D. Gupta, for the respondent. 1959. May 5. The Judgment of the Court was delivered by HIDAYATULLAH, J.-The Indian Molasses Co. (Private) Ltd., Calcutta (hereinafter called the assesses Company), have brought this appeal, with the special leave of this Court granted on November 9, 1956, against the judgment of the High Court of Calcutta dated December 21, 1955, in Income- tax Reference, No. 15 of 1954. The question of law referred to the High Court was:

> " Whether on the facts and in the circumstances of the case, and on a true construction of the Trust Deed, dated 16th September, 1948, and the Policy dated the 13th January, 1949, the payments made by the assessee Company and referred to in paragraph 4 above constitute 'expenditure' within the meaning of that word in section 10(2)(xv)of the Indian Income-tax Act, 1922, in respect of which a claim for deduc- tion can be made,subject to the other conditions mentioned in that clause being satisfied ".

The question was answered in the negative. The facts of the case are as follows: One John Bruce Richard Harvey was the Managing Director of the assessee Company in 1948. He had by then served the Company for 13 years, and was due to retire at the age of 55 years on September 20, 1955. There was, it appears, an agreement by which the Company was under an obligation to provide a pension to Harvey after his retirement. On September 16, 1948, the Company executed a Trust Deed in favour of three trustees to whom the Company paid a sum of pound 8,208-19-0 (Rs. 1,09,643) and further undertook to pay annually Rs. 4,364 (pound 326-14 sh.) for six consecutive years, and the

trustees agreed to execute a declaration of trust. The trustees undertook to hold the said sums upon trust to spend the same in taking out a deferred -Annuity Policy with the Norwich Union Life Insurance Society in the name of the trustees but on the life of Harvey under which pound 720 per annum were payable to Harvey for life from the date of his superannuation. It was also provided in the deed that notwithstanding the main clause the trustees would, if so desired by the assessee Company, take out instead a deferred longest life policy, with the said Insurance Company, in their names, but in favour of Harvey and Mrs. Harvey for an annuity of pound 558-1-0 per annum payable during their joint lives from the date of Harvey's superannuation and during the lifetime of the survivor, provided further that if Harvey died before he attained the age of 55 years the annuity payable to Mrs. Harvey would be pound, 611-12-0 during her life. It was further provided that should Harvey die before attaining the age of 55 years, the trustees would stand possessed of the capital value of the Deferred Annuity Policy,. upon trust to purchase therewith an annuity for Mrs. Harvey with the above 2 Insurance Company or another Insurance Company of repute. The other conditions of the deed of trust need Dot be considered, because they do not bear upon the controversy.

In furtherance of these presents, the trustees took out a policy on January 12, 1949. In addition to conditions usual in such policies, it provided for the following benefits:

> Amount per annum of deferred Annuity pound 563-5-8 p. a. if both Mr. and Mrs. Harvey be living on September 20,1955.
>
> pound, 720-0-0 p. a. if Mrs.Harvey should die before September 20, 1955, leaving Harvey surviving her. pound, 645-0-0 p. a. if Harvey should die before September 20, 1955, leaving Mrs. Harvey surviving him.
>
> There was a specialprovision which must be reproduced:
>
> " Provided the contract is in force and unreduced, the Grantees (i. e., the trustees) shall be entitled to surrender the Annuity on the Option Anniversary (i.e., Sept. 20, 1955) for the Capital sum of pound 10,169 subject to written notice of the intention to surrender being received by the Directors of the Society within the thirty days preceding the Option Anniversary."

Two other clauses of the second schedule of the Policy may also be quoted:

> (III) "If both the Nominees shall die whilst the Contract remains in force and unredressed and before the Option Anniversary the said funds and Property of the Society shall be liable to make repayment to the Grantees of a sum equal to a return of all the premiums which shall have been paid under this Contract without interest after proof thereof and subject as hereinbefore provided.
>
> (IV) The Grantees shall before the Option Anniversary and after it has acquired a Surrender Value be entitled to surrender the Contract for a Cash Payment equal to a

> return of all the premiums (at the yearly rate) which have been paid less the first year's premium or five per cent. of the Capital Sum specified in the Special Provision of the First Schedule whichever shall be the lesser sum, provided that if the Deferred Annuity has been reduced an equivalent reduction in the guaranteed Surrender Value as calculated above will be made. "
>
> The assessee Company paid the initial sum and the yearly premia for some years before Harvey died. In the assessment years 1949-50, 1950-51, 1651-52 and 1952-53, it claimed a deduction of these sums from its profits or gains under s. 10(2)(xv) of the Indian Income-tax Act (hereinafter called the Act), which provides:
>
> " Such profits or gains shall be computed after making the following allowances, namely, any expenditure (not being in the nature of capital expenditure or personal expenses of the assessee) paid out or expended wholly and exclusively for the purposes of such business, profession or vocation. "

This claim was disallowed by the Department and the Appellate Tribunal. The Tribunal held that it was not necessary to decide if the expenditure was wholly or exclusively for the purposes of the Company's business, and if so, whether it was of a capital nature, because in the Tribunal's opinion there was no expenditure at all. The reason why the Tribunal held this way may be stated in its own words:

> " Clauses (1) and (II) do not contain any provision having a material bearing upon Clause (111). Therefore if it happens that both Mr. and Mrs. Harvey die before 20th September, 1955, all the payments till made through the Trustees to the Insurance Society will come back to the Trustees and as there is not the slightest trace of any indication anywhere that the Trustees should have any beneficient interest in these moneys, there would be a resultant trust in favour of the Company in respect of the moneys thus far paid out. In other words, what has been done amounts to a provision for a contingency which may never arise. Such a provision can hardly be treated as payment to an employee whether of remuneration or pension or gratuity, and cannot be a proper deduction against the incoming of the business of the Company for the purpose of computing its taxable profits. In short, there has been no expenditure by the Company yet; there has been only an allocation of a part of its funds for an expenditure which may (or may not) have to be incurred in future. "

The Tribunal, however, referred the above-stated question for the opinion of the High Court. The High Court noticed the limited scope of the question, and pointed out that the Tribunal had stated at the end of the Statement of the Case:

> " In the event of the High Court holding that there was an expenditure in this case, it would still be necessary for the Tribunal whether the money was laid out or expended wholly and exclusively for the purposes of the assesses' business and, if so, whether the expenditure was in the nature of capital or revenue expenditure. "

The learned Chief Justice of the Calcutta High Court (Sarkar, J., concurring) felt the difficulty of the ques- tion. He analysed the ingredients of cl. (xv), and pointed out that the question referred to but one such ingredient. The Divisional Bench, however, did not call for an additional statement of fact, or ask that the rest of the matter be referred, so that the whole of the question involved might get disposed of It observed :

> " This Court has always construed questions referred to it with a certain degree of strictness and has not allowed any point to be canvassed before it which had not been raised before the Appellate Tribanal and which was not covered by the Tribunal's appellate order. I am, therefore, of opinion that the question should be taken as covering only the ground upon which the Tribunal held the payments to be not allowable as deductions as not embracing any other ground. "

We must express our regret that the case took the course it did. The order of assessment was passed as far back as 1952, and seven years have now passed during which only one question out of three is before the Courts for decision. Section 10(2)(xv) was analysed by the learned Chief Justice in these words:

> " It will be noticed that three ingredients of the clause lie on the surface of its language. In order that a deduction may be claimed under its provisions it must be proved first that there was an expenditure, secondly, that the expenditure was not in the nature of a capital expenditure- I am leaving aside the personal expenses-and, thirdly, that it was laid out or expended wholly and exclusively for the purposes of the assessee's business-I am leaving out profession or vocation. "

We must not be understood as finding fault with the Divisional Bench. It decided the question as framed. It is the Tribunal which referred the question in this form, keeping to itself the right to decide about the other ingredients of the clause later. Whether the question can be answered in the bland form it is posed, is a matter to which we will have to address ourselves presently. But it appears to us that this is a very unsatisfactory way to go about the business. Perhaps, the Tribunal decided this case in this way and referred the question it did, because it felt that if this Court in Allahabad Bank Ltd. v. Com- missioner of Income-tax, West Bengal (1) was able to decide whether a particular outlay was ' expenditure' without reference to the other ingredients of cl. (xv), the same could be done in this case also. That case, however, was very different in its facts. There, certain contributions on trust for payment of pensions to employees were held not to be I expenditure', because on the original trust failing, the money was (1) [1954] S.C.R. 195.

deemed to be held by the trustees on a resulting trust for the benefit of the maker. If the same can be said in this case, namely, that the money continued to belong to the assessee Company in the account years, its payment to the trustees or the Insurance Company notwithstanding, there may be a possibility of answering the question as was done in the decision of this Court cited earlier. But if such a clear-cut proposition cannot be laid down, then, obviously, there is considerable difficulty in deciding what is I expenditure ' within the clause, without reference to the rest of its provisions. Of course, to find the meaning of the word I expenditure ', a dictionary is ill that is needed, but to go

further and to decide whether the outlay in this case was I expenditure ', the context in which the word is used in the clause cannot successfully be left out. Mr. Sampath Iyengar for the assessee Company complained before us of the narrowness of the question, though before the High Court be was opposed to any extension of the ambit of the question. The following passage from the judgment of the Chief Justice shows the respective attitudes of the Department and the assessee Company before the Bench:

> " Mr. Meyer contended that language entitled him to argue not only that there had been no expenditure in fact at all, but also that even assuming that there bad been an expenditure in the sense of a physical spending, still the expenditure was not such as could be claimed as an allowance under the clause against the profits of the relevant accounting year in view of the fact that it was, in any event, an expenditure made to meet a contingent liability. Mr. S. Iyengar, who appeared on behalf of the assessee, objected to the scope of the question being so enlarged and he referred to the appellate order of the Tribunal which had proceeded on a single ground. "

The learned Attorney-General who appeared for the Department at once conceded the difficulty of answering the question, but contended that the question in its present form could be answered, though he agreed that if it could not, the Court would be free to say so.

We cannot help saying that though the Tribunal may be at liberty to decide a case as appears best to it, there is considerable hardship to the tax-payers, if questions of law are decided piecemeal and repeated references to the High Court are necessary. The jurisdiction of-the High Court is advisory and consultative, and questions of interpretation of the law in this attenuated form can well be avoided. This will tend to cut down the duration of litigation. In deciding that the payment of the lump sum and premia was not 'expenditure', different views were expressed as the case progressed. The Income-tax Officer held that in the absence of a written agreement covering the conditions of service, remuneration, etc., the arrangement could only be taken as a provision for a gratuity, more so as there was a provision in the deed of trust for payment of an annuity to Mrs. Harvey in the event of Harvey's demise. According to him, there were so many alternative arrangements for the disbursement of the money laid out, that it was impossible to say what shape the annuity would ultimately take and till certain events happened, the I expenditure' was not effective. Following, therefore, the case in Atherton v. British Insulated and Helsby Cables, Ltd. (1) and distinguishing Hancock v. General Reversionary and Investment Co. Ltd. (2), the claim for deduction was rejected by the Income-tax Officer.

The Appellate Assistant Commissioner considered that in the absence of an agreement the payment must be regarded as an ex gratia payment of a capital nature, so Iona as the trust intervened. The Appellate Assistant Commissioner also commented upon the existence of a provision for Mrs. Harvey's pension which could not be a part of the agreement. He was thus of the opinion that the case fell within the rule laid down in Atherton',s case (1). This opinion of the Tribunal which has already been reproduced earlier, was shortly that there was no 'expenditure' yet and this was only an allocation of funds for an I expenditure which might or might not be incurred in the future.

The High Court analysed the terms of the deed of (1) (1925) 10 Tax Cas. 155.

(2) (1918) 7 Tax Cas. 358.

trust, and pointed out that there were two contingencies in which money was likely to revert to the assessee Company. The first contingency was if both Harvey and Mrs. Harvey died before September 20, 1955. The second contingency was due to an omission in el. (III) to provide for a pension to Harvey, if Mrs. Harvey died before the above date. In that event, the trust would have failed, unless a policy was taken out under 61. (II). The High Court held that if any of these two circumstances happened, then there would have been a resulting trust in favour of the assessee Company, and it would have been entitled to get back all the money laid out by it. We must say here that the High Court was in error as to the second of the two contingencies because the policy which was taken out provided for all the three alternatives, and pension was payable to both or either survivor, though in different sums. Even in the trust deed, the three alternative pensions were provided as follows:

> pound 720, if the annuity was payable to Harvey alone; or pound 558-1-0, during the joint lives of both or survivor; or pound 611-12-0, to Mrs. Harvey if Harvey died before September 20, 1955. The special provision in the policy, however, covered the first contingency of both the prospective annuitants dying before September 20, 1955, and if that happened, the assessee Company would have, if it chose to surrender the policy, got back the sum of pound 10,169 subject to a written notice of the intention to surrender being received by the Insurance Company within thirty days preceding September 20, 1955. The High Court then observed in addition that there was no ' instant necessity ' for the expenditure, nor was the money 'laid out for a business purpose of an instant character', nor did it bring in a 'present asset which would always remain an asset in that form, the money having gone for ever'. The High Court pointed out that there was always a possibility ,of a resulting trust in favour of the Company and the money could not, therefore, be held to have been expended. The conclusion of the High Court, therefore, was that the assessee Company must be held to have set apart I tentatively' a sum of money in order that it might be available for the payment of a I gratuity ' to Harvey and Mrs. Harvey, but there being I no provision for the application of the money in the event of those contingencies not occurring and no annuity being payable to any one', there was no I expenditure' in any real and practical sense of the term'.
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> The arguments in this appeal have ranged, as they did before the High Court, over a very wide field. No useful purpose will be served in following them through all their convolutions. The main points urged on behalf of the assessee Company are that payment of pension is an expenditure of a revenue character and so also the payment of a lump sum to get rid of a recurring liability to pay such pension. This is illustrated from some English cases, and reference is made also to Ch. IX-B of the Act. It is also submitted that in so far as payment by the assessee Company was concerned, it was, in point of fact, made, and this was I expenditure' within the dictionary meaning of

the word. The argument of the Department is that by I expenditures meant a laying out of money for an accrued liability and not for a contingent liability, which contingency may or may not take place; that the present arrangement was only a setting apart of money for a Contingent liability and till the liability became real, there was no expenditure. The assessee Company, however, contends that expenditure on insurance is not contingent, because though the contingency relates to life and depends on it, the probabilities are great being estimated on actuarial calculations and the expenditure is real. Both sides rely on a large number of English decisions. We shall now consider the arguments in detail and refer to those authorities, which are relevant.

In dealing with cases expounding the English In. come-tax law, it must always be borne in mind that the scheme of legislation there is not the same as in our country. No doubt, a certain amount of assistance can, with caution, be taken from them, but the' problems under our Income-tax laws must be resolved, in the ultimate analysis, with reference to our laws.

It has been ruled under the English statute that sums paid to an employee as pension or gratuity are deductible as money laid out and expended for the purpose of trade, profession or vocation. See Smith v. Incorporated Council of Law Reporting for England and Wales (1). It has also been ruled that a single payment to avoid the recurring liability of an employee's pension is also a proper deduction. The leading case on the subject is Hancock v. General Reversionary and Investment Co. Ltd. (1). In that case, the taxpayer was under a liability to pay a pension to a retired actuary, and pension had, in fact, been paid for some years. Subsequently, the tax-payer purchased an annuity for the employee, which he accepted in place of his pension. The sum paid in purchasing the annuity was allowed as a deduction in computing the tax-payer's profits, it being held that it was money wholly and exclusively laid out or expended for the purposes of the trade, profession or vocation.

On the other hand, a sum which a company put into a fund for the relief of invalidity, etc., was held not to be an admissible deduction, and the case last cited was distinguished. See Rowntree, & Co. Ltd. v. Curtis (3). Pollock, M. R., drew pointed attention to the words of Lush, J., in the earlier case, where lie observed at p. 698:-

"It seems tome as impossible to hold that the fact that a lump sum was paid instead of a recurring series of annual payments alters the character of the expenditure, as it would be to hold that, if an employer made a voluntary arrangement with his servant to pay the servant a year's salary in advance instead of paying each year's salary as it fell due, he would be making a capital outlay.", and added that Lush, J., had described the actuarial payment made in Hancock's case (2) as a pension in another form, which could not be said of the invalidity, claims for which were wholly uncertain. Warrington, L. J., pointed out that the test to apply was first (1) [1914] 3 K. B. 574 ; 6 Tax Cas. 477.

(2) (1918) 7 Tax Cas. 358.

(3) [1925] 1 K. B. 328; 8 Tax Cas. 678.

whether there was an expenditure which he held there was, and next whether it could be said to be wholly and exclusively for the purposes of the trade which, in his opinion, could not be said of the expenditure in that case. The words of the learned Lord Justice on 'the first proposition have a bearing upon the present case, and may be reproduced here(at p. 703) :

> I am inclined to agree with Mr. Latter in his contention that the money has actually been expended. There is nothing like a resulting trust in favour of the company although there is that provision which I have already called attention to in the trust deed, that one of the things which might be done would be to abrogate altogether the trust or the provisions of the deed and to substitute other rules and provisions. But it seems to me that cannot be said to be a resulting trust in favour of the company having regard to the other objects which are pointed out as those to which the scheme was directed."
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> Similarly, a sum of money paid to the trustees to form a nucleus of a pension fund for the benefit of some of its employees by a company was also not held to be an admissible deduction in Atherton's case (1). Viscount Cave, L. C., recalled the test laid down in a rough way by Lord Dunedin in Vallambrosa Rubber Co. v. Farmer (2) (at p. 192) that, capital expenditure is a thing that is going to be spent once and for all and income expenditure is a thing which is going to recur every year " but added that it was not and was not meant to be a decisive test. The Lord Chancellor observed, however, that, " 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."
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> (1) (1925) 10 Tax Cas. 155.
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> (2) (1910) 5 Tax Cas. 529.

Again, in Morgan Crucible Co. Ltd. v. The Commissioners of Inland Revenue (1), the payment to an insurance company to take out a policy was held not to be an admissible deduction. There, the company operated a scheme for payment of pensions to retired or incapacitated employees, reserving to itself the uncontrolled discretion to vary or cease payment of pensions. When pensions were paid, they were deducted -but when the company took out a policy, without, informing their employees, for payment to itself of annuities equal to the pensions, it was held that by this the company had acquired an asset and this was in the nature of a capital asset. Rowlatt, J., in distinguishing Hancock's case (2), observed that unlike that case the liability to pay pensions was not got rid of and that the company had acquired an asset. The learned Judge continued (at p. 317):

> " It is true they have got an asset which would give them, in all probability, nothing on balance, because they use it to pay these pensions; but they have got an asset; they had not any pension fund to pay these pensions with, and now they have got an insurance company which will in the future not extinguish the liability but countervail it and they have got the command of this policy to the extent that they are entitled to get their capital money say ' capital money ' without prejudice-back from the insurance company on surrendering the policies."

From these cases, there are deducible certain principles of a fundamental character. The first is that capital expenditure cannot be attributed to revenue and vice versa. Secondly, it is equally clear that a payment in a lump sum does not necessarily make the payment a capital one. It may still possess-revenue character in the same way as a series of payments. Thirdly, if there is a lump sum payment but there is no possibility of a recurrence, it is probably of a capital nature, though this is by no means a decisive test. Fourthly, if the payment of a lump sum closes the (1) [1932] 2 K. B. 185 ; 17 Tax Cas. 311, 317.

(2) (1918) 7 Tax Cas. 358.

liability to make repeated and periodic payments in the future, it may generally be regarded as a payment of a revenue character (Anglo-Persian Oil Co. Ltd. v. Dale) (1), and lastly, if the ownership of the money whether in point of fact or by a resulting trust be still in the tax-payer, then there is acquisition of a capital asset and not an expenditure of a revenue character.

Side by side with these principles, there are others which are also fundamental. The Income-tax law does not allow as expenses all the deductions a prudent trader would make in computing his profits. The money may be expended on grounds of commercial expediency but not of necessity. The test of necessity is whether the intention was to earn trading receipts or to avoid future recurring payments of a revenue character. Expenditure in this sense is equal to disbursement which, to use a homely phrase, means something which comes out of the trader's pocket. Thus, in finding out what profits there be, the normal accountancy Practice may be to allow as expense any sum in respect of liabilities which have accrued over the accounting period and to deduct such sums from profits. But the Income-tax laws do not take every such allowance as legitimate for purposes of tax. A distinction is made between an actual liability in praesenti and a liability de futuro which, for the time being, is only contingent. The former is deductible but not the latter. The case which illustrates this distinction is Peter Merchant Ltd. v. Stedeford (2). No doubt, that case was decided under the system of Income-tax laws prevalent in England, but the, distinction is real. What a prudent trader sets apart to meet a liability, not actually present but only contingent, cannot bear the character of expense till the liability becomes real.

We may here refer to two other cases. In Alexander Howard & Co. Ltd v. Bentley (3), a business of blouse and gown manufacture was carried on by one A. C. Howard. His three brothers were employed by him as salaried managers. In 1933 A. C. Howard remarried (1) [1932] 1 K. B. 124; 16 Tax Cas. 253.

(2) (1948) 30 Tax Cas. 496.

(3) (1948) 30 Tax Cas. 334.

and under pressure from his brothers a company was formed and the directors were authorised to enter into an agreement to purchase the business. A. C. Howard was the governing director of the company and his three brothers, permanent directors. The company also entered into a service agreement with them, and Art. 107 thereof provided :

> " After the death of the said Alexander Charles Howard and during such. time as his legal personal representatives shall hold at least Ten Thousand Shares in the Company, any widow surviving him shall receive out of the profits of the Company an annuity of One Thousand Pounds per annum during her life."

This service agreement was executed on January 3, 1934. In 1943 by a deed of release A. C. Howard released to the company all right to a claim in respect of the annuity in consideration of the payment to him of a sum of pound 4,500. This amount was based upon the findings of an actuary. The taxpayer submitted that the sum paid in redemption of the annuity was a proper charge against revenue, and was deductible. The Commissioners held against the company on two main grounds. They held that in order to decide whether the sum paid to obtain release of the annuity was properly allowable as a deduction, they had to decide first whether the annuity itself would have been properly chargeable to revenue, (Anglo-Persian Oil Co. Ltd. v. Dale (1) and Bean v. Doncaster Amalgamated Collieries Ltd. (2) per Lord Simon at pp. 311-312); and they held next that the redemption of the annuity freed the company from a contingent liability and the company had. thus secured only an enduring advantage.

Singleton, J., before whom the case came in appeal, affirmed the decision. He pointed out that this was not a case of a company providing an annuity or pension for an employee, "

> for " (to quote him) " the wife of Mr. Alexander Charles Howard had nothing whatever to do with the Company ". If, therefore, (1) [1932] 1 K. B. 124; 16 Tax Cas. 253.
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> (2) (1946) 27 Tax CaS. 296.

the original annuity was not chargeable to revenue, the sum of pound 4,500 paid to avoid it, could not also be. The other case is Southern Railway of Peru Ltd. v. Owen (1). In that case, the English company was bound to provide compensation to all its employees on the termination of their services. Legislation to this effect was deemed to be a part of the contract of service. Such right arose on dismissal or on termination of the employment by the employer after proper notice. The compensation was an amount equal to one month's salary for every year of service. There were, however, certain exceptions under which the compensation was not payable. The company sought to deduct an amount equal to the burden cast on it each year but the claim was refused. It was held by majority that though 'the company was entitled to charge against one year's receipts the cost of

making provision for the retirement payments which would ultimately be payable as it had the benefit of the employees services during that year, provided the present value of the future payments could be fairly estimated ', since the factor of discount was ignored in making the deduction, the claim could not be entertained. These two cases illustrate the propositions that the recurring liability of a pension which is compressed into a lump payment should itself be a legal obligation, and that, if contingent, the present value of the future payments should be fairly estimable. If the pension itself be not payable as an obligation, and if there be a possibility that no such payment may be necessary in the future, the whole of the amount cannot be deducted but only the present value of the future liability, if it can be estimated. It is significant that the case in Sun Insurance Office v. Clark (2) was applied to the last corollary.

So far, we have dealt with the principles which underlie leading cases decided in England, some of which were in the forefront of the arguments. We have already stated that the English decisions should be read with considerable caution. Under the English Income-tax Act, the law is stated in a negative (I) [1957] A.C. 334.

(2) [1912] A.C. 443.

form. Section 137 of 15 & 16, Geo. 6 & I Eliz. 2, c. 10, which prescribes the general rules regarding deductions is expressed in the negative, and r. (a) which was applicable to the cited cases reads as follows:

> " Subject to the provisions of this Act, in computing the profits or gains to be charged under Case I The Case 11 of schedule D, no sum shall be deducted in respect of-
>
> (a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade, profession or vocation." In these several cases, emphasis was sometimes laid on the words " wholly and exclusively ", sometimes on " laid out or expended " and sometimes on " for the purposes of the trade...". It was the nature of the liability or the time of payment or the value of the payment or all of them which determined whether the amount should be deducted or not.

Clause (xv) of s. 10(2) of the Act, with which we are concerned, reads as follows:

> 10. " Business-(1) The tax shall be payable by an assessee under the head I Profits and gains of business, profession or vocation' in respect of the profits or gains of any business, profession or vocation carried on by him.

(2) Such profits or gains shall be computed after making the following allowances, namely-

(xv) any expenditure not being an allowance of the nature described in any of the clauses (i) to (xiv) inclusive, and not being in the nature of capital expenditure or personal expenses of the assessee laid out or expended wholly and exclusively for the purpose of such business, profession or

vocation."

This section, though it enacts affirmatively what is stated in the negative form in the English statute, is substantially in pari materia with the English enactment and would have justified our considering the English authorities as aids to the interpretation thereof But there is no case directly on what is I expenditure and if the authorities under the English statute were to be of real assistance, the whole of the matter should have been before us. The question, however, limits the approach to whether the payments made towards the policy were expenditure within cl.(xv). I Expenditure' is equal to I expense' and 'expense' is money laid out by calculation and intention though in many uses of the word this element may not be present, as when we speak of a joke at another's expense. But the idea of I spending' in the sense of I paying out or away' money is the primary meaning and it is with that meaning that we are concerned. I Expenditure' is thus what is 'paid out or away' and is some- thing which is gone irretrievably.

To be an allowance within cl. (xv), the money paid out or away must be (a) paid out wholly and exclusively for the purpose of the business and further (b) must not be (i) capital expenditure, (ii) -personal expense or (iii) an allowance of the character described in cls. (i) to (xiv). But whatever the character of the expenditure, it must be a paying out or away, - and we are not concerned with the other qualifying aspects of such expenditure stated in the clause either affirmatively or negatively. So, the question is whether in a business sense the amount was spent, that. is to say, paid out or away. To discuss this, we must go to the terms of the policy.

No doubt, under the general terms of the policy an annuity was to be provided for the Harveys. We are not concerned with Mrs. Harvey, because she had no claim to the annuity or pension any more than Mrs. Howard bad in Alexander Howard & Co. Ltd. v. Bentley (1) already discussed by us elsewhere. That consideration involves a finding on whether an annuity to Mrs. Harvey was an expense made wholly and exclusively for the purpose of the business, and that is not a matter open to us by the limited question posed. In any event, the

-provision for a pension or annuity to Mrs. Harvey cannot rank higher than an annuity to Harvey, and the matter can be considered on the limited aspect that a pension or annuity to Harvey was also contemplated.

(1) (1948) 30 Tax Cas, 334.

In the years of account the assessee Company did hand out to the trustees, the sums of money for which deduction is claimed. But was the money spent in so far as the assessee Company was concerned ? Harvey was then alive and it was not known if any pension to him would be payable at all.'Harvey might not have the lived to be 55 years. He might even have abandoned c his service or might have been dismissed. Till September 20, 1955, the assessee Company had dominion through the grantees over the premia paid, at least in two circumstances. They are to be found in the special provision, and the third clause of the second schedule of the policy. These provisions have been quoted already, but may again be reproduced:

" Special provision:

Provided the contract is in force and unseduced, the Grantees shall be entitled to surrender the Annuity on the Option Anniversary for the Capital sum of pound 10,169 subject to written notice of the intention to surrender being received by the Directors of the Society within the thirty days preceding the Option Anniversary." - Cl. (III): " If both the Nominees shall die whilst the Contract remains in force and unreduced and before the Option Anniversary the said funds and Property of the Society shall be liable to make repayment to the Grantees of a sum equal to a return of all the premiums which shall have been paid under this Contract without interest after proof thereof and subject as hereinbefore provided."

To be a payment which is made irrevocably there should be no possibility of the money forming, once again, a part of the funds of the assessee Company. If this condition be not fulfilled and there is a possibility of there being a resulting trust in favour of the Company, then the money has not been spent, i. e., paid out or away, but the amount must be treated as set apart to meet a contingency. There is a distinction between a contingent liability and a payment depending upon a contingency. The question is whether in the years of account, one can describe the assessee Company's liability as contingent or merely depending upon a contingency. In our opinion, the liability was contingent and not merely depending upon a contingency. That such a distinction is real was laid down in the speech of Lord Oaksey in Southern Railway of Peru Ltd. v. Owen (1), and was recognised generally in the speeches of the other Law Lords. Now, the question is what is the effect of the I payment of premia in the present case ? Learned counsel for the assessee Company referred us to the provisions of Chapter IX-B of the Act, particularly ss. 58R, 58S and 58V thereof. We regret we are not able to see bow these provisions help in the matter. We are not concerned with the provisions of this Chapter, because the allowance does not fall within any of the provisions, and we have only to decide the question whether the amounts -paid to purchase the policy involved an expenditure in the accounting years. Next learned counsel relied upon Joseph v. Law Integrity Insurance Company, Limited (2), Prudential Insurance Company v. Inland Revenue Commissioners (3) and In re National Standard Life Assurance Corporation (4) to show that there was no contingent liability but a liability depending on a contingency, namely, the duration of life, the probabilities of which were estimated on actuarial calculations. No doubt, these cases deal with insurance of human life but the observations therein are not material here. In the first of these cases, it was held that the kind of policies which were issued were policies of insurance on human lives, and that the company was carrying on the business of life insurance contrary to its memorandum of association and the policies were ultra vires the company. The policies were also illegal within s. I of the Assurance Companies Act, 1909.. In this context, the definition that I a policy of life insurance' means I any instrument by which the payment of monies, by or out of the funds of an assurance company, on the

(1) [1957] A.C. 334.

(3) [1904] 2 K.B. 658.

(2) [1912] 2 Ch. 581.

(4) [1918] 1 Ch. 427, 430.

happening of any contingency depending on the duration of human life, is assured or secured was referred to. The policies issued by the company, though ostensibly called I investment policies' were held to be really life insurance policies. The next case arose under s. 98 of the Stamp Act, 1891. It was held that a contract by which in consideration of the payment by a person of a weekly premium, a sum certain was payable to him on his attaining the age of 65 or, in the event of his dying earlier, A smaller sum was to be paid to his executors, was a policy of insurance upon a contingency depending upon a life within the meaning of the section. In the last case, the question arose under s. 30 of the Assurance Companies Act, 1909, and it was decided that a certificate-holder held a policy on human life because money was payable not only at the expiration of a certain number of years but all premiums were repayable in the event of death to the legal representative.

These cases may help to determine the nature of the contract with the insurance company but cannot help in the solving of the question whether the payments to the insurance company were expenditure. That insurance of human lives involves a contingency relating to the duration of human life is a very different proposition from the question whether the payment in the present case to the trustees was towards a contingent liability or towards a liability depending on a contingency. In our opinion, the payment was not merely contingent but the liability itself was also contingent. Expenditure which is deductible for income-tax purposes is one which is towards a liability actually existing at the time, but the putting aside of money which may become expenditure on the happening of an event is not expenditure. In the present case, nothing more was done in the account years. The money was placed in the hands of trustees and/or the insurance company to purchase annuities of different kinds, if required, but to be returned if the annuities were not bought and the setting apart of the money was not a paying out or away of these sums irretrievably.

In our opinion, the question was correctly answered by the Calcutta High Court. We, therefore, dismiss the appeal with costs.

Appeal dismissed.