The Commissioner Of Excessprofits Tax, ... vs N. M. Rayaloo Iyer & Sons on 8 December, 1960

Equivalent citations: 1961 AIR 692, 1961 SCR (3) 60

Author: J.C. Shah

Bench: J.C. Shah, J.L. Kapur, M. Hidayatullah

PETITIONER:
THE COMMISSIONER OF EXCESSPROFITS TAX, MADRAS

Vs.

RESPONDENT:
N. M. RAYALOO IYER & SONS.

DATE OF JUDGMENT:
08/12/1960

BENCH:
SHAH, J.C.
BENCH:
SHAH, J.C.
KAPUR, J.L.
HIDAYATULLAH, M.

CITATION:
1961 AIR 692 1961 SCR (3) 60

ACT:
Excess Profits Tax-Deductions-Remuneration of managing agent-Percentage of net Profits less outgoings--Excess Profits tax, if included in outgoings-Construction of agreement-Commission paid to branch managers-Deduction when of 1922), ss. 10(2)(XV), 10(2)(x)-Excess Profits Tax Act, 1940 (15 of 1940), ss. 2(16), 19, 21, Sch. 1, cl. (12).

HEADNOTE:
The respondents, a firm carrying on business in dyes and chemicals under the name and style of Colours Trading Company, with their head office at Madurai and thirteen branch offices in different towns, were the chief representatives in South India of the products of the I. C. I., a manufacturing concern. M was employed as the General Manager of the respondents and by virtue of an agreement, he was to be paid remuneration at the rate of Rs. 3,000 per

annum and 12-1/2% of the net profits of the company calculated by deducting from the gross profits of the business the salaries, wages and other outgoings. The branch offices were managed by local managers and assistant managers who were paid in addition to monthly salary, annual and special bonus and dearness allowance. The respondents received from the I. C. I. commission at varying rates on the different-products sold to them and with effect from April 1, 1944, the I.C.I. allowed a special emergency commission of 5% recommending that 1% out of the commission allowed may be passed on by the respondents to their sub-distributors. The respondents claimed to have distributed to their employees commission pursuant to the recommendation of the I.C.I. at rates varying between 2% and 7-1/2% and in some cases at a rate as high as 12%. Though under the service agreement, commission was payable to the employees only if the turnover exceeded Rs. 1,00,000 net in any year, the respondents claimed to have paid them commission at generous rates even when the turnover fell far short of that amount. In the year of account ending April 12, 1945, there was a revision of the scales of salaries of the employees, as a result of which the employees received an amount equal to 2-1/2 times the enhanced basic salary and also commission sometimes exceeding 12 times the basic salary.

In computing the total income of the respondents for the years 1943-44 and 1944-45 for purposes of income-tax, the income-tax Officer disallowed the payment Of 12-1/2% of the net

61

profits to M, and for the years 1945-49 he disallowed the commission paid to the branch managers and other employees on the ground that taking into account all the circumstances the remuneration paid to the employees was adequate and that any additional commission paid was in excess of what was reasonable or necessary. The Appellate Tribunal confirmed the order of the Income-tax Officer except in the case of M to whom payment of 5% of the net profits without deduction of Excess Profits Tax or Business Profits Tax, or 12% after deduction of Excess Profits Tax or Business Profits Tax, whichever was higher, was regarded as permissible deduction. The High Court, on reference, took the view, inter alia, that in determining the net profits under the agreement with M, the excess profits tax could not be deducted, that in considering the question whether the bonus or commission paid to the employees in the present case might be permitted as a justifiable deduction, in the light of S. 10(2)(X) Of the Income-tax Act and r. 12 of Sch. 1 of the Excess Profits Tax Act, the test of reasonableness of the expenditure was to be judged from the point of view of a business man and not by the application of any subjective standard of a taxing officer, and that on an analysis of the materials furnished, there was nothing per se unreasonable in the amounts of commission actually paid

by the respondents to the branch managers and assistant managers.

Held: (i) that the question whether in the computation of the taxbale income, the commission payable to M under the agreement entered into with him by the respondents should be allowed before deducting the excess profits tax, depended on the true interpretation of the agreement; the expression "outgoing" in the agreement was not restricted to business or commercial outgoings but included the excess profits tax paid by the assessees, and that, consequently, the net profits of which M was to be given a percentage by way of commission should be computed after deducting the excess profits tax paid.

Commissioner of Income-tax, Delhi v. Delhi Flour Mills Co., Ltd., [1959] SUPP. 1 S.C.R. 28, relied on.

(2) that under cl. (12) Of Sch. 1 of the Excess Profits Tax Act, 1940, it was for the Excess Profits Tax Officer, subject to review by the Tribunal, to decide whether the deduction was reasonable and necessary, having regard to the requirements of the business and in case of payments for services, to the actual services rendered by the persons concerned; it was not open to the High Court exercising its jurisdiction on questions referred to it under the Excess Profits Tax Act, to substitute its own view as to what may be regarded as reasonable and necessary and to set aside the decision of the taxing authorities on a re-appreciation of the evidence. If the High Court considered that the taxing authorities had committed an error in law by misconceiving the evidence or by applying erroneous tests or

62

otherwise by acting perversely, the proper course for it was in answering the questions submitted, to lay down the true principles applicable to the ascertainment of the permissible deductions and to leave it to the taxing authorities to adjudicate upon the reasonableness and necessity of the expenses in the light of the requirements of the business.

(3) that there was ample evidence in support of the conclusion of the Excess Profits Tax Officer which was confirmed by the Tribunal, and that the question, whether the disallowance by the excess profits tax authorities of the commission paid to branch managers was justified under r. 12 of Sch. 1 of the Excess Profits Tax Act, should have been answered in the affirmative.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 494 and 495 of 1958.

Appeals from the judgment and order dated April 18, 1955, of the Madras High Court in Case referred Nos. 53 of 1952 and 44 of 1953.

Hardayal Hardy and D. Gupta, for the appellant. A. V. Viswanatha Sastri, R. Ganapathy Iyer, S. Padmanabhan and G. Gopalakrishnan, for the respondent. 1960. December 8. The Judgment of the Court was delivered by SHAH, J.-These are two appeals filed with certificates of fitness granted by the High Court of Judicature at Madras. Appeal No. 494 of 1958 arises out of orders passed in certain Excess Profits Tax Appeals and Appeal No. 495 of 1958 arises out of orders passed in certain Income-tax References, Excess Profits Tax Appeals and Business Profits Tax Appeals.

M/s. N. M. Rayaloo Iyer & Sons-hereinafter referred to as the assessees-are a firm carrying on business principally in dyes and chemicals. They are the chief representatives in "South India" of the products of the Imperial Chemical Industries Company (India) Ltd.-hereinafter referred to as the "I.C.I.". The business in dyes and chemicals was in the years material to these appeals, conducted in the name and style of "Colours Trading Company", with its Head Office at Madura and in thirteen branch offices in different towns in "South India". The busines was carried on originally in partnership by three brothers, N. M. R. Venkatakrishna Iyer, N. M. R. Subbaraman and N. M.' R. Krishnamurti. On April 13, 1946, N. M. R. Subbaraman retired from the firm and the share of N. M. R. Venkatakrishna Iyer was taken over by a private limited company N. M. R. Venkatakrishna Iyer & Sons Ltd., but the business was, notwithstanding the changes in the personnel, continued in the original name and style. One N. M. R. Mahadevan (son of N. M. R. Venkatakrishna Iyer)-hereinafter referred to as Mahadevan-was employed by the assessees as the General Manager of the Colours Trading Co. By letter dated April 17, 1940, the assessees wrote to Mahadevan agreeing to pay him remuneration at the rate of Rs. 1,800 per annum and 5% of the net profits of the concern (Colours Trading Company) calculated by deducting from the gross profits of the business, salaries, wages and other outgoings but without making any deduction for capital. By letter dated March 30, 1943, the salary of Mahadevan was fixed at Rs. 3,000 per annum and the commission was enhanced to 12-1/2% of the net profits of the Colours Trading Company. The branch offices were managed by local managers and assistant managers who were paid in addition to monthly salary, annual and special bonus and dearness allowance. The assessees received from the I. C. I. commission at rates varying between 7-1/2% and 12% on different products sold to them. With effect from April 1, 1944, the I. C. I. allowed a special emergency commission of 5% on all dyes and dye- stuffs sold to the assessees. This special emergency commission was increased to 15 % on all sales on or after March 1, 1945, but was subsequently reduced to 10% on sales on and after September 1, 1946.

These appeals relate to the liability of the assessees to Excess Profits Tax for the chargeable accounting periods ending April 13, 1943, April 12, 1944, April 12, 1945, and, March 31, 1946, and for Business Profits Tax for the chargeable accounting periods ending April 12, 1946, March 31, 1947, April 13, 1947, March 31, 1948, and April 12, 1948.

The assessees claimed that they had paid to their employees in the years of account 1942-43 to 1947-48 under agreements executed from time to time a share in the special emergency commission received from the I. C. I., in addition to monthly salary, dearness allowance and general and special bonus. The I. C. I. in allowing the emergency commission by its letter dated January 24, 1944,

recommended that 1% out of the 5% commission allowed may be "passed on" by the assessees to their "sub-distributors". The assessees claimed that pursuant to this recommendation, they paid to their employees commission at rates varying between 1-1/2% to 4%, and when the emergency commission was increased to 15% and the I. C. I. by letter dated February 23, 1945, recommended that 6% out of this commission may be passed on to the sub-distributors, the assessees claimed to have distributed commission at rates varying from 2% to 7-1/2% and in some cases at a rate as high as 12%. Under the service agreements, commission was payable to the employees only if the turnover in dyes exceeded Rs. 1,00,000 net in any year, but to employees in several branches the assessees claimed to have paid commission at generous rates even when the turnover fell far short of that amount. In the year of account ending April 12, 1945, there was a revision of the scales of salaries of the employees, and the assessees commenced giving to their employees dearness allowance and special bonus which in the aggregate exceeded 50% of the basic annual salary and also annual bonus equal to the annual salary. The result of this revision of emoluments was that each employee received an amount equal to at least 21 times his enhanced basic salary. In addition to this remuneration, the assessees claimed that they had paid a share in the commission which in some cases exceeded 12 times the basic salary.

In computing the total income of the assessees for the years 1943-44 and 1944-45 for purposes of income-tax, the Income- tax Officer disallowed the payment of 12-1/2% of the net profits of the Colours Trading Co. to Mahadevan and in computing the income for the assessment years 1945-46, 1946-47, 1947-48 and 194849 the Income-tax Officer disallowed the commission. paid to the branch managers and other employees. In appeal the Appellate Assistant Commissioner set aside the order which disallowed the amount of commission paid to Mahadevan and following the order of the Income-tax Appellate Tribunal in certain Excess Profits Tax appeals, allowed 5% of the net profits without deduction of Excess Profits Tax or Business Profits Tax, or 121% after deduction of Excess Profits Tax or' Business Profits Tax whichever was higher. That order was confirmed in appeal by the Income-tax Appellate Tribunal. The Tribunal also confirmed the order disallowing the emergency commission paid to the branch managers and other employees, and in the computation of taxable income for purposes of Income-tax, Excess Profits Tax and Business Profits Tax, added back all those payments. At the instance of the assessees, the Tribunal referred two sets of questions to the High Court under s. 66(1) of the Income-tax Act read with s. 21 of the Excess Profits Tax Act. Questions 1 to 3 in Referred Case No. 44 of 1953 were:

> (1) Whether in allowing a deduction under s. 10(2) (xv) of the Income-tax Act, the Income-tax Officer is precluded from going into the question whether the amount was paid wholly and exclusively for the purpose of the assessee's business? (2) Whether there was any material before the Tribunal to hold that the commission payment to N. M. R. Mahadevan at 121 % before deduction of Excess Profits Tax or Business Profits Tax was not wholly and exclusively laid out for the purpose of the assessee's business?

(3) Whether the commission payment to the branch managers, assistant managers and other employees is an expenditure laid out wholly and exclusively for the purpose of the business?

Questions referred in Referred Case No. 53 of 1952 were:

> (1) Whether the Appellate Tribunal erred in law in holding that in accordance with the terms of letters dated 17th April, 1940, and 30th March, 1943, and the conduct of the parties the Excess Profits Tax payable by the assessee should be deducted from the profits before the commission of 12-1/2% payable to M. N. R. Mahadevan is calculated? (2) Whether there is any material on evidence sufficient in law for the Appellate Tribunal to hold that the commission of 12-1/2% on profits paid to Mahadevan was unreasonable within the meaning of Rule 12 of Schedule 1 of the Excess Profits Tax Act?
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> (3) Whether on the facts and circumstances of the case the disallowance by the Excess Profits Tax authorities of the commission paid to branch managers is justified under Rule 12 of Schedule 1 of the Excess Profits Tax Act?

The material provisions relating to allowances under the Excess Profits Tax Act and the Business Profits Tax Act (which Act superseded the Excess Profits Tax Act as from March 30, 1946) were on the questions arising in this case substantially the same and hereafter reference to the Excess Profits Tax Act will in respect of the period after March 30, 1946, be deemed to be a reference to the Business Profits Tax Act.

In the opinion of the High Court, in computing the taxable income, the deductions claimed by the assessees fell to be considered not under s. 10(2)(xv) of Income-tax Act but properly under s. 10(2)(x) of the Income-tax Act, the latter being a specific provision in the Act relating to deduction of commission or bonus paid to an employee. The High Court observed that in assessing liability to Excess Profits Tax the bonus or commission paid to the employees of the tax payer may be permitted as a deduction in the light of s. 10(2)(x) of the Income-tax Act and r. 12 of Sch. 1 to the Excess Profits Tax Act. The case of Mahadevan, according to the High Court, did not present much difficulty, the only question which fell to be determined in this case being whether in allowing deduction of commission at the rate of 12-1/2% on the net profits, the Excess Profits Tax paid by the assessees was to be taken into account. Following a judgment of the Punjab High Court in Commissioner of Income-tax, Delhi v. Delhi Flour Mills Ltd. (1), the High Court observed that in computing net profits Excess Profits Tax could not be deducted, but on the materials on the record, the question whether the commission paid to the branch managers and other employees was properly deductible could not be decided, and accordingly the High Court called for and obtained from the Tribunal a supplementary statement of facts. The High Court after considering the supplementary statement observed that the assessees had undoubtedly distributed substantial sums out of the emergency commission to its managers and assistant managers in the branches at rates well above the minima recommended by the I. C. I., but the distribution was at rates within the percentages allowed by the I. C. I., as additional commission and the balance retained by the appellants out of the emergency Commission was also substantial. In the view of the High Court, the Tribunal had to consider three factors, (1) the reasonableness of the commission in the light of the conditions laid down in s. 10(2)(x), (2) the reasonableness of the percentages above the minima suggested by the I. C. I., and (3) the need for maintaining the reputation of the I. C. I., and the

distributor in conditions that prevailed during that period when "black-marketing was rampant", but observed the High Court "the Tribunal had made no real attempt to analyse the evidence before it to justify its conclusion that only the minima recommended by the I.C.I. and nothing in excess satisfied the test of reasonableness under r. 12, Sch. 1, of the Excess Profits Tax Act". They then observed that, whether the test of reasonableness is that prescribed by s. 10(2)(x) of the Income-tax Act or whether reasonableness has to be judged in the light of commercial expediency under r. 12, Sch. 1, of the Excess Profits Tax Act, the expenditure was to be judged from the point of view of a businessman and not by the application of any subjective standard of a taxing (1) [1953] 23 I.T.R. 167.

officer and that on an analysis of the materials furnished, they were unable to see anything per se unreasonable in the amounts of commission actually paid by the assessees to the branch managers and assistant managers in the branches. The High Court also observed that the minima recommended by the I. C. I. did not provide the only or an absolute standard for judging the reasonableness of the payments made, and stated:

> "No doubt, the employees of the assessee were in receipt of regular salaries and bonuses. But then, a sub-distributor if he had not been paid a salary, would have had to be paid a share of the basic commission itself. What the assessee got in the years in question was in the nature of a windfall. It shared it with its employees. It had been instructed to share it. The emergency commission was allowed by the Imperial Chemical Industries so that the distributors could maintain the reputation of the Imperial Chemical Industries in the market even under the disturbed conditions that prevailed in those years. If, to maintain that reputation and to maintain its own, the assessee paid to its employee s even on a liberal basis, a share of that emergency commission, it is a little difficult to hold that, while receipt of the emergency commission was reasonable, sharing it beyond a particular point would per se be unreasonable, in the sense that no prudent businessman in that line of business, in those years, and in the market condition that prevailed then, with ample scope for black-marketting, would have paid out commission on such a basis".

They then concluded:

> "Though, of course, it was for the assessee to show that it was entitled to the deduction claimed under s. 10(2)(x) of the Income-tax Act and r. 12 of Sch. 1 of the Excess Profits Tax Act, there was really no basis on record to show that judged from the point of view of a businessman, payments in excess of the minima recommended by the Imperial Chemical Industries were not reasonable. We are of opinion that the entire claim should have been allowed both under s. 10(2)(x) of the Income- tax Act and under r. 12 of Sch. 1 of the Excess Profits Tax Act on the ground that the statutory requirements were satisfied by the assessee."

The High Court accordingly answered the questions about the disallowance of commission paid to the employees of the assessees being justified under r. 12, Sch. 1, of the Excess Profits, Tax Act in the

negative. Against those orders, these two appeals have been preferred with certificates of fitness from the High Court.

The first question which falls to be considered is whether in the computation of taxable income for purposes of Income- tax and Excess Profits Tax, commission allowed to Mahadevan at 12-1/2% should be allowed after deducting the Excess Profits Tax paid. By the agreement dated April 17, 1940, as modified by the agreement dated March 30, 1943, Mahadevan was to be paid remuneration at the rate of Rs. 3,000 per annum and 121 % of the net profits of the Colours Trading Company. In the view of the High Court in determining the "net profits" under the agreement "in accordance with the principles of commercial accountancy and the principles laid down under the Excess Profits Tax Act" the Excess Profits Tax which is a tax on profits could not be deducted. In our judgment the question is one of the true interpretation of the agreement. Mahadevan was under the agreement to receive 121% commission on the net profits of the Colours Trading Co. calculated by deducting from the gross. profits of the business the salaries, wages and other outgoings. The expression "outgoings" is not restricted to business or commercial outgoings. The agreement specifically disentitles the employers to make deductions of capital expenditure, but there is no indication that the outgoings are to be business outgoings only. There is nothing in the agreement or in the context justifying the view that in the expression 'outgoings' is not included the Excess Profits Tax paid by the assessees.

In Commissioner of Income Tax, Delhi v. Delhi Flour Mills Co. Ltd. (1), it was observed by this Court in construing a similar agreement that the Excess Profits Tax was a part of the profits itself, but it was no part of the net profits contemplated by the parties; if it was a part which had to be deducted in arriving at the net profits, that is to say, the divisible profits which alone the parties had in mind, as a matter of construction the net profits meant divisible profits and were to be ascertained after deduction of Excess Profits Tax.

Counsel for the Revenue has not challenged the decision of the High Court that in computing taxable income for the purpose of income-tax commission paid to the various employees is a permissible deduction under s. 10(2)(x) of the Income-tax Act. The only question which survives on this branch for consideration is, therefore, whether those deductions are permissible in the assessment of Excess Profits Tax.

By s. 21 of the Excess Profits Tax Act, amongst other provisions, s. 10 of the Income-tax Act is made applicable with modifications if any as may be prescribed as if it were a provision of the Excess Profits Tax Act and refers to the Excess Profits Tax instead of Income-tax. By s. 2(19), the expression "profits" means profits determined in accordance with Sch. 1 of the Act which lays down the rules for computation of profits for the purpose of Excess Profits Tax Act. Rule 12 of Sch. 1 (which was added by s. 4 of the Excess Profits Tax Ordinance, 1943 provided as follows:

> "(1) In computing the profits of any chargeable accounting period no deduction shall be allowed in respect of expenses in excess of the amount which the Excess Profits Tax Officer considers reasonable and necessary having regard to the requirements of the business and in the case of directors' fees or other payments for services, to the actual services rendered by the person concerned:

> Provided that no disallowance under this rule shall be made by the Excess Profits Tax Officer unless he has obtained the prior authority of the Commissioner of Excess Profits Tax. (2) [1959] Supp. 1 S.C.R. 28.
>
> (2) Any person who is dissatisfied with the decision of the Excess Profits Tax Officer under this rule may. appeal in the prescribed time and manner to the Appellate Tribunal. (3) In relation to chargeable accounting periods ending after the 31st day of December, 1942, the Central Government may make rules for determining the extent to which deductions shall be allowed in respect of bonuses or commissions paid.

We were informed at the bar that though authorised, the Central Government did not make rules for determining the extent to which deductions shall be allowed in respect of bonuses or commissions paid. The Excess Profits Tax Act was substituted as from the year 1946 by the Business Profits Tax Act, 1947. That Act also defined by' s. 2, cl. (16), the expression "profits" as meaning profits determined in accordance with Sch. 1 and by s. 19, the provisions of the sections of the Indian Income-tax Act as applied to the Excess Profits Tax Act by virtue of ss. 21 and 21A in so far they were not repugnant to the provisions of the Business Profits Tax Act applied to that Act as they applied to Excess Profits Tax Act and by cl. (3) of Sch. 1, a provision substantially similar to cls. (1) & (2) of cl. 12, Sch. 1, of the Excess Profits Tax Act was incorporated. Profits of a business for purposes of Excess Profits Tax Act have to be ascertained by reference to s. 10 of the Income- tax Act modified to the extent directed by Sch. 1 of the Excess Profits Tax Act. By cl. (12) of Sch. 1 of the Excess Profits Tax Act, a deduction in respect of expenses in excess of the amounts which the Excess Profits Tax Officer considers reasonable and necessary having regard to the requirements of the business and in the case of payments for services to the actual services rendered by the persons concerned, is not to be allowed. The deduction to be allowed, it is true, does not depend upon any subjective satisfaction of the Excess Profits Tax Officer, but on objective standards as to what is reasonable and necessary having regard to the requirements of the business and in the case of payments for services to the actual services rendered by the persons concerned. The order passed by the Excess Profits Tax ,'Officer is open to review by the Tribunal to which appeal against the order of the Excess Profits Tax Officer lies. But in considering whether the deduction is properly claimed, the primary duty is vested by the Legislature in the Excess Profits Tax Officer. It is for him subject to review by the Tribunal to decide whether the deduction is reasonable and necessary, having regard to the requirements of the business and in case of payments for services to the actual services rendered. The jurisdiction which the High Court exercises on questions referred to it under the Excess Profits Tax Act is merely advisory; the High Court is not sitting in appeal over the judgment of the taxing authorities. If the taxing authorities having regard to the circumstances come to a conclusion that expenditure claimed as a deduction is not reasonable and necessary, it is not open to the High Court to substitute its own view as to what may be regarded as reasonable and necessary. Even if the High Court holds that the taxing authorities have committed an error in law by misconceiving the evidence, or by applying erroneous tests, or otherwise by acting perversely, the High Court may in answering the questions submitted, lay down the true principles applicable to the ascertainment of the permissible deductions and leave it to the taxing authorities to adjudicate upon the reasonableness and necessity of the expenses in the light of the requirements of the business.

In the case in hand, the Excess Profits Tax Officer held,

(a) that the employees of the assessees were being amply remunerated for services rendered by adequate salary, generous dearness allowance and annual bonus equal to the basic salary, (b) that the emoluments of the employees had been increased year after year and there was no material to show that the employees had made a persistent demand for increased emoluments, (c) that the commission was credited to the employees' account at the end of the year and was carried forward but no payments were made to them' (d) that the agreements which had been produced by the assessees were fabricated with a view to, reduce tax liability, and (e) that the expenditure' claimed was not proved to have been laid out wholly and exclusively for the purpose of the business. Taking into account these circumstances, the Excess Profits Tax Officer held that the remuneration paid to the employees was adequate and any additional commission paid was in excess of what was reasonable and necessary. The only criticism urged by counsel for the assessees against the grounds given is that the Excess Profits Tax Officer observed that while the net profit according to the Profit & Loss Account of the firm was Rs. 20,487 leaving a share of Rs. 6,800 only to each of the partners, some of the managers got more than this amount. It appears that the Excess Profits Tax Officer committed an error in so observing. The profits of the Colours Trading Co. as disclosed by the order of assessment for the year 1945-46 were Rs. 99,435 and not Rs. 20,487; but that error did not affect the ultimate conclusion recorded by the Excess Profits Tax Officer. According to the books of account of the assessees for the year 1943-44 of the business in dyes, the profits were Rs. 99,435 and they claimed to have distributed a commission of Rs. 1,00,715 to their employees out of the emergency commission, which was prima facie wholly disproportionate to the amount received by them.

The order passed by the Excess Profits Tax Officer was confirmed in appeal by the Appellate Tribunal. In the view of the Appellate Tribunal, no additional incentive was required to sell dyes and chemicals in the years in question because dyes and chemicals were in short supply and there was a rise in demand. The Tribunal also referred to the table setting out the distribution among the employees of dearness allowance, bonus and salary in the relevant years, and observed:

> "In addition to the generous allowances, the payment of this sum appears to us a payment made in order to dissipate the profits. It would be sufficient to say that including the commission alleged 10 to have been paid, the total emoluments would be something like 1200% and in some cases even more than the basic annual salary. There is no doubt in our mind, that this was wholly unnecessary for business purposes."

Observing that the assessees having no sub-distributors, the direction given by the I.C.I. did not require the assessees to "pass on" the commission to their employees, they concluded that the expenditure alleged to have been incurred was not reasonable and necessary within the meaning of r. 12, Sch. 1, of the Excess Profits Tax Act.

The following table which is incorporated in the statement of case of the Tribunal sets out for the four years in question the emergency commission received by the assessees and the aggregate

amount paid by them to their employees.

Assessment year.	Extra commission received by the assessee. Rs.	Amount of commission paid by the assessee. Rs.
1945-46	1,28,533	1,00,715
1946-47	3,20,391	2,44,698
1947-48	3,15,934	1,28,506
1948-49	3,70,964	1,75,079

This distribution out of the emergency commission to the employees has to be viewed in the context of the following circumstances set out by the Tribunal:

(1)that even though the I.C.I. recommended payment to sub-

distributors and the assessees had no sub-distributors, they claimed to have paid commission to their employees at rates in excess of the minimum rates recommended by I.C.I. (2) that this commission was paid to the employees in branches in which the annual turnover did not exceed Rs. 1,00,000 even though the agreements which the assessees had executed expressly provided that the commission was to be paid only if the annual turnover in a branch exceeded Rs. I lakh and (3)that the basic salaries of the employees had been substantially increased from time to time and generous dearness allowance and Deepavali bonus were given besides the annual bonus to the employees. An analysis of annexure 'IL" to the supplemental statement of case made by the Tribunal discloses some striking instances of Payments to employees. One Themaswamy was paid annually commission varying from Rs. 15,000 to Rs. 23,000 when his basic salary was Rs. 2,100 per annum; one K. N. Rajagopalachari was paid commission varying from Rs. 16,000 to Rs. 12,000 when his basic salary was Rs. 1,260 per annum; one S. L. Radhakrishnan was paid commission varying from Rs. 5,700 to Rs. 13,000 when his salary varied between Rs. 516 and Rs. 636 per annum and one K. R. Rama Rao was paid commission varying from Rs. 4,600 to Rs. 10,520 his salary being Rs. 492 and later increased to Rs. 612 per annum. There was thus ample evidence in support of the conclusion of the Excess Profits Tax Officer which was confirmed by the Tribunal. As we have already observed, it is the province of the Excess Profits Tax Officer and the Tribunal to assess the permissible deductions in the context of reasonableness and necessity having regard to the requirements of the business and interference with the conclusion is permissible if the view of the taxing authorities is vitiated by an error of law or is not based on any materials, or the conclusion is such that no man instructed in law could have arrived at. It is true that in considering whether the deduction claimed by the assessees for payments made as bonus or commission paid to an employee is to be allowed, the taxing officer must have regard to the provisions of s. 10(2)(x) of the Income-tax Act and cl. (12) of Sch. 1 of the Excess Profits Tax Act; and in assessing the reasonableness, consideration of commercial expediency must undoubtedly be taken into account. But commercial expediency must be viewed in the light of the requirements of the business and the actual services rendered by the persons concerned. Any abstract consideration of commercial expediency is out of place.

In our view, the High Court was not justified in seeking to reappreciate the evidence on which the conclusion of the Excess Profits Tax Officer which was confirmed by the Tribunal was based. Their

jurisdiction being advisory, the High Court had to answer the questions submitted for opinion on the facts found; if the High Court held the view that the taxing authorities had misdirected themselves in law or had made a wrong inference in law or had failed to apply the correct tests or had misconceived the evidence, it was. open to them to invite the attention of taxing authorities to the error committed by them; but the High Court could not set aside the decision of the taxing authorities on a reappreciation of the evidence. We may also point out that even if the High Court concluded that the total disallowance of the deduction claimed was not justified, the High Court could not substitute its own view as to what was reasonable and necessary. The High Court bad, if it disagreed with the taxing authorities, still to answer the questions submitted and leave to the consideration of the Excess Profits Tax Officer what in the circumstances was reasonable and necessary. Counsel for the assessees submitted that in any event, the Tribunal having in its supplementary statement of case stated that payment in excess of what was recommended by the I.C.I. was unjustified, this court may so modify the order of the High Court that deductions of the amounts which were recommended by the I.C.I. may be regarded as permissible deductions. The I.C.I. recommended distribution of a certain percentage out of the emergency commission to the sub-distributors; but in the administrative set up of the assessees, the sub-distributors did not find a place. The assessees carried on their business through paid employees. In terms therefore the recommendation by the I.C.I. had no application to the assessees. It is true that even if the assessees did not carry on the business through sub- distributors, payment made to its employees if reasonable and necessary having regard to the requirements of the business, may still be deductible, but that in our judgment is a matter to be decided by the taxing authorities and not by us.

The Tribunal had come to the conclusion that no payment in addition to the salary, annual bonus and, special bonus was justified and any expression of opinion to the contrary in the supplementary statement pursuant to the order for statement of case could not in our judgment affect the conclusion originally recorded.

In our view the answer to the question whether the disallowance by the Excess Profits Tax authorities of the commission paid to branch managers was justified under r. 12, Sch. 1, of the Excess Profits Tax Act should have been answered in the affirmative. On the view taken by us, Appeal No. 494/1958 will be allowed, but there will be no order as to costs.

Appeal No. 495 of 1958 will be allowed with *costs. Appeals allowed.