CEYLON

INCOME TAX CASES

VOL. I., 1933-1936.

EDITED BY

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COLOMBO

CEYLON LAW PUBLISHING CO.

1937.

FOREWORD

The sympathetic reception given by the Bench and the Bar to my monograph on **Crown's Option: Does the doctrine apply to Ceylon Income Tax?** encouraged me in writing two companion volumes on **Taxable Profits and Income** and **Taxation of Non-resident Traders** which I hope to publish very soon. In the course, however, of the preparation of these two volumes I felt the need of making available to those who are interested in the income tax law of Ceylon the decisions of the Supreme Court under the Income Tax Ordinance, reported in the manner in which tax cases are reported elsewhere. I decided, therefore, to bring out in one volume all the decisions of the Supreme Court under the Ordinance delivered between the years 1933 and 1936 so that those who have to decide or interpret the difficult questions which arise in the assessment and collection of income tax in Ceylon may have such decisions ready for their reference. It will be found that many of these decisions have already been reported, but not in the manner which has been adopted in the following pages. In addition to retaining the usual features of reports of tax cases, I have taken the liberty of adding at the end of the report of each case a Note, wherein I have attempted to draw attention to parallel provisions of the income tax laws of other countries, particularly of the United Kingdom, and the decisions of the Courts on such provisions. I have, in some instances, commented upon the conclusions arrived at by the learned Judges who decided the cases reported in this volume. The comments which I have made are based upon the interpretation placed by learned and eminent Judges and writers on the corresponding provisions of the statutes from which the draftsman of the Ceylon Ordinance has gleaned his inspiration.

K. SATIA VAGISWARA AIYAR

Law Library,
Colombo.
March 10, 1937.

The Mode of Citation of the Cases reported in the First Volume of the Ceylon Income Tax Cases will be as follows :—

1 C. I. T. C.

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Present: DRIEBERG J. AND BARBER A.J.

COMMISSIONER OF INCOME TAX *v.* J. RODGER

[S. C. No. 105 (1933)—Special].

Decided: *28th August, 1933.*

Statutory income—Assessment of—Commencement of employment—Is change of employer a commencement of employment?—Meaning of "employment"*—Income Tax Ordinance, No. 2 of 1932, S. 11 (4).*

The assessee was employed during the year preceding the year of assessment as an accountant in a firm B. During the said period he left firm B. and joined firm W, also as accountant. but on a higher salary. On a Case stated as to whether the assessee in entering the service of firm W, on a date falling within the year preceding the year of assessment, commenced an employment in Ceylon on that day so as to bring him within the provisions of sub-section (4) of section 11 of the Income Tax Ordinance,

HELD that the assessee only changed his employer but not his employment and that he did not, therefore, commence to carry on an employment within the meaning of sub-section 4) of S. 11.

Per DRIEBERG J—"I do not think the word employment is here used in that sense to indicate a particular contract of service but that it refers to occupations other than trades, businesses, professions, or vocations. The assessee must be regarded as having commenced an employment as an accountant not when he took appointment as such under Walker and Greig Limited. but when he first began to do the work of an accountant taking remuneration for his services, and this he had begun to do before the year preceding the year of asseessment."

Cases referred to:

Davies v *Braithwaite*, (1931) 2 K.B. 628; 18 T.C. 198..... (1)

Fry v. *Burma Corporation Ltd.*, (1930) 15 T.C 113 ..... (2)

The assessee, J. Rodger, an Associate of the Chartered Institute of Secretaries, was employed as an accountant under Brown & Co. Ltd., on a salary of Rs. 400/- per mensem from the 1st April, 1931, to the 28th February, 1932. On the 1st March, 1932, he joined Walker and Greig Ltd. as an accountant on a salary of Rs. 650/- per mensem. Brown & Co. Ltd., and Walker & Greig Ltd., are independent companies. The Commissioner of Income Tax confirmed an assessment of Rs. 7,800/- and a tax of Rs. 212/- which was sought to be levied from the assessee in respect of his income for the year of assessment ending on the 31st March 1933. The Commissioner upheld the contention that the assessee commenced an employment in Ceylon on a day within the year pre-

ceding the year of assessment, that is to say, on the 1st March, 1932, when he joined Walker & Greig Ltd., as an accountant, and that therefore his statutory income had to be ascertained by a reference to the provisions of sub-section (4) of section 11 of the Income Tax Ordinance. In other words, the basis of assessment was the amount of the salary earned by the assessee for the period of one year from the 1st March 1932, viz Rs. 7,800/- and a tax of Rs. 212/-, therefore, fell to be levied from him.

On appeal by the assessee to the Board of Review constituted under the Ordinance, the Board annulled the assessment under section 11 (4) of the Ordinance on the ground that the assessee commenced his 'employment in Ceylon' before the year preceding the year of assessment and that a change of employers within that period did not amount to a 'commencement of employment in Ceylon' within the meaning of sub-section (4) of section 11.

On application made by the Commissioner of Income Tax, the Board of Review stated the following Case for the opinion of the Supreme Court on the question of law whether or not the assessment fell under sub-section (4) of section 11 of the Ordinance.

CASE STATED

1. At a meeting of the Board of Review held on the 11th March, 1933 for the hearing and disposal of appeals under the provisions of Section 73 of the Income Tax Ordinance 1932, J. Rodger, hereinafter called the Assessee, appealed against an Assessment of Rs. 7,600/- and a tax of Rs. 212/- sought to be levied from him in respect of his income for the year of assessment ending 31st March, 1933.

2. The following facts were admitted or established to the satisfaction of the Board:-

(a) The Assessee was Accountant to Brown & Company Limited up to the 28th February 1932 when he left that Company. His salary at the date of leaving was Rs. 400/- per month;

(b) On the 1st March, 1932, the Assessee joined Walker & Greig Limited as Accountant at a salary of Rs. 650/- a month;

(c) Brown & Company Limited and Walker & Greig Limited are not connected concerns, but are independent companies;

(d) The Assessee is an Associate of the Chartered Institute of Secretaries.

3. It was contended on behalf of the Assessee:—

(a) That though not connected with one another both companies are doing precisely similar business, that the nature of his daily duties at Walker & Greig Limited is exactly the same as what it was when he was working under Brown & Company Limited, and that in consequence he had not "commenced to carry on or exercise an employment in Ceylon" within the meaning of Section 11 (4) of the Income Tax Ordinance.

(b) That in these circumstances he could not be assessed on the basis of his income for the year 1932-33, under the provisions of section 11 (4) but on the basis of his income for the year preceding the year of assessment.

(c) That section 11 (4) only applied to cases of persons who had come out to Ceylon and commenced employment in Ceylon, for the first time, within the year preceding the year of assessment.

4. It was contended in support of the assessment that: —

(a) A change of employers, without a change in the nature of the employment, amounted to the cessation of one employment and the commencement of another, within the meaning of section 11 (4) and that therefore the assessee was liable to be assessed on the income for one year from the date of the commencement of the new employment;

(b) The two appointments cannot be regarded as one and the same employment and that therefore the Assessee must be deemed to have commenced a new employment on the 1st March, 1932, with the consequent liability to be assessed on the income for one year from that date.

5, We, the members of the Board who heard the appeal, gave the following decision:-

"It is contended for the Assessor that the Appellant on a day within the year preceding the year of assessment.....commenced..... employment in Ceylon.....We are unable to uphold this contention. The appellant commenced his employment in Ceylon before the year preceding the year of assessment and we hold that the change of employers within that period cannot be construed as a commencement of employment in Ceylon within the meaning of section 11 (4). The assessment under section 11 (4) is accordingly annulled."

6. The Commissioner of Income Tax, on the 4th April, 1933, duly required us to state a case on a question of law for the opinion of the Supreme Court under the provisions of Section 74 (1) of the Income Tax Ordinance, 1932, which Case we have stated and do sign accordingly.

1. Sgd. *Francis de Zoysa*
2. „ *A. Mahadeva*
Members of the Board of Review.

Colombo,
2nd May, 1933.

L. M. D. de Silva K. C., Solicitor General, with him *H. L. Wendt* C. C. for the Commissioner of Income Tax-appellant:— The question for decision is whether the assessee-respondent commenced to carry on or exercise a trade, business, profession, vocation, or employment in Ceylon, when he joined the firm of Walker and Greig Limited as an accountant on the 1st March, 1932. If he did so, the basis of assessment of his statutory income is not the normal one laid down in sub-section (1) of S. 11 but his case will fall under sub-section (4) of S. 11. It will be seen that S. 11 (1) lays down the general rule for the computation of the statutory income. In view of the impracticabilty of ascertaining the income earned during the year of assessment, sub-section (1) makes the preceding year the basis of assessment. The following sub-sections deal with cases where it will be to the advantage of the Revenue to have a different basis, approximating as much as possible the assessee's income during the year of assessment. Sub-section (4) of S. 11 is one of the exceptions to the rule in sub-section (1). One has to read sub-section (4) as:— 'commenced to carry on..... *an* employment' and not as 'commenced to carry on..... employment' If the respondent had joined the firm of Walker & Greig Ltd., on the 2nd March, 1932, instead of on the 1st March, as in this case, it will be conceded that he had no employment on the 1st March. Surely then, when he gets employed again after the cessation of his employment he 'commences' an employment. The fact that in this case there was no interval between the two 'employments' does not affect the question to be decided.

The word "employment" is used in the English Income Tax Act in two different senses and English decisions will not be of much assistance in deciding this case. The word "employment" may be used to mean that a person is doing something, as in Section 114 of the Criminal Procedure Code. If the words are read as 'an employment', such a meaning is not possible. Nor is the word used in the broad sense of a 'calling.' An 'employer' is an essential element

of the meaning of 'employment'. Read in this sense, a change of employers means also a change of employment. It is not necessary that a person should first engage himself in an activity to commence an employment. A re-commencement is also a commencement.

The *Respondent*, in person:- My business is that of an accountant which I commenced to carry on years ago. There was no change in my employment on the 1st. March, 1932. There cannot be a change of employment without a change in the nature of the employment. Take the case of a Proctor who practised in Kandy and then started practice in Colombo. There will be no change of employment when he did so. Though I left one employer and started work under another, I did not by so doing 'commence an employment'. A Chartered Accountant is often employed by a number of firms, but he does not carry more than one employment. If the Legislature intended that a change of employers amounted to a change of employment they would have said so in clear terms. In *May* v. *Falk*, (1932) 17 T. C. 218, the assessee who was secretary and director of a company resigned his office as secretary and was appointed a member of the executive committee of directors. It was held that membership of the executive committee did not constitute a new employment.

L.M.D. de Silva, Solicitor General, in reply, referred to *Seldon* v. *Croom—Johnson*, (1932) 1. K.B. 759.

DRIEBERG J.—

This is a case stated by the Board of Review under the provisions of Section 74 of the Income Tax Ordinance of 1932. The question is regarding the asessment of the income of the assessee for the year from 1st April 1932 to 31st March 1933. He is an Associate of the Chartered Institute of Secretaries and an accountant by profession and in the year preceding the year of assessment he was employed from the 1st April 1931 to the 28th February 1932 by Brown and Company Limited as accountant on a salary of Rs. 400/- a month; on 1st March he joined Walker and Grieg Limited as accountant on a salary of Rs. 650/- a month. Brown and Company Limited and Walker and Greig Limited are not connected concerns but are independent companies. His income was assessed at Rs. 7,800/-, that is on the basis of a monthly salary of Rs. 650/-. It was contended by the Income Tax Commissioner that in taking service under Walker and Greig Limited he had commenced an employment within a year preceding the year of assessment, that is, on the 1st of March 1932, and that as provided by Section 21 (4) of the Ordinance his statutory income for the year of assessment was his profits for one year from that date and that he was liable to pay on an income of

Rs. 7,800/-. The assessee contended that his statutory income for the year of assessment was the income actually received by him during the preceding year; this amounted to Rs. 5,050, eleven month's salary under Brown and Company at Rs. 400 a month and one month's salary under Walker and Greig Limited at Rs. 650. The Board of Review held in favour of the assessee and annuled the assessment under Section 11 (4). At the request of the Commissioner the Board have stated a case which is shortly this Did the assessee in entering the service of Walker and Greig Limited on the 1st of March 1932 commence an employment in Ceylon on that day so as to bring him within the provisions of Section 11 (4) of the Ordinance.

Sub-section 4 of Section 11 is one of several exceptions to the general manner of assessment laid down in sub-section 1 and it is necessary to consider the basis of assessment.

Section 11 (1) enacts that "Save as provided in this section, the satutory income of every person for each year of assessment from each source of his profits and income in respect of which tax is charged by this Ordinance shall be the full amount of the profits or income which was derived by him or arose or accrued to his benefit from such source during the year preceding the year of assessment, notwithstanding that he may have ceased to possess such source or that such source may have ceased to produce income."

We have two years to consider, "the year of assessment" and "the preceding year." A person is not taxed on the income of the preceding year as such but on his income for the year of assessment, and by an arbitrary rule his income for the preceding year is accepted as his income for the year of assessment : you do not tax the income of the preceding year but tax the income of the year of assessment and measure that income by that of the preceding year.

There are exceptions to this mode of assessment; provision is made in sub-section 6 for a cessation of income occurring during the year of assessment or during the preceding year, where it is due to the assessee ceasing to carry on a trade, business, profession, vocation, or employment in Ceylon; sub-sections 7 and 8 deal with incomes, from sources other than those stated in sub-section 6 of persons who become resident or cease to be resident on a day within the year of assessment or on a day within the preceding year. Sub-section 9 provides for death within the year of assessment and sub-section 10 deals with the assessment of income where a person receives a capital sum from the estate of a deceased person within a year of assessment.

I have mentioned these exceptions before referring to those dealt with in sub-sections 3 and 4 which deal with incomes from a certain source and which begin at a certain stated point of time. These are incomes derived from a "trade, business, profession, vocation, or employment in Ceylon" which a person has "commenced to carry on or exercise" on a day within a year of assessment (sub-section 3), or on a day within the year preceding a year of assessment (sub-section 4). The Income Tax Commissioner claims that the case falls within sub-section 4 which is as follows:- "Where on a day within the year preceding a year of assessment any person whether resident or non-resident has commenced to carry on or exercise a trade, business, profession, vocation, or employment in Ceylon, or, being a resident person, elsewhere, his statutory income therefrom for that year of assessment shall be the amount of the profits for one year from such day". If the assessee, when he entered the service of Walker and Greig Limited commenced an employment within the meaning of this sub-section, then his statutory income for the year of assessment commencing on the 1st of April 1932 would be the profits, which is another word for income, for one year from the 1st of March 1932 at the rate of Rs. 650/- a month. The Commissioner contends that this is so while the assessee says that he did not commence an employment when he entered the service of Walker and Greig Limited but that he did so when he first began to practise the profession or calling of an accountant.

The decision depends on the meaning of the word employment in this sub-section. According to ordinary usage it may mean that on which a person is employed and is synonymous with business or occupation; it is also used to indicate a particular contract of service under a particular master.

In the English Income Tax Act the word is used in both senses. Schedule D deals with " The annual profits or gains arising or accruing from any trade, profession, employment or vocation", and Schedule E deals with the incomes of persons "having or exercising an office or employment of profit." The distinction in the use of the word employment was explained by ROWLATT J. in *Davies* v. *Braithwaite* (1). The word as used in Schedule D means the way in which a man employs himself, and in Schedule E it means something analogous to an office. We are asked to apply the latter meaning to the word in sub-section 4.

Little help can be obtained by considering the meaning given to the word in other statutes and, as I have said, according to ordinary usage both meanings are possible.

The learned Solicitor-General pointed out the reasonableness of the construction he contended for. He said that if the assessee had taken employment under Walker and Greig Limited, not on a higher but on a reduced salary, let us say of Rs. 200/- a month, he would have been assessed on a statutory income of Rs. 2,400/- though the income actually received by him during the preceding year would have been Rs. 4,600-. While I agree with him that there is nothing unfair or unreasonable if the assessment is made on that basis, I do not think that is the right construction of this sub-section. There can be no question when a person commences to carry on or exercise a trade business, profession, or vocation; in the case of a doctor, for example, it would be the time when he first treats patients. It is contended, however, that a person may begin to practise a profession and later, while continuing to do so, "commence an employment" in the sense of an office of profit; for example, a doctor might follow his profession privately and while doing so accept a salaried office as doctor. He can rightly be said to commence an employment when he accepts that post. But I do not think the word "employment" is here used in that sense to indicate a particular contract of service but that it refers to occupations other than trades, businesses, professions or vocations. The assessee must be regarded as having commenced an employment as an accountant not when he took an appointment as such under Walker and Greig Limited but when he first began to do the work of an accountant taking remuneration for his services, and this he had begun to do before the year preceding the year of assessment.

The Members of the Board of Review were of opinion that Section 11 (4) only applied to the case of persons who had come out to Ceylon and commenced employment in Ceylon for the first time, within the year preceding the year of assessment. This is not correct, for the section deals with the commencement of employment by a person whether resident in Ceylon or not.

This sub-section and sub-section 3, which deals with commencement on a day within the year of assessment, provide for trades and other activities, regarded as sources of income, when they "first sail within the ambit of the Income Tax Act", to use the words of ROWLATT J. in *Fry (H.M. Inspector of Taxes)* v. *Burma Corporation Limited*, (2).

Sub-section 5 deals with the same source of income as sub-sections (3) and (4) and provides that where the "commencement" was within two years preceding the year of assessment that the Commissioner, on application made to him within twelve months of the year of assessment, shall reduce the assessment to the actual income earned

during the year of assessment. It appears to me that this is based on a recognition of the fact that the stability of incomes from such sources cannot be assumed and that the income of the preceding year is not as safe as an estimate of that of the year of assessment as in the case of occupations followed for a longer period before the year of assessment. I do not think this sub-section was intended to apply to persons who have for a long period been engaged on an occupation of a certain nature but who, within two years of the year of assessment, had a variation in income on going over to a new employer.

The assessment by the Board of Review of the assessee's income for the year 1932-1933 on the basis of his income for the year preceding the year of assessment is confirmed.

I make no order regarding costs.

BARBER A. J.—I agree.

Appeal dismissed.

Assessment by Board of Review confirmed.

[Reported in 35 N. L. R. 169.]

[**Note**:—The first step in the assessment of tax, under all Income Tax enactments, is to determine the particular *source* under which the assessee's income falls. S. 6 (1) of the Ceylon Income Tax Ordinance classifies "profits and income" under eight *sources*. S. (1) (*b*) deals with "the profits from any employment". It is submitted that the eight *sources* of "profits and income" described in S. 6 are exclusive of one another, in the same manner as the different Schedules of the United Kingdom Act and the six Cases of Schedule D. of the same Act are mutually exclusive.†

A persual of the Case Stated shows, though it is not expressly stated there, that the assessment in dispute was made on the basis that the assessee's income fell under S. 6 (1) (*b*), "profits of employment." An examination of sub-section (2) (*a*) of S. 6 suggests that the term "employment" is used in the Ordinance in the restricted sense of service under an employer. It may be noted that this sub-section corresponds, both in language and principle, to Rule 1 of the Rules applicable to Schedule E. as amended by S. 18 (1) of the Finance Act of 1922 and S. 45 (1) of the Finance Act of 1927, dealing with the basis of assessment of all offices or employments of profit. The dictum of DRIEBERG J. that "the word 'employment' is here used not in that sense to indicate a particular contract of service but that it refers to

† *Fry* v. *Salisbury House Estate Ltd.* (1930) A.C. 432; 15 T.C. 266, is authority for the proposition that the Schedules of the United Kingdom Act are mutually exclusive. For the view that the Cases of Schedule D. are also similarly exclusive of one another, see *Income Tax Principles* by Raymond W. Needham K.C. [Gee & Co., (Publishers) Ltd. London] and *Crowns' Option: Does the doctrine apply to Ceylon Income Tax* by K. Satia Vagiswara Aiyar [Ceylon Law Publishing Co. Colombo].

occupations other than trades, businesses, professions or vocations" appears to be contrary to the scheme of the Ceylon Ordinance which places "employment" in a category distinct from the "trade, business, profession, or vocation" of S. 6 (1) (*a*).†

DRIEBERG J. has also expressed the view that the word "employment" is used in two senses in the United Kingdom Act, namely, that on which a person is employed, where it is synonymous with business or occupation, and a particular contract of service under a particular master. According to this learned Judge, "Schedule D. deals with 'annual profits or gains arising or accuring from any trade, profession, employment or vocation', and Schedule E. deals with the incomes of persons 'having or exercising an office or employment of profit'..... The word as used in Schedule D. means the way in which a man employs himself, and in Schedule E. it means something analogous to an office"

The words "profession, employment or vocation" occurring in Schedule D. of the English Income Tax Acts right up to the Act of 1918 have been judicially defined. Dealing with these words in the Act of 1842, DENMAN J. said:—"I am not disposed to put so limited a construction on the word 'employment'..... I do not think that employment means only where one man is set to work by others to earn money; a man may employ himself so as to earn profits in many ways. But the word 'vocation' is analogous to 'calling,' a word of wide signification, meaning the way in which a man passes his life", *Partridge* v. *Mallandaine* [1886] 18 Q.B.D. 276, at p. 278; 2 T.C. 179, 180. Thus a book-maker, *Partridge* v. *Mallandaine*, supra, an actress, *Davies* v. *Braithwaite*, [1931] 2 K.B. 628; 18 T.C. 198; and a jockey, *Wing* v. *O' Connell*, [1927] I.R. 84, were held to have carried on a "vocation" or "profession" under Schedule D. of the United Kingdom Act.

The passage in the judgment of DRIEBERG J. referring to the two distinct senses in which the word 'employment" is used in Schedules D. and E. of the English Acts recalls the observations made by ROWLATT J. in *Davies* v. *Braithwaite* (supra) at p. 634 of the King's Bench Reports.

But ROWLATT J. refers, in the course of the same judgment at p. 633, to the change that took place in the law in 1922 in consequence of the view he expressed in *Great Western Railway Co.* v. *Bater*, (1920) 3 K. B. 266, in regard to the use of the word "employment" in Schedules D. and E. and the decision of the House of Lords approving his view, (1922) 2 A. C. 1. The Finance Act of 1922 was passed in consequence of this decision, by S. 18 of which "profits from an office, employment or pension" were, with certain exceptions, transferred from Schedule D. to Schedule E. Referring to this change, ROWLATT J. says in *Davies* v. *Braithwaite*, supra, at p. 635 :—It seems to me that when the Legislature took "employment" out of Schedule D. and put it into Schedule E. alongside "offices," the Legislature had in mind

† S. (1) For the purposes of this Ordinance, "profits and income" means:—
(*a*) the profits from any trade, business, profession, or vocation for however short a period carried on or exercised;
(*b*) the profits from any employment; .....

employments which were something like offices, and I thought of the expression "posts" as conveying the idea required. When a person occupies a post resting on a contract, and if then that is employment as opposed to a mere engagement in the course of carrying on a profession, I do not think that it is a very difficult term of distinction, though perhaps a little difficult to apply to all cases. But I would go further than that and say that it seems to me that where one finds a method of earning a livelihood which does not consist of the obtaining of a post and staying in it, but consists of a series of engagements and moving from one to the other—and in the case of an actor's, or actress's life it certainly involves going from one to the other and not going on playing one part for the rest of his or her life, but in obtaining first one engagement, then another, and a whole series of them—then each of those engagements cannot be considered an employment, but is a mere engagement in the course of exercising a profession, and every profession and every trade does involve the making of successive engagements and successive contracts and, in one sense of the word, employments.

"It is clear", says Judge Konstam K.C., commenting on this change in the law, "that the meaning of the world 'employment' in connection with Schedule E. is confined to employment under an employer (whether the latter be the Crown, an individual, or a corporation) and is not used in the wide sense of a 'calling or 'vocation'."* The position today, therefore, as far as the United Kingdon Acts are concerned, is that all *public* offices and employments of profit and all employments which are analogous to public offices and employments are charged under Schedule E. These "employments" are, as was pointed out by ROWLATT J. in *Davies* v. *Braithwaite*, (supra), at p. 635, those which are described in popular language as "posts."

See also, *per* ROWLATT J. in *Great Western Railway Co.* v. *Bater*, (1920) 3 K. B. 266, at p. 274; *per* LORD ATKINSON in the same case, (1922) 2 A. C. 11, at p. 14 and *per* FINLAY J. in *May* v. *Falk*, 17 T. C. 218, at p. 227.

It is submitted that in the local Ordinance the word "employment is used in the restricted sense of a "post" or "office." This view is confirmed by the circumstance that sub-sections 6, 7, 8, 9 and 10 of S. 76 of the Ordinance provide the concession of payment of tax by twelve monthly instalments to "any person whose principal source of income is *the profits of an employment*" and such profits are stated in those sub-sections as being payable by the *employer*.

If the word 'employment' is so understood, the assessee clearly commenced an employment in Ceylon on the 1st of March 1932, i.e., when he joined Walker & Greig Ltd. as accountant. The phrase "to commence an employment" is not new in the language of Income Tax Enactments, nor is the basis of assessment provided by sub-section 4 of S. 11 and the other sub-sections of the same section novel. Sub-section 4 corresponds, in principle and language, to S. 45 (4) (ii) of

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* *The Law of Income Tax*, 5th Edn., p. 247.

the Finance Act of 1927 and Rule 2 of the Rules applicable to Cases I & II of Schedule D. of the Act of 1918. S.45 (4) (ii) of the Act of 1927 is as follows:—

"Where the person *first held the office or employment*..... on some day in the year preceding the year of assessment other than the sixth day of April, income tax shall be computed on the amount of the emoluments for the year of assessment".

Rule 2 of the Rules applicable to Cases I and II of Schedule D. of the Act of 1918 is as follows:—

"Where the trade, profession, employment, or vocation has been *set up and commenced* within the year preceding the year of assessment the computation shall be made on the profits or gains for one year from the period of the first setting up of the same....."

The observation, therefore, of DRIEBERG J. that "Little help can be obtained by considering the meaning given to the word 'employment' in other statutes" is unfortunate as far as the sections quoted above from the English enactments are concerned. It is submitted that inasmuch as there is a close similarity of language and principle between the relevant sections of the local Ordinance and the United Kingdom Acts, the application of English Case law for the determination of the question raised in the Case Stated might have been quite helpful.

When a person has commenced to carry on or exercise a trade or an employment is a question of fact, see *May* v. *Falk*, supra. The words have no special statutory significance and are to be interpreted in their ordinary accepted meaning, see *per* LAWRENCE L.J. at p. 268, *Fry* v. *Burma Corporation Ltd.* (1930) 1 K.B. 249, also 17 Hals—2nd Edn—p. 110, Art. 208. A barrister who becomes a King's Counsel does not discontinue his profession as a junior barrister and set up a new profession as a King's Counsel, *Seldon* v. *Croom-Johnson*, (1932) 1 K.B. 759; 16 T.C. 740. The secretary and director of a company who, on resigning as secretary and being appointed a member of the executive committee of directors, received £5000 as compared with £300 a year payable to a director, was held not to have commenced a new office or employment, *May* v. *Falk*, supra. [See also, on the question of "commencing a business", *Fry* v. *Burma Corporation, Ltd.*, supra, (1930) 1 K.B. 249; 15 T.C. 113, C A; *Kirk and Randall Ltd.* v. *Dunn* (1924), 131 L.T. 288; 8 T.C. 633; *Merchiston Steamship Co., Ltd.* 1. *Turner*, (1910) 2.K.B. 923; 5 T.C. 520; *Birmingham and District Cattle By-Products Co., Ltd.* v. *Inland Revenue Commissioners*, (1919) C2 T.C. 92.]

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Present : MAARTENSZ A. J.

COMMISSIONER OF INCOME TAX *v.* F. W. DE VOS *

[S. C. No. 611—P. C. Colombo, No. 5512.]

Decided : *29th November, 1933.*

Recovery of Income Tax—Default committed by assessee—Issue of certificate by Commissioner to Police Magistrate for recovery of the tax in default as a fine—Regularity of procedure—Income Tax Ordinance, No. 2 of 1932, Ss. 79 (2) and (3) and 80 (1).

Scope of the proviso to S. 80 (1) pointed out.

The assessee was charged with tax in a sum of Rs 58/70. As he made default in the payment of the tax, the Commissioner of Income Tax issued a certificate to the Police Magistrate of Colombo in order that he might take further proceedings under S. 80 (1) of the Ordinance for the recovery of the tax. Summons was issued on the assessee in default to show cause why such further proceedings should not be taken against him. The assessee, while admitting that the amount of the tax was due, contested that the procedure adopted by the Commissioner was irregular. The learned Police Magistrate rejected this contention and fined the assessee in a sum of Rs 58/70 and sentenced him, in default of payment of the fine, to three months' imprisonment. On a petition presented by the assessee to the Supreme Court,

HELD (i) that as the proceeding in question was not of a criminal nature, the provisions of the Criminal Procedure Code regarding appeals do not apply to the order made against the assessee by the Magistrate,

(ii) That as the Commissioner of Income Tax is by the terms of Ss. 79 and 80 of the Income Tax Ordinance vested with absolute discretion as to what steps should be taken to recover the tax from the defaulter, he was entitled to proceed under S. 80 (1) without having resorted to the procedure laid down in S. 79 (2) and (3) and

(iii) that the Commissioner may even proceed under both Ss. 79 and 80 simultaneously for the recovery of the tax.

A petition by the assessee praying that an order made by E.H.R. Tenison Esq., Police Magistrate of Colombo, under S. 80 (1) of the Income Tax Ordinance of 1932 be set aside.

The assessee, a proctor of the Supreme Court, was charged with tax amounting to Rs. 58/70. He made default in the payment of the tax and the Commissioner of Income Tax, purporting to act under S. 80 (1) of the Ordinance, issued the following certificate to the Police Magistrate of Colombo:—

> I hereby certify that Mr. F.W. de Vos of..... has made default in the payment of Rupees fifty-eight and cents seventy (Rs. 58/70) being income tax due from him, the particulars of which amount appear hereunder.
>
> I am of opinion that recovery of the said tax in default by seizure and sale is inexpedient.
>
> (Sd) H. J. HUXHAM
> *Commissioner of Income Tax.*

* 35 N.L.R. 349; 2 C.L.W. 351 13 Cey. Law Rec. 221; 11 Times (Cey.) 141.

The Police Magistrate, thereupon, acting in terms of S. 80 (1) of the Ordinance issued a summons on the assessee to appear before him to show cause why further proceedings for the recovery of the tax should not be taken against him. The assessee appeared in Court in obedience to the summons and stated he had cause to show and the matter was fixed for inquiry, when an Assessor of the Income Tax Department gave evidence of the facts of the assessment of tax and the default made in payment thereof. The assessee stated on oath that he had property, both movable and immovable, available for satisfaction of the amount of the tax and that he had given particulars of such property to the Income Tax Department. He also stated that he was in a position to pay the amount of the tax in instalments of Rs. 2/50. He contested, however, the regularity of the procedure adopted by the Commissioner in having issued the certificate without having resorted to the remedies available to him under S. 79 (2) and (3). The learned Police Magistrate, by his Order dated the 14th July, 1933, rejected this contention and imposed on the assessee a fine of Rs. 58/70, the amount of the tax, and also sentenced him, in default of payment of the fine, to undergo three months' imprisonment. In doing so, the learned Magistrate stated, in the course of his Order, as follows :—

"The Assessor admits that he has made no inquiries in regard to Mr. deVos's movable property and further admits that the accused offered to pay the amount by instalments of Rs 2/50. The accused conducted his own defence and contested this case on the words of S. 80 (1) in which *inter alia* it is stated, 'The Police Magistrate shall thereupon summon such defaulter before him to show cause why further proceedings for the recovery of the tax should not be taken against him etc." The accused contended that he could not show cause why "*further*" proceedings should not be taken against him, as no proceedings at all had been taken under S. 79 (2) and (3) of the Income Tax Ordinance.

The matter is one of importance and raises an interesting legal point. [The learned Magistrate quoted here the procedure laid down by Ss. 79 and 80 (1) for the recovery of the tax and continued.—]

Under the proviso to S. 80 (1) a Magistrate's hands are tied and the contention of the Assessor in this case, that the certificate having been filed by the Commissioner precludes me from inquiring further, has to be upheld.

Now it would appear quite obvious that the correct procedure contemplated (and apparently not followed in this case) was that the Commissioner should take step

(A) Through the Government Agent, or Fiscal or

(B) Through the District Court and the Fiscal to have the property seized and sold.

If such methods, having been tried, failed, a plaint (a certificate) could be filed before the Magistrate.

If S. 80 (1) is read as completely distinct from S. 79, it would appear to give the Commissioner such autocratic powers as to allow him to file a plaint before the Magistrate without first following the normal procedure. I do not think, however, that such powers were ever contemplated, and, if used, would become a serious danger to the tax-payer.

Further on the face of the certificate, a Magistrate is not authorized to inquire into the correctness of this decision, even though the facts in the case which came out at the trial may show that the certificate is wrong, but the tax-payer would appear to have no redress.

As the law stands, I do not think the contention of the accused in regard to "further proceedings" can be upheld, but it is quite clear that the correct procedure has not been followed by the Income Tax Department in this case. The accused admits that the amount is due and on the face of the certificate I have to convict."

The accused, thereupon, filed a petition to the Supreme Court.

H.V. Perera for the assessee-petitioner.

H.L. Wendt for the Commissioner of Income Tax-respondent.

[The arguments of Counsel appear from the judgment.]

MAARTENSZ A.J.—This is an appeal by an assessee against whom an order has been made in a proceeding under Section 80 (1) of the Income Tax Ordinance, 1932.

The proceeding is not of a criminal nature and the provisions of the Criminal Procedure Code regarding appeals do not apply to the order made against the appellant. The Ordinance makes no provision for appeals from orders made under Section 80, and I do not think the appellant has a right of appeal; but as the objections to the order have been fully discussed, I shall treat the appeal as an application for revision.

Section 80 is one of a series of sections enacted for the purpose of recovering income tax from a person in default.

Section 79 (2)† provides for the recovery of the tax by seizure and sale of the movable property of the defaulter. Sub-section 3 provides for the recovery of the tax by seizure and sale of the movable and immovable property of the defaulter on the writ of execution issued by a District Court having jurisdiction in any district where the defaulter resides or in which any property, movable or immovable, owned by the defaulter is situated.

It was conceded that these remedies were alternative to each other. Section 80 (1) enacts:—

"Where the Commissioner is of opinion in any case that recovery of tax in default by seizure and sale is impracticable or inexpedient, or where the full amount of the tax has not been recovered by seizure and sale, he may issue a certificate containing particulars of such tax and the name and last known place of business or residence of the defaulter to a Police Magistrate having jurisdiction in the division in which such place is situate. The Police Magistrate shall thereupon summon such defaulter before him to show cause why further proceedings for the recovery of the tax should not be taken against him, and in default of sufficient cause being shown, the tax in default shall be deemed to be a fine imposed by a sentence of the Magistrate on such defaulter for an offence punishable with fine only or not punishable with imprisonment, and the provisions of sub-section 1 of section 312 [except paragraphs (a), (c) and (h) thereof)]of the Criminal Procedure Code, 1898, relating to default of payment of a fine imposed for such an offence shall thereupon apply, and the Magistrate may make any direction which, by the provisions of that sub-section, he could have made at the time of imposing such sentence."

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†8.79 (2) (*a*) Where any tax is in default, the Commissioner may issue a certificate to a Government Agent, Assistant Government Agent, Fiscal, Deputy Fiscal or Income Tax Collector containing particulars of such tax and the name of the defaulter, and the officer, to whom such certificate is issued shall be empowered and is hereby required to cause the tax to be recovered from the defaulter named in the certificate by seizure and sale of his movable property.

.....

(3) Where any tax is in default, and the Commissioner is of opinion that recovery by the means provided in sub-section (2) is impracticable or inexpedient, he may issue a certificate to a District Court having jurisdiction in any district where the defaulter resides or in which any property movable or immovable owned by the defaulter is situate, containing particulars of such tax and the name or names of the person or persons by whom the tax is payable, and the Court shall thereupon direct a writ of execution to issue to the Fiscal authorizing and requiring him to seize and sell all and any of the property movable and immovable of the defaulter or such part thereof as he may deem necessary for recovery of the tax, and the provisions of sections 226 to 297 of the Civil Procedure Code shall, *mutatis mutandis*, apply to such seizure and sale.

It is clear from the evidence in the case that the Commissioner of Income Tax moved the Police Court under the provisions of Section 80 (1) without taking either of the steps provided by Section 79 for the recovery of the tax.

The main contention of the appellant was that the Commissioner of Income Tax was not entitled to proceed under Section 80 (1) until he had ascertained that proceedings under Section 79 had failed or were likely to fail.

In support of this contention it was pointed out: (*a*) that a proceeding under Section 80 (1) was of a more drastic character than the proceedings provided for by section 79; (*b*) that section 80 (1) provided for the defaulter showing cause against further proceedings being taken against him and it was urged that the proceedings referred to were the proceedings provided for by section 79; (*c*) that the phraseology of section 79 (3) differed from the phraseology of section 80 (1) which indicates that section 80 (1) should be resorted to after steps had been taken under section 79. I am unable to accept this contention. As regards the first objection the mere fact that a proceeding under the section is of a more drastic character than the proceedings provided for by another section does not limit the discretion of the person entitled to put the sections into operation.

As regards the second, the proceedings mentioned in section 80 (1) do not, in my opinion, refer to proceedings under section 79 but to proceedings under the section itself. The defaulter can show cause against further proceedings by showing that the place where he resided or carried on business was outside the jurisdiction of the Magistrate, or that he was entitled to a stay of proceedings for the reasons set out in sub-section 2 of the section.

As regards the change in phraseology, I do not think it has the effect contended for by the appellant. Section 79 (3) provides that "where any tax is in default and the Commissioner is of opinion that recovery by the means provided in sub-section (2) is impracticable or inexpedient, he may issue a certificate to a District Court having jurisdiction... ....." for the purpose of having the movable or immovable property of the defaulter seized and sold by the Fiscal. At that stage the only other remedy was by seizure and sale of the movable property. It was necessary, however, in section 80 to refer to both remedies and accordingly it provides that where the Commissioner is of opinion in any case that recovery of tax in default by seizure and sale is impracticable or inexpedient or where the full amount of the tax has not been recovered by seizure and sale he may issue a certificate.

The only difference is that in section 79 (2) movable property is specified while in section 80 (1) the nature of the property is not specified. There is nothing in the difference of phraseology to indicate that the proceedings provided for by section 79, sub-sections (2) and (3), must be resorted to before the Commissioner takes action under section 80 (1).

The Commissioner is, in my opinion, by the terms of the sections vested with absolute discretion as to what step should be taken to recover the tax from the defaulter. He may even proceed under both section 79 and section 80 simultaneously ; for section 83 enacts that

"Where the Commissioner of Income Tax is of opinion that application of any of the provisions of this Chapter has failed or is likely to fail to secure payment of the whole of the tax due from any person it shall be lawful for him to proceed to recover any sum remaining unpaid by any other means of recovery provided in this chapter, save where an order has been made by a Police Magistrate under Section 80 and carried into effect."

I am, therefore, unable to agree with the learned Magistrate's opinion that the Commissioner should first proceed under section 79 (2) and (3) of the Ordinance and that he can only proceed under section 80 (1) if such steps have failed.

I am also unable to agree with the learned Magistrate that the proviso to section 80 (1) precluded him from deciding whether the Commissioner had properly exercised his discretion. It is true the certificate states that the Commissioner is "of opinion that recovery of the said tax in default by seizure and sale is inexpedient "; but that is not a particular which the Commissioner is required to state by section 80 (1) and is, therefore, not a statement to which the proviso, which enacts as follows :—

"Provided that nothing in this section shall authorize or require the Magistrate in any proceeding thereunder to consider, examine, or decide the correctness of any statement in the certificate of the Commissioner", applies.

The appeal is dismissed and the application for revision of the order refused.

Appeal dismissed.

[**Note**:—The procedure for the recovery of income tax in default is laid down in Chapter XIII of the Income Tax Ordinance, Ss. 77—83. This procedure may, in the light of the judgment reported above, be summarised as follows:

A. The issue of a certificate by the Commissioner of Income Tax to any one of the officers mentioned in S. 79 (2) (*a*) and the seizure and sale by such officer of the *movable* property of the assessee—section 79 (2)

B. The issue of a certificate by the Commissioner to a District Court having jurisdiction and by the issue thereupon by such Court to the Fiscal authorizing him to seize and sell *all and any* of the property *movable and immovable* of the defaulter, in conformity with the provisions of sections 226 to 297 of the Civil Procedure Code—section 79 (3).

C. The issue of a certificate by the Commissioner to a Police Magistrate having jurisdiction and the recovery of the tax in default by the said Magistrate as a fine imposed by a sentence of the Magistrate on such defaulter for an offence punishable with fine only or not punishable with imprisonment—section 80 (1).

D. The issue of a notice in writing by the Commissioner to any person who owes or is about to pay money to the assessee in default, etc., requiring the person noticed to pay any such money not exceeding the amount of the tax in default to the officer named in such notice—section 81.

E. The issue of a certificate by the Commissioner to a Police Magistrate to the effect that any person is *about to* or *likely to leave Ceylon* without paying all tax assessed upon him and the issue by such Magistrate on receipt of the said certificate of a direction to the Inspector-General of Police to take such measures as may be necessary to prevent such person from leaving Ceylon without paying the tax or furnishing security to the satisfaction of the Commissioner for payment thereof—section 82.

F. (a) As the Commissioner is vested with absolute discretion as to what steps should be taken to recover all the tax due from a defaulter, he is entitled to issue a certificate to a Police Magistrate under S. 80 (1) without having resorted to the procedure of recovery by seizure and sale laid down in S. 79 (2) and (3)—decision of the Supreme Court.

(b) Where the Commissioner is of opinion that the application of any one of the means described in A,B,C,D or E above *has failed* or *is likely to fail* to secure payment of the whole amount of the tax due from any person, it shall be lawful for the Commissioner to proceed to recover any sum remaining unpaid by any of the other means of recovery specified above, save where an order has been made by a Police Magistrate under C above, section 80, and carried into effect—section 83. According to the judgment of the Supreme Court, the effect of this provision is to authorize the Commissioner to proceed under both Ss. 79 and 80 simultaneously, in other words, he may use, at the same time, more than one means of recovery of tax.

(c) The procedure taken by a Police Magistrate against an assessee in default under S. 80 (1) is not of a criminal nature and the provisions of the Criminal Procedure Code regarding appeals do not apply to an order made by a Magistrate under the said section—decision of the Supreme Court.

(d) An assessee in default noticed by a Police Magistrate under S. 80 (1) to show cause why further proceedings should not be taken against him for the recovery of the tax can show that the place where he resided or carried on business was outside the jurisdiction of the Magistrate or that he was entitled to a stay of the proceeding for the reason that the tax was in excess of the sum which should have been charged from him and that, inasmuch as he had not appealed against the assessment within the proper time, he might have an opportunity to submit to the Commissioner his objection to the tax. Except under such circumstances, the Magistrate cannot stay the proceeding taken against the assessee in default—section 80 (2) and decision of the Supreme Court.

(e) The language of S. 79 (2) and (3), particularly the words "*all and any* of the property movable and immovable of the defaulter," makes it clear that the Ordinance exempts no property belonging to the assessee from being available for payment of the tax. This is in conformity with English law under which even implements of trade of the assessee may be seized—*Hutchins* v. *Chambers*, (1758) 1 Burrows, 579 and *MacGregor* v. *Clamp*, (1914) 1 K.B. 288.

(f) Sub-sections (1) and (4) of S. 76 of the Ordinance state when tax is "deemed to be in default". S. 76 (1) also lays down that the notice of assessment should specify a date on or before which the tax charged has to be paid. The Board of Income Tax prescribes, under S. 91 of the Ordinance, the Form of the notice of assessment and such Forms, varying according as the assessee is an individual or a company etc., resident or non resident, have already been prescribed. A perusal of these Forms shows that it is within the discretion of the Assistant Commissioner, who is empowered under S. 67 of the Ordinance to sign the notice of assessment, to fix the period within which the amount of the tax charged has to be paid.

It is a rule of construction, particularly of fiscal enactments, that it is not open to the Court, much less then to the subject, to inquire what the intention of the Legislature was in passing an enactment, if the words thereof are sufficiently clear and un-ambiguous. It is not, therefore, permissible to inquire whether the State Council *intended* to vest the Commissioner of Income Tax with the powers which the plain language of sections 79 to 83 clearly grants him.

The local procedure for the recovery of tax avoids the scrupulous regard which the British Legislature has paid to the person and property of the subject. Sections 153 to 176 of the United Kingdom Act of 1918 deal with the collection of tax. The provisions for the recovery of tax in England vary in certain minor respects from those applicable to Scotland and Ireland. As far as England is concerned, S. 162 (1) provides that if a person neglects or refuses to pay the sum charged, upon demand made by the collector in accordance with the assessments and warrants delivered to him, distraint may be made. S. 165 (1) provides that, *if no sufficient distress can be found*, the defaulter may be committed to prison under a warrant of the General Commissioners, but the General Commissioners will not issue a warrant unless 10 clear days have elapsed after the service of the demand. S. 169 (1) provides that "any tax charged under the provisions of this

Act may be sued for and recovered, with full costs of suit, from the person charged therewith, in the High Court as a debt due to the Crown, or by any other means whereby any debt of record or otherwise due to the Crown can, or may at any time, be sued for and recovered, *as well as by the summary means* specially provided by this Act for levying the tax."

Though the phraseology of the above provision may appear to suggest that, as under the local Ordinance, recovery of tax may be made by the application simultaneously of more than one of the means provided by the Act, the British Legislature has provided sufficient safeguards for the prevention of any hardship or injustice. The High Court causes process to be issued either on a Schedule of arrears delivered on oath by a collector and certified to the Court by the Commissioners of Inland Revenue or on a Schedule of defaulters made by the General Commissioners and certified to the Court by the Commissioners of Inland Revenue. But a Schedule of defaulters cannot be certified to the High Court, nor is it an authority for the issue of process, unless the collector has stated on oath, under S. 175 (5), that no distress can be found.]

Present: MACDONELL C. J. AND GARVIN S. P. J.

HAKIM BHAI v. COMMISSIONER OF INCOME TAX*

[*S. C. No. 96 (1933)—Special*]

Decided: *22nd February, 1934.*

Business of money-lending--Loans on security of promissory notes and I. O. U.'s—Interest at 18 per cent. per annum shown on instruments —Return showing income from loans calculated at the said rate of interest —Assessment made on an estimate based on the difference between the sums appearing on the face of the documents as having been lent and the sums ass med to have been lent—Finding by Board of Review confirming assessment—Legality.

Income from loans – Is it restricted to interest?—Meaning of profit— Income Tax Ordinance, No. 2 of 1932, Ss. 6 (1) (a) and (g), 47† and 52 (2).

The assessee, an Afghan carrying on the business of money-lending in Colombo, furnished his return showing his income for the year preceding the year of assessment as having been derived solely from interest at the rate of 18 per cent. per annum which he stated he received on the loans he had advanced on the security of promissory notes and I. O. U. 's. On appeal to the Commissioner of Income Tax and the Board of Review against an assessment made by the Assessor on an estimate of the assessee's income from his business, these tribunals found that his profit or income from his business consisted not only of the interest at the said rate which was admitted by him to have been received, but also of a further sum namely, the difference between the sums appearing on the face of the instruments to have been lent and the smaller sums which were actually lent in respect of each of those instruments.

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*(1934) 35 N. L R. 291

†Repealed and added, with a slight alteration, as sub-section (3) of S. 9 by the Amending Ordinance No. 27 of 1934.

HELD (i) that as the Board of Review had found as a fact that the assessee would pay to his borrower one sum but would require the borrower to admit his indebtedness in, or to promise repayment of, a larger sum, the difference between the larger sum and the smaller sum was a profit within the meaning of S. 6 (1) *(a)* of the Income Tax Ordinance and as such was liable to be charged with tax and

(ii) that S. 47 of the Ordinance was not inconsistent with the Crown's right to assess, for the purpose of income tax, the whole of the profits whether it consisted of interest or any other form of profit, which a money lender derived from his business.

Per MACDONELL C. J.— "Loans may produce to the lender that kind of income called interest taxable under the Ordinance as interest, section 47, but they may produce a further profit or income derived otherwise than by way of interest on those loans which further profit or income will be taxable under the Ordinance, by section 11 (1) read in conjunction with section 13 and section 14, if falling within the definition of profit or income given in section 6 (1). On the facts stated, the difference between the sum named by this applicant in his business instruments as the sum repayable and the sum which he actually lent will be a profit within section 6 (1), and the recording in a business instrument one sum as lent while at the same time lending a smaller sum to the person bound by that instrument, may, possibly, be a disposition not in fact given effect to within section 52 (2), and if so liable to be disregarded under that section. The business instruments of the applicant were not conclusive evidence of the transactions recorded therein but could be contradicted by parol evidence."

Case stated under S. 74 (2) of the Income Tax Ordinance, No. 2 of 1932, by the Board of Review constituted under S. 70 of the Ordinance.

The assessee was a member of the 'Afghan' community in Ceylon. He was a native of Baluchistan in British India and carried on the business of money-lending in Colombo. During the year April 1931—March 1932, ie, the year preceding the year of assessment, he was resident in Ceylon within the meaning of the Income Tax Ordinance. For the year of assessment, April 1932—March 1933, he rendered a return showing his income for the year preceding the year of assessment to be Rs. 2,783/-. He supported his return by a statement containing the names of his debtors, the nature of the documents on which he had advanced the loans and the interest which he had received from each of his debtors. The statement disclosed that the assessee had lent money invariably on promissory notes and I. O. U's which carried interest at 18 per cent. per annum. The assessee declared that his method of business was to lend money on such documents and that his only income was from interest which he had received from his debtors at the rate of 18 per cent. per annum.

The Assessor rejected this return on the ground that it did not disclose the true facts regarding the assessee's business and, acting under S. 64 (2) (*b*) of the Ordinance, he estimated the assessee's assessable income from his business to be Rs. 9,080/- and charged him with tax Rs. 138/20. The assessee, thereupon, appealed to the Commissioner of Income Tax. At the hearing of the appeal, the assessee gave evidence on oath supporting the facts which he had stated in his return. The Commissioner called two witnesses, who, according to the assessee's statement of accounts had borrowed money from the assessee on promissory notes and I. O. U.'s These witnesses gave evidence to the effect that in regard to a loan advanced to each of them by the assessee the sums of money shown as lent were 50% more than the actual sums lent and that in respect of these transactions, they repaid the assessee in instalments the sums appearing on the face of the documents to have been lent, the difference between the sums actually lent and the sums appearing on the face of the documents being the assessee's income or profit in respect of such transactions. The Commissioner allowed to be read in evidence extracts from a report prepared by an officer of the Colombo Municipality, the Charity Commissioner, purporting to show that it was the practice of 'Afghan' money-lenders to lend sums of money considerably less than what was stated on the documents to have been lent and that the difference represented their profits or income. This officer, however, was not called to give evidence at the hearing of the appeal, and the Commissioner over-ruled the objection taken to the admissibility of these extracts from the Charity Commissioner's Report on the ground that the provisions of the Evidence Ordinance relating to the admissibility of evidence did not apply to the hearing of appeals before him. Acting, therefore, on the evidence above referred to, the Commissioner confirmed the assessment made by the Assessor and accordingly recorded his determination. The assessee appealed to the Board of Review, who in turn confirmed the assessment as determined by the Commissioner. The assessee applied then to the Board of Review to state a case for the opinion of the Supreme Court on the questions of law which had arisen for determination and the Board stated and signed the following

CASE STATED

Upon the application of Seyed Hakim Bai

1. At a meeting of the Board of Review held on the 10th February, 1933, for the purpose of hearing appeals under the provisions of section 73 of the Income Tax Ordinance, Seyed Hakim Bhai, hereinafter called the applicant, appealed against an assessment of Rs. 9,080/., tax Rs. 138/20, made upon him for the year ending 31st March, 1933.

2. The following facts were admitted or established to the satisfaction of the Board:—

(a) The applicant is a member of the "Afghan" community in Ceylon. He is a native of Baluchistan in British India. For the year in question he was resident in Ceylon within the meaning of the Income Tax Ordinance.

(b) The applicant carries on in Colombo the business of a money-lender

(c) His method of conducting his business is to lend money on the security of promissory notes or I.O.U's. These documents state on the face of them that the client has borrowed a certain stated sum of money, and in every case it is stipulated that interest at the rate of 18% per annum shall be paid thereon. The applicant never lends money except on the security of documents of this nature.

(d) The applicant has rendered a return, supported by a statement of accounts, declaring that his only income was from interest at 18% per annum on all loans secured as mentioned above, the amount for the year preceding the year of assessment being Rs. 2,783/-.

(e) The applicant's usual method of conducting business was to take as security for any loan a promissory note or an I.O.U. for a considerably larger sum which is repayable by instalments spread over a certain period.

(f) His profit did not consist of interest at 18% per annum on the amount stated in the promissory note or I.O.U. as the principal sum lent, but the difference between that sum and the sum actually lent and

(g) The Return furnished by him did not truly disclose the whole of his income for the year from his business as a money-lender.

3. It was contended on behalf of the applicant:—

(a) That the applicant's return and statement are correct and should be accepted.

(b) That the whole of the applicant's business consisted in lending money on the security of promissory notes and I.O.U's and these, being written documents setting out particulars of transactions, must be regarded as conclusive evidence of those transactions; that no oral evidence could be led to contradict them and that the Board must arrive at its determination on the assumption that the documents correctly represented the transactions.

(c) That the applicant's sole income was from interest on loans and that under section 47 of the Income Tax Ordinance his income from

that source should be the full amount of interest "falling due". The amount of interest falling due, it was argued, is the amount secured to and legally recoverable by the applicant on the documents. If the applicant does in fact receive sums in excess of the amounts secured to him, such sums were not income within the meaning of the Income Tax Ordinance and were not taxable as only such interest as can be recovered at law on the documents should be taken into consideration.

(d) That the applicant was entitled to exemption under the provisions of section 15 of the Income Tax Ordinance.

4. It was contended in support of the assessment:—

(a) That the applicant's return and statement did not disclose the true facts regarding his business and should be rejected.

(b) That the question at issue was not what sum could be legally recovered as interest on certain documents, but a pure question of fact, namely, what was the amount of the profit derived by the applicant from his business as moneylender.

(c) That the applicant had been assessed on the profits from a trade or business under the Income Tax Ordinance, section 6 (1) (*a*). Section 47 refers solely to the determination of income from interest, which is assessable under section 6 (1) (*e*). Section 47 had no application to an assessment made under section 6 (1) (*a*).

(d) That the profit derived by the applicant consisted of the difference between the nominal amount of the promissory note or I.O.U. and and the sum actually advanced. This defference was not interest and section 47 had no application thereto.

(e) That the promissory notes and I. O. U.'s, in so far as they related to the payment of interest, were "dispositions which were not given effect to" within the meaning of section 52 (2). The Assessor had disregarded such dispositions, and was entitled to do so by virtue of that section.

(f) That under section 73 (4) of the Income Tax Ordinance the onus of proving that the assessment was excessive lay on the applicant. He had failed to prove that the assessment was excessive. The assessment should, therefore, be confirmed.

5. We, the Members of the Board who heard the appeal, gave the following decision:—

"The Board of Review having heard the Counsel for the appellant, and the Assistant Commissioner on behalf of the Assessor, confirm the assessment as determined by the Commissioner.

The Board orders the appellant to pay the sum of Rs. 100/-, as costs.

'The Board came to the conclusion that the matter before them for decision was a pure question of fact, and it was not prepared to accept the statement of accounts submitted by the appellant as a true return of his income".

6. The applicant on 23rd February, 1933, required us to state a case on a question of law for the opinion of the Supreme Court which Case we have accordingly stated and signed.

H. M. Fernando,
E. S. Captain,
F. G. Morley.

Colombo,

Members of the Board of Review.

**F. A. Hayley* K. C., with him *K. Satia Vagiswara Aiyar*, for the assessee-appellant.—The Case Stated is open to objection for many reasons. The Board of Review must state a case which the applicant requires and not any other case. The main point contested before the Board was whether the Commissioner of Income Tax was justified in confirming the assessment on the evidence which was adduced before him and whether it was open to him to allow oral evidence to be led to contradict or vary the contents of the promissory notes and I.O.U.'s in the possession of the assessee.

The Stated Case here does not clearly raise the questions of law which your Lordships' Court has to determine. The point for determination is whether income from loans consists solely of interest or whether it comprises something more. The appellant's income was all derived from loans. Under S. 47 of the Ordinance the receipt of interest on these loans is not a condition precedent to liability to tax. That section lays down that tax is leviable on interest which falls due, whether it is received or not. Conversely, if there is a writing, a promissory note or an I. O. U., as in this case, by which a creditor agrees to recover a certain rate of interest, namely, the rate appearing on the face of the documents, the fact there was an arrangement by which the debtor agreed to pay a larger sum does not affect the amount of the tax. It is not interest falling due under S. 47. Interest falling due is interest legally recoverable.

L. M. D. de Silva, K. C., Solicitor General, with him *H. L. Wendt* C. C., for the Commissioner of Income Tax-respondent.—The assessment in this case has been made under S. 6 (1) (*a*), profits of business. S. 47, therefore, does not apply here. Even if S. 47 were to apply to this case, that portion of the assessee's income represented by the interest which has fallen due would be taxable under that section and

* Only a brief summary of the arguments dealt with in the judgments is given here.— Ed.

the remainder of the income that he has received will be taxable as profits under other sections of the Ordinance. Further, it has been held by the Privy Council that profit arising from illicit traffic in liquor is 'income' which is liable to taxation, *Minister of Finance* v. *Smith*, (1927) A. C. 193. In the same way, even if the appellant's profits consist of interest not legally recoverable, they can be taxed.

S. 52 (2) deals with artificial or fictitious transactions and provides that the assessor may disregard any transaction or disposition, the effect of which would be to reduce the amount of the tax payable by any person. The taxing authority has, under the Ceylon Ordinance, greater powers than are conferred upon him by the Income Tax Acts of England and India. S. 73 (7) of the Ordinance is intended to confer upon the Board of Review such power as to dispense with the formalities of the rules of evidence. The finding of the Board on a question of fact will not be reviewed by this Court, and what we have here is purely a question of fact, namely, the profit derived by the appellant from his business of money-lending.

F. A. Hayley was heard in reply.

MACDONELL C. J.—This was a case stated, under section 74 (2) of the Income Tax Ordinance, No. 2 of 1932 by the Board of Review, a body constituted under section 70 of that Ordinance. Section 64 of the Ordinance provides that an Income Tax Assessor appointed under the Ordinance can require any person, in his opinion chargeable with Income Tax, to furnish a return of income upon which the Assessor can make an assessment, or the Assessor can make one, disregarding the return or even if the person has furnished no return. If the person against whom an assessment is made objects to it, he can under section 69 appeal to the Commissioner. Under that section the Commissioner can institute further inquiry with a view to obtaining an agreement between the Assessor and the person assessed, sub-section (2), and failing such agreement shall fix the time and place for the hearing of the appeal to him, sub-section (3), to which hearing he can, "summon any person whom he may consider able to give evidence respecting the appeal to attend before him at the hearing and may examine such person on oath or otherwise", sub-section (5), and he may "in disposing of an appeal... .....confirm, reduce, increase, or annul the assessment", sub-section (6). If the person assessed is dissatisfied with the decision of the Commissioner on the appeal under section 69, he can give notice of appeal to the Board of Review, section 71 (3). The hearing and disposal of an appeal to that Board are regulated by section 73 which provides for the attendance at it of the appellant personally or by representative, sub-section (2), and of the Assessor or other authorized person in support of the assessment, sub-section (3). The rest of section 73 is as follows:—

(4) The onus of proving that the assessment as determined by the Commissioner on appeal, or as referred by him under section 72, as the case may be, is excessive shall be on the appellant.

(5) All appeals shall be heard in camera.

(6) The Board shall have power to summon to attend at the hearing any person whom it may consider able to give evidence respecting the appeal and may examine him as a witness either on oath or otherwise. Any person so attending may be allowed by the Board any reasonable expenses necessarily incurred by him in so attending.

(7) At the hearing of the appeal the Board may, subject to the provisions of section 71 (4), admit or reject any evidence adduced, whether oral or documentary, and the provisions of the Ceylon Evidence Ordinance, 1895, relating to the admissibility of evidence shall not apply.

(8) After hearing the appeal, the Board shall confirm, reduce, increase, or annul the assessment as determined by the Commissioner on appeal, or as referred by him under section 72, as the case may be, or make such orders thereon as to the members present may appear fit.

(9) Where under sub-section (8) the Board does not reduce or annul such assessment, the Board may order the appellant to pay as costs of the Board a sum not exceeding one hundred rupees, which shall be added to the tax charged and recovered therewith.

The provisions of the Ordinance as to cases stated, such as that now before us, are contained in section 74 which enacts as follows:—

[His Lordship quoted here S.74† and proceeded.—] It is sufficient for the moment to say of this section that under it the Supreme Court has power to hear the point of law stated in the case and to determine it,

† The relevant portions of S. 74 are:—

S. 74 (1) The decision of the Board shall be final: provided that either the appellant or the Commissioner may make an application requiring the Board to state a case on a question of law for the opinion of the Supreme Court.....

(2) The stated case shall set forth the facts and the decision of the Board, and the party requiring it shall transmit the case, when stated and signed, to the Supreme Court within fourteen days after receiving the same.

(3) .....

(4) The Supreme Court may cause a stated case to be sent back for amendment and thereupon the case shall be amended accordingly.

(5) The Supreme Court shall hear and determine any question of law arising on the stated case and may in accordance with the decision of the Court upon such question confirm, reduce, increase or annul the assessment determined by the Board, or may remit the case to the Board with the opinion of the Court thereon. Where a case is so remitted by the Court, the Board shall revise the assessment as the opinion of the Court may require.

and to require the confirmation, reduction, &c., of the assessment in question in accordance with such determination. The Court can also send the case back for amendment by the Board and this might be necessary, for instance if the point of law for determination was imperfectly stated. [His Lordship then set out the Case Stated and continued.—]

In argument before us the form of this case was variously criticised and it is indeed open to objection on several grounds. It does not clearly raise what is the point of law we are to determine and paragraphs 4 (b) and (5) describe as "pure questions of fact" what are in reality mixed questions of law and fact. Thus, paragraph 4 (b) "the amount of profit derived by the applicant from his business as money-lender" involves a question of fact, namely, what amount of money the applicant has received from that business but it also involves questions of law, for instance, the interpretation of section 6 (1) of the Ordinance, and, having regard to other portions of the case, of section 47 also, possibly of other sections as well. None the less, though the case has been inartificially stated, it is perfectly possible to extract from it certain questions of law which therefore we can answer.

The gist of the facts set out in this case is that the applicant being a money-lender takes from his borrowers promissory notes or I. O. U.'s, wherein the borrowers acknowledge themselves to be indebted to him in a certain sum and promise to repay that sum with interest thereon at 18 per centum per annum, and the applicant claims that his sole income is the interest on the loans as stated in these documents, namely, the 18 per cent, and that, if he does, in fact, receive from his borrowers something over and above that interest and over and above the sums they bind themselves to repay, these extra amounts he so receives are not 'income' within the meaning of the Ordinance and so not taxable thereunder. This contention involves a consideration of section 47* of the Ordinance, the material portion of which is as follows:— "Income arising from interest on loans, mortgages, and debentures shall be the

*S. 47 of the principal Ordinance No. 2 of 1932 ran as follows:—"Income arising from interest on loans, mortgages, and debentures shall be the full amount of interest falling due, whether paid or not. Where, however, any person proves to the satisfaction of the Commissioner that any such interest is unpaid the Commissioner may direct that payment of the tax charged in respect thereof be deferred for such time as he may deem necessary, and where it is proved that any such interest cannot be recovered, any assessment which includes such interest shall, notwithstanding the provisions of S. 75, be reduced by the amount of interest included which has been shown to be irrecoverable."

By the Amending Ordinance No. 27 of 1934, this section was repealed but added as sub-section 3 of S. 9 in following form:— "*Income arising from interest* shall be the full amount of interest falling due whether paid or not, *without any deductions for outgoings or expenses.....*"

full amount of interest falling due, whether paid or not". This provision deals only with that kind of income from loans which can be described as 'interest', it says so; it does not profess to deal with any other income which may possibly arise from loans. All interest from loans is income but it does not therefore follow that all income from loans is interest—it is the familiar, all terriers are dogs but all dogs are not terriers.

This consideratien of section 47 shows negatively that in the case of loans, 'interest' does not necessarily comprise all the income that may be derivable from loans. Is there anything in the Ordinance which states positively that income derived from loans other than interest on those loans is income taxable under its provisions? Section 6 (1) defines 'profits and income' to mean "(*a*) the profits from any trade, business, profession or vocation", also "(*g*) rents, royalties, and premiums". Having this definition of 'profits and income' we find from section 11 (1) that, save for certain exceptions not claimed in this case, "the statutory income of every person for each year of assessment from each source of his profits and income in respect of which tax is charged by this Ordinance"—loans are a source in respect of which tax is charged—"shall be the full amount of the profits or income which was derived by him or arose or accrued to his benefit from such source during the year preceding the year af assessment". From this 'statutory income' as defined in section 11 (1), there must be deducted under section 13 certain matters or allowances, none of which have been claimed in the present case, to arrive at the 'assessable income' of any person, and when that deduction has been made—here there is nothing to deduct—you arrive at the taxable income of the person, section 14. The taxable income, then, of any person is his statutory income, less certain deductions which do not require to be made in this case, and his statutory income is the full amount of the profit or income which was derived by him or arose or accrued to his benefit from any source thereof taxable under the Ordinance,—loans are a taxable source—and the phrase 'profits and income' includes profits from any business, section 6 (1) (*a*), and also premiums, section 6 (1) (*g*). Then there is positive enactment that income derived from loans, other than interest on these loans, is taxable income under this Ordinance.

Now this being the law, as disclosed in the sections quoted, it remains to apply it to the facts stated in the case before us. Paragraphs 2 (e) and (f) of that case are as follows:- " (e) The applicants's usual method of conducting business was to take as security for any loan a promissory note or I.O.U. for a considerably larger sum which is repayable by instalments spread over a certain period. (f) His profit did not consist of interest at 18 per cent. per annum on the amount stated in

the promissory note or I.O.U. as the principal sum lent, but the difference between that sum and the sum actually lent". In the by-going, we may note that it was conceded in argument that there was evidence before the Board for the finding of fact contained in these paragraphs 2 (c) and (f) as far as they do contain findings of fact, for they also contain a proposition of law, though the adequacy of that evidence was contested. The facts are then that the applicant would pay to his borrower one sum but would require the borrower to admit his indebtedness for, or to promise repayment of, a larger sum. The difference between the larger sum and the smaller sum seems clearly to be a 'profit', section 6 (1) (*a*), the definition of 'profit' in the Concise Oxford Dictionary being 'advantage, benefit, pecuniary gain, excess of returns over outlay'. The difference between the larger sum and the smaller might also be described as a 'premium', section 6 (1) (*g*), one of the definitions of which in the same Dictionary is 'sum additional to interest'. It seems to follow then that the difference between 'the amount stated in the promissory note or I. O. U. as the principal sum lent..... and the sum actually lent" is a 'profit' or 'income' derived by the lender from a "source in respect of which tax is charged" under the Ordinance, and therefore a portion of his statutory income under section 11 (1), which by the combined effect of sections 13 and 14 becomes his taxable income and he is taxable thereon accordingly. This conclusion will dispose of the matters of law raised in paragraphs 2 (e) and (f), and also of that raised in paragraph 2 (g), for on the facts stated the return made by the applicant did not disclose the whole of the income, as that word is defined by section 11 (1) read in conjunction with section 6 (1) (*a*) and (*g*), made by him as a money-lender, and also of that raised in paragraph 4 (b) which, though stated as a 'pure question of fact', really contains a question of law, namely, the profit derived by applicant from his business as a money-lender; the difference between the larger sums and the smaller sums mentioned just above, will be a profit, defined as above. Further this conclusion will dispose of the matters of law raised in paragraph 3 (c) and in paragraphs 4 (c) and (d) since it holds that in questions as to profit or income from loans, it is necessary to consider and, where the facts require, to apply not only section 47 but also section 11 (1) read in conjunction with section 6 (1) (*a*) and (*g*).

Further questions of law, dependant upon those just determined and upon the facts on which they are based, arise out of paragraph 3 (b) and paragraph 4 (e) of the case. Those paragraphs contain the contention of the applicant that the written documents, promissory notes and I. O. U.'s, setting out particulars of his transactions as a money-lender must be regarded as conclusive evidence of these transactions not to be contradicted by oral evidence, and the contention in reply that these

promissory notes and I. O. Us in so far as they relate to interest are "dispositions which were not given effect to" within the meaning of section 52 (2) and consequently to be disregarded. The important parts of section 52 are as follows:—

"(2) Where an Assessor is of opinion that any transaction which reduces or would reduce the amount of tax payable by any person is artificial or fictitious or that any disposition is not in fact given effect to, he may disregard any such transaction or disposition and the persons concerned shall be assessable accordingly. (3) Nothing in this section shall prevent the decision of an Assessor in the exercise of any discretion given to him by this section from being questioned in an appeal against an assessment in accordance with Chapter XI. (4) In this section.—

(a) 'disposition' includes any trust, grant, covenant, agreement, or arrangement".

The 'disposition' is said to be this. The applicant takes a written statement from the debtor that the debter owes him, and will repay by instalments, say, Rs. 200/-, but in actual fact the applicant has only lent the debtor, say, Rs. 150/- The admission, express or implied, by the debtor that he has borrowed, and so received, the Rs, 200/-, is said to be a disposition in the sense of 'agreement' or 'arrangement' which is 'not in fact given effect to' since in fact he has not received Rs. 200/- but Rs. 150/- only. But he has agreed to pay the Rs. 200/- and this sum to the extent of Rs. 50/- will be a 'profit' to the lender since it is an excess of returns over outlay, and it is argued that the disposition can be disregarded and the lender assessed on the profit disclosed. This may be so, but it is perhaps unnecessary in the present case to make any pronouncement thereon.

Paragraph 4 (f) after referring to section 73 (4) of the Ordinance as placing on an applicant the onus of proving that his assessment is excessive goes on to state that this applicant has failed to prove that his assessment was excessive. It only remains to mention paragraph 5 of the Case which formally confirms the assessment as determined, declares the matter to be one of pure fact and declines to accept the statement of accounts submitted by the appellant as a true return of his income. It has been pointed out above that this paragraph 5 contains a proposition of law as well as statements of fact, but the conclusions set out above will dispose of the proposition of law contained therein.

The other paragraphs in the Case not specifically referred to in this judgment, namely, paragraphs 1, 2 (a), (b), (c) and (d), 3 (a) and (d) do not seem to contain any question of law but only questions of fact or of argument as to fact and do not therefore need discussion.

I would summarize the conclusions arrived at on those points of law which can be collected from the case submitted to us. Loans may produce to the lender that kind of profit or income called interest taxable under the Ordinance as interest, section 47, but they may produce a further profit or income derived otherwise than by way of interest on those loans, which further profit or income will be taxable under the Ordinance, by section 11 (1) read in conjunction with section 13 and section 14, if falling within the definition of profit or income given in section 6 (1). On the facts stated, the difference between the sum named by this applicant in his business instruments as the sum repayable and the sum which he actually lent will be a profit within section 6 (1) and the recording in a business instrument one sum as lent, while at the same time lending a smaller sum to the person bound by that instrument, may possibly be a disposition not in fact given effect to within section 52 (2), and if so liable to be disregarded under that section. The business instruments of the applicant were not conclusive evidence of the transactions recorded therein but could be contradicted by parol evidence.

In addition to the matters of law discussed and determined above, a large number of matters were argued as to which it seems unnecessary to pronounce an opinion. It was urged for the appellant that in stating a case the Board must state that case which the applicant asks and no other. It was also urged that the evidence upon which the Board found certain facts proved was insufficient but at the same time it was conceded that there was some evidence for such finding and also (as I understood) that if there is some evidence to justify a finding of fact by such a tribunal as the Board, a Court will not go behind that finding. The differences between Ordinance No. 2 of 1932 and the corresponding English and Indian enactments were also insisted upon, by both sides. In support of the assessment emphasis was laid on the differences between Ordinance No. 2 of 1932 and other income tax enactments as increasing under that Ordinance the powers of the taxing authority and diminishing the rights of the subject in that behalf. It was argued on the same side that section 73 (7) of the Ordinance had "emptied the term evidence of all content"—this phrase was put from the Bench but adopted by the Solicitor-General—also that "to the extent that the Board of Review adopts the findings of the Commissioner the Supreme Court on a case stated has seisin of the matter" but that "to the extent that the Board departs from the Commissioner's finding, the matter is beyond the competence of the Court". These questions and others were very ably argued before us on both ssdes but a decision upon them is unnecessary since the matters of law arising out of the case stated to us can all be determined, and have all been determined,

without pronouncing on these questions. They are matters which can be decided when they definitely arise, but in the case before us they do not arise, so I would wish to express no opinion upon them.

For the reasons given earlier in this judgment I think that the assessment on the applicant referred to in paragraphs 1 and 5 of the case stated must be confirmed, and this appeal dismissed. The appellant must pay the costs of these proceedings but the Rs. 50/- already paid by him in accordance with section 74 (1) may be taken as part of the costs he is now ordered to pay.

GARVIN S.P.J.—This matter comes before us upon a case stated by the Board of Review under the provisions of section 74 of the Income Tax Ordinance, No. 2 of 1932. The case was stated at the instance of a person who objected to the assessment of his income made under the provisions of this Ordinance and who, for convenience will be referred to as the appellant.

As a person who, in the opinion of the assessors, was chargeable with tax, the appellant was required to and did furnish a return of his income. The assessor did not accept the return, and in accordance with the provisions of section 64 (2) (b) proceeded to make an estimate of the amount of his assessable income. Being dissatisfied with this assessment, he appealed to the Commissioner, and from the decision of the Commissioner affirming the assessment already made, he appealed in due course to the Board of Review. The Board in turn confirmed the assessment.

The appellant carries on in Colombo the business of a money-lender. He lends money on the security of promissory notes or I.O.U's. In every instance, the money was lent at the rate of 18 per cent. per annum, and his return consisted of a statement of accounts showing as his only income interest at 18 per cent. on various loans secured by promissory notes or I.O.U's.

The return appears to have been rejected on the ground that whereas these documents stated that what was lent was the sums specified on each note or I.O.U., the fact was that the amounts entered in these documents were greatly in excess of the amounts actually lent. In the result, therefore, the appellant, in respect of such transactions, received not only the interest upon the larger sums specified in the documents, but the difference between the amounts actually lent and the amounts specified in the documents which the borrower promised to repay.

It was admitted that there was some evidence to support the conclusion arrived at by the assessor, and confirmed by the various tribunals of appeal that the appellant's profits did not consist solely of the

interest at 18 per cent. per annum on the amounts stated in the promissory notes, but it was urged that, by reason of the provisions of section 47 of the Income Tax Ordinance, income from loans was restricted to the interest on the loans and that it was not competent, therefore, in making an assessment of the income of a person who may appear to be chargeable with tax, to take into consideration any other profit which the lender may derive from such loans. The point, therefore, which emerges upon a perusal of the case stated for determination by this Court is whether the appellant is right in his contention that, as the effect of S. 47 of the Income Tax Ordinance, it is not permissible, when assessing the appellant's income, to take into consideration any profits which may accrue to him from loans other than the interest payable by the borrower. Now, the provisions of section 47 with which we are here immediately concerned are as follows: "Income arising from interest on loans, mortgages and debentures shall be the full amount of interest falling due, whether paid or not". The remainder of the section deals with cases in which interest is unpaid or is irrecoverable and prescribes how and what measure of relief is available in such cases.

Now, all that is said in the material part of section 47 is that the "income arising from interest on loans" shall, for the purpose of the assessment, be taken to be the full amount of the interest which has fallen due irrespective of whether the interest has been paid or not. Manifestly, it was a provision that was intended to facilitate the work of assessment by enabling the assessors to treat as income all interest which has fallen due, while leaving it to the person assessed to plead and prove the existence of circumstances which entitle him to relief. The existence of such provision is in no sense inconsistent with the rights to assess, for the purpose of income tax, the whole of the profits, whether it consists of interest or any other form of profit which a money-lender derives from his business.

There might possibly have been some foundation for this argument had the opening words of the section been "income arising from loans, mortgages and debentures shall be the full amount of interest falling due, whether paid or not". It is impossible to construe the section as bearing any such connotation as the words of the legislature are "income arising from interest on loans &c". Where, as in this case, the assessor and the various tribunals of appeal were satisfied that other profits were derived by the appellant from his business in addition to the interest payable on the amounts specified in the securities taken by him, it is impossible to say that they were wrong in refusing to assess the appellant on the basis of the return made by him.

It does not appear to me to be necessary, for the determination of the question of law which arises upon the case stated, to determine whether the assessor may not also rely upon the provisions of section 52 (2). As for the contention that no oral evidence was admissible or should have been admitted to contradict the terms of these various promissory notes and I.O.U.'s, or to show the true nature of the transactions which took place between lender and borrower, it is sufficient to state that they were not very strongly pressed upon us and clearly cannot be sustained. There is no occasion, therefore, to revise the assessment made in this case which is accordingly affirmed.

The appellant will pay the taxed costs of this proceeding. The sum of Rs. 50/- already paid by him will be retained as part of the costs awarded.

Assessment affirmed. Appeal dismissed.

[Proctor for the assessee-appellant: *E.J. Koelman.* Proctor for the Commissioner of Income Tax: *Trevor de Saram,* Crown Proctor]

[**Note:**—Some questions of importance to the tax payer and the taxing authority are raised in the judgments delivered in the above case. The form in which the Board of Review has to state a case for the opinion of the Supreme Court and the evasion of tax by means of artificial or fictitious transactions were incidentally referred to in the judgments but no definite pronouncements thereon were made as they were not necessary for the determination of the question of law which emerged out of the Stated Case. The question which the Supreme Court had to decide was whether, in ascertaining the profits or income of the assessee, a money-lender, anything other than interest due on the loans advanced by him can be included, if, as a matter of fact, the money-lender did derive from his loans anything other than such interest. The decision of the Court was that if the loans produced to the lender, in addition to that kind of income called interest, a further profit or income, the latter was taxable under the Ordinance.

It is submitted with respect that their Lordships arrived at a sound conclusion but by a process of reasoning, which conflicts with certain well-known principles of income tax. It was admitted both by the assessee and the Income Tax department that the former carried on the business of money-lending in Colombo. The assessee's income, therefore, fell to charged under *source* (a) of S. 6 (1) of the Ordinance, viz., profits of a trade or business. The assessment was made on the basis that the assessee's income fell under profits of business. The application by their Lordships of the rule contained in what stood as S. 47 in the

principal Ordinance to an assessment of what was admittedly the profits of business, it is submitted, is opposed to the view that the rules for the ascertainment of tax under the Ordinance are definite codes and apply exclusively to their respective defined subject-matters, viz., the eight *sources* of income in S. 6 (1).† The taxing authority followed this principle and rightly contended before the Board of Review that S. 47 referred solely to the determination of income from interest, which was assessable under S. 6 (1) (*e*) and that S. 47 had no application to an assessment made under S. (6) (1) (*a*)—*vide* paragraph 4 (*c*) of the Stated Case, p. 25 *supra*. The matter has, since the decision of the Supreme Court, been clarified by the enactment of the new S. 47†† which is as follows :—

> Where any provision of this Ordinance expressly relates to any particular source of profits or income mentioned in sub-section (1) of section 6, such provision shall not apply to the determination of any profits or income which is assessable and has been assessed as falling within any other source mentioned in that sub-section.

The scope and purpose of what was originally S. 47 of the Ordinance—what is now sub-section (3) of S. 9—will be fully discussed later, while reporting the decision of the Supreme Court in *Commissioner of Income Tax* v. *Arunachalam Chettiyar*.§ It is sufficient for the moment to point out that in the light of how this sub-section stands at present, namely, "Income arising from interest shall be the full amount of interest falling due whether paid or not, *without any deduction for outgoings or expenses*", it is manifest that the legislature never intended the rule of computation contained in this sub-section to be applied for the determination of the profits of the business of moneylending, where deductions have necessarily to be made for outgoings and expenses.

A perusal of the judgment of the Supreme Court in the case under review appears to suggest that the real relevancy of 'interest' in the assessment of the profits of a moneylender was overlooked. "Where you have got interest," points out ROWLATT J., "earned in this sort of way in the course of a business in which loans of this kind have to be made for the purposes of the business, you do not get the interest emerging as taxable under any case at all till you get to the business—that is the point—as in the ordinary case of a banker in this country. He receives no end of interest, which is a taxable matter under Case III but it is not taxed as interest as such, because it is merely incidental: it is only part of the business to make this interest, not as interest but as the income of the business." *

†See *per* Lord ATKIN in *Fry* v. *Salisbury House Estate Ltd.*, 15 T.C. 222, at p. 320. See also *Crown's Option* by K. Satia Vagiswara Aiyar, Ch. VIII.

††Enacted as S. 47 by S. 21 of the Income Tax Amending Ordinance, No. 27 of 1934.

§It is not possible to discuss this question incidentally, yet an attempt will be made to point out the fallacy of applying this rule of computation to a moneylending business, while reviewing the decision of the Supreme Court in *Commissioner of Income Tax* v *Arunachalam Chettiar*, S.C Minutes dated 13th November, 1935, which will be reported later in these pages.

**Butler* v. *Mortgage Company of Egypt Ltd.*, (1927) 138 L.T. 328; 13 T.C. 803. See also *Crown's Option* (Ibid) Ch. XI.

The observations of ROWLATT J. apply with equal force to 'premium' as a factor in the profits of the business of a moneylender. Though no doubt, as was pointed out by MACDONELL C. J. in his judgment, a premium means 'a sum additional to interest', one has to remember that it means, according to the same dictionary from which His Lordship quoted, a number of other things. It includes a reward or prize, an amount to be paid in consideration of a contract of insurance, a sum additional to the wages paid to an employee, any bonus, a fee for instruction in a profession and a charge for changing one currency into another of greater value. The draftsman of the Ordinance, consistent with the classification of 'profits and income' adopted by him, had to mention 'premiums' as a separate subject-matter of charge in order to make the classification as exhaustive as possible and he included this item of charge under S. 6 (1) *(g)*, " rents, royalties and premiums". In the ascertainment of the profits of the business of a moneylender, any sum of money which the moneylender derives in addition to interest may be described as a 'premium', but it is not taxable as such but only to the extent that it swells the profits of the moneylender's business.

One other matter which emerges out of the Stated Case and on which the learned Judges who heard this case have not pronounced a definite opinion is the extent to which the Supreme Court will interfere with a finding of fact by the Board of Review. It is important in this connection to remember that the assessee joined issue with the Commissioner of Income Tax and the Board of Review as regards the sufficiency of the evidence on which both these tribunals arrived at their findings of facts. It is submitted that this was a question of law which should have been stated as such for determination by the Supreme Court. In regard to the power of the Supreme Court to review findings of facts by a tribunal like the Board of Review, there appears to be no difference between the language of the relevant sections of the Ceylon Ordinance and the English Act and a reference may, therefore, be made to Article 749 of 17 *Halsbury* (Hailsham Edition) p. 365 and the cases therein summarized. See particularly *per* POLLOCK M. R. in *I. R. C.* v. *Turnbull, Scott and Company*, (1924) 132 L.T. 296, at p. 298; 12 T.C. 749 C.A.:—"If he (the Commissioner) had evidence, proper evidence, on which he could come to that conclusion, we could not interfere with his dicision." See also *per* COZENS-HARDY M. R. in *Gramophone and Typewriter Ltd.* v. *Stanley*. (1908) 2 K.B. 89, 95; 5 T.C. 358, 374:—"It is undoubtedly true that if the Commissioners find a fact, it is not open to the Court to question that finding unless there is no evidence to support it. If, however, the Commissioners state the evidence which was before them and add that upon such evidence they hold that certain results follow, I think it is open to the Court to say whether the evidence justified what the Commissioners held."]

Present: DALTON AND DRIEBERG JJ.

RAJAPAKSE *v.* COMMISSIONER OF INCOME TAX*

[S. C. No. 50 (1934)—Special.]

Decided: *24th November, 1934.*

Ascertainment of income of an advocate—Part of residence used as chambers—Is cost of travelling from chambers to the Supreme Court at Hulftsdorp an allowable deduction?

Meaning of the terms 'business' and 'place of business'—Is the Supreme Court at Hulftsdorp a place of business of an advocate?—Is his chambers his place of business?

Observations as to how the Board of Review should state a case—Income Tax Ordinance No. 2 of 1932, S. 10 (a).

The assessee, appellant, was an advocate residing in Colombo. He normally attended the Supreme Court at Hulftsdorp for the argument of appeals. He had his chambers in his residence, in which he interviewed proctors and clients, wrote opinions, accepted retainers and prepared his cases. He claimed that the cost of travelling from his chambers to the Supreme Court should be deducted from his income inasmuch as it was not the cost of travelling between his "residence and place of business or employment" within the meaning of S. 10 (*a*) of the Ordinance, but was an expense incurred in the production of his income within the meaning of S. 9 (1).

HELD that the item in question was not a cost of travelling between the assessee's residence and place of business within the meaning S. 10 (*a*) of the Ordinance and was therefore an allowable deduction.

Per DALTON J. for the reason that "the Supreme Court sitting in its appellate jurisdiction at Hulftsdorp is not a place of business or employment of the appellant within the meaning of section 10 (*a*) of the Income Tax Ordinance, 1932" and

Per DRIEBERG J. on the ground that, as "both the (assessee's) chambers and the Courts are his places of business, his expenses of travelling from one to the other will not be within the (said) section."

Per DALTON J.—"I have no doubt that the section [10 (*a*)] was intended to, and does apply to, professional men such as the appellant, just as to others carrying on their trade, business or employment generally".

"The term 'place of business or employment' as used in this sub-section [10 (*a*)] imports, in my opinion, first of all some idea of fixity of place, so far as the business or employment is concerned, a place where a man would normally be found regularly or perhaps at stated intervals for the purpose of carrying on his work or profession generally.....The words, to my mind, import also a conception of some personal right to the place as a place of business or employment, or a duty to be there, based on something very much stronger than an advocate's right of audience in the Courts and his duty to the Court and to his clients "

Per DRIEBERG J. --"The words 'business or employment' [in S. 10 (*a*)] were intended to include all those activities of a person in the nature of 'trade, business, profession or vocation' which are a source of profits or income and

*36 N. L. R. 258; 14 Cey. Law Rec. 133; 12 T. L. R. 44; 2 C.L.W. 479

chargeable with tax under section 6 (1).....the phrase (place of business) is used.....in the larger sense which, I incline to think, is the intention of the Ordinance—the place of a person's occupation which is a source of a profit or income whether it be a trade, business, profession or vocation.....accepting the word (business) in the general sense of meaning his income-yielding occupation."

Per DRIEBERG J.—"A case stated should, I think, contain in addition to a statement of the facts the matter of law submitted for decision formulated as a question."

Case stated under S. 74 (2) of the Income Tax Ordinance, No. 2 of 1932, by the Board of Review constituted under S. 70 of the Ordinance.

The assessee was an advocate residing at Rosmead Place, Colombo. He normally attended the Supreme Court, Hulftsdorp, Colombo, every day when it is sitting for the argument of appeals listed for hearing before that Court. He had chambers in his house in which he interviewed proctors and clients, wrote opinions, accepted retainers and prepared his cases. He occasionally appeared in the original Courts, outside Colombo, on retainers. In returning the profits from his profession for the income tax year 1932—33 the assessee claimed certain deductions under S. 9 (1)† including the travelling expenses he incurred in going to outstation Courts, rent of the chambers in his house and the cost of travelling to and from such chambers to the Supreme Court. He was allowed a deduction in respect of the first two items, but was refused the deduction for the cost of travelling from his chambers to the Supreme Court, Hulftsdorp, amounting to Rs. 640/-, on the ground that it was "the cost of travelling between residence and place of business or employment" within the meaning of sub-section (*a*) of S. 10.†† The assessee appealed to the Commissioner of Income Tax and then to the Board of Review. The Board upheld the assessment by the following decision:—

"We the members of the Board who heard the appeal upheld the decision of the Commissioner and the assessment was confirmed as we were of opinion that the deduction claimed was the cost of travelling between residence and place of business or employment within the terms of S. 10 (*a*)".

The assessee, thereupon, required the Board to state a case for the opinion of the Supreme Court, which they did as follows :—

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†S. 9 (1) :—"Subject to the provisions of sub-sections (2) and (3), there shall be deducted, for the purpose of ascertaining the profits or income of any person from any source, all outgoings and expenses incurred by such person in the production thereof, including.."

††S. 10:—"For the purpose of ascertaining the profits or income of any person from any source, no deduction shall be allowed in respect of—

(*a*) domestic or private expenses, including the cost of travelling between residence and place of business or employment;..."

CASE STATED

Upon the application of Mr. L. A. Rajapakse.

1. At a meeting of the Board of Review held on the 13th day of February, 1934 for the purpose of hearing appeals under the provisions of section 73 of the Income Tax Ordinance, Louis Alexander Rajapakse, Advocate, hereinafter called the appellant, appealed against an assessment of Rs. 13,718/- for the purposes of income tax, and the imposition of a tax of Rs. 547/40 made upon him for the year of asesssment ending 31st March, 1933, on the ground that a deduction which he claimed for the cost of travelling in his motor car between his chambers and the Supreme Court at Hulftsdorp had been disallowed, the appellant's contention being that such cost was not "cost of travelling between residence and place of business or employment" within the meaning of section 10 (*a*) of the Income Tax Ordinance.

2. The following are the facts either as admitted or as established to the satisfaction of the Board:-

(a) The appellant is an Advocate residing in Colombo. He normally attends the Supreme Court in Hulftsdorp, Colombo, every day when it is sitting for the argument of appeals listed for hearing before that Court. He has chambers in his house in which he interviews proctors and clients, writes opinions, accepts retainers and prepares his cases. He occasionally appears in the original Courts outside Colombo, on retainers. The travelling expenses incurred in going to such outstation Courts have been allowed.

(b) In returning the profits from his profession he claimed certain deductions, including rents etc., of the chambers in his house, and the cost of travelling to and from such chambers to the Supreme Court sitting in its appellate jurisdiction at Hulftsdorp, Colombo, amounting to Rs. 640/- for the Income Tax year ending 31st March, 1933.

(c) The appellant was allowed *inter alia* the expenses of the chambers, but was refused the above deduction for the cost of travelling from his chambers to the Supreme Court at Hulftsdorp, Colombo.

(d) The appellant has in his chambers a telephone which had been originally installed long before the coming into operation of the Income Tax Ordinance, the annual rent for which, the appellant admitted, is paid on the basis that it is a telephone installed in a private residence and not in a place of business.

3. It was contended on behalf of the appellant, before the Board:

(a) That the appellant's chambers are a place of business and the travelling from these chambers to the Appeal Courts is not travelling between the residence and the place of business that is contemplated in section 10 (*a*) of the Income Tax Ordinance.

(b) That the term "place of business" in section 10 (*a*) of the Ordinance cannot be applied to a place where one has to go in the performance of or in the course of performing one's duty where the duty has already begun elsewhere.

(c) That a "place of business" connotes a fixed place where one's duty, for the performance of which a fee is charged, begins; that the appellant's duty begins in his chambers; that they are his place of business and that the Appeal Court to which he travels in the performance of his professional duty is not "travelling between residence and place of business" as contemplated by section 10 *(a)*.

(d) That the expenses of travelling so incurred must be considered as an expenditure incurred in the production of the appellant's income under Section 9 (1) of the Ordinance and must therefore be allowed.

(e) That the car was used for professional purposes and the deduction claimed was not an expenditure incurred for "domestic or private purposes".

4. It was contended on behalf of the Commissioner:

That the chambers may perhaps be regarded as a place of business but they are in the residence; that the Supreme Court where the appellant argues his cases is a place of business; that a "place of business" may well be a place where the duty is carried out; that payment of a fee is not for the preparation of his cases but for their argument; that such argument takes place in the Supreme Court at Hulftsdorp, Colombo, and that therefore the daily travelling in Colombo is between "residence and place of business" within the meaning of section 10 (*a*) and the cost of such travelling is therefore not allowable.

5. We the Members of the Board who heard the Appeal upheld the decision of the Commissioner and the assessment was confirmed as we were of the opinion that the deduction claimed was the cost of travelling between residence and place of business or employment within the terms of section 10 (*a*).

6. The appellant on the 4th March, 1934, required us to state a case on a question of law for the opinion of the Supreme Court which case we have accordingly stated and signed.

1. A. C. G. Wijeyekoon
2. S. Pararajasingham
3. W. L. Kindersley

Members of the Board of Review.

Colombo,
27th April, 1934.

H. V. Perera, with him *K. Sa'ia Vagiswara Aiyar and M. M. I. Kariapper*, for assessee-appellant.—The decisions of the Board of Review and the Commissioner of Income Tax rest on the view that the deduction claimed in this case comes within S. 10 (*a*) of the Income Tax Ordinance and, therefore, not allowable. The Board of Review have lost sight of the fact that, in the case of an advocate, his chambers, though forming part of his residence, are his place of business. A place of business means a place where a man may be expected to be found usually and where he begins the performance of his duties for the sake of profit. A good part of an advocate's work is done by him in his chambers. It is here that he has his conferences with his proctors and clients. His correspondence in connection with his professional work is done here and his preparation for the argument of his cases takes place here. The case of a proctor is different. For one thing he has no right of audience in the Appeal Courts. His office at Hulftsdorp or elsewhere, where he has this name plate, is really his place of business, at least one of his places of business; but the Courts can hardly be described as a proctor's place of business. The case of an advocate having only chamber-work makes my point clear. He may go the Courts at Hultftsdorp to refer to authorities which he cannot find in his chambers which is really his place of business. A place of business may be described as a place where one enters into a contract to perform a service; it is not a place where one seeks to execute or complete the contract entered into elsewhere.

Secondly, the profession of an advocate is neither a business nor an employment within the meaning of sub-section (*a*) of section 10. In a broad sense the word business may be applied to a profession, but the word business really connotes something commercial. It implies advertising which is not available ordinarily to a professional man. Employment presuppbses an employer and wages form an important part of the relationship. Further, an advocate cannot offer his services to the public at large. He cannot sue for his fees. His work, therefore, is really honorary. [Counsel also cited *Commissioner of Inland Revenue* v. *Maxse*, (1919) 1 K. B. 647, 12 T. C. 41 to elucidate the distinction between business and profession in income tax law.]

J. E. M. Obeyesekere, Actg. Deputy Solicitor General, with him *M. F. S. Pulle* C.C., for the Commissioner of Income Tax.—

The finding of the Board of Review that the deduction claimed by the assessee was the cost of travelling between residence and place of business is a question of fact which should not be disturbed.

[DRIEBERG J.—If that is, so why did the Board of Review state a case at all ?

The question of law here is, whether apart from the appellants' connection with them, the Courts at Hulftsdorp are a place of business. [Counsel cited *Ushers Wiltshire Brewery Ltd* v. *Bruce*, (1915) A. C. 433]. An advocate may have more than one place of business. The Courts at Hulftsdorp are a place of business for an advocate in the sense that he goes there ordinarily to argue his cases. He does at Hulftsdorp at the Law Library a good part of his other business also, namely, interviewing proctors and accepting retainers. An advocate is available to proctors at Hulftsdorp.

The assessee's residence in this case does not cease to be a residence merely because he uses one room in that residence as his chambers. When the assessee travels from Rosemead Place, where he has his residence, and Hulftsdorp, he travels between his residence and a place of business within the meaning of sub-section (*a*) of section 10.

In English income tax law, the word 'business' has a wide meaning. It does not mean a trade only. The phrase 'business of the Courts' is common. An advocate's business is in the Courts. [Counsel cited *Smeeton* v. *Attorney General*, (1920) 1 Ch. 85; 12 T. C. 166, *Inland Revenue Commissioners* v. *Korean Syndicate*, (1921) 3 K. B. 258, and *Smith* v. *Anderson*, (1880) 15 Ch. D. 247, 258.]

H. V. Perera, in reply:—An advocate's work may be considered from two points of view, viz., the work involved in the argument of the cases he has in hand and the several engagments which he accepts. From the first point of view he begins his work not at the time the Courts begin their sittings, but earlier in the day in his own chambers. From the second point of view, a particular engagment of his may not require the argument of a case at the Courts and even when it does, the preparation for the argument is done in his chambers. In the case of an advocate, then, the position is that he has commenced his day's work in his chambers. When he travels to the Courts from his chambers in his residence he is travelling to a place where a part of his duties, begun elsewhere, has to be performed. One must also remember that an advocate has a right of audience in all the Courts in Ceylon, not merely in the Courts at Hulftsdorp.

DALTON J.—This is a case stated for the opinion of this Court under the provisions of Section 74 of the Income Tax Ordinance 1932.

The following facts are established or admitted. The appellant is an advocate residing at Rosmead Place, Colombo. He normally attends the Supreme Court in Hulftsdorp, Colombo, every day when it is sitting for the argument of appeals listed for hearing before that Court. He has chambers in his house in which he interviews proctors and clients, writes opinions, accepts retainers and prepares his cases. He occasionally appears in the original Courts outside Colombo, on retainers. The travelling expenses incurred in going to such outstation Courts have been allowed.

In returning the profits from his profession he claimed certain deductions including rent of the chambers in his house and the cost of travelling to and from such chambers to the Supreme Court sitting in its Appellate Jurisdiction at Hulftsdorp, amounting to Rs. 640/- for the Income Tax year ending March 31st, 1933. He was allowed a deduction in respect of his chambers, but was refused the deduction for the cost of travelling from his chambers to the Supreme Court at Hulftsdorp. The Board of Review held that the deduction claimed was the cost of travelling between residence and place of business or employment, within the terms of section 10 (*a*) of the Ordinance and, therefore, the deduction claimed could not be allowed.

Two questions arise for decision, the first and principal one being whether the Board was correct in holding that the Supreme Court, Hulftsdorp, was the appellant's place of business or employment, within the meaning of section 10 (*a*). I regret I am unable to agree with their conclusion on this point.

I am satisfied that it was intended that the sub-section (*a*) should be read as widely as possible, and for that reason I am unable to agree with Mr. Perera's contention that the profession of an advocate cannot be brought within the words used there. I have no doubt that the section was intended to, and does apply to, professional men such as the appellant just as to others carrying on their trade, business or employment generally. I agree with him, however, when he urges that the Appellate Courts at Hulftsdorp cannot be said to be the appellant's place of business or employment, or even a place of business of the appellant within the meaning of the section, although the Courts are undoubtedly of course places to which the appellant resorts in the course of carrying on his profession.

The term "place of business or employment," as used in this sub-section, imports, in my opinion, first of all some idea of fixity of place, so far as the business or employment is concerned, a place where a man would normally be found regularly or perhaps at stated intervals, for the purpose of carrying on his work or profession generally.

Which of the Appeal Courts is it suggested is the place of business or employment in this case? Perhaps that Court in which the appellant's cases may be heard on any particular day. That Court may vary from day to day, and on some days it may happen that the appellant has no cases down for hearing. In the latter case he would presumably not attend the Courts at all, but his work would still be going on his chambers. Can it then be said that his place of business is the Appellate Courts as a whole, whether they are sitting or not, and whether he has any cases down for argument or not? That, I think, is the contention put forward that has been upheld by the Board. Wide though the words of the sub-section undoubtedly are, I feel quite unable to give it any such vague and indefinite construction as we are asked to do in this case. The words, to my mind, import also a conception of some personal right to the place as a place of business or employment, or a duty to be there, based on something very much stronger than an advocate's right of audience in the Courts and his duty to the Court and to his clients. Advocacy is no doubt an important part of the appellant's work, but there is much of his work that he does not do in the courts at all. The preparation of his cases, the writing of opinions, acceptance of retainers, conferences and consultations normally take place in his chambers, as is admitted in the case stated by the Board, and not elsewhere. That is the place where enquiry would normally be made for him, where his clerk would be, and the place to which his work or business comes to him. So far as any of the work mentioned is done in Hulftsdorp, it would, I presume, be done at the Law Library, but in any case probably to a very small extent.

Another difficulty that arises from the argument put forward by Mr. Obeyesekera in support of the Board's decision is as to the extent to which he would carry it. It is conceded of course that a man may have a place of business, but that there may be no business coming in, and nothing for him to do. In that event it was answered that he would have no income tax, but that is not so. A young advocate, looking for work, hoping for briefs, but possibly not very successful for some years, might have an income from other sources such as private property belonging to himself, and any deduction he claims would presumably be a deduction from the total income he receives. The argument put before us must, I think, be extended to this, that the courts in question are the place of business of every advocate practising there or holding himself out as practising there, whatever the extent of his work may be.

That all the courts which the appellant attends are not a place of business or employment of the appellant, within the meaning of section 10 (*a*), has been recognised by the Board of Review, for they

have allowed a deduction under section 9 (1) of the Ordinance in respect of travelling expenses incurred by the appellant in going to courts outside Colombo. I have some difficulty is understanding on what ground that has been allowed, if the courts which he attends are a place of business or employment, within the meaning of section 10 (*a*). I do not see that the fact that an advocate appears more frequently in one Court than in another can have any bearing upon the construction of section 10 (*a*).

I find practically no assistance on this question from any of the English authorities cited to us, for the provisions of the law we are asked to construe here differ from the equivalent provisions of the Income Tax law in England. I would add, however, that I should be very surprised to hear any barrister practising in London giving his place of business or employment, using that term as applicable to a professional man, as the Royal Courts of Justice in the Strand, however large or small the volume of his work there might be.

If the appellant's place of business is the courts which he attends in the course of carrying on his profession, then it might well be said that the place of business of a medical practitioner, who carries on private practice, is the different houses of his patients which he visits in the course of his morning or evening round. Another instance in the case of the medical man would be when he attends patients in a nursing home, which does not belong to him, and at which he holds no appointment. If he fairly regularly attended patients of his at such a nursing home, whenever they were inmates there, could it possibly be said that such a nursing home was his place of business? In my opinion, the most that could be said, so far as the question arising here for decision is concerned, is that he visits these houses and the nursing home just as an advocate attends the Courts for the purpose of, and in the course of, carrying on his profession, and no more. Instances of the same kind arise in the case of other professions also.

For the above reasons I am unable to agree with the Board of Review in their decision that the deduction claimed by the appellant here was for travelling between residence and place of business or employment, for the reason that the Supreme Court sitting in its appellate jurisdiction at Hulftsdorp is not a place of business or employment of the appellant, within the meaning of Section 10 (*a*) of the Income Tax Ordinance, 1932. Whether or not these travelling expenses were incurred by the appellant in the production of his income, within the meaning of section 9 (1), is of course not a matter that arises for my decision on the case stated.

The further question argued before us as to whether the deduction claimed was for travelling from his residence or chambers, need

not, in view of my conclusion above, be considered, although this, I think, would be mainly a question of fact.

I would therefore answer this question of law as above set out. In the event therefore the appellant succeeds in his appeal. It was agreed that there should be no order in respect of costs, whatever our decision be, except that the appellant should be entitled to a refund of the sum of Rs. 50/- paid on the case being stated, if he be successful; he will therefore be entitled to be repaid that sum.

DRIEBERG J.—This is a case stated under the provisions of section 74 of the Income Tax Ordinance No. 2 of 1932 by the Board of Reveiw on the application of the assessee who had appealed to the Board from the decision of the Income Tax Commissioner. The assessee is an advocate residing in Colombo and practising mainly in the Appeal Court. He has his chambers in his house and he claimed that, in the assessment of his taxable income, allowance should be made for the cost of his travelling from his chambers to the Supreme Court which amounted to Rs. 640/- a year. The Commissioner decided that this was the cost of travelling between his residence and place of business and that under section 10 (*a*) of the Ordinance no deduction could be made for it. The assessee appealed to the Board who upheld the decision of the Commissioner. He then asked, under section 74 (1), that the Board should state a case on a question of law for the opinion of this Court. A case stated should, I think, contain in addition to a statement of the facts the matter of law submitted for decision formulated as a question. This has not been done here, though the Board observed the requirements of section 74 (2), that the case stated should "set forth the facts and the decision of the Board".

I have referred to this for this reason; the only material before us is the case stated by the Board under Section 74 (2). It is there stated that the assessee claimed that he was entitled to the deduction of Rs. 640/- on the ground that they were expenses incurred in the production of his income and under section 9 (1) should be deducted in ascertaining his taxable income. The Commissioner decided that the claim was barred by Section 10 (*a*) and assessed his taxable income at a certain amount; this was upheld by the Board. The Members of the Board stated their decision as follows:—"We the members of the Board who heard the Appeal upheld the decision of the Commissioner and the assessment was confirmed as we were of the opinion that the deduction claimed was the cost of travelling between residence and place of business or employment within the terms of section 10 (*a*)." Now if these expenses are barred by section 10 (*a*) there still remained the question expressly raised by the assessee that he was entitled to a deduction of them under section 9 (1). This aspect of the matter was not dealt with by the

Board, but as the Board upheld the Commissioner's assessment, which was what the assessee appealed from, I must assume that the Board was of opinion that the expenses did not fall within section 9 (1).

This shows the necessity for the Board, when acting under section 74, to formulate expressly the question of law for the decision of this Court.

We were told, however, that the only question for our decision was whether the assessee's claim fell within section 10 (*a*). In dealing with this, it will be necessary to refer to section 9 (1), but it will be understood that anything that I say is not to be considered as a ruling on the applicability of that provision to this case, for argument was not directed to it.

Chapter III of the Ordinance consists of two sections 9 and 10, and has the title "ASCERTAINMENT of PROFITS or INCOME." Section 9 (1) provides that, subject to the provisions of sub-section (2)*, there shall be deducted, for the purpose of ascertaining the profits or income of any person from any source, all outgoings or expenses incurred by such person in the production thereof including the several classes of expenditure set out in sub-sections (*a*) to (*g*). Sub-section (2) of section 9 deals with certain exceptions concerned with the profits or income from land.

Section 10 (*a*) enacts that for the purpose of ascertaining the profits or income of any person from any source, no deduction shall be allowed in respect of domestic or private expenses, including the cost of travelling between residence and place of business or employment.

The assessee says that in that part of his residence which he uses as his chambers he gives interviews to proctors and clients, deals with matters submitted for opinion and generally does all that work of an advocate unconnected with or not requiring appearance in a Court. I take it that he would ordinarily be engaged there until he left for the Courts and that on days on which the Courts do not sit he would spend a considerable part of his time there on that part of his work as an advocate which I have referred to. As there is no provision in Colombo for chambers in the vicinity of the Courts, advocates are obliged to use a part of their residence for the purpose and we were told that the Income Tax authorities recognise this and allow them for this reason a deduction from the rent they pay. In these circumstances, can it be said that in going to and returning from the Courts he travels between his residence and his place of business or employment? It was conceded that the Courts could not be regarded as the assessee's place of employment and I need only consider the question from the point of view whether they can be considered his place of business.

* "Sub-sections (2) and (3)," after the Amending Ordinance of 1934. See foot-note at p. 29, *supra*.

A part of Mr. H.V. Perera's argument was that the word 'business' in itself excluded the occupation of an advocate, which is a profession and not a business. There is no doubt that, used in that special sense, it would have that effect. To speak of a person as engaged in business implies occupation in trade or commerce and not in a profession such as law or medicine. But the word has a wide range of meaning and can be used to mean generally the work that a man is engaged on, whether it be a trade or a profession. The Oxford Dictionary recognises the use of the word in these different senses. It appears to me, however, that it was not intended to use the word 'business' in section 10 (*a*) in a special sense, but that the words 'business' or 'employment' were intended to include all those activities of a person in the nature of 'trade, business, profession or vocation' which are a source of profit or income and chargeable with tax under section 6 (1). It will be noted that (*a*) and the other sub-sections of section 10 deal with matters which are not to be excluded in ascertaining the income derived from any source; the word 'any' is important.

This, however, does not conclude the question before us for we have to deal not with the word 'business' alone but with the phrase 'place of business' in relation to the circumstances of this case. Here again we are confronted with the uncertainty, whether the phrase is used in a special sense, or in the larger sense which, I incline to think, is the intention of the Ordinance—the place of a person's occupation which is a source of profit or income whether it be a trade, business, profession or vocation. According to the Oxford Dictionary, the phrase is usually used in the special sense and includes a shop, office, wharehouse or commercial establishment. Mr. H. V. Perera contended that an advocate could have no place of business, the word 'business' having no application to the calling of an advocate, and his travelling from his house or chambers to the Courts does not fall within section 10 (*a*). The Deputy Solicitor General argued that his chambers in his residence are not a place of business of his and that his movement to the Courts and back must be regarded as travel between his residence and place of business which, he said, was the Courts. The question is not free from difficulty. Several cases were cited to us which, however, are of no real help as there is nothing similar to section 10 (*a*) in the English or the Indian Acts. I cannot agree with the Deputy Solicitor General that the assessee's chambers cannot be regarded as his place of business or at any rate one of his places of business. He does there that work of an advocate which is not done in the Courts and a place where he does his professional work must be regarded as his place of business accepting the word in the general sense of meaning his income-yielding occupation. He does in chambers the work of an advocate and receives

remuneration for it. In the Courts he also does the work of an advocate, but of another class, for which he receives remuneration. Some work for which he is remunerated may be done partly in chambers and partly in Court.

If I am right in my view that both his chambers and the Courts are his places of business, his expenses of travelling from one to the other will not be within the section. Whether he is entitled to a deduction for them or not will depend on whether they are to be regarded as outgoings or expenses incurred by him in the production of his income; this question, however, is not before us.

In my opinion one cannot say that his movement to the Courts is not from his chambers for the reason that the chambers are part of his residence and that he may not leave direct from chambers to the Court but that he may probably leave from his residence, assuming that there are separate exits. But these are superficial considerations which do not touch the real question. We are concerned with the assessee as an income-producing individual and his work and movements as such; we have the fact that for a certain part of the day before 11 o'clock he is engaged in that work in his chambers and that he then proceeds with, I take it, the least possible loss of time to begin in the Courts another class of work, or it may be another stage of work already partly done in chambers. His movement is from one place of business to another and it cannot cease to be that for the reason that he may, in the interval for some purpose, enter the residential part of his house. Section 10 (*a*) deals with travels from one's residence to a place where one's business begins and from which one returns to one's residence. Such travelling is unconnected with one's business and its cost is placed in the same class as expenses of a domestic or private nature.

I, therefore, hold that the expenses incurred by the assessee in travelling from the premises in which are his residence and his chambers to the Courts are not costs of travel between his residence and place of business or employment within the meaning of section 10 (*a*) of the Income-Tax Ordinance.

Counsel were agreed that as this was a test case we should make no order as to costs. The assessee is, however, entitled to a refund of the fee of Rs. 50/- paid under section 74 (1).

Appeal allowed.

[Proctors for assessee-appellant: *Samarasinghe & de Silva.* Proctors for the Commissioner of Income Tax—respondent: *J. F. de Saram* and *C. T. de Saram.*]

[**Note:**—It will be noted that the question of law which was submitted for the opinion of the Supreme Court was whether a certain deduction claimed by the assessee was "the cost of travelling between

residence and place of business or employment" within the meaning of S. 10 (*a*) of the Ceylon Income Tax Ordinance. We may, for the sake of convenience of reference, quote the words of the relevant portions of the two sections of Chapter III of the Ordinance, which is headed "ASCERTAINMENT of PROFITS or INCOME".

SECTION 9 (1). Subject to the provisions of sub-sections (2) & (3), there shall be deducted for the purpose of ascertaining the profits or income of any person from any source, all outgoings and expenses incurred by such person in the production thereof *including*—[Here follow categories (*a*) to (*g*) of deductions *allowed* by the Ordinance.]

SECTION 10. For the purpose of ascertaining the profits or income of any person from any source, no deductions shall be allowed in respect of—

(*a*) domestic or private expenses, including the cost of travelling between residence and place of business or employment:

(*b*) any disbursements or expenses not being money expended for the purpose of producing the income.

(*c*) .....(*d*).....(*e*).....

(*f*) rent of, or expenses in connection with, any premises or part of premises not occupied or used for the purpose of producing the income; [then follow four other categories (*g*) to (*j*) of deductions *not allowed* by the Ordinance.]

The decision of the Supreme Court is that the amount claimed by the assessee did not come within the purview of S. 10 (*a*), in other words, that it was not "the cost of travelling between the assessee's residence and his place of business", the term 'employment' having been conceded to be inapplicable in his case. The further question as to whether this amount was an expense incurred by the assessee in the production of his income and, therefore, allowable under S. 9 (1) was not argued before the court and, therefore, was left open.

The learned Judges based their decision in the case on grounds which appear to be in conflict which each other. According to DALTON J., the Supreme Court at Hulftsdorp is not a place of business or employment of the assessee and, therefore, the claim did not fall within the ambit of S. 10 (*a*). DRIEBERG J., however, was of the view that the assessee's chambers in his residence and the courts at Hulftsdorp were both his places of business and that as the expense in dispute was incurred in travelling from one place of business to another, it was not caught by S. 10 (*a*). There is, therefore, this direct conflict of view between the two Judges on a fundamental question that emerges out of the Case Stated, namely, whether, in the case of an assessee whose profession is that of an advocate, the Supreme Court at Hulftsdorp or, for that matter, any of the other courts in the Island, is his 'place of business' within the meaning of S. 10 (*a*).

The learned Judges also were of the opinion that there is nothing similar to section 10 (*a*) of the Ceylon Ordinance in the English or the Indian Income Tax Acts and that, therefore, the cases decided under those Acts were of no assistance in deciding the question that was argued before them. It may, perhaps, be useful to pursue here this aspect of the matter.

Under Schedule D. of the United Kingdom Income Tax Act. the tax is charged in respect of "any trade, profession, employment or vocation" and after the passing of the Finance Acts of 1922 & 1927 all

"offices or employments" are taxed under Schedule E. of the Income Tax Act. We have, therefore, the classification of taxable sources of income under the heads,(1) trade (2) profession (3) employment and (4) vocation, which are the sources of income dealt with in S. 6 (1) (*a*) & (*b*) of the Ceylon Ordinance. It is no doubt true that the category "business" which occurs in S. (1) (*a*) of the Ceylon Ordinance finds no place in the English Income Tax Acts, even in the Consolidating Act of 1918. The British Legislature, however, found after 1918 the necessity of adding to the several classes or sources of taxable profits and income the more comprehensive class known as "business," which is mentioned in the Finance Acts passed after 1918—*vide* "a trade or business of any kind" in S. 25 (1) of the Finance Act of 1925. The draftsman of the Ceylon Ordinance, therefore, when he classified taxable sources of profits or income under the main categories of "trade, business, profession, vocation or employment," had before him the model of the United Kingdom Acts.

Rule 3 of the Rules applicable to Cases I and II of Schedule D. of the United Kingdom Act is as follows:—

In computing the amount of the profits or gains to be charged, 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, employment or vocation :

(b) any disbursements or expenses of maintenance of the parties, their families or establishments or any sums expended for any other *domestic or private purposes* distinct from the purposes of such trade, profession, employment, or vocation ;

(c) the rent or annual value of any dwelling-house or domestic offices or any part thereof except such part thereof as is used for the purposes of the trade or profession :

[We have omitted clauses (d) to (m) of this Rule as being not quite relevant to our present purpose but they are important for the reason that they have supplied the principle and the language of sub-sections (*c*) and (*d*) of S. 9 and of sub-sections (*c*), (*d*), (*e*) and (*i*) of S. 10 of the Ceylon Ordinance. The provision of sub-sections (*a*) and (*b*) of S. 9 of the Ceylon Ordinance dealing with depreciation and obsolescence of machinary are derived from Rule 6 of the Rules applicable to Cases I and II of Schedule D.]

Schedule E of the United Kingdom Act, as was stated earlier, deals with the taxation of all offices or employments. Rule 9 of this Schedule enacts –

If the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office or employment or of keeping and maintaining a horse to enable him to perform the same, or otherwise to expend money wholly, exclusively, and necessarily in the performance of the said duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed.

Section 209 (1) (a) of the United Kingdom Act enacts in general terms that "in arriving at the amount of profit or gains for the purpose of income tax no other deductions shall be made than such as are expressly enumerated in this Act."

Commenting on the various provisions of the United Kingdom Act referred to above, Lord SUMNER said: "The paradox of it is that there are no allowable deductions expressly enumerated at all, and there is in words no deduction allowed at all, unless indirectly by the words in Rule 3 of the First Case.....The effect of this structure,

I think, is this, that the direction to compute the full amount of the balance of the profits must be read as subject to certain allowances and to certain prohibitions of deductions, but that a deduction, if there be such, which is neither within the terms of the prohibition nor such that the expressed allowance must be taken as the exclusive definition of its area, is to be made or not to be made according as it is or is not, on the facts of the case, a proper debit item to be charged against incomings of the trade when computing the balance of profits of it".*

In view of the above dictum of Lord SUMNER on the question of the deductions allowable under the United Kingdom Income Tax Acts, the provisions of sections 9 and 10 of the Ceylon Ordinance will be found to be a re-statement, no doubt in a simpler and more direct manner, of the principles of English income tax law. Section 9 states the main principle by enacting that, in the ascertainment of profits or income for the purposes of taxation, all outgoings and expenses incurred in the production of such profits or income shall be deducted from gross receipts, and the deductions mentioned in sub-sections (*a*) to (*g*) of section 9 are illustrative, and not exhaustive, of allowable deductions. Section 10 enumerates ten categories of deductions which the Ordinance does not allow in the ascertainment of profits. They are not, in the eye of income tax law, deemed to be outgoings incurred in the production of profits.

It is respectfully submitted that reading together sections 9 and 10 of the Ceylon Ordinance and the provisions of the United Kingdom Acts which we have quoted above, there appears to be no difference of principle between the two systems, particularly in the light of the interpretation placed upon the relevant English enactments by learned and eminent Judges of England. The Income Tax Department of Ceylon has interpreted the sections in question strictly in accordance with English law on the subject. We find it stated in the Ceylon *Income Tax Manual*:

> The Ordinance taxes nett profits after allowing all expenses incurred in earning them. No attempt is made to furnish a list of allowable expenses, and the only tests as to whether an expense is allowable are—
> (1) is it incurred in producing the income?
> (2) is it specially dealt with in paragraphs (*a*) to (*g*) of section 9 (1)?
> (3) is it a prohibited deduction under any paragraph of section 10—
> Explanation No. 367.

It will be readily seen that these are the indentical tests suggested in the dictum of Lord SUMNER.

As regards the Indian law, S. 10 of the Indian Income Tax Act of 1922 deals with the ascertainment of the profits of "business." Subsection (2) states:—"Such profits or gains shall be computed after making the following *allowances*," and the act enumerates ten categories of deductions allowed, the last of which is comprehensive and reads as follows:—"Any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains".

S. 11 deals with "professional earnings", which "shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purposes of such

* *Usher's Wiltshire Brewery Ltd.* v. *Bruce*, (1915) A.C. 433, at pp. 467 and 468; 6 T.C. 399.

profession or vocation, provided that no allowance shall be made on account of any personal expenses of the assessee".

The Indian law on the question of allowable deductions is, therefore, practically the same as the law in Ceylon and England, though, as pointed out by Mr. V.S Sundaram, "in *form*, the law in the United Kingdom differs, mentioning, as it does, the prohibited deductions only."* [See in this connection paragraphs 40 and 41 of the Indian *Income Tax Manual*.]

It has to be admitted, however, that the language of section 10 (*a*) of the Ceylon Ordinance is not a *verbatim* reproduction of any of the relevant provisions of the United Kingdom Acts, but it is an amplification of their language. Rule (3) (*b*) of the Rules applicable to Cases I and II of Schedule D prohibits the deduction of expenses incurred for any "domestic or private purposes." Rule 9 of Schedule E states affirmatively as regards cost of travelling that "the expenses of travelling in the performance of the duties of the office or employment" may be deducted from the emoluments of the employee. The draftsman of section 10 (*a*) has consolidated these two rules under one heading. The phrase "place of business or employment' has to be read, in the sense in which DALTON J. has interpreted it, namely, a place which is fixed, in regard to which one has a duty to be there. The emphasis is on the word *place*, something which is objective in relation to the assessee, not personal to him, something which is of the essence of the business or employment, without which the business will not function. [The use of the phrase "place of business" in other enactments—eg., Ss. 31 and 111 of the Joint Stock Companies Ordinance of 1861, Ss. 2 and 4 of the Registration of Business Names Ordinance of 1918—confirms this view.]

Reading the phrase "place of business" in this sense, the deduction claimed by the assessee as "cost of travelling" will not fall within S.10(*a*). The further question whether such cost of travelling may be allowed as an expense incurred in the production of the assessee's income will depend upon the extent to which such expense was essentially necessary for yeilding the professional income of the assessee. The policy of the Income Tax Department of Ceylon is set out in Explanation 367 of the *Income Tax Manual*, which deals with a doctor carrying on private practice and will, therefore, cover the case under review. The *Manual* states that "for professional use of his car a reasonable proportion of the total cost of driver's wages, running costs and depreciation—section 9 (1)(*a*)—in accordance with the approximate mileage run for professional and private purposes, respectively", will be deducted from the gross amount of the income from the profession. In view of the similarity in language, certainly in substance, between the relevant sections of the Ceylon Ordinance and the United Kingdom Acts the decisions under the latter may be applied to the interpretation of the former† and reference may, therefore, be had to 17 Halsbury (Hailsham Edition) p. 220 *et seqq*. and the cases therein summarized.]

Law of Income Tax in India, 3rd Edn., p. 496

† Cf, for instance, the dictum of SIR ARTHUR WILSON in *Lowell & Christmas Ltd.* v *Commissioner of Taxes*, (1908) A C 46, which was quoted with approval by AKBAR S.P.J. and KOCH J. in *Anglo-Persian Oil Co., Ltd.* v. *Commissioner of Income Tax*, p. 56, *infra*.

Present: AKBAR S.P.J. AND KOCH J.

THE ANGLO-PERSIAN OIL CO LTD. LONDON
v. COMMISSIONER OF INCOME TAX

[S.C. No. 161 (1935)—Special]

Decided: *30th July, 1935.*

Agreements made in London between English Company registered in United Kingdom and various ship-owners, by which the English company undertook to supply to ship-owners, and they undertook to take, all the latter's requirements of fuel oil—Oil stored in Colombo in tanks belonging to agents of the English company, a Ceylon company registered in United Kingdom and delivered to ships in Colombo by the Ceylon company—Payments made in London—Are the profits arising from such transactions deemed to be derived by the English company from business transacted by them in Ceylon?—Do such profits arise to the English company in Ceylon?—Are the profits derived by them from Ceylon?—Income Tax Ordinance No. 2 of 1932, Ss. 5 & 34—Sale of Goods Ordinance No. 11 of 1896, Ss. 4 (1), 17 (2), 18 (Rules 1 and 5 [1]) and 30 (2).

Meaning of the phrase 'business transacted in Ceylon' *in S. 5 (2) and of* 'instrumental in disposing of any property' *in S. 34 (1) discussed.*

The appellant company, registered in the United Kingdom, entered into agreements in London with various ship-owners by which the appellant company undertook to supply, and the ship-owners bound themselves to take, all the latter's requirements of fuel oil. The appellant company had as their agents in Colombo, a Ceylon company registered in the United Kingdom. The appellant company's fuel oil was stored in Colombo in tanks belonging to the Ceylon company, where the latter stored their oil also. Delivery of the oil was made by the Ceylon company at Colombo to the ships belonging to the ship-owners who had contracted with the appellant company; but payment was arranged to be made in London on receipt of telegraphic advice of the quantity delivered each time. On appeal against an assessment made upon the appellant company through its agents, the Ceylon company, on the profits which, it was claimed, the appellant company had made from the supply of its oil to ships calling at Colombo,

HELD, on the facts stated,

(i) that the agreements entered into between the appellant company and the shipowners were not merely agreements to sell oil but were contracts of sale by which the property in the oil stored in Colombo passed to the shipping company at the time each contract was signed, the exact quantity being limited by the requirements of the several ships of the shipping companies calling at Colombo and the delivery being made in instalments in Colombo to suit the convenience of the buyers,

(ii) that delivery was not, in the circumstances of this case, an essential requisite of the contract of sale to give it validity, though it may be a necessary consequence that follows in order to implement it,

(iii) that inasmuch as the contracts in this case, forming as they do the essence of the business, were habitually made outside Ceylon, the appellant company did not transact any business in Ceylon either directly or through their agents, the Ceylon company,

(iv) that, therefore, as regards the appellant company, no profits arose in or were derived from Ceylon, within the meaning of S. 5 of the Ordinance and

(v) That although the appellant company's agents in Ceylon may actually deliver the oil or may be instrumental in such delivery, if they did not actually effect the contracts or if they were not instrumental in effecting them, the non-resident appellant company would not be liable on the profits arising from such contracts within the meaning of S. 34 of the Ordinance.

Per AKBAR S.P.J.— In section 5 (2) the words used are 'business transacted in Ceylon whether directly or through an agent' whereas the words in Schedule D of the English Act are 'trade exercised within the United Kingdom'. In my opinion the words mean the same thing.....

In my opinion section 34 was inserted in the Ceylon Ordinance to include contracts which have been entered into as a result of the efforts of agents in Ceylon of a foreign principal, even when such contracts have been finally concluded outside Ceylon..... The section is meant..... to catch up acts of canvassing which result in contracts of selling or disposing outside Ceylon if the Crown can prove that the agent was instrumental in getting the sale or disposal fixed.....

The word 'disposal' was used, I suppose, to include contracts other than sales proper disposing of property, eg, barters or exchanges..... on behalf of his foreign principal as a definite legal act and does not include a mere delivery by an agent in Ceylon of goods sold in pursuance of a contract made outside Ceylon. [KOCH J. also interpreted the word 'disposal' in the same sense in his judgment].

Per KOCH J —The words 'instrumental in selling' mean 'aiding or assisting in bringing about' the contract of such sale, which but for such aid and assistance may never have come of.

Followed :—

Grainger & Son v. *Gough*, (1896) A. C. 325; 3 T. C. 462 (2)
Lowell & Christmas, Ltd. v. *Commissioner of Taxes*, (1908) A. C. 46 (3)
Erichsen v. *Last*, (1881) 8 Q. B. D. 414; 4 T. C. 422 C. A. (4)
Maclaine & Co. v. *Eccott*, (1926) A.C. 424; 42 T.L.R. 416; 10 T.C. 481 (5)
Werle & Co. v. *Colquhoun*, (1888) 20 Q.B.D. 753; 2 T.C. 402, C.A. (6)
Greenwood v. *Smidth (F.L) & Co*, (1922) 1 A.C. 417; 8 T.C. 193 (7)
Wilcock v. *Pinto & Co*, (1925) 1 K.B. 30; 9 T.C. 111 C.A. (8)
Muller (W.H.) & Co. London Ltd. v. *Inland Revenue Commissioners*, (1928) A.C. 34; 13 T.C. 158 (11)

Referred to :—

Armayo & Co. v. *Ogston*, (1925) 1 K.B. 109 (1)
Turley v. *Bates*, (1863) 2 H. & C. 200 (12)
Higgin v. *Pumpherston Oil Co.* (1893) 20 Rettie 532 (13)

Not followed :—

Crookston Bros. v. *Furtado*, (1911) Scot. C. 217; 5 T.C. 602 (9)
Turner v. *Rickman*, (1898) 4 T.C. 25 (10)

Case stated for the opinion of the Supreme Court by the Board of Review under section 74 of the Income Tax Ordinance No. 2 of 1932.

The facts were stated as follows by AKBAR J. in his judgment:— The appellant is the Anglo-Persian Oil Company Ltd., registered in the United Kingdom and its agent in Ceylon is the Anglo Persian Oil Co., (Ceylon) Ltd. also registered in the United Kingdom. The appellant company enter into contracts in London with shipowners whose ships call at various ports including Colombo. In Colombo the appellant company, although it has no place of business, stores its fuel oil with its agent, the Ceylon company, which has its place of business in Colombo where it trades in fuel oil as part of its business. A specimen form of the contracts is attatched and under it the appellant company undertakes to supply fuel oil for the requirements of the shipping company's vessels at certain named ports including Colombo and at a stated price per ton. The shipping company binds itself to buy from the appellant company the estimated oil requirements of its vessels at the named ports. The minimum quantity which the shipping company undertakes to buy and the maximum quantity which it may require the appellant to deliver during the period, (which is also fixed) are also stated. Clause 3 provides that the prices include delivery f.o.b., where there are direct pipe-lines, but where delivery is by barge (as in Colombo) the shipping company pays an extra sum, also paid per ton. The appellant company's weights and measurements are to be accepted as conclusive but the shipping company may also be represented at the measuring to verify the correctness of the measurements. By clause 5 payment is to be made in London by cash nett on receipt of the appellant's agent's telegraphic advice of the quantity delivered. By clause 7 the shipping company had to give the appellant's agents at the named ports 48 hours notice of each delivery required. Clause 9 states that each delivery shall constitute a separate contract. The appellant has the right to suspend or cancel the contract in the event of the shipping company failing to make the payments provided in the contract and in certain other contingencies not material to this case.

According to the facts stated the agents of the appellant i.e , the Ceylon company, store the appellant's oil and their own oil in tanks built on premises leased out from the Crown by the Ceylon company for the latter's own business. When a ship belonging to a company which has entered into a contract with the appellant arrives in Colombo a representative of the Ceylon company visits the ship and ascertains the requirements of oil and the required quantity is brought in lighters belonging to the Ceylon campany and delivered to the ship. A document of delivery and acceptance is signed by representatives of the ship and the Ceylon company and a copy of this document is sent by the Ceylon company to the appellant in London.

The assessor claimed that the appellant company had made in respect of the transactions above referred to for the year of assessment 1932-1933 taxable profits amounting to Rs. 500,000 and he accordingly made an assessment of tax Rs. 60,000/- on the appellant company in the name of their agents, the Ceylon company, in terms of S. 35 of the Income Tax Ordinance. The Commisssoner of Income tax in appeal confirmed the assessment, whereupon the appellant appealed to the Board of Review who in turn confirmed the assessment by the following order.—

Messrs. Anglo-Persian Oil Company Limited, the assessee-appellant in this matter, is a company registered in the United Kingdom. The alleged agent, Messrs. Anglo-Persian Oil Company (Ceylon) Limited, is similarly registered and carries on the business of dealing in fuel oil in Ceylon.

2. The assessee has entered into contracts with various ship-owners in the United Kingdom whereby the ship-owners undertake to purchase actually their whole requirements from the assessee at various ports including Colombo. The rate per ton is fixed in each contract and the price is paid and received outside Ceylon.

3. The practice followed in Ceylon is briefly as follows:-

The local oil company, part of whose business is to deal in fuel oil, store the oil of the assessee in their tanks upon their premises at Kolonnawa or Bloemendahl, and upon being notified by a ship-owner of his requirements weigh or measure the necessary quantity of the oil, which is mixed up with their own, and deliver it to the ship-owner on board his ship. Thereafter the local company send a telegraphic advice of the quantity delivered to the London Company, on receipt of which payment falls due. In these circumstances it is evident that the local company intervene in an executory contract to the end of ascertaining the thing to be sold and the price thereof—essential elements of a contract of sale. In other words the local company take an active part in advancing an executory contract into a completed sale. Property passes by reason of their action.

4. The assessee contends that the oil cannot be regarded as property which is in Ceylon or which is to be brought into Ceylon and that it does not fall within the scope of section 34 (1). It is difficult to accept this contention in the light of existing facts. The facts are that the oil sold is stored in the local company's afore-mentioned premises and mixed up with their own oil held for local sale. Furthermore there is nothing to show that the oil supplied to the shipowner had not been in the local company's premises for an indefinite period of time. If the oil "is not in Ceylon" it is difficult to say where it "is". The point is devoid of merit.

5. The assessee has canvassed the intention of the Legislature. This is a matter which need not be gone into in the event of the language used being unambiguous.

6. Certain notes contained in the Ceylon Income Tax Manual have been brought to our attention, and the assessee's case has been presented with much force and skill. It is, however, manifest that section 34 (1) has been designed to cast the net as wide as the Legislature had jurisdiction to cast it and that the assessee has come within its range. Whether section 34 (1) is politic and whether it contravenes the territorial limit of taxation it is not for us to consider.

7. In the result we hold that the local Company has been instrumental in selling as well as in disposing of property in Ceylon.

8. The appeal is therefore dismissed and the assessment is confirmed.

The appellant company, thereupon, required the Board to state a case for the opinion of the Supreme Court which they did in the manner following:—

CASE STATED

Upon the application of the Anglo-Persian Oil Co. Ltd., by its agents, the Anglo-Persian Oil Co. (Ceylon) Ltd.

1. The Anglo-Persian Oil Co. Ltd. (hereinafter referred to as "the appellant") was assessed for the year of assessment 1932-1933 as having a taxable income of Rs. 500,000/- upon which it was assessed to pay a tax of Rs. 60,000/-. The assessment was made upon the appellant through the Anglo-Persian Oil Co. (Ceylon) Ltd. (hereinafter referred to as the "Ceylon Company").

2. Being dissatisfied with the said assessment the appellant company appealed to the Commissioner of Income Tax on the ground that the appellant was not liable to income tax. The Commissioner of Income Tax dismissed the appeal and confirmed the assessment.

3. Dissatisfaction was expressed on behalf of the appellant against the decision of the Commissioner and an appeal was duly lodged to the Board of Review constituted under the Income Tax Ordinance on grounds hereinafter set forth.

4. At a meeting of the Board of Review held on the 23rd day of July, 1934, the appeal was heard by the Board of Review and adjourned for further hearing on the 21st day of August, 1934.

5. The appellant company and the Ceylon company are both registered in the United Kingdom. The appellant company has no place of business of its own in Ceylon. The Ceylon company has a place of business of its own in Ceylon and deals inter alia in fuel oil produced by the appellant company. The Ceylon company store the oil of the appellant company and other oil in which the Ceylon company deals, in tanks belonging to them erected upon premises leased out

from the Crown by the Ceylon company for the purpose of the Ceylon company's business. These tanks are situated at Kolannawa and Bloemendahl. Considerable stocks of oil are stored in these tanks to meet the obligations of the appellant company in respect of contracts entered into in London by the appellant company with various shipowners whose ships are likely to call at Colombo. A specimen form of such a contract, containing all the clauses, is annexed to this case as a part thereof and is marked A for easy identification*.

6. Under these contracts the respective ship-owners undertake to purchase their whole requirements of fuel oil from the appellant company; the ships of the particular ship-owners taking the oil at the various ports which are specified in each contract. The appellant company therefore has to have ready and available various quantities of oil, at the various ports to meet the various contracts. The agreements provide for a fixed price per ton of oil, and in addition the minimum quantity which the ship-owner undertakes to buy during the period of the contract and the maximum quantity which the ship-owner may require the appellant company to supply during the contract period are both fixed by the contract.

Specimen of Agreement.

Memorandum of Agreement No. made this day of ..... 19 between.....as Agents on behalf of.....(hereinafter called the "Buyers") and the Anglo-Persian Oil Company, Limited, of Britannic House, London, E. C. 2., (hereinafter called the "Sellers").

Clause 1. The Sellers undertake to supply fuel oil of Furnace quality for the requirements of the Buyers' vessels (including Chartered Vessels) at the undermentioned ports and prices :—

Port. Per ton of.

Clause 2. The Buyers on the other part bind themselves to take from Sellers' (or Associated Companies') installations, all the.....oil requirements of their vessels and chartered vessels at the above ports which they estimate at..... tons per annum. The minimum quantity which Buyers undertake to lift during the period of this contract is.....tons and the maximum quantity which they may require the sellers to deliver during the same period is.....tons.

Clause 3. The oil is sold ex tank in bond and the prices in Clause 1 include delivery f. o. b. where Buyers' vessels take their supplies by direct pipeline at the Sellers' (or Associated Companies') installations. In the event of any vessels requiring delivery by barge, Sellers agree to give delivery by this method where they have the necessary facilities, the vessel to provide a free side and Buyers to pay an extra.....per ton for all oil so delivered, the minimum payment per trip being ... to cover hire of tugs, barges, etc.

Clause 4. The Sellers' weights and measurements shall be accepted as conclusive evidence of the quantities delivered. Buyers, however, are at liberty to be represented at the measuring if they so wish and to verify the correctness of the Sellers' measurements, but the Sellers shall be entitled to proceed in the absence of such representatives and the weights ascertained by them shall be accepted by the Buyers as correct.

Clause 5. Payment for any oil supplied under this contract shall be made in London by cash nett and shall fall due for payment there on receipt of Sellers' Agents' telegraphic advice of the quantity delivered, any adjustment being made if necessary on receipt of mailed advice.

7. When a ship whose owner has entered into an agreement with the appellant company for the supply of oil arrives in Colombo, a representative of the Ceylon company visits the ship and ascertains its requirements of oil. The requisite quantity of oil is brought to the ship in lighters belonging to the Ceylon company and delivered to the ship by the Ceylon company's employees. The ship's officer and a representative of the Ceylon company, acting on behalf of the parent company sign a delivery and acceptance document. A copy of this document is sent to the appellant company in London. The ship-owner pays the appellant company in London the cost of the oil supplied to the ship in Colombo at the rate agreed upon in the contract. Sometimes, but not invariably, the Ceylon company receives instructions by cable from the appellant company to supply the oil required by a ship, which is due to call at Colombo, the approximate quantity required being also mentioned.

8. The assessment was in respect of profits which it is claimed, the appellant company must have made from the supply of its oil to ships calling at Colombo. The amount of the assessed income was not disputed, nor was it disputed that if the company was liable to tax, the amount payable would be 12% of its assessed income, viz, Rs. 60,000/-. The only question on the appeal both before the Commissioner and before the Board was as to the liability of the appellant company to tax.

Clause 6. The prices hereby fixed are inclusive of the taxes, dues, and other charges (except Customs charges) at present payable in respect of the oil to be delivered hereunder and if at any time during the currency of this agreement any new or increased tax, due, or other charge, shall be levied by any Government, Municipal, Port, Harbour, Dock, or other Authority upon or in respect of any oil to be delivered hereunder the said prices shall be proportionately increased. Work performed outside usual working hours on public and Dock holidays, Sundays or Saturday afternoons shall be paid for by the Buyers at Tariff rates in addition to the abovementioned prices.

Clause 7. Buyers shall give Sellers' Agents at the various ports at least 48 hours notice exclusive of Sundays and Holidays at the port concerned of each delivery they require under this contract.

Clause 8. Buyers shall not assign or transfer this contract, or any benefit thereunder, to any other person, firm, or corporation without the consent in writing of the Sellers and shall not at any time dispose of any oil delivered to them hereunder otherwise than by consuming the same in vessels owned by or chartered to them.

Clause 9. Each delivery shall constitute a separate contract.

.....

Clause 12. Sellers have the right to suspend or cancel this contract in the event of buyers failing to make the payments as above provided or if buyers become bankrupt or commit an act of bankruptcy or being a Limited Company if a Receiver be appointed or a resolution passed for voluntary liquidation or a petition be presented for an order of winding-up.

Clause 13. This agreement is to commence on the day of 19 and to remain in force until the day of 19

9. It was contended on behalf of the appellant: (a) that such profits are not income arising in or derived from Ceylon or for services rendered in Ceylon within the provisions of the Income Tax Ordinance (b) that these profits are the results of contracts made in London where payment is made for the oil supplied; that Colombo is merely one of many depots established along the shipping routes and utilized for the delivery of the oil; (c) that the Ceylon company merely receives and stores the oil on behalf of the assessee and hold it against the delivery instructions of the assessee; (d) that the Ceylon company does not enter into any negotiations whatever with the ship-owners and that they are consequently neither instrumental in effecting a sale nor in disposing of the oil within section 34 of the Ordinance, the oil being merely temporarily stored pending the arrival of the ships which take delivery thereof; (e) that the oil must be regarded in the same position as agricultural produce which is brought to Ceylon for trans-shipment to other countries, on the profits of which produce no tax is levied as it is stored in bond in warehouses; and that the oil in this instance is not kept in bonded warehouses because there is no duty payable on bunker oil; (f) that the oil is already sold under the contract entered into in London, and that therefore the appellant company does not carry on in Ceylon any trade or business so as to bring it within the Ordinance.

10. It was contended in support of the assessment that the sole question for consideration was whether the transactions fell within the provisions of section 34 (1). It was urged that the Agreement was indefinite as regards the quantity although it fixed a maximum and a minimum; that under its provisions the oil may be taken by the ship-owner at any one or more of a number of ports and that there was no obligation on the ship-owner to take any oil at all in Colombo; and that in consequence a definite sale was effected by the Ceylon company when it appropriated and supplied a specific quantity of oil, on behalf of the appellant company, to any particular vessel; that payment being made outside the Island is expressly made immaterial by section 34; that even if the Ceylon company be held not to effect the sale, it must at least be held to be instrumental in effecting the sale or in disposing of the goods; that even if the Ceylon company did nothing but the mere physical act of delivery of the oil, it must be held to have been instrumental in disposing of the goods; that even if the sale can be said to have been effected by the non-resident person, i.e. the appellant, outside Ceylon, liability is not avoided in view of the express provisions of section 34.

11. The Board of Review confirmed the decision of the Commissioner, and dismissed the appeal and confirmed the assessment for the following reasons:-[See the Board's Order on p. 59 *supra*.]

12. Being dissatisfied with the decision of the Board, the appellant company has duly requested the Board to state a case for the opinion of the Honourable the Supreme Court on a question of law, as to whether the appellant company is liable to pay Income Tax upon the facts set forth above.

This case we have accordingly stated on this seventeenth day of October, One thousand nine hundred and thirty four.

Members of the Board of Review.

**H.V. Perera*, with him *F.C.W. Vangeyzel* and *G.E. Chitty*, for the assessee—appellant: The main question for decision in this case is whether the Ceylon company "sells or disposes of or is instrumental in selling or disposing" of the appellant company's oil stored in bulk in Ceylon so as to make the appellant company liable to taxation within the meaning of S. 34 (1) of the Ordinance. The contracts of sale of the oil are made in London between the appellant company and the ship-owners, who have an option of taking oil or not, according to their requirements in Colombo. The oil is the property of the appellant company and when a ship-owner wants oil in Colombo, the Ceylon company merely delivers the oil in pursuance of a contract of service between it and the appellant company.

One has to construe the word 'disposes' in the context as equivalent to 'sells'. The Ceylon company cannot, on the facts stated, be considered as a seller of the oil. Nor could it be regarded as 'instrumental' in selling the oil. Its function is purely ministerial, in the same way as that of the labourer who pumps the oil or the boatman who takes the lighter out to the ship, who will not be regarded as 'instrumental' in selling the oil. Mere delivery of goods which are covered by a contract made abroad will not fall within S. 34.

Counsel cited *Erichsen* v. *Last* (4) and *Lowell and Christmas* v. *Commissioner of Taxes* (3).

M.W.H. de Silva, Acting Solicitor General, with him *H. H. Basnayake*, C.C., for the Commissioner of Income Tax—respondent: The question which arises for determination is whether the assessee is liable to pay income tax, not whether he is liable under a particular section of the Ordinance. It is open, therefore, for your Lordships' court to decide this case upon an interpretation not only S.34(1) of the Ordinance but also S. 5. The language of S. 34 differs from the corresponding provision of the English Act. Further, the English law uses the phrase 'trade exercised' while the Ceylon Ordinance has 'business transacted'. [The Solicitor General referred to Lord MCLAREN'S interpretation of the words 'business' and 'trade' in *Muat* v. *Stewart*, 2 T.C. 601, at p. 607.

*The Editor is indebted for the arguments of Counsel in this case to A.B. Cooray, Esq., Editor of the *New Law Reports*.

The term 'business' is wider than 'trade' in its scope. In the absence of any special meaning given to a word in a fiscal enactment, the word must be read in its ordinary, natural meaning—see the observations of SANKEY J. in *Neville Reid & Co. Ltd.*, v. *Commissioner of Inland Revenue*, 12 T. C. 545, at p. 568. When one considers where a business is transacted, one has to look to the place where the most important step in the business is taken, which in this instance is the place of delivery. The business is transacted there and the profits arise there. See *Turner* v. *Rickman* (10) and *Crookston Bros.v. Furtado* (9), particularly the dictum of WILLS J. in the former.

A perusal of clause 9 of the agreement, a specimen of which is annexed to the Case Stated, shows that the contract in question was only an agreement to sell. It became a contract of sale as when the Ceylon company ascertained the requirements of oil of each of the ships which entered the harbour of Colombo and whose owners had entered into agreements with the appellant company.

If the delivery of oil by the Ceylon company cannot be brought within the words "sells or is instrumental in selling' of S. 34, it falls at least within the words "disposes or is instrumental in disposing" which immediately follow.

Lastly, if the course of business of the appellant company is outside the scope of S. 34 of the Ordinance, it is clearly 'business transacted in Ceylon through an agent', namely, the Ceylon company, within the meaning of S. 5 (2).

[The learned Acting Solicitor General cited also the following cases.—*Greenwood* v. *Smidth (F. L.) & Co.* (7), *Belfour* v. *Mace*, 13 T. C. 538, 558 and *Grainger & Son* v. *Gough* (2).

AKBAR S. P. J.—[His Lordship summarized the facts as set out above and proceeded.—]

The assessment was in respect of profits which it is claimed the appellant company must have made from the supply of oil to the shipping company's ships calling at Colombo. The question to be decided is whether on these facts the appellant company is liable to be taxed under the Ordinance. The case for taxation was solely put before the Board on the ground that the liability to be taxed arose under section 34 of the Ordinance and it was urged for the appellant that the sole question to be decided by us was whether section 34 applied. The Deputy Solicitor-General, however, contended that it was open to us to decide this case upon an interpretation not only of section 34 but also of the general section 5 of the Ordinance. As the case sent up to us for our opinion is (as it is expressed in paragraph 12) "whether the appellant company is liable to pay Income-Tax upon the facts set forth above", we were of opinion that it was necessary for us to interpret both sections. There was another reason for this course. Section 34 is supplementary to sec-

tion 5 and, as I shall indicate later, was presumably drafted to catch up cases which were likely to escape the net cast by section 5, according to certain English decisions. It would be necessary, therefore, to consider both sections and if in the result we came to the conclusion that section 34 did not apply but that section 5 did, our decision will lead to no practical benefit to the appellant company. Apart from this, as I have said, paragraph 12 of the Case Stated is wide enough to allow us to consider both sections, see *per* ATKIN L.J. in *Armayo & Co.* v. *Oyston* (1).

On the Case Stated and the contract, is is quite clear that the contract was signed in the United Kingdom for delivery of oil in Ceylon, (which is not a product of Ceylon), by the appellant's agents in Ceylon and that the price was paid in the United Kingdom. The oil belonging to the appellant company is mixed up with the oil of the local company and stored in the Ceylon company's stores. The Ceylon company would be paid for this storage and also for their services to the appellant company by the appellant which payment would be liable to taxation under section 5. The Ceylon company appears to be nothing more than an agent for delivery of oil, the quantity, the price, the conditions and method of delivery having been already fixed by a contract entered into in England.

By section 5 income tax is payable in respect of profits and income in the case of a person not resident in Ceylon (as in this case) if they arise in or are derived from Ceylon. I do not think the profits of the appellant company arise in Ceylon or are derived from Ceylon. In my opinion the profits of the appellant company arise from the contracts made in England and not from the mere act of delivery in Ceylon made in pursuance of the contract. If the oil delivered is the product of Ceylon one may contend that the profits arose in or are delivered from Ceylon, just as the income from a tea estate in Ceylon may be said to arise in Ceylon even though the non-resident owner sold the tea on contracts made in the country of his domicil. But the oil is not the product of Ceylon, and it is oil that has been shipped to Ceylon. Nor do I think that the profits have been derived from Ceylon; the word "derive" implies that the source of the profits or income must be Ceylon. If the local Government can reach the income derived by an agent in England who is paid for his services in England on behalf of a person resident in Ceylon by the latter, such income may possibly be said to be derived from Ceylon. In my opinion these two words "arise" and "derive" were meant to include the case of the Ceylon company when it makes any profits or gets any income for anything done in Ceylon and the case of a non-resident owner deriving his income from an estate in Ceylon.

On the facts stated in this case, although the generality of the words has not been restricted, I think the words mean nothing more than its definition in sub-section (2) of section 5. Otherwise a foreign merchant sending goods, sold on a contract made ouside the Is-

land and when the price is also paid outside Ceylon to a purchaser in Ceylon, would be liable to be taxed when the goods are sent to an agent by post. It is the same distinction between trading *with* a country and trading *within* a country pointed out by LORD HERSCHELL in *Grainger & Son* v. *Gough* (2).

In section 6 (2) the words used are "business transacted in Ceylon whether directly or through an agent", whereas the words in Schedule D. of the English Act are "trade exercised within the United Kingdom". In my opinion the words mean the same thing. In *Lovell & Christmas Ltd.* v. *Commissioner of Taxes* (3), the Privy Council interpreted the words "income derived from business" in the New Zealand Act as more or less equivalent to the words in the English Act. SIR ARTHUR WILSON said as follows in his judgment:—"The language of the English Income Tax Acts and that of the New Zealand Act are not identical, but there is sufficient similarity in substance to make the English decisions authoritative as to the principles to be applied to the interpretation of the Colonial Act". The Privy Council applied the principles of the English decisions even though the sales were of produce shipped by growers in New Zealand in and under arrangements and contracts made in New Zealand for sale by the appellant company in England. "The rule seems to be that where such contracts forming as they do the essence of the business or trade are habitually made, there a trade or business is carried on within the meaning of the Income Tax Acts, so as to render the profits liable to Income Tax". There is a series of English decisions beginning with *Erichsen* v. *Last* (4) down to quite recent times in which the deciding factor was held to be the place where the contracts were made. In some of these decisions, the three essential points of the place where the contracts was made, the place where delivery was to be made and the place where the price was to be paid were considered but the crucial test was laid down as the place where the contract was made. In *Maclaine & Co.* v. *Eccott* (5), the LORD CHANCELLOR said as follows: "The question whether a trade is exercised in the United Kingdom is a question of fact, and it is undesirable to attempt to lay down any exhaustive test of what constitutes such an exercise of trade; but I think it must now be taken as established that in the case of a merchant's business, the primary object of which is to sell goods at a profit, the trade is (speaking generally) exercised or carried on (I do not myself see much difference between the two expressions) at the place where the contracts are made. No doubt reference has sometimes been made to the place where payment is made for the goods sold or to the place where the goods are delivered, and it may be that in certain circumstances these are material considerations; but the most important and indeed the crucial question is, where are the contracts of sale made. Statements to this effect by Lords Justices BRETT and COTTON in *Erichsen* v. *Last* (4) were quoted with approval in this House in

the case of *Grainger* v. *Gough* and the same principle was the basis of the decisions in *Werle* v. *Colquhoun* (6) *Lovell and Christmas* v. *Commissioner of Taxes* (3) *Greenwood* v. *Smidth* (7) and *Wilcock* v. *Pinto* (8). The decision in *Crookston* v. *Furtado* (Supra) may probably be supported for the second reason given by the Court namely, that the profits there in question had not been received by the agents; but on the question first discussed—namely as to the place where the trade was carried on, I think that the reasoning of LORD DUNDAS is to be preferred to that of the other members of the Court".

This case was followed by the House of Lords in *Muller & Co., (London) Ltd.* v. *Commissioner of Inland Revenue* (11) and VISCOUNT DUNEDIN referred to the remarks of LORD SHAW in the former case.

In the case before us the contract is made in England and the price is to be paid in England and only the delivery is to be made in Ceylon. The Deputy Solicitor-General argued that the delivery was to be regarded as decisive in this case, for he said it regulated the price and he quoted the case of *Turner* v. *Rickman* (10), and *Crookston Bros.* v. *Furtado* (9). In the former case it is true that WILLS J. while holding that the contracts were concluded and the deliveries made in the United Kingdom, was of opinion that even if the contracts had been made in New York the delivery of the goods here would by itself have consituted an exercise of trade in this country. But WILLS J.'s remarks were *ob ter* and although it is referred to in the dissenting judgment of LORD DUNDAS in *Crookston Bros.* v. *Furtado* (*ubi supra*) he preferred to follow the other decisions of the English Courts. In *Maclaine* v. *Eccott* (supra) VISCOUNT CAVE preferred the reasoning of LORD DUNDAS.

LORD SHAW'S remarks are as follows:—"But I may be allowed before doing so to add but a few words to those of the LORD CHANCELLOR in regard to the case of *Crookston* v. *Furtado* (1911) S.C. 217. It humbly appears to me that the judgment of the majority of the learned Lords of the Second Division was erroneous. I think the weight of authority upon the subject in England was much too lightly treated. As illustrative of this I may cite the following passage from LORD SALVESEN'S judgment: 'I am fully aware', says he (it was a clear case of a contract completed in England), 'that my opinion runs counter to some dicta of the English Judges and especially to the dictum of LORD JUSTICE BRETT in the case of *Erichsen* (8 Q.B.D. 414) which was quoted without disapproval in the subsequent case of *Grainger* [12 Times L. R. 364 (1896) A.C. 32, and from which it might be inferred that the fact that a foreign company makes its contracts in England for the sale of its goods there, even when it does so through an agent, is of itself sufficient to constitute an exercise of trade by a foreign company so as to render it amenable to assessment under our fiscal law".

My Lords, in the case of *Grainger* (supra) LORD HERSCHELL said:—

"In all previous cases contracts have been habitually made in this country. Indeed, this seems to have been regarded as the principal test whether trade was being carried on in this country. Thus in *Erichsen* v. *Last* (*supra*) the present Master of the Rolls said:—'The only thing we have to decide is whether, upon the facts of this case, this company carry on a profit-earning trade in this country. I should say that whenever profitable contracts are habitually made in England by or for foreigners, with persons in England, because they are in England, to do something for or supply something to those persons, such foreigners are exercising a profitable trade in England even though everything to be done by them in order to fulfil the contracts is done abroad'"

It appears to me that it gives insufficient weight to the important judgment in *Grainger's case* (*supra*) to treat it as having quoted the observations of LORD ESHER in *Erichsen* v. *Last* (*supra*) 'without disapproval', and I agree with LORD DUNDAS that LORD HERSCHELL agreed with and approved of LORD ESHER'S expressions.

I go so far as respectfully to adopt as my own the judgment of LORD DUNDAS, who dissented from the majority of the Second Division Judges, and in particular to accept his statement to this effect —'I now come to the last and, as I think, the most important question of fact, namely, whether or not the contracts of sale by the company were made within the United Kingdom. In my opinion, they were so made. It is admitted that 'the appellant have authority to sell the company's phosphates at or over minimum prices fixed by the company—. The appellants make the sales without reference to the company. It is left to the appellant's discretion to whom to sell'. Crookston Brothers, therefore, are not mere canvassers for orders, to be approved or rejected by their principals, but have full authority to make contracts of sale, so long as the price they contract for is not below the prescribed minimum.

LORD DUNDAS gives a careful citation of the authorities and considers that if he is right in holding that the sales were made in this country it follows from the decisions and particularly from the opinion in *Grainger* v. *Gough* (*supra*) that the company exercised a trade here.

I humbly think that both Mr. JUSTICE ROWLATT and the Court of Appeal were right in disregarding *Crookston* v. *Furtado* (*supra*) and in holding that it did not correctly interpret the Income Tax Acts in the particular mentioned.

So that according to the English decisions the business of the appellant company must be held so far as liquid fuel was concerned to be transacted not in Ceylon but in England. The Deputy Solicitor-General, however, argued (and this part of his argument also affected the position that he took up with regard to Section 34 to which I shall refer later) that the contract which was signed in the United Kingdom was nothing more than an agreement to sell and that the sale proper took place in Ceylon as each delivery was made. (See section 1 of the Sale of Goods Ordinance, No. 11 of 1896). I do not think that this is

so on the statement of facts set out for the opinion of this Court. Paragraph 5 states as follows:—'The Ceylon Company store the oil of the appellant company and other oil in which the Ceylon Company deals, in tanks belonging to them.....Considerable stocks of oil are stored in these tanks to meet the obligations of the appellant company in respect of contracts entered into in London by the appellant company with various ship-owners whose ships are likely to call at Colombo'.

Paragraph 6 states that under the contracts the shipping company undertakes to purchase their whole requirements of fuel oil from the appellant company at the port of Colombo.....and that, therefore, the appellant company has to have ready and available various quantities of oil at the various ports to meet the various contracts. The contract provides for a fixed price per ton of oil; and the minimum quantity which the shipping company undertakes to buy during the period of the contract and the maximum quantity which the shipping company may require the appellant company to supply during the contract period are both fixed by the contract.

Paragraph 11, sub-para 3, also makes it clear that the appellant company store their oil in the Ceylon company's tanks in Colombo. At the time the contract was entered into there was an agreement to buy all the oil required by the shipping company's ships calling at Colombo; the oil was stored by appellant in Colombo and the minimum and maximum quantities were fixed in the contract. The oil was to be delivered in Colombo according to the requirements of each ship as it came to Colombo. These contracts are entered into by business men, who will have no difficulty in calculating the exact oil requirements at each port during each month.

It seems to me that in these circumstances the intention was that the property in the oil stored in Colombo passed to the shipping company at the time the contract was signed, the exact quantity being limited by the requirements of all the ships of the shipping company calling at Colombo and only the delivery was to be made in instalments in Colombo to suit the convenience of the buyer.

Section 18 of Ordinance No. 11 of 1896 begins by stating that 'unless a different intention appears', the rules enumerated in it are to be applied. The intention in this contract, it appears to me, was to transfer the property in the oil at the time the contract was entered into in England and that only the delivery was to be made later at intervals according to the requirements of the buyer from time to time. It is to be noted in this connection that it is the buyer who has to notify in the first instance his requirements for each ship as it arrives in Colombo, see *Turley* v. *Bates* (12). The Ceylon company's duty was merely to measure out the quantity required and give delivery to the ship. I cannot, therefore, subscribe to the contention that the contract signed in London was an agreement to sell and that each delivery in Colombo by the Ceylon company was an actual sale by the latter on behalf of the appellant company.

The Deputy Solicitor-General referred to Clause 9 of the contract as supporting his view but, far from supporting him, there is a reason for its insertion. The whole contract is a contract for sale of oil to be delivered by stated instalments. Under Section 30 (2) of the Sale of Goods Ordinance No. 11 of 1896, where there is a breach by the seller in the delivery of any one or more instalments or by the buyer to take delivery, it is a question in each case, depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not a right to treat the whole contract as repudiated. It was to emphasise this aspect of the contract that the parties inserted clause 9. It puts into relief that the main contract was the one entered into in England and unless the facts were so strong as to justify a court in setting aside the whole contract, a breach or any number of breaches of the delivery or acceptance of delivery were only to be compensated by damages. It seems to me that the appellant company is not liable to be taxed under section 5 on the kind of contract before us. Thus there remains the further question whether the Crown can tax the appellant under Section 34, which was the only contention of the Commissioner before the Board of Review. In *Grainger & Son* v. *Gough* (2), the House of Lords held as follows: "A foreign merchant, who canvasses through agents in the United Kingdom for orders for the sale of his merchandise to customers in the United Kingdom does not exercise a trade in the United Kingdom within the meaning of the Income Tax Acts, so long as all contracts for the sale and all deliveries of the merchandise to customers are made in a foreign country". This is the headnote of the case, but, as I have already said, the reference to the delivery was made because there was such delivery outside the United Kingdom in that particular case. What LORD HERSCHELL said was as follows: "In all previous cases contracts have been habitually made in this country. Indeed this seems to have been regarded as the principal test whether trade was being carried on in this country".

In my opinion, section 54 was inserted in the Ceylon Ordinance to include contracts which have been entered into as a result of the efforts of agents in Ceylon of a foreign principal even when such contracts have been finally concluded outside Ceylon. This seems to be the intention of the draftsman when one considers the words 'is instrumental in selling or disposing". It is difficult to construe section 34 but the words in lines five to eight "and whether the insurance sale or disposal is effected by such person or by or on behalf of the non-resident person outside Ceylon", must be read *singuli in singulos*. as follows, to give the section a meaning "and whether the insurance, sale or disposal is effected by 'such person or when such person is instrumental in effecting any insurance, sale or disposal, the insurance sale or disposal is effected by or on behalf of the non-resident person outside Ceylon". Otherwise there will be an insurance, sale or disposal effected simultaneously by the separate acts of both the person in Ceylon and his principal outside Ceylon.

I cannot accede to the Deputy Solicitor-General's argument that each delivery in Ceylon was a sale or disposal by the agent, for reasons which I have stated previously. Nor can I accede to his argument that the words 'sells or disposses' will include a mere delivery in Ceylon of goods already sold by a contract made outside Ceylon by a non-resident person through a mere agent for delivery in Ceylon of the non-resident person. The word 'disposal' was used, I suppose, to include contracts other than sales proper disposing of property, e.g., barters or exchanges. The sale or disposal, when it refers to the person in Ceylon, means in my opinion a sale or disposal by the person in Ceylon on behalf of his foreign principal as a definite legal act and does not include a mere delivery by an agent in Ceylon of goods sold in pursuance of a contract made outside Ceylon.

My opinion that the sale or disposal in reference to the agent in Ceylon can only mean a sale or disposal by the agent is confirmed by the words in lines 4 and 5, "whether such property is in Ceylon or is to be brought into Ceylon". Therefore, the sale or disposal must be a complete legal act of the agent transferring title. The section is meant, as I have said, to catch up acts of canvassing which result in contracts of selling or disposing outside Ceylon if the Crown can prove that the agent was instrumental in getting the sale or disposal fixed. In my opinion, the appellant is not liable to pay Income Tax upon the facts stated and he is entitled to his costs at the hearing of this case which will be taxed by the Registrar and the fee of Rs. 50/- paid by the appellant under section 74 (1) will be refunded to him

KOCH J.—The appellant, the Anglo-Persian Oil Co. Ltd., being dissatisfied with the decision of the Board of Review, has requested the latter to state a case for the opinion of this Court on a question of law. That question is whether the appellant company is liable to pay income tax upon the facts set forth.

It would appear that the decision of the Board that the appellant was liable was solely confined to his liability under S. 34 of the Income-Tax Ordinance, and when the learned Deputy Solicitor-General sought to reason that on the facts stated the appellant was also liable to be taxed under the provisions of S.5 of this Ordinance, appellant's counsel objected. I do not think there is any force in the objection in view of the terms of reference to us. We are asked generally for our opinion on the law on the facts as stated. The objection therefore must be overruled.

There is also the utility point of view which is worth considering, and that is that nothing will be gained by the appellant if he succeeds under S. 34 but continues to be liable under S.5. The authorities will proceed to tax him duly under S. 5. Is is as well therefore that his liability be tested under S. 34 and S. 5 respectively.

The facts stated by the Board have been fully recapitulated by my brother and there is no purpose to be served by my repeating them.

I shall first deal with the question of the liability of the assessee under S. 34 of the Ordinance. The contention of the Commissioner of Income Tax before the Board of Review that the assessee was liable was confined to this section. This section presents some difficulty, but I am of opinion that after careful consideration it is clear that on the facts stated liability to pay does not attach to the assessee. This section makes provision for the liability of non-resident persons by reason of acts done by a person in Ceylon on behalf of a person resident abroad. These acts are specifically set out in the section. Firstly the acts must refer to the effecting of a contract of insurance in Ceylon., or if the insurance is effected out of Ceylon by the non-resident person, the latter would nevertheless be liable if his agent in Ceylon was instrumental in bringing about the contract. I advisedly use the words "in bringing about" because I wish to emphasize the implication contained in the words "effects or is instrumental in effecting", which precede the words "any insurance" and which to my mind must be confined to acts that precede the making of the contract and do not extend to acts that succeed such contract and may be necessary to implement it.

The same vein of intention on the part of the draughtsman, in my opinion, runs through the other contracts that follow, and that brings me to the second type of contracts set out, viz, sales. Here again the non-resident person would be liable if his agent in Ceylon sells any property on his behalf in Ceylon, whether such property is at the time in Ceylon or is to be brought into Ceylon; the non-resident person will also be liable although the sale was actually effected by him, if in point of fact his agent in Ceylon acting on his behalf was "instrumental in selling" that property. Carrying out the idea already enunciated, I am opinion that the words "instrumental in selling" mean aiding or assisting in "bringing about" the contract of such sale, which but for such aid and assistance may never have come off. A very apt illustration of this may be negotiations on the part of the agent in Ceylon carried out in Ceylon that have led to the making of the contract of sale of property in Ceylon or to be brought into Ceylon between the principals both of whom may be resident outside.

It has been strongly argued by the Deputy Solicitor General that delivery is an integral part of a contract of sale; in fact he pressed on us that it was the essence of such a contract and this being so, he maintained that delivery having actually taken place in Ceylon, the non-resident seller was liable to pay tax on the profits he derived from the sale.

I regret that I cannot agree with this submission. Delivery is not, in my opinion, an essential requisite for a contract of sale to give it

validity in every case, when entered into, although it may be a necessary consequence that follows in order to implement it.

Our Sale of Goods Ordinance No. 11 of 1896 in S. 4 (1) sets forth: " A contract for the sale of any goods shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or pay the price or a part thereof, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf ". For a contract to be said to be " enforceable by action " there must be a contract of binding effect already entered into.

The second clause to this section says that " The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured or provided or fit or ready for delivery ".

If then a contract which provides for a future delivery of the "res" is nevertheless an enforceable contract, I cannot see that delivery is an essential of the contract such as the "res", "pretium" or "consensus" would be.

I do not agree with the learned Deputy Solicitor-General's argument that the contract in question was a mere agreement to sell and not a contract of sale when the Ceylon company "ascertained the requirements of oil" after the ship requiring oil entered the port of Colombo.

A contract of sale has been defined to be a contract, when under its terms express or implied, the seller transfers or agrees to transfer the property in the goods to the buyer. A sale takes place when the property in the goods is transferred from the seller to the buyer, but where the transfer of the property in the goods is to take place at a future date, then when such time elapses, what until then was only an agreement to sell becomes a sale.

Reading the contract as a whole and taking into consideration the intention of the parties, regard being had to the terms thereof and also to the conduct of the parties and the circumstances of the case, as has been required to do under S 17 (2) of our Sales Ordinance, I have little difficulty in coming to the conclusion that the understanding was that the property in the goods passed at the date the contract was entered into but the delivery was postponed for future dates. I am supported in this view by the circumstance that on the facts stated to us considerable stocks of oil are stored by the assessee in tanks in Ceylon belonging to the Ceylon company to meet the obligations of the appellant company in respect of contracts entered into in London

by the appellant company with the ship-owners, the ship-owners undertake to purchase their whole requirements of fuel oil from the appellant company and the appellant company must have ready and available at Colombo sufficient oil to meet those requirements. The maximum and minimum quantities have also been fixed, and the sellers by the terms of the contract not only bound themselves to sell but the buyers had bound themselves to buy.

Section 18, Rule 1 of the Sale of Goods Ordinance says that where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or delivery or both be postponed. The contract in question is un-conditional; the goods are specified and they are in a deliverable state, so far as oil stored in tanks for sale can always be said to be in a deliverable state.

Rule 5 (1) further provides for the sale of unascertained or future goods by description and lays down that such goods in a deliverable state can be unconditionally appropriated to the contract by assent when the property in the goods would pass to the buyer. The assent may be express or implied. I think it is clear therefore that the intention was that the property in the goods should pass at the time of the contract, the sellers and buyers had bound themselves to sell and buy maximum and minimum quantities respectively which were fixed and so was the price, but delivery was postponed to suit the convenience of the buyers.

The "ascertainment of the requirements of the buyer" on the part of the seller's agent here was nothing more than to receive a demand for delivery from the buyer after the ship arrived in port.

Clause 7 of the contract provides for the buyer giving the seller's agent (the Ceylon company) 48 hours' notice of each delivery they require under this contract.

Clause 9 reads, "Each delivery shall constitute a separate contract". Respondent's counsel depended on this condition for his argument that the contract was only an agreement to sell until the delivery took place. I do not agree that this clause was inserted for that purpose or that its appearance in the contract substantitates the position taken up by the respondent. In my opinion this provision was included for no other reason than to make clear that a breach on the part of the seller's agent to deliver in Colombo according to the instalments contemplated when called upon, should not be considered a repudiation of the whole contract but a severable breach giving rise to a claim for compensation—vide S. 31 of the English Sale of Goods

Act 1893. If this is once made clear, the reference in this clause of the contract to the delivery would, on the other hand, tend to support my view that the property had already passed and delivery was merely postponed.

It has been held in *Higgin* v. *Pumpherston Oil Co.*, (13) that the insertion of a clause, such as No. 9 above refered to, made each delivery stand by itself and the buyer cannot enforce delivery of arrears, it being his duty to buy in against the seller on the occasion of each separate breach.

I therefore hold that although the agent in Ceylon may actually deliver the *res*—or may be instrumental in such delivery, if he did not actually effect the contract, or if he was not instrumental in effecting it, the non-resident would not be liable on the profits arising from that contract.

The next argument of the learned Deputy Solicitor-General is that if the act of delivery by the agent in Ceylon cannot rightly be brought in under the words " sells or is instrumental selling ", it is clearly caught up by the words that immediately follow, namely " disposes or is instrumental in disposing".

Now, if it was intended to introduce the word " disposes " to include the mere physical act of delivery of the property sold, the submission would have been right but is this word so intended or has it been inserted to provide for contracts other than sales out of which profits may accrue ? The real difficulty in the interpretation of this section now arises. I have very carefully considered the arguments for and against and feel that the legislature intended to tax profits derived by a non-resident person from every type of contracts entered into in the circumstances set forth in the section. It first referred to a common type of business contracts in Ceylon, viz., insurances, next a commoner type of business transactions, viz, sales, next and finally, it used a very comprehensive word to include all other contracts which involved the disposal of "property in Ceylon or to be brought into Ceylon". These latter words are helpful in arriving at what really the words "disposes of" mean. If "disposes" was meant to include a mere delivery, how is it possible to effect such an act in connection with property not in Ceylon at the time but expected to arrive later ? It might be asked if "disposes" does not include an act of delivery that accompanies or follows a sale but was intended to include generally contracts other than sales under which profits passed, what could be the contracts so contemplated ? The answer for one can be contracts of barter or exchange. Such contracts were the backbone of trade and business in times past and even today resuscitated in some parts of the world. The difficulty of estimating the actual profits arising from

such transactions is another matter and cannot affect the appropriateness of the illustration. Profits did – very large profits they were— arise from barter or else no trade by way of barter could obtain. Voet refers freely to such contracts. Why should profits arising on such contracts not be taxed under our Income Tax Law? This is, however, only one type, there are others.

My view is that the word "disposes" connotes clear and intelligible contractual relations between the agent in Ceylon and the disposee and was not intended to refer to such a detail as a mere delivery that may to the imaginative mind be performed even by a non-human agency.

If the draughtsman really intended to provide for cases of mere deliveries under sale contracts, nothing could have been easier than to insert words appropriate to such an idea e.g., "sales or deliveries thereunder". It would not be extravagant to expect this as the term "goods sold and delivered" is well known in legal circles and is a familiar expression in drafting. To give one instance, *vide* S. 9. of Ordinance No. 22 of 1871 (Prescription Ordinance):—"No action shall be maintainable for or in respect of any *goods sold and delivered* or for any shop bill....." The draughtsman does not stop at the words "goods sold" but tacks on the words "and delivered".

For these reasons I am of opinion that in the circumstances the provisions as contained in S. 34 do not impose any liability on the appellant to pay tax.

I now come to the second point, and that is the assessee's liability under S. 5. This section provides for income tax being chargeable on "profits and income arising in or derived from Ceylon" in the case of a person non-resident in Ceylon. In sub-section (2) "profits and income arising in or derived from Ceylon" are for the purposes of the Ordinance considered to include all profits and income derived from services rendered in Ceylon or from property in Ceylon or from business transacted in Ceylon whether directly or through an agent. It is only reasonable to suppose that the Ceylon (agent) company have been and are being paid for the storage of oil supplied by the assessee company and also for their services to the assessee company. Under this sub-section the Ceylon company can be taxed and has presumably been taxed for the profits derived by it on this head.

We next come to profits and income derived from property in Ceylon. I consider this to mean that profits are taxable if they arise out of some immovable property situate in Ceylon such as a tea or rubber estate, or as the result of trade connected with commodities or products manufactured or grown in Ceylon. The oil in question is not the product of this Island but has been transported from abroad

to be merely stored here and delivered by the Ceylon company to the steam-ship company where their vessels call and their requirements are notified—the Ceylon company being merely an agent for storage and delivery for the assessee non-resident company. This point did give some trouble while the learned Deputy Solicitor-General was outlining his argument because I felt that there was reason in his insistiug that were it not for Ceylon and the property (oil) being available to the steam-ship company in Ceylon there would be no purpose in the entering into of the contract. At the close of the arguments, however, on this point, I felt that the words "property in Ceylon" could not be said to be any property whatsoever that happened to be in Ceylon irrespective of the fact of its being sent here for the sole purpose of delivery to a party who was to accept it under an agreement entered into abroad under which agreement the quantity, price and method of delivery etc., were all previously arranged and provided for.

What remains to be considered is whether the profits that have been taxed have arisen from "*a business transaction in Ceylon*", whether directly or through an agent.

The precise words in the English Income Tax Act of 1918 are "profits or gains arising or accruing from any trade exercised within the United Kingdom". Now, if the words in our Ordinance have the same meaning as that intended by the words in the English Act, there is a series of authoritative decisions showing what actually was meant. It is therefore necessary to learn whether the difference in phraseology between our Ordinance and the English Statute on this point materially matters.

The case of *Commissioner of Taxes* v. *Lovell & Christmas Ltd.* (3) that came up before the Privy Council reported in (1908) Appeal Cases p46, is very helpful. This was an appeal from the decision of the Supreme Court of New Zealand. Four of the learned Judges of that Court held in favour of the Commissioner but STOUT C.J. dissented. The words in the New Zealand Act were "income derived from business", which are words very closely allied to the words in our Ordinance. The facts, as stated, and on which the Privy Council based their decision, can be summarized thus. Lovell was a salaried officer of Lovell & Christmas Ltd. He resided in and had no other business in New Zealand. His company carried on in London the business of provision agents. That business consisted of selling in London dairy produce sent from New Zealand and other parts of the world. The company had established credit at all the New Zealand Banks. Every year a servant of the company, Mr. Kowin, arrived in New Zealand, met Lovell and attended together meetings of the different butter and cheese factories and endeavoured to persuade the directors of these

factories to consign their season's output to the defendant company to be sold in London on commission. The defendant company from London instructed Messrs. Kowin and Lovell of the amount to which it was prepared to make advances. Messrs. Kowin and Lovell then entered into negotiations with the dairy companies and interviewed their directors and offered verbally to make advances within the limit so fixed. The defendant company thereupon made the necessary advances through a Bank in New Zealand against shipping documents. The produce shipped was sold in London by the defendant company on commission.

On these facts the majority of the Supreme Court of New Zealand considered that the case fell within the principle of the English case *Erichsen* v. *Last* (4), which when applied made the profits on the commission sales profits derived from contracts made in New Zealand and therefore derived from business in New Zealand. STOUT C.J., on the other hand, was of opinion that the principle laid down in *Grainger* v. *Gough* (2) was the one to be followed. The Privy Council agreed with the view of of the dissenting Judge STOUT C.J. and was of opinion that the business which yielded the profit was the business of selling goods on commission in London. The commission was the consideration for effecting such sales., and the monies received by the defendant company out of which they deducted their commission and from which therefore their profits came, were paid to them under the sales effected in London. The earlier arrangements entered into in New Zealand were merely transactions, the object and effect of which was to bring goods from New Zealand within the net of the business in London which was to yield the profit. The Privy Council was further of opinion that although the language of the English Income Tax Act and that of the New Zealand Act were not indentical, there was sufficient similarity in substance to make the English decisions authoritative as to the principles to be applied to the interpretation of the Colonial Act.

Now, if inspite of the canvassing by the defendant company's officials in New Zealand and the arrangements made by them in New Zealand with the dairy companies to ship to London on advances received in New Zealand through Banks in New Zealand, the opinion of the Privy Council was that the profits arising from the commission sales in London cannot rightly be said to be "income derived from business" carrived on in New Zealand, how much stronger would be the case of the resisting tax-payer on the facts of the case before us, when all that was done in the taxing country was ascertaining the requirements and making a delivery.

The language of our Ordinance is much more similar in substance to that of the New Zealand Act, and therefore while the opinion of the Privy Council in the New Zealand case on the law would apply in its full intensity to Ceylon, the authoritative English decisions as to the principles to be applied to the interpretation of the words "from any trade exercised within the United Kingdom" will also apply to the interpretation of the words of our Ordinance, namely, "from a business transacted in Ceylon".

These decisions have been clearly and fully considered by my brother, and, agreeing as I do with him in his comments regarding them, I think it unnecessary for me to say anything more than that they (the decisions) positively disclose that the crucial test is the place where the business contract has been made.

On the facts stated by the Board to us, and applying the law to them, I have therefore no hesitation in holding that the profits of the appellant company do not arise in Ceylon or are derived from Ceylon. It is my opinion therefore that the appellant upon the facts stated to us is not liable to pay income tax either under S.34 or S.5 of our Income Tax Ordinance.

I agree with the order made by my brother as to costs.

[Proctors for assessee—appellant: *Julius* and *Creasy*. Proctors for the Commissioner of Income Tax—respondent: *F. J. de Saram* and *C. T. de Saram*.]

[**Note.**—The decision in the above case raises an important question in income tax law, namely, the taxation of non-resident persons. As the same question arose in *Chivers & Sons Ltd.*, v. *Commissioner of Income Tax*, which was decided on the 1st November, 1937, it may be convenient to discuss the principles of non-resident liability under the Ceylon Income Tax Ordinance after this case is reported on a later occasion. For the present, attention is drawn to such sections of the Ordinance as determine this liability and on which the decision under review is based.

SECTION 2.—

"Agent" in relation to a non-resident person or to a partnership in which any partner is a non-resident person, includes—

(a) the agent, attorney, factor, receiver, or manager in Ceylon of such person or partnership; and

(b) any person in Ceylon through whom such person or partnership is in receipt of any profits or income arising in or derived from Ceylon.

"Business" includes agricultural undertaking.

"Non-resident" means not resident in Ceylon within the meaning of section 33.

"Resident" or "Resident in Ceylon" means resident in Ceylon within the meaning of section 33.

SECTION 5.—

(1) Income tax shall...be charged...in respect of the profits and income of every person for the year preceding the year of assessment—

(a) wherever arising, in the case of a person resident in Ceylon, and

(b) arising in or derived from Ceylon, in the case of every other person.

(2) For the purposes of this Ordinance, without in any way limiting the meaning of the term, "profits and income arising in or derived from Ceylon," includes all profits and income derived from services rendered in Ceylon or from property in Ceylon or from business transacted in Ceylon whether directly or through an agent.

SECTION 34.—

(1) where a person in Ceylon, acting on behalf of a non-resident person, effects or is instrumental in effecting any insurance or sells or disposes of or is instrumental in selling or disposing of any property, whether such property is in Ceylon or is to be brought into Ceylon and whether the insurance, sale or disposal is effected by such person in Ceylon or by or on behalf of the non-resident person outside Ceylon and whether the monies arising therefrom are paid to or received by the non-resident person directly or otherwise, the profits arising from any such insurance, sale or disposal shall be deemed to be derived by the non-resident person from business transacted by him in Ceylon, and the person in Ceylon who acts on his behalf shall be deemed to be his agent for all the purposes of this Ordinance.

(2) The profits of a non-resident person from employment by a resident person shall be chargeable with tax in so far as such profits arise from services or past services rendered in Ceylon.

SECTION 35.—

A non-resident person shall be assessable either directly or in the name of his agent in respect of all his profits and income arising in or derived from Ceylon, whether such agent has the receipt of the income or not....

We may also summarize the conclusions other than those set out in the head note which were reached by the learned Judges, in so far as they have a bearing on the question of non-resident liability to Ceylon income tax.

(i) S. 34 of the Ordinance is supplementary to S. 5 and was drafted to catch up cases which were likely to escape the net cast by S. 5—*per* Akbar S. P. J. at pp. 65 & 66, *supra*.

(ii) The words "business transacted in Ceylon," occurring in Ss. 5 (2) & 34 (1) of the Ceylon Ordinance, mean the same thing as the words "trade exercised within the United Kingdom" of the United Kingdom Income Tax Act, 1918, Schedule D, Rule (1) and the distinction drawn in the English law of income tax between "trading

in a country" and "trading *with* a country" applies to the interpretation of the Ceylon Ordinance — *per* Akbar S. P. J. at p. 67.

(iii) The English decisions as to the principles to be applied to the interpretation of the words "trade exercised within the United Kingdom" shall also apply to the interpretation of the words of the Ceylon Ordinance, namely, "business transacted in Ceylon"—see particularly *per* Koch J. at p. 80.

(iv) Though the case for taxation was put by the Commissioner of Income Tax before the Board of Review on the ground that the liability arose under S. 34 of the Ordinance, the Supreme Court considered the question from the point of view of both Ss. 5 & 34.

(v) The words "profits arising in or derived from Ceylon" in S. 5 of the Ordinance, when applie to a non-resident, included, for example, income derived from an estate in Ceylon—*per* Akbar S. P. J. at p. 66. The word 'property' in S. 5 (2) means immovable property or trade connected with commodities or products manufactured or grown in Ceylon—*per* Koch J. at pp. 77 & 78.]

Present: AKBAR S.P.J. AND KOCH J.

COMMISSIONER OF INCOME TAX *v.* R. M. A. R. A. R. R. M. ARUNACHALAM CHETTIYAR*

[*S. C. No. 24 (1935)—Special*]

Decided: *11th November, 1935.*

Ascertainment of profits of the business of money-lending—Interest falling due during the period of which profits are being ascertained but not paid—Does such interest form part of the profits of the business?—Income Tax Ordinance, Ss. 5, 6, 9 & 47.

The Assessee-firm carried on mainly the business of money-lending in Ceylon. They made a return of their profits or income for the year of assessment 1932—1933 which was not accepted by the Assessor. The Assessor, thereupon, made an estimate of the Assessee's income for the year preceding the year of assessment to be Rs. 170,000/- which included a sum of Rs. 32,000/- representing arrears of interest which fell due during the year preceding the year of assessment, but was not paid. It was admitted by the Assessee-firm that this unpaid interest was due on good loans, that is to say, that they had no reasonable doubt of its recovery. On objection taken to the assessment, the Assessor reduced the amount of the assessment to Rs. 79,000/- but this included the sum of Rs. 32,000/- referred to above. On appeal to the Commissioner of Income Tax, the Assistant Commissioner affirmed the Assessor's decision on two grounds, firstly, that section 47 [present sub-section (3) of Section 9] applied to the assessment rendering this unpaid interest liable to tax and, secondly, that on a true construction of the relevant sections of the Ordinance this sum was part of the profits of the business.

The assessee appealed to the Board of Review. Before the Board, the Assessor admitted that section 47 [present sub-section (3) of Section 9] did not apply to the assessment in dispute, whereupon the Board of Review reduced the assessment by deleting therefrom the said sum of Rs. 32,000/-

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* 37 N. L. R 145; 15 Cey. Law Rec. 91

The Commissioner of Income Tax, thereupon required the Board of Review to state a case for the opinion of the Supreme Court as to whether in law the assessment should be reduced by this sum of Rs. 32,000/-

HELD

(i) that the Crown is not bound by the particular system of accounting adopted by the assessee,

(ii) that inasmuch as sub-section 1 (*d*) of section 9 provides for allowances being made for bad and doubtful debts, good debts must be included in the calculation of profits, as long as they became due and payable during the period of which the profits are being ascertained and

(iii) that the amount in dispute, having been agreed upon as an estimate of interest that became due and payable during the year preceding the year of assessment about the recovery of which there was a reasonable certainty, should have been treated as a good debt and, therefore, included in arriving at the profits of the period in question.

HELD, further,

(i) that the sources of income in heads (*a*) and (*e*) of sub-section (1) of section 6 are alternative heads of charge in the case of a money-lending business,

(ii) that the Crown has the choice of assessing a money-lender under either of the 2 heads of charge and

(iii) that, therefore, by virtue of sub-section (3) of section 9, the sum in dispute should be included in calculating the profits.

Per AKBAR S.P.J.—"Our law under chapter III (of the Income Tax Ordinance) is similar in character to the Jamaican Law in that debts are not to be deducted in estimating the profits or income of a trade excepting bad and doubtful debts, the only difference being that such debts are expressly mentioned in the Jamaican Law and they arise by implication in our section 9 (1) (*d*). It will also be seen that our law is expressly worded so as to make it different from the Jamaican Law as regards the year in which bad or doubtful debts are to be deducted."

"...the law applicable to Income Tax and the English rules in Schedule D. to the Income Tax Act, 1918, are more or less similar to our provisions, at any rate so far as the fact that tax was levied on profits arising or accruing from a trade is concerned and the fact that deduction was to be made with respect to bad or doubtful debts."

Followed:—

Edinburgh Life Assurance Co v. *Lord Advocate*, (1910) A. C. 143, 163; 5 T. C 472, 491 (1)

Gloucester Railway Carriage & Wagon Co., Ltd, v. *Commissioners of Inland Revenue*, 12 T. C. 720, 740 (2)

Inland Revenue Commissioners v. *Sterling Trust, Ltd.* (1925) 12 T. C. 868, C. A., at p. 888. (3)

Gleaner Co. Ltd. v. *Assessment Committee*, (1922) 2 A. C. 169; 91. L J. (P. C.). 181; 127 L T 568. (4)

Collins and Sons Ltd. v. *Inland Revenue Commissioners*, (1925) 12 T. C. 773, 780 (9)

Re Spanish Prospecting Co. Ltd. (1911) 1 Ch. 92; 80 L. J. (Ch.) 210; 103 L. T. 609 (10)

O'Kane and Co. v *Inland Revenue Commissioners*, (1922) 12 T. C. 303, 338 (11)

Dailuaine—Talisker Distilleries v. *Inland Revenue Commissioners*, (1930) 15 T. C. 613, 620 (12)

Distinguished:—

Board of Revenue v. *R. M. A. R. A. R.R M. Arunachalam Chettiyar*, (1924) I. L. R. 44 Madras 65; 1 I. T. C. 75. (7)

Referred to:—
Gresham Life Assurance Society v. *Styles*, (1890) 25 Q. B. D. 351, 354, 355; 2 T. C. 633, 633 (6)
City of London Contract Corporation Ltd. v. *Styles*, (1887) 4. T. L. R. 51; 2 T. C. 239, C. A. p. 243 (7)
Hall & Co. Ltd. v. *Inland Revenue Commissioners*, (1921) 3. K. B. 152; 12 T. C. 382. C. A. (8)
Followed, *on the question of Crown's Option*:
The Scottish Mortgage Co. of New Mexico v. *McKelvie*, (1886) 2 T. C. 165, 172; (13)
The Liverpool & London & Globe Insurance Co. v. *Bennett*. 6 T. C. 327, 376; (1911) 2K. B. 577; affirmed (1912) 2 K. B. 41; (1913) A. C. 610. (14)
Rosyth Building and Estates Co. Ltd. v. *Rogers* (1921) 8 T. C. 11, 15) (15)

Case stated for the opinion of the Supreme Court by the Board of Review under S. 74 of the Income Tax Ordinance No. 2 of 1932.

The assessee-firm, whose partners are non-resident persons belonging to the Nattukottai Chettiyar community of South India, carry on in Ceylon a business mainly of money-lending. They were assessed for the year of assessment 1932-33 as having a taxable income of Rs. 170,000/-. On their objecting to this assessment, the Commissioner of Income Tax caused further inquiry to be made under S. 69 (2) of the Ordinance and it was agreed between the assessor and the assessee's representative that the correct estimate of the assessee's income should be Rs. 79, 830/-, subject, however, to the assessee's objection to include in it a sum of Rs.32,000/-, which was estimated to be interest on loans which fell due during the year preceding the year of assessment and which was regarded as likely to be received subsequently.

The Assistant Commissioner, T. D. Perera Esq., who heard an appeal against the assessment, reduced the assessment to Rs. 79, 830/- and in his order dated the 22nd September, 1934, stated his his reasons as follows:—

"(1) The contention that section 47 *does not apply to interest which is taxed as profits of a money-lending business is not sound. The judgment of the Supreme Court in *Seyed Hakim Bai* v. *The Commissioner of Income Tax*, S. C. No 96 (Inty.)** proceeds on the footing that section 47 is applicable in regard to the income from interest of a person carrying on the business of money-lending

(2) Even if section 47 should be held to be inapplicable, I am of opinion that the position that, when interest falls due for payment, income therefrom does not 'arise' is untenable. It is a truism that 'income' is not merely 'receipts less outgoings'. This is amply demonstrated not only by the use of the word 'arising' in section

*See foot—note at p. 85 *infra*. ** Reported at p. 21, *supra*.

5 but by such provisions as section 9 (1) (*d*) relating to the allowance of bad debts, which show that the fact of a debt being due whether received or not makes it income."

The assessee, thereupon, appealed to the Board of Review on the ground that the assessment was excessive and should not include the sum of Rs.32,000/- which was interest not received. The Board of Review allowed the appeal by the following Order of the 11th December, 1934.

"It is admitted by the Assessor that section 47 * has no application to an assesssment made under section 6 (1) (*a*), that is to say, where the interest arises as profits from a trade, business, profession or vocation, and that section 47 only applies to an assessment under section 6 (1) (*e*). It is not necessary, therefore, for us to consider the effect of section 47. The Assistant Commissioner's finding with regard to section 47 is not entirely sound, as this precise point did not arise in the case of *Sayed Hakim Jai* v. *Commissioner of Income Tax* (35 N. L. R. 291)**. As regards the further point argued before us, we hold, in view of the decisions cited to us, that interest which has not in fact been received during the year of account is not to be regarded as profits or income arising in or derived from Ceylon within the meaning of section 5 (1) or as profits or income which was derived or arose or accrued to the assessee's benefit, within the meaning of section 11 (1).

We accordingly uphold the appeal, and reduce the assessment made by the Assistant Commissioner of Rs. 79,830/- by deleting therefrom the amount of Rs. 32,000/-".

The Commissioner of Income Tax, thereupon, required the Board to state a case for the opinion of the Supreme Court which they did in the manner following:—

CASE STATED

I. The firm of R M. A. R. A R. R. M. hereinafter referred to as the Respondent was assessed for the year of assessment 1932-1933 as having a taxable income of Rs. 170,000/- and was assessed to pay a tax of Rs. 17,000/-.

* On the date of this order, viz, the 11th December, 1934, the Income Tax Amending Ordinance No. 27 of 1934 had not been passed by the State Council, and S. 47 of the Ordinance as it stood in the original Ordinance ran as follows:—"Income arising from interest *on loans, mortgages and debentures* shall be the full amount of interest falling due, whether paid or not....." The Amending Ordinance was passed by the State Council on the 14th December, 1934, and received the assent of His Excellency the Governor on 24th December, 1934, and, *inter alia*, repealed S. 47 and re-enacted it as sub-section (3) of section 9 with the omission of the words italicised and the addition, after the word "not," of the words "without any deductions for outgoings or expenses." The Amending Ordinance also substituted in the place of S 47 a new section which is numbered as section 47 in the consolidated Ordinance.

** Reported at p. 21, *supra*.

2. The Respondent Firm, whose partners are non-resident persons, carry on in Ceylon a business mainly of money-lending. A return of income having been made by the Firm, the Assessor did not accept the return, and made an estimated assessment of Rs. 170,000/- including therein a sum of Rs. 32,000/- as an estimated figure of interest on loans, which interest was due during the year preceding the year of assessment, and which he regarded as likely to be received subsequently.

3. Being dissatisfied with the said assessments, the Respondent appealed to the Commissioner of Income Tax to review and revise the same on the ground that the assessment of income was excessive, by notice duly given under the provisions of section 69 (1).

4. On the Respondent objecting to this assessment, the Commissioner caused further enquiry to be made into the case under section 69 (2) of the Income Tax Ordinance. It was agreed between the Assessor and the Respondent's representative that the correct estimate of the Respondent's income should be Rs. 79,830/-, subject, however, to the dispute as to the aforementioned sum of Rs. 32,000/- which amount was included in the figure of Rs. 79,830/-.

5. At the hearing before the Assistant Commissioner on 19th September, 1934, it was admitted on behalf of the Respondent that Rs. 32,000/- would be a fair estimate of the unpaid interest which fell due for payment during the year preceding the year of assessment on recoverable loans, that is to say, of interest regarding the recovery of which there could be no reasonable doubt. But it was urged that this sum should not be included in the assessment on the ground *inter alia* that it was not actually received during the year preceding the year of assessment.

6. The Assistant Commissioner by his order dated 22nd September, 1934, dismissed the appeal of the Respondent and fixed the assessment of income at Rs. 79,830/-. The Assistant Commissioner over-ruled the contention of the Respondent that section 47 of the Ordinance does not apply to interest which is taxed as profits of a money-lending business and held that the judgment of the Supreme Court in *Seyed Hakim Bai* v. *The Commissioner of Income Tax*, 35 N. L. R. 291, proceeds on the footing that section 47 is applicable in regard to income from such interest. The Assistant Commissioner was also of the view that even if section 47 be held to be inapplicable, the Respondent's contention that income from interest falling due for payment does not "arise" within the meaning of section 5 is untenable The Assistant Commissioner decided that income is not merely "receipts less outgoings" and held that

the fact of a debt being due, whether received or not, made it income.

7. Being dissatisfied with the decision of the Assistant Commissioner the Respondent appealed to the Board of Review on the ground that the assessment was excessive. It was argued on his behalf that the assessment in this case is made under section 6 (1) (*a*) as on the profits from a trade or business and not under section 9 (1) (*e*), which deals with "interest", and that, consequently, section 47 which deals with income arising from interest, does not apply; that when a case falls within the scope of section 5 (2) and 6 (1) (*e*) the other sections applicable to "a different situation" cannot apply; that "income" and or "profits" connotes something that "has come into one's hands or is adjusted and carried forward as capital and not merely what is receivable", and that no interest can be said to become due during any year unless the contract of loan provides for payment at stated intervals and that even then, what accrues is at best a right to receive or a mere chose in action. The Assessor admitted that section 47 did not apply to "interest" forming part of the profits of any trade or business assessed under section 6 (1) (*a*), and that it is restricted to cases where the assessment of the income arising from "interest" is made under section 6 (I) (*e*); that is, to interest not arising or accruing as part of the profits of a trade, business or profession. He also contended that the scheme of the Ordinance is that all profits which fall due are to be assessed whether recovered or not. He also referred to section 9 (I) (*d*), and section 11 (1). Counsel for the Respondent relied on the case of *Lambe* v. *I. R. C.* 1934, 1 K. B. p. 197; (1928) 1 K. B. 73: 16 Tax Cases 414: 14 Tax Cases 518; (1924) A. C. 508; (1920) 3 K. B. 35 at pp. 50-52 and Counsel for the Respondent also argued that the Ordinance does not tax income "accruing" but only income "arising" and relied on *Indian Income Tax Cases* Vol. 1 p. 75. Counsel for the Respondent was also heard on the footing that section 47 did apply as the Assistant Commissioner took a view different to that involved in the admission made by the Assessor.

8. The Board of Review by their decision allowed the appeal of the Respondent and reduced the assessment of Rs. 79, 830/- by deleting therefrom the amount of Rs 32,000/-.

The following was the decision of the Board on the 11th December 1934, [Here followed the order set out above.]

9. The Commissioner of Income Tax has expressed dissatisfaction with the decision of the Board and has duly requested the Board to state a case for the opinion of the Hon'ble the Supreme Court on the question whether, in law, the assessment should be

reduced by the said sum of Rs. 32,000/- which was accepted by the Assessor and the Respondent as a correct estimate of the amount of interest which had become due (although it had remained unpaid) during the year preceding the year of assessment on good loans, and which interest the Respondent was certain could be collected ultimately, where such interest has become due in the course of a money-lending business carried on by an assessee. We have accordingly stated and signed this case on this 25th day of February, 1935.

1. (Sgd) *A. E. Keuneman*,
2. (Sgd) *S. C. Paul*,
3. (Sgd) *H. E. de Kretser*.

Members of the Board of Review.

M. W. H. de Silva, Acting Solicitor General, with him *H. H. Basnayake*, Crown Counsel, for the Commissioner of Income Tax-appellant :—The question for determination by the Court is very simple, namely, whether under the Ceylon Income Tax Ordinance a certain sum of money which fell due to the assessee firm at the end of the period of account but was not received by them, forms part of their profits. The answer to this question will depend upon the interpretation of the relevant sections of the Ceylon Ordinance, which differs in material respects from the English and Indian law on the subject. The Full Bench decision of the Madras High Court in *Board of Revenue* v. *Arunachalam Chetty* (5) relied upon by the respondent before the Board of Review is based upon section 3 of the Indian Act of 1918, under which income has to be received before it bears the charge. The Indian law was altered by the Act of 1922, section 6 of which added 'profits' to the words of charge. Section 13 of the Act of 1922 was also an addition to meet the alteration of the law. The Indian cases, therefore, do not apply to the local Ordinance under which income becomes taxable when it accrues to the assessee. The interest in dispute is profits which have to be calculated on commercial principles of reckoning profits and not on the basis of cash received by the assessee. If the latter basis is adopted it will open the door to evasion of tax. Sub-section 3 of section 9 of the Ceylon Ordinance distinctly provides for the taxing of interest not received and this section may be applied for the computation of the profits of that portion of the assessee's business which consists of money-lending. The Crown has the right to elect the head under which they will lay the charge. [The Actg. Solicitor General referred here to *The Scottish Mortgage Co. of New Mexico* v. *Mc Kelvie* (13), *The Liver*

pool and London and Globe Insurance Co. v. *Bennett* (14) and *Rosyth Building & Estates Co., Ltd.* v. *Rogers* (15)]. Paragraph (*d*) of sub-section 1 of section 9 provides for allowances for bad and doubtful debts. There is a corresponding provision in the English Act and such a provision implies that good debts must be included in the ascertainment of profits. True profits can be arrived at only by the comparison of the assets of the business at the beginning and at the end of the period of accounting and book debts form part of such assets. [The other cases relied upon by the Solicitor General in support of his arguments are referred to in the judgment.]

H. V. Perera, with him *N. Nadarajah* and *K. Satia Vagiswara Aiyar*, for assessee-respondent.—No material alteration of the law was made by the Indian Act of 1922. Section 9 of the earlier Act of 1918 comprised profits of business and therefore the Full Bench decision of the Madras High Court in *Board of Revenue* v. *Arunachalam Chetty* (5) applies to the assessment in dispute. The special provision of sub-section 3 of section 9 should not be applied to the ascertainment of the profits of business. Due effect should be given to section 47* of the Ordinance. The assessment in this case was on the profits of the business, and not on interest. Sub-section 3 of section 9 has to be construed as having particular reference to interest as such, not when it merges in the profits of business. In the latter case, unpaid interest is not profit—see *Lambe* v. *Inland Revenue Commissioners*, (1934) 1 K.B. 178. In *St. Lucia Usines & Estates* v. *Colonial Treasurer*, [1924] A.C. 508 the Privy Council held that a debt due was not income. On the facts of this case the Crown has no right of option in laying the charge. The argument based on deductions for bad debts will not hold good in view of the fact that even in England profits are sometimes calculated on a cash basis. In *Inland Revenue Commissioners* v. *Morrison*, 17 T.C. 325, there is a reference to both systems of ascertaining profits. Income includes profits and in appropriate circumstances one term may be used and not the other, but the tax is on income, see *London County Council* v. *Attorney General*, [1901] A.C. 26 at p. 35.

M. W. H. de Silva, in reply, referred in particular to Snelling's *Income Tax Practice* † at p. 512, Dowell's *Income Tax Laws* and *Re: Spanish Prospecting Co., Ltd.* (10)

* That is to say, what was enacted as S. 47 by the Amending Ordinance No. 27 of 1924 See the first foot-note at p. 85 *supra*.

† *Dictionary of Income Tax and Sur Tax Practice* by W. E. Snelling, (Pitmans), 8th Edn.

AKBAR S. P. J.—This is a case stated by the Board of Review on the application of the Commissioner of Income Tax under section 74 of the Income Tax Ordinance for determination by this Court. The assessee is a firm carrying on a business in Ceylon mainly of money-lending and for the year 1932-33 the respondent's income was assessed at Rs. 79,830/- including a sum of Rs 32,000/- which is the subject matter of the dispute arising in this case. It was agreed between the parties that this sum of Rs. 32,000/- would be a fair estimate of the unpaid interest which fell due for payment during the year preceding the year of assessment on recoverable loans, i. e, of interest regarding the recovery of which there could be no reasonable doubt. There was an appeal to the Board of Review from the Commissioner's assessment and the Board of Review allowed the appeal of the respondent and reduced the assessment of Rs 79,830/- by deleting therefrom the amount of Rs. 32,000/-. The question referred to us for decision is whether in law the assessment should be reduced by the sum of Rs. 32,000/-, which was admitted by both parties as a correct estimate of the amount of interest which had become due (although it had remained unpaid) during the year preceding the year of assessment on good loans, and which interest the respondent was certain could be collected ultimately, as such interest had become due in the course of the money-lending business carried on by the assessee.

It will be noticed that the case stated mentions the fact that the assessee carries on a business in Ceylon "mainly of money-lending." It was admitted at the hearing before us that the assessee also carries on a business in rice in addition to his main business of money-lending. Under section 5 (1) of the Income Tax Ordinance, 1932, as amended by Ordinances Nos. 7 of 1932, 21 of 1932 and 27 of 1934 (referred to in this judgment as the Income Tax Ordinance) an income tax is charged in respect of the profits and income of every person resident in Ceylon or arising in or derived from Ceylon, in the case of every other person.

By sub-section 2 of that section the term "profits and income arising in or derived from Ceylon," includes, without in any way limiting the meaning of the term, "all profits and income .....derived from services rendered in Ceylon, or from property in Ceylon, or from business transacted in Ceylon whether directly or through an agent."

Section 6 defines the expression "profits and income" for the purposes of the Ordinance under 8 sub-heads: 6 (1) (a) specifying the profits from any trade, business, profession or vocation for however short a period carried on or exercised; 6 (1) (e) referring to

dividends, interest or discounts; and the last sub-head 6 (1) (*h*) referring to income from any other source whatever, not including profits of a casual and non-recurring nature.

Chapter III deals with the ascertainment of profits or income and section 9 enumerates what shall be deducted for the purpose of ascertaining the profits or income. Section 9 (1) starts with the qualification that subject to sub-sections 2 and 3 all outgoings and expenses incurred by a person in the production of the profits or income are to be deducted. The section states that the outgoings and expenses are to include outgoings and expenses falling into 7 categories which are set forth in sub-heads. Sub-head (*d*) of section 9 (1) allows a deduction of such sum as the Commissioner in his discretion considers reasonable for bad debts incurred in any trade, business, profession vocation or employment which have become bad during the period of which the profits are being ascertained and for doubtful debts to the extent that they are estimated to have become bad during the said period, notwithstanding that such bad or doubtful debts were due and payable prior to the commencement of the said period. The proviso to this sub-head states that all sums recovered during the said period on account of amounts previously written off or allowed in respect of bad or doubtful debts are to be treated for the purposes of the Ordinance as receipts of the trade, business etc., for that period. I have quoted this sub-head 9 (I) (*d*) *in extenso* for the simple reason that the words of that clause strongly support the view of the Commissioner of Income Tax. The sub-head expressly refers to profits in the expression "during the period of which the profits are being ascertained."

The Solicitor General's argument is that if in the calculation of the profits the Commissioner is given a discretion to allow bad debts to be written off and to allow a reasonable sum to be fixed by him to be deducted from the profits in respect of doubtful debts, it stands to reason that good debts must be included in the calculation of profits so long as they become due and payable during the period of which the profits are being ascertained. Mr. Perera argued that that sub-head only applied in the case of those persons who carried on a trade or business who had adopted the system of accounting which brought in debts and that it did not apply to those persons who carried on a trade or business who kept the system of accounting which only took into account actual receipts or cash, which he called accounting on the cash basis. That is to say, according

to Mr. Perera's argument, the income tax was to depend on the choice of the assessee in regard to the method of accounting. His argument went even further. Whatever system of accounting is adopted by the assessee, his books must show the outstanding debts due to him, but if he keeps one book or draws up a balance sheet in which only the receipts are shown, for the purpose of the income tax, it is this book or balance sheet which is to be taken as the basis of the calculation of the income tax and it is this system which is to be called the keeping of accounts on the cash basis.

The law seems to be clear that the assessment must be made and the income tax levied on principles to be deduced from the words of the Income Tax Ordinance whenever a question arises in and is submitted to a Court of law for decision.

In other words, the Crown is not bound by the particular system of accounting adopted by the assessee, 5 Tax cases 491 [1], 12 Tax cases 740 [2] and 882 [3]. If for, purposes of practical convenience, the Assessing Officer agrees to accept the system of accounting adopted by the assessee for purposes of calculating the Income Tax, that is a matter which only concerns him and the assessee so long as matters arising therefrom are not referred for arbitration to the law Courts. What a law Court is concerned with is the interpretation of the law, so far as it exists and affects the points submitted for decision.

In *Gleaner Co., Ltd.* v *Assessment Committee* [4] the Privy Council observed as follows:—

"Their Lordships have been referred to the practice of the inland revenue authorities in this country under similar provisions which appears to sanction the practice of permitting debts that are bad to be deducted in the year the loss is sustained. Their Lordships are unable to attach any weight to this practice. It may be due either to a misunderstanding of the statute or it may be that if all the provisions of the various English Income Tax Acts were examined they might bear a different interpretation to those that are now before their Lordships, or again, the convenience of administration may have suggested this form of relief. Their Lordships are unable to appreciate how the establisment of this practice, although it may be of long standing, can afford them assistance in the present dispute. It may however afford some explanation of why the particular point has never been taken in English Courts, although in one or two cases to which attention has been called it may have been relevant for discussion."

That case is also of importance because section 10 of the Jamaica Ordinance* expressly included any debts in the income from any trade except bad debts and doubtful debts.

Our law under Chapter III is similar in character to the Jamaican law in that debts are not to be deducted in estimating the profits or income of a trade excepting bad and doubtful debts, the only difference being that such debts are expressly mentioned in the Jamaican law and they arise by implication in our section 9 (1) *(d)*. It will also be seen that our law is expressly worded so as to make it different from the Jamaican law as regards the year in which bad or doubtful debts are to be deducted, probably owing to the judgment of the Privy Council.

Chapter IV of the Income Tax Ordinance relates to the ascertainment of what is called the statutory income of an assessee from each source which is to be the full amount of the profits or income which was derived by him or arose or accrued to his benefit from such source during the year preceding the year of assessment.

Chapter V lays down rules for the ascertainment of the assessable income, and it is got by taking the assessee's total statutory income and making certain specified deductions. Chapter VI lays down rules for the ascertainment of the taxable income which is got by deducting from the assessable income certain specified deductions and Chapter VII sets out the rates at which the tax is to be charged on the taxable income. This seems to be the general scheme by which income tax is to be charged in Ceylon under the Income Tax Ordinance. It will be seen that the tax is to be levied on not merely income but also profits to be determined by the rules laid down in the Ordinance.

Mr. Pereira in support of his argument laid great stress on the judgment of the Full Bench of Madras in the case of *Secretary to the Board of Revenue, Income Tax, Madras* v. *Arunachalam Chettiyar* [5].

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* S 10 of the Jamaica Income Tax Law, No. 24 of 1919, as amended by the Income Tax Amendment Law, No. 39 of 1920, reads as follows:—

"No deduction in respect of income shall be allowed in respect of:-

(a) any disbursements or expenses not being money wholly and exclusively laid out or expended in acquiring the income upon which the income tax is payable.....

(d) any debts, except bad debts proved to be such to the satisfaction of the Assessment Committee and doubtful debts to the extent that they are respectively estimated by the Assessment Committee to be bad."

But if that case is carefully examined it will be found that it is against him. In the first place the Court was interpreting the words of the Income Tax Act of 1918 and the Chief Justice laid stress on the word "income" which appeared in section 3, the principal section which created the charge. He emphasized that it was the income which was taxed and that income meant actual receipts. The Chief Justice quoted with approval Lord ESHER'S judgment in *Gresham Life Assurance Society* v. *Styles* [6] in which he stated that the balance on which income tax was charged was "the difference between what was received in any three years and what it cost to obtain those receipts." The Chief Justice was of opinion that this decision supported his interpretation that "receipts" meant actual money received. Lord Esher made use of similar expressions in the case of *City of London Contract Corporation* v. *Styles* [7]."How can you carry on a busineses after you have embarked your capital in the purchase of it? You must find new money in order to pay the expenses year by year; but then you do find money to pay the expenses year by year, and you get the reciepts year by year and the difference between the expenses necessary to earn the receipts of the year and the reciepts of the year are the profits of the business for the purpose of the income tax."

Commenting on this very passage LORD STERNDALE M. R. in *Hall & Co.* v. *Commissioners of Inland Revenue* [8] said as follows:—"Of course the learned Master of the Rolls does not there mean by receipts money which is actually received; he means debts which will be received and which therefore on their face value require an allowance for bad debts."

It will be seen by a reference to that case that there was no doubt at all that debts were to be included in reckoning the profits and loss; the only dispute being whether the profits were to be calculated for the year in which the two contracts were made or when the deliveries were made. LORD STERNDALE said as follows:— "As I have said, the short and simple answer to the respondent's contention is that these profits were neither ascertained nor made at the time that these two contracts were concluded. Many contingencies might have happened to prevent the realization of profit which was anticipated when the contracts were made. Many complications might have occurred that might have produced a different result I think that the respondents did right in the way that they carried these profits into their accounts; it is the ordinary commercial way of making

up accounts, and in my opinion, it is the right way. It would be wrong to carry into the accounts, as profits of one year, the estimated profits which would accrue in subsequent years and which might perhaps never be made at all."

ATKIN L. J. in the same case said as follows:—"The profits for excess profits duty are to be assessed on the same basis as profits for income tax purposes, and the word 'profits' for income tax purposes is to be understood in accordance with the words of Lord Halsbury in *Gresham Life Assurance Co.* v. *Styles* * 'in its natural and proper sense—in a sense in which no commercial man would misunderstand'." Referring to a similar provision in the English law to ours, Lord CLYDE, in *Collins & Sons* v. *Commissioners of Inland Revenue* [7] stated as follows:—"It is a general principle, in the computation of the annual profits of a trade or business under the Income Tax Acts, that those elements of profit or gain, and those only, enter into the computation which are earned or ascertained in the year to which the inquiry refers; and in like manner, only those elements of loss or expense enter into the computation which are suffered or incurred during that year." That was a case dealing with excess profits duty but the law applicable was the same as the law applicable to income tax and the English rules in Schedule D to the Income Tax Act, 1918, are more or less similar to our provisions, at any rate, so far as the fact that tax was levied on profits arising or accruing from a trade is concerned and the fact that deduction was to be made with respect to bad or doubtful debts.

The Full Court decision of the Madras High Court may be distinguished on the two grounds that the Indian Act of 1918 in section 3 referred to income; although in section 9 the word 'profits' is used and the sentence is as follows: "the tax shall be payable by an assessee under the head 'income derived from business' in respect of the profits of any business carried on by him." The other ground is that there was no provision in the Indian Act for bad or doubtful debts. It was owing to this decision that the law was recast in India. The charging sections have been drafted to make it clear that the tax is leviable on income, profits and gain; and by section 10 (3) the word "paid" means actually paid or incurred according to the method of accounting adopted. By section 13, although the choice of the method of accounting is left to the

* (1892) A. C. 309 at p. 315; 3 T C 185 at p. 188. The House of Lords reversed the decision of the Queen's Bench (24 Q. B. D. 500) and of the Court of Appeal (25 Q. B D. 351). AKBAR S. P. J. refers at p. 94 *supra* to the dictum of Lord ESHER in the Court of Appeal, 25 Q. B. D. 351 at pp. 354 & 355.

assessee, a discretion is vested in the Income Tax officer to adopt any other method of accounting if by the system adopted the income, profits or gain cannot be properly deduced.

So that it will be seen that the Madras case in no way supports the respondent's contention. On the other hand, the English authorities on provisions of law similar to ours are decidedly in favour of the appellant. In the case of *In re: The Spanish Prospecting Company Limited* [10] FLETCHER-MOULTON L. J. in a judgment which has been frequently quoted, explained what profits meant in a business The following is an extract:—

"To render the ascertainment of the profits of a business of practical use it is evident that the assets, of whatever nature they may be, must be represented by their money value. But as a rule these assets exist in the shape of things or rights and not in the shape of money. The debts owed to the company may be good, bad or doubtful. The figure inserted to represent stock-in-trade must be arrived at by a valuation of the actual articles. Property, of whatever nature it be, acquired in the course of the business, has a value varying with the condition of the market. It will be seen, therefore, that in almost every item of the account a question of valuation must come in. In the case of a company like that with which we have to deal in the present case, this process of valuation is often exceedingly difficult because the property to be valued may be such that there are no market quotations and no contemporaneous sales or purchases to afford a guide to its value. It is not to be wondered at, therefore, that in many cases companies that are managed in a conservative manner avoid the difficulty thus presented and content themselves by referring to assets of a speculative type without attempting to affix any specific value to them. But this does not in any way prevent the necessity of regarding them as forming a part of the assets of the company which must be included in the calculation by which *de facto* profits are arrived at. Profits may exist in kind as well as in cash. For instance, if a business is, so far as assets and liabilities are concerned, in the same position that it was in the year before with the exception that it has contrived during the year to acquire some property, say mining rights, which it had not previously possessed, it follows that those mining rights represent the profits of the year, and this whether or not they are specifically valued in the annual accounts."

It is true that he said that the actual profit and loss accounts of the company will not bind the Crown in arriving at the income tax to be paid. But he was referring principally to the habit of writing off liberally for depreciation.

FLETCHER-MOULTON'S judgment was quoted with approval in *Kane* v. *Commissioners* [11]. In *Dailuaine—Talisker Distilleries Ltd.* v. *The Commissioners of Inland Revenue* [12] LORD CLYDE said: "It is elementary that a profit and loss account is not an account of receipts and expenditure in cash only; its purpose is to show how the business stands, for better or worse, on the operations of the year." To adopt any other interpretation would be to nullify the intention of the legislature when it included section 9 (1) (*d*) in Chapter III. One of the practical difficulties is indicated in the dissenting judgment of SADASIVA AYYAR J. in the Madras case. I think it was to prevent an evasion of the law in the manner indicated by this Judge that our law was drafted.

As remarked by the Solicitor General, a money-lender could so adjust his accounts as to escape liability to be taxed. If only actual receipts were to be taxed, he could increase his capital year by year by borrowing money and the interest payable by him for such loans would automatically be deducted from his assesssable income under section 13 (1) (*a*), so long as he complies with section 13 (7); for, in my opinion, section 13 (1) (*a*) (iv) only applies when the non-liability to pay is absolute.

One other point was pressed on us in appeal, and as it was urged at length, I will briefly indicate it. The assessee was carrying on the business of a rice merchant, in addition to his main business of money-lending. The Solicitor General argues that the Assessing Officer has a right, when taxing the assessee under section 6 (1) (*a*), to consider his income from the interest on loans under head (6) (1) (*e*) apart, and then to bring it under (6) (1) (*a*) as part of the profits of both aspects of his business as money-ender and rice merchant. If he is right in his contetion, as he appears to be from the opening words of section 9 (1), then by section 9 (3) the interest due is to be reckoned, whether it is paid or not, without any deductions for outgoings or expenses. And there is provision in the sub-section for the deferring of the payment of tax and for the reduction of the assessment by the value of irrecoverable interest. Mr. Perera argues, on the contrary, that the effect of section 47 is to make section 9 (3) inapplicable when the assessment is made under section 6 (1) (*a*). But the words of section 47 say that when any provision relates expressly to any particular source of profits or income mentioned in section 6 (1) that provision is not to apply to the determination of any profits or income which is assessable and has been assessed

as falling within any other source mentioned in that sub-section. The Solicitor General replies that, when he applied section 9 (3), he did so only with reference to section 6 (1) (*e*) and that it was after such application the profits were determined under section 6 (1) (*a*) with reference to both aspects of the assessee's business.

The question is not free from doubt. In favour of Mr. Perera's argument is the fact that under section (9) (1) all outgoings and expenses are to be deducted, but under section 9 (3) no deductions are to be made for outgoings and expenses. There will be some practical difficulty in giving effect to these contradictory provisions where two or more branches of the business are carried on by one staff of employees, but that is not a matter which affects the interpretation of the law. The fact that section 9 starts with the words that the section is "subject to the provisons of sub-sections (2) and (3)" shows, I think, that the draftsman contemplated a business being carried on with different sources of profits enumerated under section 6 (1).

There are many companies particularly insurance companies which invest their savings and profits on investments. Can it be said that section 9 (3) only applies to an ordinary investor? If so, why did the draftsman say that section 9 (1) which seems to apply mostly to those engaged in a trade, business, profession, vocation or employment, is to be subject to sub-sections (2) and (3)? I am inclined to agree with the Solicitor General's view. It makes no difference if the assessee carried on solely the business of lending money, for in that case the Crown has the choice of assessing him either under head 6 (1) (*a*) or 6 (1) (*e*), (2 Tax Cases 172 [13]; 6 Tax Cases 376 [14]; and 8 Tax Cases 15 [15]).

If I am right, this will be an additional reason for the opinion I have already expressed that the decision of the Board of Review was wrong. The appeal will be allowed with costs incurred in this Court, and the deposit of Rs. 50/- will be paid to the revenue and will be reckoned as part of the costs the assessee is ordered to pay. The assessment will, therefore, stand at Rs. 79,830/-.

MAARTENSZ J. — I agree.

Appeal allowed. Assessment affirmed.

[Proctors for the Commissioner of Income Tax-appellant: *F. J. de Saram* and *C. T. de Saram*. Proctor for the assessee-respondent: *H. T. Ramachandra*].

[**NOTE**:—It will not be possible in the short space available here to discuss at length the several questions that arise from the judgment of AKBAR S.P.J., with which MAARTENSZ J. agreed. Our comments may be summarized under two heads.

A. Is there a warrant under the Ceylon Income Tax Ordinance for taxation under alternative heads? The decision of the Supreme Court is, in effect, that there is such a warrant.

B. Is interest which became due to a money-lender during the year preceding the year of assessment in the course of his business in Ceylon, but which remained unpaid, taxable? The decision of the Supreme Court is that such interest is chargeable with tax provided there is a reasonable certainty of its recovery, in other words, if it is a good debt.

A. *Is there a warrant under the Ceylon Ordinance for taxation under alternative heads?*

A perusal of the argument adduced by the learned Solicitor General and adopted by the Court, particularly the three English cases relied on in support of this argument, viz , *The Scottish Mortgage Co. of New Mexico* v. *Mc. Kelvie* (13), *The Liverpool & London & Globe Insurance Co.* v. *Bennett* (14), and *Rosyth Building & Estates Co. Ltd.* v. *Rogers* (15), suggests that the Court applied what is known in the English Law of Income Tax as the rule of Crown's Option. The reader is referred for a proper understanding of this principle of English Law to the Editor's monograph, *Crown's Option**.

The rule has a particular reference to the peculiar structure of the Income Tax Acts of the United Kingdom, whereby all income is classified under 5 Schedules and the income falling under one of them, i.e., Schedule D., is further classified under 6 Cases. It is to these Cases the right of option extends, and, as applied to them, the rule may be stated thus: –

'If the words of the Act plainly make the subject taxable under either of two Cases and he is assessed under one Case, it is no defence for him to say that he is also assessable under the other, and unless the words of the Act are not plain.....the subject cannot pray in aid the interpretation of the Act in favour of the subject so as to require that he should be taxed under the Case which is least burdensome to himself.' **

Reference may be made also to Dowell's *Income Tax Laws*,† 9th Edn., pp. 543 *et sequa* and Konstam's *Law of Income Tax*, ††

* *Crown's Option*: *Does the Doctrine apply to Ceylon Income Tax?* by K. Satia Vagiswara Aiyar [Ceylon Law Publishing Co., Colombo], the first of a series of monographs entitled STUDIES IN CEYLON INCOME TAX LAW.

** Per HAMILTON J. (later Lord SUMNER) in *Liverpool & London & Globe Insurance Co.* v. *Bennett*, at p 360 of 6 Tax Cases. See also per Lord DUNEDIN (now Viscount) in *Revell* v. *Edinburgh Life Insurance Company*, (1906) 5 T.C. 221 at p. 226.

† *The Acts relating to the Income Tax* by Stephen Dowell M.A., Ninth Edition by P. M. Smyth, [Butterworth & Co., London].

†† *A Treatise on the Law of Income Tax* by E. M. Konstam K.C. [Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd., London]

6th Edn., pp. 111 & 112, and the cases therein cited. See also *Fry* v. *Salisbury House Estate Ltd.* (1930) A.C. 432; 15 T.C. 266 and *Simpson* v. *Grange Trust Ltd.*, (1935) A.C. 422, where the Crown's right of election under the English Acts is clearly defined.

Mr Raymond W. Needham K.C. discusses, in his *Income Tax Principles*,§ the question whether the doctrine of option is sound as a matter of basic principle and comes to the conclusion:

"The doctrine that the Crown can elect between one Case and another of Schedule D. presupposes that the Cases are not exclusive of each other in their content, and that the same subject matter can fall within more than one Case. This basic supposition is, it is submitted, wrong; and if it is wrong, then the whole doctrine of the Crown's option, the primary part of it, not less than its extension, may have to go, notwithstanding its antiquity."§§

The reader is also referred to Chapter VIII, pp. 27 to 34 of *Crown's Option*, supra, where the view is submitted that there is no warrant in the Ceylon Ordinance for taxation under alternative heads.

As regards the 3 English cases followed by AKBAR S.P.J. in this part of his judgment, the *Scottish Mortgage* and *Liverpool* cases only establish that, as between the 6 Cases of the English Acts, the Crown has, in appropriate circumstances, the right to elect the Case under which they will lay the charge, while the *Rosyth* case, to the extent that it decided that the Crown could opt between the 5 Schedules of the English Acts, was held by the House of Lords in *Fry* v. *Salisbury House Estate Ltd.*, (supra), to have been wrongly decided.

The contention of the learned Solicitor General that the Crown in Ceylon has, when assessing a money-lender, the right "to consider his interest on loans under head 6 (1) (*e*) apart and then to bring it under 6 (1) (*a*) as profits" of his business is examined in the monograph *Crown's Option*, supra, Chapter IX, pp. 35 to 45, with particular reference to the origin and scope of S. 47 of the Ordinance.

A perusal of paragraph 7 of the CASE STATED, p. 87 *supra*, will show that the assessment was made under S. 6 (1) (*a*), profits of business. On appeal, the Assistant Commissioner treated the income as falling under 6 (1) (*e*) and applied the principle of what is now sub-section (3) of S. 9 to the assessment. Before the Board of Review, the taxing authority conceded that the income was not to be treated as falling under 6 (1) (*e*), while before the Supreme Court, the Crown fell back on 6 (1) (*e*).

Apart from the unambiguous language of S. 47 of the Ordinance, the position taken by the Crown in the case under review is, it is submitted, not in accord with English law—see particularly *Pickles* v. *Foulsham*, (1922) 2 K.B. 413; affirmed (1924) 1 K.B. 323; (1925) A.C. 458.

The principle enunciated in sub-section (3) of S. 9 of the Ordinance is based on the practice of "contingent assessment" adop-

§ Gee & Co. (Publishers) Ltd., London. §§ at p. 4.

ted by the Inland Revenue of England at the time of the drafting of the Ceylon Income Tax Ordinance. There is a passing reference to this practice in the judgment of ROWLATT J. in *Liegh* v. *Inland Revenue Commissioners*, (1928) 1 K.B. 78. In *Lambe* v. *Inland Revenue Commissioners*, (1934) 1 K.B. 178; 18 T.C. 212, the principle is clearly illustrated and held by FINLAY J. to be illegal.

"There are many companies," says AKBAR S.P.J., at p. 98 *supra*, "particularly insurance companies, which invest their savings and profits on investments. Can it be said that S. 9 (3) only applies to an ordinary investor?" If His Lordship meant to convey that the rule of computation embodied in S. 9 (3) applies to insurance companies, His Lordship's view, it is submitted, is untenable, in view of the special provisions of S. 42 of the Ordinance governing the ascertainment of the profits of insurance companies.

B. *Is interest which fell due to a money-lender during the year preceding the year of assessment in the course of his money-lending business in Ceylon, but which remained unpaid, liable to be charged with tax, if there is a certainty of the recovery of such interest?*

It is difficult to deal with this question in an incidental manner but the following suggestions are submitted with due respect to the decision of the Court in the case under review*:—

1. The profits or income of a money-lender fall under source 6 (1) (*a*) of the Ordinance, and not under 6 (1) (*e*)—see the Departmental view stated in paragraph 4 (*c*) of the STATED CASE in *Hakim Bai* v. *Commissioner of Income Tax*, page 25, *supra*. Also the dictum of ROWLATT J. in *Butler* v. *Mortgage Company of Egypt Ltd*, (1927) 138 L. T. 328; affirmed (1928) 139 L. T. 29; 13 T. C. 803 and the observations of Sir John Houldsworth Shaw, Solicitor of Inland Revenue, and J. Mac Donald Baker, Asst. Solicitor of Inland Revenue, in their chapter on *Income Tax* in 17 Halsbury (1935 Edn.), Art. 391, p. 190.

2. AKBAR S P. J. concedes (at p. 95 *supra*) "that the English Rules in Schedule D. to the Income Tax Act, 1918, are more or less similar to our provisions, at any rate, so far as the fact that tax was levied on profits arising or accruing from a trade is concerned and the fact that deduction was to be made with respect to bad or doubtful debts."

By S. 5 (1), in the case of a resident person, profits, wherever *arising* to him, are liable to bear the tax, while, under S. 11 (1), profits or income *derived* by him or which *arose* or *accrued* to his benefit from any of the 8 sources of income enumerated in S. 6 are taxable. Ss. 9 & 10 lay down rules for the "ascertainment of profits or income". Sub-sections 2 & 3 of S. 9 provide special rules for computing profits or income from rent and interest. Except as

* What follows is a summary of the conclusions contained in the Editor's monograph *Taxable Profits or Income* which will be published shortly as the second of the series *Studies in Ceylon Income Tax Law*.

provided in these two sub-sections.** sub-section (1) of S. 9 defines what expenses shall be *allowed* as deductions from the profits, while S. 10 enacts that 10 classes of expenses are *not allowed* as deductions. The test provided by sub-section (1) of S. 9 for an allowable deduction is that it should be an outgoing or expense incurred in the production of the profits or income. Such outgoings or expenses *include* 7 categories, of which 9 (1) (*d*) is as follows:—

> "(*d*) such sum as the Commissioner in his discretion considers reasonable for *bad debts* incurred in any trade.... *which have become bad during the period of which the profits are being ascertained* and for *doubtful debts* to the extent that they are estimated to have become bad during the said period...."

3. Before we comment on the structure and significance of the rules contained in Ss. 9 & 10 of the Ordinance, reference may be made to the corresponding provisions of the English Act of 1918.

Rule I of Schedule D states that tax under this Schedule shall be charged, in the case of a resident person, in respect of the annual profits or gains *arising* or *accruing* to him, wherever the property may be situated or the trade etc. is carried on.

The Rule applicable to Case I states that the tax shall be computed on the *full amount* of the *balance* of the *profits* or *gains*, while Rule 1 of the Rules applicable to Cases I & II states, in clause (1), that "the tax shall be charged *without any other deduction than is* by this Act *allowed*." Rule 3 enacts:

> 3. In computing the amount of the profits or gains to be charged 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....

[Note the similarity of language in the prohibition contained in S. 10 (*b*) of the Ceylon Ordinance. See also *per* Lord PARKER of Waddington in *Usher's Wiltshire Brewery Ltd. v. Bruce*, (1915) A. C. 433; 6 T. C. 399, at 458 of the Appeal Cases.]

This is followed by 12 categories, *b* to *m*, of deductions prohibited with certain exemptions. The rules contained in Ss. 9 (1) and 10 of the Ceylon Ordinance are similar in language and principle to the provisions of Rule 3. Clause (*a*) of Rule 3 is important and may be quoted in full:-

> "(*i*) *any debts, except bad debts proved to be such* to the satisfaction of the Commissioners and *doubtful debts to the extent that they are respectively estimated to be bad* ..."

** S. 9 (1) of the Ordinance reads:—"Subject to the provisions of sub-sections (2) and (3), there shall be deducted.....all outgoings and expenses incurred...in the production of (profits or income)" AKBAR S.P.J. construes this to mean (see p. 98 *supra*) that, in the ascertainment of profits of business, this general principle may be modified by sub-sections (2) & (3). It is submitted, however, that the context suggests that the rules contained in sub-sections (2) & (3) are special rules applicable to the respective subject-matters therein dealt with and do not limit in any manner the principle of sub-section (1) which always applies to the computation of profits of business. See, further, *Crown's Option*, supra, p. 46.

4. Commenting on Rule 3 above of the English Act Lord SUMNER observes in *Usher's Wiltshire Brewery Ltd.* v. *Bruce* (supra), at p. 467 of the Appeal Cases :—

"The effect of this structure, I think, is this, that the direction to compute the full amount of the balance of the profits must be read as subject to certain allowances and to certain prohibitions of deductions, but that a deduction, if there be such, which is neither within the terms of the prohibition, nor such that the expressed allowance must be taken as the exclusive definition of its area, is to be made or not to be made according as it is or is not, on the facts of the case, a proper debit item to be charged against the incomings of the trade when computing the balance of profits of it."

As Lord PARKER of Waddington said in the same case, at p. 458 of the Appeal Cases :—

"The expression 'balance of profits and gains' implies, as has often been pointed out, something in the nature of a credit and debit account, in which the receipts appear on the one side, and the costs and expenditure necessary for earning these receipts appear on the other side. Indeed, without such account, it would be impossible to ascertain whether there were really any profits on which the tax could be assessed."

See, further, on this question *(1) Coltness Iron Co.* v. *Black*, (1881), 6 App Cas. 315; 1 T.C. 287, *per* Lord BLACKBURN at p. 334 of App. Cas; *(2) Gresham Life Assurance Society* v. *Styles*, (1892), A.C. 309; 3 T.C. 185, *per* Lord HALSBURY L.C. at p. 314 of the Appeal Cases and *per* Lord HERSCHELL at p. 323; *(3) Strong & Co.* v. *Woodifield*, (1906) A.C. 448; 5 T.C. 215, *per* Lord LOREBURN L.C. at p. 452 of the Appeal Cases ; *(4) Stevens* v. *Boustead & Co.*, (1918) 1 K.B. 382, *per* SCRUTTON L.J. at p. 390; *(5) Lothian Chemical Co. Ltd.* v. *Rogers*, (1926) 11 T.C. 508, *per* Lord President CLYDE, at pp. 520 & 521; *(6) Rosebank Printing Co. Ltd.* v *Commissioners of Inland Revenue* (1928,) 13 T.C. 864, *per* Lord President CLYDE, at p. 874 and (7) *Naval Colliery Co. Ltd.* v. *Commissioners of Inland Revenue*, 12 T.C. 1017.

It is submitted that the principles enunciated in the English decisions referred to above for the determination of "the balance of profits" of a business apply in their entirety to the Ceylon Ordinance, particularly to the provisions of Ss. 9 & 10. Two matters are treated as fundamental in all the above decisions, (i) the preparation of "something in the nature of a debit and credit account," (ii) the enumeration of what are proper items to be entered on the debit side. But neither in the English Acts nor in the Ceylon Ordinance have we a definition of what items may properly be entered on the credit side of the account. In other words, there is no statutory definition of what are 'trade receipts', though we have statutory directions for not deducting certain 'trade expenses.'

5. AKBAR S.P.J. adopts, at p. 91 (supra), the Solicitor General's argument that because sub-section *(d)* of section 9 (1) of the Ceylon Ordinance provides for deductions for *bad* and *doubtful debts*, *good debts* must be included on the credit side of the assessee's account. The principles, it is submitted, enunciated in *Edinburgh Life Assurance Co.* v. *Lord Advocate* (1), *Glourester Railway Carriage & Wagon Co. Ltd.* v. *Commissioners of Inland Revenue* (2),

Inland Revenue Commissioners v. *Sterling Trust Ltd.* (3), and followed by AKBAR S.P.J.—we may also add *Glenboig Union Fire Clay Co.* v. *Inland Revenue Commissioners*, 12 T.C. 427 and *Doughty* v. *Commissioners of Taxes*, (1927) A.C. 327—merely prove, as pointed out by the learned writers in 17 Halsbury, Art 221 that the method of book-keeping adopted by a person is not conclusive in the matter of calculating profits either for or against the person charged.

As was pointed out in *Pundit Pandurangh* v. *Commissioner of Central Provinces*, 2 Indian Tax Cases 69, "mere entries in books of accounts for the purpose of calculating the profits of a business are not by themselves conclusive and the question what constitutes receipts for the purpose of Income Tax is a question of law."

6 The question then for determination in this case is whether interest which became due to a money-lender during the year preceding the year of assessment, but remained unpaid, is a trade receipt, even if such interest were a good debt.

It is respectfully submitted that the error in AKBAR S.P.J.'s view arose out of a failure to appreciate the fact that when the English Acts and the Ceylon Ordinance speak of *bad debts*, the reference is to the *book debts* of the business *. As ROWLATT J. points out in *Curtis* v. *Oldfield Ltd.* 133 L.T. 229; 9 T.C. 319 :—

> "When the rule speaks of a bad debt it means a debt which is a debt that would have come into the balance sheet as a *trading debt* in the trade that is in question and that it is bad. It does not really mean any bad debt which, *when it was a good debt, would not have come in to swell the profits.*"

Stating the matter in another way, the crucial test is whether unpaid interest, though a good debt, is a trade-receipt in the case of a money lender's business. In *Smiles* v. *Australasian Mortgage Agency Co. Ltd.*, (1888), 2 T.C. 367, it was held that where a concern carries on the business of making fluctuating advances of the nature of banker's advances, amounts *received* for the *use* of the money are trade-receipts. Again, in *Bennett* v. *Ogston*, (1930), 15 T.C. 374 ROWLATT J. said:—"I think when you deal with *interest as a receipt of a trade*, you must deal with it year by year, and the *interest, as it comes in in the year, is a receipt from the trade.*" See in this connection also (*1*) *Grey* v. *Tiley*, (1932), 16 T.C. 414, C.A. (*2*) *Leigh* v. *Inland Revenue Commissioners*, (1928), 1 K.B. 73, 11 T.C. 590; (*3*) *Lambe* v. *Inland Revenue Commissioners*, (1934), 1 K.B. 178; 18 T.C. 212 and (*4*) *Dewar* v. *Inland Revenue Commissioners*, (1935), 2 K.B. 351, C.A.

7. Finally, a reference must be made to the decision of the Privy Council in *St. Lucia Usines & Estates Co.* v. *Colonial Treasurer of St. Lucia*, (1924) A. C. 508 which, though cited by res-

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* Book-debts are "such debts as, in the ordinary course of carrying on business, would be entered in books, although not actually entered." *Shipley* v. *Marshall*, 32 L.J.C.P. 258. See also *per* Lord SAND at p. 623 in *Dailuaine-Talisker Distilleries Ltd.* v. *Commissioners of Inland Revenue*, (1930), 15 T.C. 623.

pondent's Counsel, is not dealt with by AKBAR S. P. J. This case arose under the Income Tax Ordinance of 1919 of St. Lucia. By section 3, "Every person *receiving* income or to whom income shall *accrue* shall, in respect of such income, pay an annual income tax." By section 4 (1), "the income in respect of which income tax is imposed" by the Ordinance shall include 5 categories, of which category (*a*) is as follows:

"(*a*) Income *arising* or *accruing* to any person residing in this Colony ....derived from the annual profits or gains of or in respect of or from any profession, trade, employment or vocation, whether the same shall be respectively carried on in this Colony or elsewhere."

The language employed in the above section of the St. Lucia Ordinance is identical with the relevant provisions of the Ceylon Ordinance and the English Acts and sub-section (3) of section 4 of the former Ordinance enacts, in the same way as sections 9 & 10 of the Ceylon Ordinance, that:—

"(3) No deduction shall be allowed for any sum employed or intended to be employed as capital, *nor for any disbursements or expenses whatsoever not being money wholly and exclusively laid out or expended in acquiring the income* upon which income tax is payable."

The question that the Privy Council had to decide in the St. Lucia case was whether interest which fell *due* to the appellants in 1921 was income which *arose* and *accrued* to them in that year and the Judicial Committee held that it was not such income and, therefore, not liable to bear the charge. LORD WRENBURY who gave the judgment of the Committee said:

"The words 'income arising or accruing' are not equivalent to the words *debts arising or accruing*,... It is said, and truly, that a commercial company, in preparing its balance sheet and profit and loss account, does not confine itself to its actual receipts—does not prepare a mere cash account —but *values its book debts* and its stock-in-trade and so on and calculates its profits accordingly. From the practice of commerce and accountants and from the necessity of the case, this is so. But this is far from establishing that income arises or accures from, as above instanced, an investment which fails to pay the interest due "

It is submitted that such a definite pronoucement of the Privy Council on what are identical provisions of the St. Lucia Ordinance should at least have been considered by the Supreme Court.

The circumstance that the St. Lucia Ordinance uses the word *income* in reference to *trade* emphasizes that *profit* attracts tax only to the extent that it is income and that it is fallacious to argue, as was done in the case under review, that the Ceylon Ordinance has, by the use of the words "profits and income," cast the net wider.

It is necessary at this point to make a reference to *Gleanor Company Ltd.* v. *Assessment Committee* (4), a decision of the Privy Council on the Income Tax Law of Jamaica from which AKBAR S. P. J. has derived support to the view that *good debts* should be included in the income from a money-lending business. The first observation which we submit in regard to this case

is that the appellant company carried on the business of newspaper proprietors in Jamaica, the essential nature of which is quite different from the business of money-lending. What may be proper trade receipts in the one will not be such in the other. In the case of the newspaper trade, the annual profits or gains of the trader, as was pointed out by Lord BUCKMASTER, are not properly measured by considering only the moneys taken. There must, in the profit and loss account of such a business, be an examination of the debts and a careful distinction between those that are good, doubtful and bad. But this, we submit, is far from saying that money due to a money-lending business by way of interest must be included as a trade receipt. In the latter class of business the right test is that suggested by ROWLATT J. in *Bennett* v. *Ogston* (supra), a decision primarily relating to the assessment of the trading profits of a money-lending business.

It has also to be mentioned that the decision in the *Gleanor* Company case was cited by counsel for the respondent in the *St. Lucia* case, so that the decision in the latter was pronounced after a due consideration of the principle enunciated in the former.

8. AKBAR S. P. J. discussed the Full Bench decision of the Madras High Court in *Board of Revenue* v. *Arunachalam Chettiyar* (5) cited by respondent's Counsel and came to the conclusion that this case did not help the respondent. The decision of the Court in that case was that interest which accrued due to a money-lending firm in the year of account was not assessable, under section 9 of the Income Tax Act of 1918, as profits of the business, unless it was received or realized in the year of account. AKBAR S. P. J., it is submitted with respect, is under a misapprehension that the decision of the Madras Court related to the word 'income' occurring in S. 3 of the 1918 Act and not to the words 'profits of business' occurring in S. 9 of that Act. The relevant provisions of the Indian Act of 1918 are set down below:

S. 3 (1) "....this Act shall apply to all income from whatever source it is derived if it *accrues* or *arises* or is received in British India."

S. 9 (1) "The tax shall be payable by an assessee under the head 'income derived from business' in respect of the *profits of any business* carried on by him.

(2) Such profits shall be computed after making the following allowances, in respect of sum paid, or, in the case of depreciation, debited, namely,"

[Here follow 9 categories of allowable deductions in respect of rent, repairs, capital borrowed, insurance premiums, depreciation, obsolescence of machinery and lastly,]

"(ix) ....any *expenditure* (not being in the nature of capital expenditure) *incurred solely for the purpose of earning such profits*"

A perusal of the above provisions, it is submitted, negatives the force of the argument that the decision of the Madras Court does not apply to Ceylon, on the ground that the decision did not interpret what are 'profits of business.' It also negatives the second

reason for which AKBAR S. P. J. held that the Madras decision did not apply to Ceylon, namely, that there was no provision in the Indian Act for bad or doubtful debts. It is submitted that the 9 sub-clauses of section 9 of the Indian Act of 1918 [S. 10 (2) of the Act of 1922] define the allowable business deductions. Bad debts are allowable under sub-clause (ix) of section 9 of the 1918 Act—Vide Sundaram on *The Law of Income Tax* (3rd Edition), pp 545 *et sequa*, and *Indian Income Tax Manual*, Vol. I. 3rd Edition, Para 37. It is elementary, however, that where the *cash* system of accounts is adopted by the assessee, there can be no *bad debts* either under the Indian Act or the English Act or, for that matter, under any other taxing statutes.

Nor are losses on loans made in the course of a money lending business treated as bad debts in their proper sense; they are losses of circulating capital and as such allowable deductions, see *Reid's Brewery Co.* v. *Male*, (1891) 2 Q. B. 1; 3 T. C. 279.

It may also be observed that there is no requirement under the English Acts that an assessee should keep his accounts under one of the two accepted systems of book-keeping, viz., *cash* and *mercantile* accounts, and not the other—Vide Konstam's *Law of Income Tax*, 6th Edition p.119 and Snelling's *Income Tax Practice*, 8th Edition, p. 14.

9. Another observation made by AKBAR S. P. J. is, it is respectfully submitted, incorrect The learned Judge expresses the view, at pp. 95 & 96 *supra*, that the Indian Act of 1918 was amended in order "to make it clear that tax is leviable on income, profits and gain", suggesting, therefore, that *profit* was not in the ambit of the 1918 Act Though, no doubt, the decision of the Madras High Court led to the revision of the 1918 Act, the object of the revision was different, for which see paragraph 3 of the "Statement of Objects and Reasons" of the 1922 Act, (Appendix VII, Sundaram's *Law of Income Tax*) In *Puran Mal* v. *Commissioner*, (1924) 2 Indian Tax Cases 236, which turned on the question whether unrealized interest was profit, MARTINEAU J. followed the Madras case of *Board of Revenue* v. *Arunachalam Chetty* (5) and pointed out: The addition of the words "profits or gains" (in the 1922 Act) makes no difference as far as the matter before us is concerned.

It is necessary at this stage to refer to a distinction which AKBAR S.P. J. draws between *income* and *profits* while dealing with the Full Bench decision of the Madras High Court. (see p. 95 supra). There is no doubt a difference in concept between the two terms. *Profit* is the balance that remains after setting off the debit side of the account against the credit side, it is, in other words, what remains after deducting the expenses of a trade from its incomings. What remains is the trader's income, what he can legitimately take for his use and enjoyment. As far as liability to tax is concerned, it is not all profits that will bear the tax, but only that portion of it which is the trader's income. See in this connection the definition of 'income' in S. 3 of the Income Tax Law of Jamaica:—

"The expression 'income' means 'net income.' namely, the sum remaining after deducting the expenses, if any, of acquiring the income, including the necessary expenses actually paid in carrying on any business or trade, but not including personal living or family expenses."

10. Finally, the dictum of FLETCHER-MOULTON L.J in *Re: The Spanish Prospecting Co Ltd.* (10) is adopted in its entirety by AKBAR S.P J. To begin with, this case arose in liquidation proceedings of a company in which 2 persons had agreed to serve the company at a fixed salary which they were not entitled to draw except out of the profits. The question was what were the profits of the company and whether it included certain debentures appearing as unvalued assets in the half-yearly balance sheets. The method of computation of profits laid down by FLETCHER-MOULTON L.J. in this case was admitted by the learned Lord Justice himself as totally unsuited for the ascertainment of profits for income tax purposes. "The balance sheet," as pointed out by NAPIER J., in the Madras case of *Arunachalam Chetty* (5), "must, of course, contain a valuation of the whole of the property of the undertaking including, as stated by the learned Lord Justice, debts owing to the company, good, bad, or doubtful. It must also include debts accruing due, and on the debit side must be placed debts considered bad or doubtful. One may venture to doubt whether many of the trading companies do, in fact, prepare their statements of profits in the year in the manner suggested by the learned Lord Justice. It is admittedly not the method contemplated by the Companies Act. [*Vide*, on this point, Ss. 40 & 41 of the Joint Stock Companies Ordinance No. 4 of 1861 and clauses 70, 71 and 72 of Table C. Also, clause 124 of Table B. of the Joint Stock Banking Ordinance 1897; see, also, Buckley's *Law and Practice under the Companies Acts*, 11th Edn. pp. 751 *et sequa*, where the learned author states that "the credit balance of a revenue account is applicable for dividend."]

The unsuitability of the method of computation of profits enunciated by FLETCHER-MOULTON L.J. for income tax purposes was pointed out in *Naval Colliery Co., Ltd.* v. *Commissioners of Inland Revenue*, (1926). 136 L.T. 28 [K.B.]; (1928) 138 L.T. 593, [H.L.]; 12 T.C. 1017, in very much the same terms as those used by NAPIER J. in the Madras case, see particularly *per* LORD WARRINGTON at p. 597 of 138 L.J.—"The learned Lord Justice (FLETCHER-MOULTON) was dealing *not* with a *profit and loss account* for the purpose of in ome tax *but* with a *balance sheet* intended to show the actual financial condition of a business at the end of a business year."

LORD WARRINGTON also explained earlier in the same page that what might be a proper item in the balance sheet might not be a proper debit item in the profit and loss account for income tax purposes. This dictum is, it is submitted, equally true of credit items. A debt due might properly be entered in a balance sheet, but not on the credit side of a profit and loss account, unless it be a book debt which appears in the revenue account of the trade or business.

Another observation made by AKBAR S.P.J. is in regard to the judgment of SADASIVA AYYAR J. in the Madras case. This learned Judge did not really dissent from the other judges who heard the case. All that His Lordship held was that unpaid interest would be taxable, though not realised, if it came so completely under the assessee's control that by an act of his will he could receive it in cash without greater trouble than is involved in drawing money from his banker. This view is in accord with English law. See *Simpson* v. *Executors of Bonner Maurice*, (1929) 45 T.L.R. 581; 14 T.C. 580, C.A. Nor did SADASIVA AYYAR J. suggest, it is submitted, that, under the 1918 Act, there was the possibility of evasion of tax. All that this learned Judge said was that "it is advisable that the legislature should periodically try to remove anomalies and difficulties of interpretation by amendments of the Act expressed in clear and definite language." (p. 80, I.L.R. 44 Madras.)

11. The Solicitor General's argument in the case that a money-lender will increase his capital year by year by borrowing money if only his actual receipts were to be taxed appears to have appealed to AKBAR S.P.J. It is not clear by what manipulation of figures a money-lender can achieve such a result. Nor can, it is submitted, any inference resulting in liability to tax be justifiably drawn from the circumstance that under sub-section (1)(*a*) of section 13 of the Ordinance, the assessee is entiled to claim an allownce for interest payable, not actually paid, by him.

12. The cases of *Hall & Co. Ltd.* v. *Inland Revenue Commissioners* (8), *Collins & Sons Ltd.* v. *Inland Revenue Commissioners* (9), *O'Kane & Co.* v. *Inland Revenue Commissioners* (11), *Dailuaine Talisker Distilleries* v. *Inland Revenue Commissioners* (12), were all relied upon by the Court in support of the decision. The case of *Hall & Co.* related to an assessment of excess profits duty and the determination of the accounting period was vital. The Court of Appeal reversed the decision of ROWLATT J. who had adopted the principle enunciated by FLETCHER-MOULTON L. J. in *The Spanish Prospecting Co.* case, and held that profits on the purchase and sale of control gear ought to be included in the accounting periods during which the deliveries of goods were effected, and not in the pre-war periods during which the contracts were made. The dictum of YOUNGER L, J. in this case [at p. 150, (1921) 3 K. B.] is important: "The only proper way in which the profits arising from the working out of this contract ought to be brought into account is to ascertain them *as and when they are realized*."

It has also to be mentioned that the passage from the judgment of LORD STERNDALE M. R. in the *Hall & Co.* case has to be read with the qualification, that His Lordship himself [at p. 153 of 3 K. B.] adopts the principle laid down by ESHER M.R. in *City of London Contract Corporation* v. *Styles* (2), viz., that the net profit of the year is "the difference between money expended in the year in order to earn the income which was to be received in the year and the *income so received*."

The ratio decidendi of the *Hall & Co.* case was followed in the Scotch case of *Edward Collins & Sons Ltd.* v. *Commissioners of Inland Revenue* (9). But the question for determination in this case was whether the appellant company who had made certain contracts for esparto and pulp, which turned out to be in excess of their requirements, were entitled, in arriving at the balance of their profits and gains in the accounting period to debit against their profit and loss account the difference between the contract prices and the ruling market prices of the goods in question at the date when they struck their balance at the end of their accounting period. In other words, the appellant company sought to set against the actual ascertained receipts of their business in one period a loss which they had neither suffered nor incurred in that period.

Resisting the appellant's contention that their apprehended losses *in futuro* be allowed as a deduction from the present profits of their commercial undertaking, Lord President CLYDE, no doubt, made the observation at p. 780 of the 12 Tax Cases which is quoted by AKBAR S. P. J. (see p. 95 supra). It is respectfully submitted that it was not necessary for the Lord President to have decided what profits were earned or ascertained in the period of account, nor has the learned Lord President made an attempt in the case cited to do so.

AKBAR S P. J. observes that Lord Justice FLETCHER-MOULTON'S judgment was quoted with approval in *Kane & Co.* v. *Commissioners* of *Inland Revenue* (11). This is an Irish case which arose under the Finance (No 2) Act 1915, S. 38 and Finance Act, 1918, S. 35. and the question for determination was whether profits of realization of stock were made "in the course of trade". The Court of Appeal of Ireland reversed the decision of the King's Bench Division of the Irish High Court to the effect that such profits were not assessable to excess profits duty and the Crown appealed to the House of Lords, (1922) 126 L. T. 707. Though the Court of Appeal of Ireland had reached its decision by strictly following the principle of computation laid down by FLETCHER-MOULTON L. J., the question which the House of Lords found itself required to decide was whether the profits of realization arose from any trade or business and the Board had no difficulty in arriving at the conclusion that the profits in question did so arise and were, therefore, liable to duty. But the House of Lords, it is submitted, decided the case by an interpretation of the relevant sections of the statutes without any reference whatever to FLETCHER MOULTON L. J.'s judgment.

We have already stated that Lord Justice FLETCHER-MOULTON'S method of computation was held to be unsuitable for income tax purposes by the Court of appeal in England in *Naval Colliery Co. Ltd.* v. *Commissioners of Inland Revenue* (p. 108, supra), apart from the Lord Justice himself having recognized in his judgment the limitations of that method.

As regards the Scottish case of *Dailuaine-Talisker Distilleries Ltd.* v. *Commissioners of Inland Revenue* (12), cited with approval by AKBAR S. P. J. in his judgment, the vital point to be remembered is that the essence of the business in that case was distilling whisky and selling it and the main consideration with the Court of Session was the ascertainment of the profits of such a business. The Lord President follows the passage quoted by AKBAR S. P. J. at 620 of the 12 Tax Cases, with the significant observation: "If goods have been sold or delivered to a customer within the year, the sum due by the customer is credited to the business and debited to the customer and enters the profit and loss account at the end of the year, *whether payment in cash* (or otherwise) has been received within the year or not." This must be so, because the trader, every time he sells an article, makes a profit or loss irrespective of the receipt of the price. The Lord President enunciates that "every contract is what its own terms make it" and comes to the conclusion that whisky storage rents are not, in the circumstances of the case, trade receipts during the period of accrual of the rents but were receipts in the year in which the amounts became due. The principle of this case was qualified in the later Scottish case of *Commissioners of Inland Revenue* v. *Oban Distilleries Ltd.*, (1933) S.C. 44, where the Court of Session held that such rents were assessable to tax when collected by the company which was in volumtary liquidation.

It is hazardous, it is respectfully submitted, "to isolate passages from the judgments of learned judges, take them out of their setting and aply them to a case arising under wholly different circumstances."(*per* DAS J. at p. 306 of 4 Indian Tax Cases). Though, no doubt, there is the practice with some accountants to take in items of interest due to a money-lender on the credit side of the profit and loss account and then show a debit for items which are bad—*vide* Snelling's *Income Tax Practice*, supra—this practice, it is submitted, is not sanctioned by the law either of England or of Ceylon.

The Supreme Court has by inference arrived at the conclusion that because clause (*d*) of sub-section (1) of section 9 requires an allowance to be made for bad debts, good debts must be included as a trade receipt, whatever be the nature of the trade, and that interest which fell due to a money-lending business is a trade receipt, if there is certainty of its recovery. LORD WRIGHT, delivering the judgment of the House of Lords in *Simpson* v. *Grange Trust Ltd*, (1935) A. C. 422, said:- "Taxation cannot be imposed by analogy or by implication or by any sort of *cypres* doctrine"]

Present: DALTON J. AND SOERTSZ A. J.

R. M. A. R. A. R. R. M. ARUNACHALAM CHETTIYAR *v.* COMMISSIONER OF INCOME TAX*

*[Application for leave to appeal to the Privy Council in S. C. No. 24 (Special), 1935.]***

Decided: *20th December, 1935.*

Decision of the Supreme Court on a case stated by Board of Review—Is it a final judgment or order in a 'civil suit or action'?—Has aggrieved party the right of appeal to the Privy Council ?—Income Tax Ordinance, S. 74.—Appeals (Privy Council) Ordinance, 1909, S. 4.—Charter of 1833, S. 52.

The assessee, who was dissatisfied with the decision of the Supreme Court on a case stated by the Board of Review, made an application to the Supreme Court for leave to appeal to the Privy Council.

Held that there is no right of appeal to the Privy Council from a judgment of the Supreme Court on a case stated under S. 74 of the Income Tax Ordinance

Per DALTON J. (on the question whether the application was liable to stamp duty): "...The applicant has not explained how he or the documents are exempted from the stamp duty set out."

Followed: *Soertsz* v. *Colombo Municipal Council*, (1930) 32 N.L.R. 62. (1)

Application for leave to appeal to the Privy Council from a judgment of the Supreme Court on a case stated by the Board of Review.

N. Nadarajah for the assessee-applicant.

M. W. H. de Silva, Actg. Solicitor General, with him *H. Basnayake*, Crown Counsel, for the Commissioner of Income Tax.

[The arguments of Counsel appear sufficiently from the judgment.]

DALTON J.—This is an application for conditional leave to appeal to the Privy Council from a decision of this Court of November 11th last in an appeal to this Court under the provisions of section 74 of the Income Tax Ordinance, 1932. The appeal came up on a question of law only, in the form of a case stated by the Board of Review.

Mr de Silva for the respondent, the Income Tax Commissioner, has opposed the application on two grounds, first, that no stamp duty has been paid, as required by law, on the proxy and application filed and, secondly, that the appellant has no right of appeal.

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* 36 N.L.R. 447; 5 C.L.W. 2.: 13 Times (Cey.) 93

** The judgment of the Supreme Court is reported at p. 82 *supra*.

I will deal with the second point first. Section 74 of the Ordinance is silent on the question as to whether or not there is any appeal from the decision of this Court. It is urged for the appellant, however, that the proceeding is a "civil suit or action" within the meaning of section 4 of the Appeals (Privy Council) Ordinance No. 31 of 1909, the Ordinance regulating the procedure on appeals to His Majesty in Council. That argument has been already replied to by the judgment of this Court in *Soertsz* v. *Colombo Municipal Council* (1).

In that case, the Tribunal of Appeal under the Housing and Town Improvement Ordinance, No. 19 of 1915, had stated a case for the opinion of this Court under section 92 of that Ordinance. Section 92 in effect contains provisions on this question similar to those contained in section 74 of the Income Tax Ordinance. In the judgment I have cited, this Court held there was no right of appeal to the Privy Council from a judgment of this Court on a case stated under section 92. It was held that the decision of the Court on the point of law submitted in the case stated was not a judgment or order in a civil suit or action, as set out in the Charter of 1833 creating the right of appeal.

Mr. Nadarajah had to concede that this decision under the Housing Ordinance, given under a section of an Ordinance in almost identical terms, on this question was a difficulty in his way. He urged, however, that the application before us should be referred to a Bench of three Judges for the matter to be reconsidered, if we were not in agreement with that decision.

I see no reason whatsoever to disagree with the decision in the case cited and would follow it in this application. The appellant, therefore, has no right of appeal from a judgment of this Court on a case stated under section 74 of the Income Tax Ordinance. Mr. de Silva concedes that on such a matter in England a party who feels aggrieved is entitled to go to the highest Court of Appeal that is open to His Majesty's subjects, but in Ceylon, such a party is by the local Income Tax Ordinance debarred from that right.

It is not necessary, in these circumstances, to deal with the first question raised, the failure to stamp the documents as required by section 4 and Part II, Schedule B, of the Stamp Ordinance, 1909. On that question, I would, however, add that the appellant has not explained how he or the documents are exempted from the stamp duty set out.

The application must be dismissed with costs.

SOERTSZ A.J.—I agree.

Application dismissed.

[Proctor for applicant: *H T. Ramachandra.* Proctors for Commissioner of Income Tax: *F J. De Saram and C. T. De Saram.*]

NOTE:—The decision of the Supreme Court rests upon the interpretation of S. 74 of the Income Tax Ordinance. The relevant passages from this section are:—

"S. 74 (1). The decision of the Board shall be final: Provided that either the appellant or the Commissioner may make an application requiring the Board to state a case on a question of law for the opinion of the Supreme Court.....

(5). The Supreme Court shall hear and determine any question of law arising on the stated case and may, in accordance with the decision of the Court upon such question, confirm, reduce, increase or annul the assessment determined by the Board or may remit the case to the Board, with the opinion of the Court thereon; where a case is so remitted by the Court, the Board shall revise the assessment as the opinion of the Court may require."

The Supreme Court followed the ruling in *Soertsz* v. *Colombo Municipal Council*, (1930) 32 N.L.R. 62 where the language of S. 92 of the Housing and Town Improvement Ordinance, No. 19 of 1915, came up for consideration. This section enacts:—

"S. 92 (1). It shall be lawful for the tribunal at any time to state and the tribunal, if ordered by the Supreme Court on the application of any party aggrieved, shall state, a case for the opinion of the Supreme Court on any question of law involved in any appeal or in any other matter submitted to it.

(2) The Supreme Court shall hear and determine the question or questions of law arising on any case stated by the Tribunal of Appeal, and shall, thereupon, reverse, affirm or amend the determination (if any) in respect of which the case has been stated, or remit the matter to the Tribunal of Appeal with the opinion of the Court on the case stated...."

As was pointed out by FISHER C.J., in *Soertsz* v. *Colombo Municipal Council* (supra), the Housing and Town Improvement Ordinance is silent with regard to applications for leave to appeal from decisions under S. 92 of that Ordinance. The Income Tax Ordinance of Ceylon is also silent in regard to the right of appeal to the Privy Council.

The United Kingdom Income Tax Act of 1918, however, explicitly gives such right to the party aggrieved by the decision of the High Court of England. By sub-section (3) of S. 149 of the said Act, "an appeal shall lie from the decision of the High Court or any Judge thereof to the Court of Appeal and thence to the House of Lords, and in Scotland, from the decision of the Court of Session, as the Court of Exchequer in Scotland, to the House of Lords."

In India, the position prior to Act XXIV of 1926 was similar to that in Ceylon. It was decided in *Tata Iron & Steel Company* v. *The Chief Revenue Authority, Bombay*, 1 Indian Tax Cases, 206, that a judgment of the High Court under S. 66 of the Income Tax

Act, 1922 (S. 51 of the Act of 1918) is not a final order or judgment within the meaning of clause 39 of the Letters Patent of the Bombay High Court, that the judgment was only advisory and that, therefore, no appeal to the Privy Council lay. Section 8 of Act XXIV of 1926, altered the law by inserting what is now S. 66-A of the Indian Act. By sub-section (2) of S 66-A "an appeal shall lie to His Majesty in Council from any judgment of the High Court delivered on a reference made under S. 66 in any case which the High Court certifies to be a fit one for appeal to His Majesty in Council."

The right of appeal to the Privy Council is denied by the Income Tax Ordinances prevailing in certain other parts of the British Empire—*vide* Income Tax Ordinance, No. 9 of 1910, of St. Lucia and the Income Tax Law, No. 24 of 1919 of Jamaica and the Privy Council cases of *St. Lucia Usines & Estates Company Ltd.* v. *Colonial Treasurer of St. Lucia*, (1924) A.C. 508 and *Gleaner Company Ltd.* v. *Assessment Committee*, (1922) 2 A.C. 169, decided respectively under the said two legal systems. In both these cases, special leave had to be obtained. S. 32 of the Local Appeals (Privy Council) Ordinance, 1909, explicitly states:—"Nothing in these Rules contained shall be deemed to interfere with the right of His Majesty upon the humble petition of any person aggrieved by any judgment of the Court, to admit his appeal therefrom upon such conditions as His Majesty in Council shall think fit to impose."

The Supreme Court did not find it necessary to decide whether or not the proxy and application filed on behalf of the appellants should bear stamp duty. It is submitted, however, that inasmuch as the Court decided that its decision on a point of law raised in a case stated under the Income Tax Ordinance was not a judgment or order in a civil suit or action, the provisions of Part II of Schedule B of the Stamp Ordinance "containing the duties on law proceedings" do not apply to the documents in question. This view gains support from the circumstance that the Stamp Ordinance makes special provisions in regard to proceedings which are strictly outside the purview of the Civil Procedure Code e.g., suits under the Patents Ordinance and the Insolvency Ordinance.]

Present: DALTON AND MAARTENSZ JJ.

COMMISSIONER OF INCOME TAX v. P.K.N.*

[S.C. No. 27. (1935)—Special]

Ascertainment of profits of business—Assessees, a firm of non-residents, carrying on business in Ceylon as money-lenders, importers and shippers—Freight on rice carried in assessees' sailing vessels to Ceylon calculated on what they would have charged an outsider and deducted from the profits of the rice business—Is such deduction permissible?—Income Tax Ordinance, No. 2 of 1932, Ss. 9 and 39.

The assessees are a firm of five non-resident partners. They carried on business in Ceylon as importers of rice from India and they had also four sailing vessels in which they carried their own cargoes to Jaffna as well as cargo for other merchants. The assessees treated their shipping business as a separate one, controlled from their office in India and carried on quite independently of the business of importing and selling rice in Ceylon Accordingly, the assessees deducted from the profits made on their business as dealers in rice the freight they would have had to pay if the rice was carried to Ceylon in ships not owned by them.

The assessor disallowed the claim on the ground that the amount claimed was not an allowable deduction.

The Board of Review allowed the assessees' appeal against the decision of the Commissioner of Income Tax who affirmed the assessment, whereupon, the Commissioner of Income Tax required the Board to state a case to the Supreme Court.

HELD that the assessees are not entitled to deduct from the profits of their business in rice the amount they would have to pay as freight if the rice was carried to Ceylon in the ships of another person.

Followed:

Dublin Corporation v. *M'Adam, Surveyor of Taxes*, (1887) 2 Tax Cases 387 ... ... (1)

Dillon (Surveyor of Taxes) v. *Corporation of Haverford West*, (1891) 1 Q.B. 575; 3 T.C. 31. ... ... (2)

Distinguished:

Commissioners of Inland Revenue v. *William Ransom & Son, Ltd.* (1918) 2 K.B. 709. ... ... (3)

Commissioners of Inland Revenue v. *Maxse*, (1919) 1 K.B. 647; 12 T.C. 41. ... ... (4)

Not followed:

The Commissioner of Income Tax v. *Steel Brothers & Co., Ltd.* 2 I.T.C. 119; (1925) I.L.R. 3 Rang. 614; A.I.R. (1926) Rang. 97; 94 Ind. Cas. 466. ... (5)

Case stated for the opinion of the Supreme Court by the Board of Review under S. 74 of the Income Tax Ordinance, No. 2 of 1932.

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* 15 Cey. Law Rec. 176; 37 N.L. R. 339

The assessees are a firm consisting of five partners, all of whom are non-resident persons. The firm carries on at Colombo the business of money-lending and at Jaffna the business both of money-lending and of importing rice from India and exporting tobacco to India. They own four sailing vessels which carried their own cargo between certain ports of India and Jaffna and at the same time earned freight by carrying cargo for other merchants. Although their ships were mainly used in carrying their own goods, they treated their shipping business in their books as a separate concern and when a ship brought their own rice from abroad to Jaffna they debited the rice account with the freight which they would have charged had they carried the rice for someone else, and they credited the shipping account with the amount of such freight. On this basis, the accountant acting for the appellant firm submitted the accounts to the assessor showing the profits from the businesses of money-lending and importing rice and the profits from outward freights i.e., on the carriage of goods from Ceylon to other ports but excluding any profit from the inward freights which the firm had charged themselves for carriage of their goods to Ceylon. The assessor decided that in arriving at the true profits earned in Ceylon from the business of importing and selling rice, the full amount of the freights which the appellant charged themselves for carriage of their goods in their own ships could not be allowed as an expense, but only that proportion of it which constituted the actual cost of carriage to themselves. He, therefore, increased the computation of profits by a sum of Rs. 16,243/- which was agreed by the appellants to be the correct amount of the difference between the freights charged to themselves and the actual cost of carriage.

The assessees objected to the assessment and the Assisstant Commissioner, T. D. Perera Esq., who heard the appeal confirmed the assessment and gave the following reasons for his decision :—

"The matter for decision in this case is to arrive at the profit arising in Ceylon of a non-resident person who brings goods into Ceylon in his own ships and sells them at a profit. The ordinary method of arriving at the gross profits from a trade is to deduct from the sum realised by the sale of goods the cost of purchase, including the cost of carriage and other expenses. In making this calculation the assessor has allowed only the actual cost of carriage of the goods and has refused to allow a hypothetical margin of profits which the appellant would have made had the goods been carried for someone else. I consider that this is perfectly sound.

The arguments for the appellants rest on the assumption that the sum of Rs. 16,243/- by which the assessor has increased the profits shown by them is an addition of profits from shipping; this is incorrect; it is not an addition of profits but a disallowance of expenses of carriage. Hence, there is no question of the application of section 39, as the assessor has not assessed shipping profits from inward freights. To put it differently, the appellants argue that by carrying goods in their own ships they have made a profit which does not arise in Ceylon and has been wrongly included. The reply to this is that it is a well-known principle that a man cannot make a profit or loss out of himself—see 6 Tax Cases 200.* In 4 Tax Cases 233** the principle was expressed in another way: "I have never yet heard that a man can make a profit by taking money out of one pocket and putting it into another."

The assessees, thereupon, appealed to the Board of Review who allowed the appeal and reduced the assessment by Rs. 16,243/- The decision of the Board was in the followiog terms :—

"The Board is of opinion that the appellants, who are non-residents, are entitled to deduct the sum of Rs. 16,243/- which is the difference between the amount of the actual cost of the carriage of the rice to themselves, as computed by the assessor, and the amount which the appellants have debited themselves with, on their rice account, as the freight for the carriage of their rice to Ceylon at the rate they would have charged had they carried the rice for some one else.

The appeal is accordingly allowed and the assessment is reduced by the sum of Rs. 16,243/-".

Being dissatisfied with the decision of the Board of Review the Commissioner of Income Tax required the Board to state a case for the opinion of the Supreme Court which they did in the manner following :—

CASE STATED

1. The firm of "P.K.N.", hereinafter referred to as the respondents, was assessed for Income Tax for the year of assessment 1932-33 as having a taxable income of Rs. 48,243/- upon which they were assessed to pay a tax of Rs. 4,824/30.

2. Being dissatisfied with the said assessment the respondents appealed to the Commissioner of Income Tax to review and

*Carlill & Silloth Golf Club v. Smith, C. A. (1913) 3 K. B. 75: 6 T.C. 198

** Harris v. Corporatoion of Burgh of Irvine, 4 T. C. 221.

revise the same on the ground that the assessment of taxable income was excessive in so far as it included a sum of Rs. 16,243/- which the respondents claimed was not taxable.

3. The respondents are a firm of five partners, all of whom are non-resident persons. The firm carries on at Colombo the business of money-lending and at Jaffna the business both of money-lending and of importing rice from India and exporting tobacco to India. They own four sailing vessels which carry their own cargo between certain Indian ports and Jaffna, and at the same time earn freight by carrying cargo for other merchants.

4. Although their ships were mainly used in carrying their own goods, the respondents treated the shipping business as a separate concern in their books, and when a ship brought their own rice from abroad to Jaffna, they debited the rice account with the amount of the freight which they would have charged had they carried the rice for some other party, and they credited the shipping account with the amount of such freight. On this basis the accountant acting for the respondents, in submitting accounts to the assessor, showing profits earned from their business of money-lending and of importing rice and of carrying goods from Ceylon to other ports in their vessels, excluded any profit from the inward freights which the respondents had charged themselves for the carriage of their own goods to Ceylon.

5. The assessor decided that in arriving at the true profits earned in Ceylon from the business of importing and selling rice, the full amount of the freights which the respondents had charged themselves could not be allowed as an expense, but only that proportion of it which constituted the actual cost of carriage to themselves. He, therefore, increased the computation of profits by a sum of Rs. 16,243/- which was agreed to by the respondents as the correct amount of the difference between the freights charged to themselves and the actual cost of carriage of their own rice in their own ships, for the purpose of their business of importing and selling rice in Ceylon.

6. At the hearing before the Assistant Commissioner on the 18th October, 1934, the respondents submitted that their firm carried on a shipping business regulated and controlled from their office in India as a separate business quite independent from that of the importing and selling of rice in Ceylon, and that the ascertainment of the profits of a non-resident person from the business of shipping is governed by section 39 of the Income Tax Ordinance of 1932, which provides that, where the ships of a non-resident shipowner

call at Ceylon ports, the full profits arising from the carriage of goods etc., shipped in Ceylon shall be deemed to arise in Ceylon. They urged that the fact that the goods were the appellants' own would not make the case different and that the profits earned from the shipping of goods from ports outside Ceylon to ports in Ceylon were not assessable for the purposes of Income Tax in Ceylon. It was further submitted on behalf of the respondents that the sum of Rs. 16,243/- represented the profits earned outside Ceylon from the carriage of goods from outside Ceylon, and was therefore not a profit arising in Ceylon, and on the analogy of section 36 (3) which excludes from taxation the manufacturing profit of a non-resident manufacturer, it was contended that shipping profits should similarly be excluded in this case. On these grounds the respondents claimed that the whole amount charged to themselves as representing the freight for the carriage of their own rice to Ceylon was not assessable and that the assessment should be reduced by Rs. 16,243/-.

7. The Assistant Commissioner who heard the appeal confirmed the assessment made by the assessor. He held that section 39 had no application since the assessor had not assessed shipping profits from inward freights. The respondents had contended that by carrying their goods in their own ships, they had made a profit which does not arise in Ceylon and was therefore not taxable in Ceylon. But the Commissioner relied on the principle expressed in Vol. 6 of the Reports of Tax Cases p. 200, and in Vol. 4 of the Reports of Tax Cases p. 233, that a man cannot make a profit or l ss out of himself. He further held that the sum of Rs. 16,243/- was not an addition of profits from shipping, but a disallowance of a portion of the sum claimed to be deducted as expenses of carriage and was therefore properly taxable. He held that the assessor's refusal to allow a hypothetical margin of profit which the respondents would have made had they carried the goods for some other party, was correct.

8. Being dissatisfied with the decision of the Commissioner the respondents appealed to the Board of Review. At the hearing before the Board on the 17th December, 1934, the respondents' Counsel urged the contentions relied on before the Assistant Commissioner and also relied on the decision reported in Vol. 2 of the Reports of Indian Tax Cases p. 119. Having heard arguments on behalf of the assessor the Board delivered the following decision

* *Commissioner of Income Tax* v. *Steel Bros*, (1925) I.L.R. 3 Rang. 614

dated 17th December, 1934, allowing the appeal and reducing the assessment by Rs. 16,243/. :

"The Board is of opinion that the appellants, who are non-residents, are entitled to deduct the sum of Rs. 16,243/- which is the difference between the amount of the actual cost of the carriage of the rice to themselves, as computed by the assessor, and the amount which the appellants have debited themselves with, on their rice account, as the freight for the carriage of their rice to Ceylon at the rate they would have charged had they carried the rice for some one else.

"The appeal is accordingly allowed and the assessment is reduced by the sum of Rs. 16,243/-."

9. The Commissioner has expressed dissatisfaction with the decision of the Board and has duly requested the Board to state this case for the opinion of the Honourable the Supreme Court on a question of law. The question which arises is whether, in law, the respondents are entitled to claim to deduct, as the cost of carriage of the rice imported into Ceylon for sale in Ceylon, the full sum with which they have charged themselves as the cost of carriage (such sum being calculated at the rate at which they would have charged any other person had such rice been shipped to Ceylon by such other person) or whether they can only deduct the actual cost of such carriage, the difference between the charges at these different rates being agreed at the above sum of Rs. 16,243/. We have accordingly stated and signed this case on the 26th day of February, 1935.

1. (Sgd.) *A. R. A. Razik.*
2. (Sgd.) *E. S. Captain.*

Members of the Board of Review.

M. W. H. De Silva, Actg. Solicitor General, with him *H. H. Basnayake*, Crown Counsel, for the appellant :— The facts of the case and the question of law on which the opinion of Your Lordship's Court is sought are stated clearly in the Case Stated by the Board of Review. (The learned Solicitor-General summarized here the facts and referred to paragraph 8 of the Stated Case.) My submission is that the assessees are not entitled to claim the full sum with which they have charged themselves on account of the cost of carriage of the rice imported to Ceylon for sale in Ceylon 'as an expense or outgoing of the rice business'. What the assessees have done is to keep separate accounts for the rice business and the shipping business in order to have the assessment of the shipping profits brought under S. 39 (1) of the Income Tax Ordinance.

The assessees are not entitled to do this. The fact that separate accounts are maintained by the assessees does not constitute separate and district businesses—see *Gloucester Railway Carriage & Wagon Co. Ltd.* v. *Commissioners of Inland Revenue*, (1925) A.C. 469, *Lothian Chemical Co. Ltd.* v. *Rogers*, (1926) 11 T.C. 508 (520, 521), and *Mitchell* v. *Egyptian Hotels Ltd.*, (1915) A.C. 1022. Though the accounts of the firm's activities were kept separately, it was all one business and the law applicable to the ascertainment of the profits of the business is S. 9 of the Ordinance. The words 'outgoings' and 'expenses incurred' occurring in S. 9 (1) have a definite legal meaning - see 17 Hals. pp. 117, 118 and p. 149. In the words of BRAMWELL B., in *Crasse* v *Rew*, (1874) 43 L.J. Ex. 144 at p. 146, an 'outgoing' means something that has gone out, an expense which someone has been at; similarily, the phrase 'expense incurred' was held to apply to only such money which one properly spent and not to remuneration for one's own labour, *Queen* v. *Governors of Poor in Hull*, 2 El. and Bl. 182; 118 E.R. 737. [Counsel referred at this point to *Commissioners of Taxation* v. *Antill*, (1902) A.C. 422 and *Mayor of West Ham* v. *Grant*, (1889) 58 L.J. Ch. 121 (123).] The question for decision is, therefore, whether the amount in dispute is an allowable deduction under S. 9 (1). It is submitted that S. 9 (1) is exhaustive and the out-goings and expenses which are allowed by the said sub-section must have been actually paid out or become payable in producing the profits of the business. The Board of Review were, therefore, wrong in allowing the duduction claimed by the assessees.

H. V. Perera, with him *N. Nadarajah* and *K. Satia Vagiswara Aiyar*, for the respondents :—The business of the assessees consists of two distinct activities, namely, (1) the importing of rice to Ceylon and selling it in Ceylon and (2) owning and chartering of ships. Though the two activities are carried on by one and the same person, they are separate businesses– see Konstam on the *Law of Income Tax*, 5th Ed. pp. 87 and 88. The profits of the business of importing rice to Ceylon and selling it therein are taxable. So are the outward freights earned by the shipping business. But S. 39 (1) of the Ordinance explicitly exempts from taxation the profits arising from the inward freights of the shipping business. The case of *Commissioners of Inland Revenue* v. *Maxse*, (1919) 1 K.B. 647 is a very good example of how profits are ascertained where two businesses are carried on by one person within the country—see also *Commissioners of Inland Revenue* v. *William Ransom & Son, Ltd.*, (1918) 2 K.B. 709. As was pointed out by

SANKEY J. in the latter case, difficulty may arise where the two businesses converge and one business is ancillary to the other. But that is not the case here. It is possible to separate the businesses and there is nothing in law to prevent this being done. In the result, a certain portion of the profits of one of the businesses of the assessees, viz., the shipping business, is under S. 39 (1) not liable to Ceylon Income Tax. If the assessees are not allowed to deduct as freight a sum calculated at the rate at which they would have charged any other person, the Crown will be taxing indirectly a portion of the profits of the shipping business which cannot be taxed in Ceylon. [Counsel also referred to Konstam (supra) p. 144 for the analogous case of the determination of the annual value of business premises.] The case of *Commissioners of Taxation* v. *Antill*, (supra relied on by the learned Solicitor-General has a particular reference to the language of the Land and Income Tax Assessment Act of 1895 of New South Wales and does not apply here. The passage from the judgment of BRAMWELL B., in *Crasse* v. *Raw*, (supra), is also not applicable to the language of the Ceylon Ordinance, as that was a decision under the Sanitary Act of 1866.

The case of the *Commissioners of Income Tax* v. *Steel Brothers*, 2 I.T.C. 119; (1925) I.L.R. 3. Rang. 614; A.I.R. (1926) Rang. 97;) 94 Ind. Cas. 466—a decision of the Full Court of Rangoon under the Indian Income Tax Act—is relevant for the determination of the point of law raised in the present case.

M. W. H. De Silva, Actg. Solicitor-General, in reply :—We have to construe strictly S. 9 (1) of the Income Tax Ordinance. The amount claimed as a deduction by the assessees and allowed by the Board of Review is clearly not an 'outgoing or expense incurred' within the meaning of S. 9 (1). What the assessees are seeking to do is similar to the claims made in *Dublin Corporation* v. *M'Adam*, (1887) 2 T.C. 387 and *Dillon* v. *Corporation of Haverford West*, (1891) 1 Q.B. 575; 3 T.C 31. The learned Solicitor-General particularly relied on p. 397 of 2 T.C. and p. 37 of 3. T.C.

MAARTENSZ J.—This is a proceeding under the Income Tax Ordinance, 1932. It is brought before us upon a case stated by the Board of Review upon the application of the Commissioner of Income Tax.

The case stated set out certain facts but the Board has not stated its finding upon those facts. We did not refer the matter back to the Board as the respondents' contention was that the opinion expressed by the Board upon the point of law dealt with was right whatever view we took of the facts.

The facts shortly stated are as follows: The respondents, hereafter referred to as the assessees, are a firm of five partners all of whom are not resident in Ceylon, carrying on business in Colombo as money-lenders, in Jaffna as money-lenders, importers of rice from India and exporters of tobacco to India. The assessees own four sailing vessels in which they carry their own cargoes to Jaffna as well as cargo for other merchants.

The shipping business was, according to the assessees treated as a separate business controlled from their own office in India and carried on quite independently of the business of importing and selling rice in Ceylon. Accordingly the assessees deducted from the profits made on their business as dealers in rice the freight they would have had to pay if the rice was carried to Ceylon in ships not owned by them. The freight deducted was determined by the freights the assessees charged other merchants for carrying their goods to Ceylon.

The amount charged as freight is not stated nor is there a finding that the amount charged is reasonable.

The assessor held that in arriving at the true profits earned in Ceylon from the business of importing and selling rice the assessees were not entitled to deduct the full amount of the freights they had charged themselves, but were only entitled to deduct the actual cost of carriage to themselves.

The actual cost of carriage is not stated, but according to the case stated the assessees accepted the amount fixed by the assessor. The difference between the amount of freight the assessees charged themselves and the actual cost allowed by the Commissioner is Rs 16,243/-.

On appeal to the Commissioner, the Assistant Commissioner confirmed the assessment made by the assessor and the assessee appealed to the Board of Review. The decision of the Board is as follows:—

"The Board is of opinion that the appellants, who are not residents, are entitled to deduct the sum of Rs. 16,243/- which is the difference between the amount of the actual cost of the carriage of the rice to themselves, as computed by the assessor and the amount which the appellants have debited themselves with on their rice account as the freight for the carriage of their rice to Ceylon at the rate they would have charged had they carried the rice for someone else.

The appeal is accordingly allowed and the assessment is

reduced by the sum of Rs. 16,243/-."

The Commissioner of Income Tax being dissatisfied with the decision of the Board of Review, this case was stated by the Board. The question of law stated is as follows:—

> "The question which arises is whether, in law, the respondents are entitled to claim to deduct, as the cost of carriage of the rice imported into Ceylon for sale in Ceylon, the full sum with which they have charged themselves as the cost of carriage (such sum being calculated at the rate at which they would have charged any other person had such rice been shipped to Ceylon by such other person) or whether they can only deduct the actual cost of such carriage, the difference between the charges at these different rates being agreed at the above sum of Rs. 16,243."

The argument before us proceeded on the footing that it made no difference whether the assessees carried on the shipping business as an independent business or not. On behalf of the Commissioner it was contended that in terms of section 9 of the Income Tax Ordinance only the costs of carriage to the assessees could be deducted. On behalf of the assessees it was contended that if the profits in shipping business were separable from the business in rice the assessees were entitled to allot to that business as profits the freight they would have to pay if the ships did not belong to them.

The question to be decided would be only of academic interest if the profits derived by the assessees from the carriage of goods to Ceylon were taxable in Ceylon, for in that case it would be immaterial whether income-tax was paid on the profits of the shipping business or on the profits of the business in rice. But under the provisions of section 39 (1) of the Income Tax Ordinance only the profits of goods carried from Ceylon are deemed to arise in Ceylon. The profits which the assessees seek to exclude from their profits of the rice business are not taxable in Ceylon if the contention of the assessees is upheld.

The Solicitor-General relied on the terms of section 9 of the Ordinance which provides that, subject to the provisions of sub-sections 2 and 3, there shall be deducted for the purpose of ascertaining the profits or income of any person from any source all outgoings or expenses incurred by such person in the production thereof.

The section further provides that outgoings and expenses

shall include (*a*) such sum as the Commissioner in his discretion considers reasonable for the depreciation by wear and tear of plant, etc., (*b*) certain losses on plant, etc., sold or discarded, (*c*) any sum expended for the repairs of plant, etc., (*d*) such sum as the Commissioner in his discretion considers reasonable for bad debts, (*e*) interest paid or payable to a banker, (*f*) any contribution made by a public officer under the Widows and Orphans Pension Fund Ordinance, 1898, (*g*) any contribution to a Pension.....Fund which may be approved by the Commissioner.

It is unnecessary to refer to the sub-sections which are not material to the question to be decided.

The Solicitor-General argued that section 9 was exhaustive and that subject to the deductions provided for by sub-heads (*a*) to (*g*) the assessees were only entitled to deduct for the purpose of ascertaining their profits from the business in rice such outgoings or expenses as were actually paid out or became payable in the production of those profits; and that the assessees were, therefore, not entitled to deduct from those profits the amount of freight which they would have had to pay if the shipping did not belong to them, as such amount could not be brought under any of the provisions of section 9.

In support of his argument the Solicitor-General referred us to two cases (i) *Dublin Corporation* v. *McAdam* (*Surveyor of Taxes*) (1), (ii) *Dillon* (*Surveyor of Taxes*) v. *Corporation of Haverfordwest* (2).

In the first case, the assessed profits of the Dublin Corporation included the income derived by the Corporation from rates levied by them for water supplied within the Municipal area and from the sale of water within and without such area.

At the hearing of the appeal by the Commissioners the respondent applied that the assessment might be amended by excluding therefrom the income derived from the rates, and that the Corporation should be charged with duty on the income derived by them from the supply of water outside the limits for purposes of trade, manufacture and otherwise, after allowing therefrom a deduction of a proportionate part of the expenses.

The decision of the Commissioners was that the Corporation was liable to pay income tax upon the profit of so much of this waterworks concern as was derived by the supply of water to the extra-municipal area. The Corporation being dissatisfied with this decision, the Commissioners stated a case for the opinion of the High Court.

PALLES C.B. made the following observation which was relied upon by the Solicitor General:—"What we have to consider, in my opinion, is whether, in relation to the extra-municipal districts, the Corporation of the City of Dublin are carrying on a trade, adventure or concern in the nature of a trade, for if they are, I am clear that whatever surplus may remain of the receipts incident to that concern is a profit within the meaning of the Act On the other hand, I think it is perfectly clear that, in order to bring this case within the operation of the Income Tax Act, it is necessary that there shall be this trading in its strict true sense. There must be, at least, two parties—one supplying water, and other to whom it should be supplied and who should pay for it. If these two parties are identical, in my opinion, there can be no trading. No man, in my opinion, can trade with himself; he cannot, in my opinion, make, in what is its true sense or meaning, taxable profit by dealing with himself and in every case of this description it appears to be a question on the construction of the Act whether the two bodies—the body that supplies and the body or class which has to pay—were either identical, or upon the true construction of the Act, must be admitted to have been held by the Legislature to be identical, and so legislated for upon that basis."

He then held the Corporation could not make a profit from the rates, as they were the agents and representatives of the ratepayers, and could not be treated as, in any sense, a body distinct from the inhabitants of Dublin., but that, as regards water supplied to persons or townships within the extra-municipal limits, that principle could have no application as the suppliers and the persons supplied were distinct persons.

In the second case, it was held that a Municipal Corporation owning gas works and supplying gas free for the public lamps and at a charge to private consumers could not deduct from the profit of supplying private consumers the expenses of lighting public lamps.

CHARLES J. in the course of his judgment made an observation similar to that of PALLES C.B.

It is, I think, perfectly clear from the principle laid down in these two cases that a person cannot be assessed for Income Tax on profits he might be said to have made from himself. Accordingly if the assessees carried goods from Ceylon in their own ships they cannot be assessed for Income Tax on the profits they would have derived from carrying the goods of other persons.

On the same principle, I am of opinion that the assessees are not entitled to deduct from the profits of the rice business what they would have had to pay in the way of freight to other persons as the profits made in their shipping business, which is not taxable for Income Tax in Ceylon.

The respondents relied on two cases in which the question for decision was whether a business carried on by the assessee was liable to excess profits duty and it was held that the proper course, when a trade or business liable to duty is carried on in connection with a trade or business not so liable, is to sever the profits of the two businesses and assess accordingly.

In the first case *Commissioners of Inland Revenue* v. *William Ransom & Son, Ltd.* (3), "the respondents, who were a limited company carrying on business as manufacturing chemists and growers of medical and other herbs, owned a factory where the manufacture and distillation of herbs were carried on, and they also occupied a farm on which they grew herbs for treatment in the factory. Memoranda were kept of the value of the produce transferred to the factory, of the prices obtained by the sale of incidental crops to the public and of the expenses relating to the farm operations. The respondents were assessed to excess profits duty, and on an appeal by them against the assessment the General Income Tax Commissioners found as a fact that the respondents occupied the farm mainly for the purpose of the factory but they were of opinion that the occupation of the farm was the business of husdandry, and that the profits of the farm should be excluded for the purpose of excess profits duty, and they fixed the assessment on this basis—

It was held (i) that, on the facts, there was evidence on which the General Commissioners could find that the Company was engaged in husbandry and (ii) that, as it was possible for the Commissioners to separate the business of husbandry from the other business, there was nothing in law to prevent them from doing so."

The ruling in this case was followed in the case of *Commissioners of Inland Revenue* v. *Maxse* (4), where the Court of Appeal held, I quote the head note, "that M. was carrying on the profession of a journalist, author or man of letters, and also the business of publishing his own periodical. The publishing business should be debited with a fair and reasonable allowance in respect of M.'s contributions, and a proper sum for his remuneration as editor and on that footing he would be liable to duty in respect of his business, but exempt therefrom in respect of his profession."

The Solicitor General contended that these cases were decided on the language used in the sections relating to excess profits duty, particularly sub-section 1 of section 40.

Part III of the Finance (No. 2), Act 1915 imposes a duty of an amount equal to fifty per cent on the profits of a business exceeding by more than two hundred pounds the pre-war standard of profits as defined for the purposes of this part of the Act.

By section 39 of the Act certain trades and businesses are exempted from payment of this duty.

Sub-section 1 of section 40 of the Act provides that: (1) "the profits arising from any trade or business to which this part of this Acts applies shall be separately determined for the purpose of this part of the Act, but shall be so determined on the same principle as the profits and gains of the trade or business are or would be determined for the purpose of income tax subject to the modifications set out in the first part of the fourth schedule to this Act and to any other provisions of this Act."

In view of the provisions of this sub-section, it was necessary in the two cases referred to, to determine separately the profits of the business liable to pay excess profits duty. Accordingly reasonable allowance was allowed to be debited against the profits of the business liable to duty in respect of the benefits derived by them from the business not liable to pay that duty. But that principle cannot be applied to the case under consideration where what has to be determined is the profits to the assessees from the trade or business in rice. The respondents were not able to refer us to any case in which it was so applied, and the absence of authority is, I think, against the contention of the respondents.

The respondents also cited the case of the *Commissioner of Income Tax* v. *Steel Brothers & Co., Ltd.* (5), where the assessees had a head office in London and it was held that, in arriving at the amount of profits assessable under the Act, the Head Office in London should be allowed a reasonable commission agent's commission on the sales and realization of produce shipped from Burma and such a commission would not be assessable.

This case is of no assistance as no reasons are given for the decision that the assessees are entitled to deduct the commission payable to a commission agent. It is certainly not deductible under any of the provisions of section 9 of our Ordinance.

In my opinion, the assessees cannot claim to make a profit in their shipping business by trading with themselves and are, there-

fore, not entitled to deduct from the profits of their business in rice the amount they would have to pay as freight if the rice was carried to Ceylon in the ships of another person.

I would, accordingly, allow the appeal with costs incurred in this Court. The taxable income will stand at Rs. 48243/- and the tax payable at Rs. 4824/30.

DALTON J.—I agree.

Appeal allowed. Assessment confirmed.

[Proctors for Commissioner of Income Tax-appellant: *F.J. de Saram & C. T. de Saram.* Proctors for assessees-respondents: *C. Perumalpillai & Son.*]

[**NOTE.**—S. 39 of the Ceylon Inome Tax Ordinanqe lays down that, in the case of a non-resident shipowner, his full profits arising from the carriage of passengers etc., shipped *in* Ceylon shall be deemed to arise in Ceylon. The language and principle of this section appear to have been suggested by S. 16 of the Income Tax Act No. 40 of 1925 of the Union of South Africa and S 27 of the Income Tax Assessment Act, 1222-30, of Australia. S 39 of the Ceylon Ordinance is in consonance with S. 5 (1) (*b*) which declares that, in the case of non-residents, only such portion of their profits which arise in or are derived from Ceylon will bear Ceylon tax.

The profits of a non-resident shipowner, like the assessees in the case under review, are, therefore, divisible into two parts, their profits from passengers and goods shipped *in* Ceylon, which are liable to Ceylon tax under S. 39 and their profits arising *outside* Ceylon which, under S 5 (1) (*b*), will not attract Ceylon tax. Normally, the assessees' claim to deduct the cost of freight of rice imported by them to Ceylon would have been allowed under S. 9 of the Ordinance. This item will enter the credit side of the assessees' shipping business at Madras and, as it is not liable to Ceylon tax, should, it is submitted, under a true construction of the Ordinance, be separated and deducted from the profits of the assessees' rice business in Ceylon. It is further submitted that, in view of the fact that the principle of the separation of excepted profits from those liable to duty was introduced by the Finance Act of 1915 and applied in the two cases of *Inland Revenue Commissioners* v. *Ransom & Son*, (1918) 2 K.B. 709 (3) and *Commissioners of Inland Revenue* v. *Maxse* (1919) 1 K.B. 647 (4), such a principle of separation of profits should have been applied to the case under review. The two cases of *Dublin Corporation* v. *Mc'Adam*, (1887) 2 T.C. 387 (1) and *Dillon* v. *Corporation of Haverford West*, (1891) 3 T.C 31 (2), having been decided before the Finance Act of 1915, are not, it is submitted, authorities helpful for deciding the question in dispute. The Indian case of *Commissioner of Income Tax* v. *Steel Bros. & Co., Ltd.*, (1925) I.L.R. 3 Rang. 614 (5), decided by the Full Court of Rangoon lends support to the above view. MAARTENSZ J. states that "this case is of no assistance as no reasons are given for the decision." In this case, a limited Company had its headquarters in London

and was admittedly a non-resident of British India. It carried on large business operations in Burma in connection with rice, timber and cotton. It also had various rice mills etc., in Burma. A Full Bench of the High Court of Rangoon decided *inter-alia*, after a consideration of the leading case of *Rogers Pratt Shellac Co.*, v. *Secretary of State for India*, 52 Cal. 1; A.I.R. (1925) Cal. 34 and the Privy Council case of *Commissioners of Taxation* v. *Kirk* (1900) A.C. 588, that, in arriving at the amount of profits of the company liable to Indian income tax, a reasonable commission agents' commission should be allowed on goods exported and sold in London. Dealing with this part of the case, the judgment states:—"If the assessee had not had a Head Office in London and wished to ship and dispose of its produce in the English market it could only do so, for ordinary practical purposes, by means of Commission Agents there, and a reasonable remuneration to such Commission Agents would have to be deducted before arriving at the nett profit earned. But, if the Head Office in London and the various branches controlled by the Head Office in Rangoon happen to be one and the same firm, it does not, in our opinion, affect the question. And in arriving at the amount of profits liable to Indian income tax, the Commissioner of Income Tax, in our opinion, should allow a reasonable commission agents' commission on the sale and realization of the produce."]

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Present: MACDONELL C.J., DALTON S.P.J. AND POYSER J.

PAUL PEIRIS *v.* COMMISSIONER OF INCOME TAX

[*S.C. No. 54—Special*]

Decided: *6th March, 1936.*

Retirement of public officer on pension—Liability to tax of commuted gratuity paid after date of retirement but before the expiry of the year of assessment and pension payable for such period—Does a person who receives pension commence a new employment?—Ordinance No. 2 of 1932, S. 11 (1), (3) & (6).

The assessee, a public officer, retired on pension on February 15, 1935. Between this date and March 31, 1935, that is to say, before the expiry of the year of assessment 1934-1935, he received a commuted gratuity and he was entitled for pension for this period. On an appeal against an assessment of these amounts,

HELD (i) that, though the assessee's employment as a public officer ceased on February 15, 1995, within the meaning of S. 11 (6) of the Ordinance, he did not commence any employment on that date, within the meaning of S. 11 (3) and

(ii) that, therefore, the commuted gratuity and pension are not liable to income tax for the year 1934-1935.

Referred to: *Commissioner of Income Tax* v. *Rodger*, (1935) 35 N.L.R. 169; 1 Ceylon Income Tax Cases 1 ... (1)
Davies v. *Braithwaite*, (1931) 2 K.B. 628; 18 T.C. 198 ... (2)
Seldon v. *Croom-Johnson*, (1932) 1 K.B. 759; 16 T.C. 740 (3)

Case stated under S. 74 (2) of the Income Tax Ordinance No. 2 of 1922, by the Board of Review constituted under S. 70 of the Ordinance.

The assessee retired from the Civil Service of Ceylon on February 15, 1935. A notice of assessment under the Income Tax Ordinance, for the year 1934-1935 was served on him on March 9, 1935. The assessment was based on his salary and the emoluments from April 1, 1934, up to February 15, 1935, and his pension of Rs. 1602/- from February 16, 1935, to March 31, 1935, and his commuted gratuity of Rs. 43,750/-. The commuted gratuity was admittedly paid to the assessee after the date of his retirement on February 15, 1935, but within the year of assessment which ended on March 31, 1935. The assessment was made on the basis that, under S. 11 of the Ordinance, the assessee ceased his employment as a Civil Servant on February 15, 1935, and commenced a new employment on February 16, 1935, and that, therefore, the salary he received up to the date of his retirement as well as the pension and gratuity payable to him after he ceased that employment were all taxable.

The assessee, being dissatisfied with the assessment, appealed against it to the Commissioner of Income Tax, J. M. Doulton Esq., who referred the appeal direct to the Board of Review under S. 72 of the Ordinance, as, in his opinion, "no useful purpose would be served by his hearing the appeal." In referring the appeal to the Board of Review, the Commissioner stated as follows:—

... ...

"4. Dr. Peiris appeals against this assessment on the grounds that he has not ceased an employment and is liable to be assessed under section 11 (1) on his income for the year ended 31st March 1934. The amount of tax due under the assessment is Rs. 4573/88

5. It has always been the practice of the department to treat the individual, who retires on pension, as having ceased his employment and commenced a new employment. Apart from the legal position, to treat the employment as continuous would always result in serious hardship to the individual. In the year in which he retired he would have to pay tax on his previous year's income which, apart from the question of a combined gratuity, would normally exceed his actual income. In the following year, he would

again have to pay on the income normally in excess of his actual income. This excess would be very considerable if he has received commuted gratuity. This hardship is considerably accentuated, if the assessee is a non-resident not living in the United Kingdom, as he would have to pay tax at a minimum of 10%, without any allowance.

6. The legal position seems to be quite clear. Up to the date of retirement, the assessee was employed as a Civil Servant. As from the date of retirement he is no longer a Civil Servant, but a pensioner.

7. The case of the *Commissioner of Income Tax* v. *Rodger* (S.C. Case 105 of 1933)* supports this view. In this case it was said that, so long as an assessee was employed as an Accountant, his employment could not be held to have ceased, even though he changed his employer. The assumption is that, as soon as he ceased to be employed as an Accountant, his employment would cease. In the present case, the appellant has ceased to be a Civil Servant, therefore his employment has ceased.

8. The practice in the United Kingdom is similar, and I am not aware that it has ever been challenged."

At the argument of the appeal before the Board of Review, it was contended on behalf of the assessee that the appeal was only against the taxation of the commuted pension which he had in fact been paid after the date of his retirement and against the taxation of the pension paid to him for the period after his retirement on February 15, 1935. The Board of Review dismissed the appeal and confirmed the assessment. The assessee, thereupon, requested the Board to state a case for the opinion of the Supreme Court which they did in the manner following:—

CASE STATED

1. At a meeting of the Board of Review, Income Tax, constituted under the Income Tax Ordinance No. 2 of 1932, held on the 13th April 1935, the appellant abovenamed appealed against an assessment for Income Tax of his commuted gratuity of Rs. 43,750/. and of the pension payable to him for the period from 16th February, 1935, to 31st March 1935. The amount of tax payable on the assessment is Rs. 4573/88.

2. The facts relative to, and leading up to, this appeal are as follows:—

* *Vide* p. 1, *supra*.

3. The appellant retired from the Civil Service of Ceylon on the 15th February, 1935. A notice of assessment under the Income Tax Ordinance, for the year 1934-1935 was served on the appellant on the 9th March, 1935. The assessment was based on his salary and emoluments from 1st April 1934, up to 15th February 1935, and his pension of Rs. 1602/- from 16th February, 1935 to 31st March, 1935, and his commuted gratuity of Rs. 43,750/-. The commuted gratuity was admittedly paid to the appellant after the date of his retirement on the 15th February, 1935, but within the year of assessment which ended on the 31st March, 1935.

4. It was stated at the argument, in support of the assessment, that the assessment was made on the ground that, under section 11, the appellant ceased his employment as a Civil Servant on 15th February 1935, and commenced a new employment on the 16th February 1935, and therefore the salary he received up to the date of his retirement as well as the pension and gratuity payable to him after he ceased that employment were all taxable. The decision of the Supreme Court in *The Commissioner of Income Tax v. Rodger*, (1933) 35 N.L.R. 169, was also relied on. It was on this basis that the assessor assessed the appellant.

5. The appellant, being dissatisfied by the assessor's assessment, appealed against it to the Commissioner of Income Tax, who referred the appeal direct to the Board of Review, under the provisions of section 72 of the Income Tax Ordinance. In doing so, he placed before the Board the fact that it has always been the practice of the Department of Income Tax to treat an individual who retires on pension as having ceased his employment, and commenced a new employment, and that the practice in the United Kingdom is similar.

6. The appellant contended at the hearing of his appeal that he did not contest the taxation of his salary and emoluments up to the 15th of February, 1935, but that the appeal was only against the taxation of the commuted pension which he had in fact been paid after the date of his retirement and against the taxation of the pension paid to him for the period after his retirement on 15th February, 1935. He contended that neither of these was taxable as neither of them came within the wording of section 11 (6) (*a*) of the Ordinance, and that they did not come within section 11 (3) as he had not commenced any new employment on the 16th February, 1935, so as to subject any income or profits received by him between the 16th February, 1935, and 31st March, 1935, to Income Tax.

7. After hearing argument the Board decided, on the 13th April, 1935, that the assessment should be confirmed, and accordingly dismissed the appeal.

8. Being dissatisfied with the decision of the Board, the appellant has requested the Board to state a case for the opinion of the Honourable the Supreme Court, on the question as to whether the commuted gratuity paid after the 15th February, 1935, but within the year of assessment, and the pension payable for the period commencing 16th February, 1935, and ending 31st March, 1935, are liable to Income Tax for the year 1934-1935, which case we have accordingly stated and signed.

Colombo,
7th day of May, 1935.

1. A. Mahadeva
2. Stewart P. Hayley
3. Francis de Zoysa

Members of the Board of Review.

H. V. Perera, with him *G. E. Chitty*, for the assessee-appellant. [Counsel stated the facts and proceeded.—] The only question that arises in this case is whether the commuted pension paid to the assessee after his retirement and the pension payable for the period beginning on February 16, 1935, and ending on March 31, 1935, are liable to income tax for the year of assessment 1934-35. Sub-sections (3) to (6) of S. 11 create exceptions to the rule contained in sub-section (1). The assessee ceased his employment as Public Trustee during the year of assessment and, therefore, sub-section (6) applies. The amounts in question do not come within the purview of S. 6 (1) (*b*) or 6 (2) (*a*) as they were not actually received prior to the cessation of the employment. They might have been liable to tax under S. 11 (6) (*a*) if they were profits which arose in the period beginning on the 1st April 1934, and ending on the 15th February 1935. The gratuity and the pension were *earned* in the ordinary course by the assessee during the whole period of his service and they became legally due to him after his retirement. They relate to a period subsequent to such retirement. Next year the amounts will be caught up by S. 11 (1).

M. W. H. de Silva, Acting Solicitor-General, with him *H. H. Basnayake*, Crown Counsel, for the Commissioner of Income Tax-respondent:—As regards the assessee's income from April 1, 1934, to February 15, 1935, S. 11 (6) applies. But after February 15, 1935, the assessee had a new source of income, viz., his pension and

gratuity, and, by a legal fiction, this is regarded as a new employment.

[MACDONELL C.J.—Commencing a new employment? We have here a man who is to do nothing!]

Pension is a new employment under the English statute, see S. 45, Finance Act, 1927. Pension is included by the local Ordinance under 'profits from employment,' see S. 6 (2)

[DALTON J.—Who is the employer of a pensioner?]

The person who pays the pension is, under a legal fiction, the employer.

H. V. Perera, in reply:—I do not deny that the commuted pension will enter into the calculation of income for purposes of Income Tax. We have, however, to remember that the tax is not imposed on income but on a person. The assessee was taxed on the footing that S. 11 (1) did not apply to that particular source of income, the income from that employment. The learned Solicitor-General conceded, and must necessarily concede on that footing, that the assessee had ceased on February 15, 1935, to carry on his employment as a public officer. The learned Solicitor-General sought some assistance from the definition of profits in S. 2 of the Ordinance. No doubt for certain purposes, as for instance, for claiming allowances for 'earned income,' S. 16 (2), 'profits from employment' include pension. But there is a fallacy in arguing that the receipt of pension implies a new employment.

The English practice is based on the express provisions of the Finance Act of 1927 and cannot be availed of for an assessment under the Ceylon Ordinance. Liability to tax under this Ordinance cannot rest on any legal fiction. If the learned Solicitor-General's argument were sound, one has to go as far as maintaining that if, for example, a person ceased his employment and received later a bonus, he commenced a new employment, that of 'bonus receiver.' Such a bonus being paid in a lump sum, the new employment will begin and cease at one and the same time.

MACDONELL C.J.—This was a case stated by the Board of Review appointed under the Income Tax Ordinance, No. 2 of 1932 which was referred by DALTON and MAARTENSZ JJ. to a Bench of three judges. The case stated was as follows. [His Lordship set down here the case stated and proceeded:—]

This case necessitates an examination of section 11 of the Ordinance No. 2 of 1932, sub-section (1) of which is as follows:— "Save as provided in this section, the statutory income of every

person for each year of assessment from each source of his profits and income in respect of which tax is charged by this Ordinance shall be the full amount of the profits or income which was derived by him or arose or accrued to his benefit from such source during the year preceding the year of assessment, notwithstanding that he may have ceased to possess such source or that such source may have ceased to produce income."

On this sub-section it is useful to quote the remarks of DRIEBERG J. in *Commissioner of Income Tax* v. *Rodger* (1). "We have two years to consider. The year of assessment and the preceding year. A person is not taxed on the income of the preceding year as such but on his income for the year of assessment, and by an arbitrary rule his income for the preceding year is accepted as his income for the year of assessment: you do not tax the income of the preceding year but you tax the income of the year of assessment and measure that income by that of the preceding year." This is the normal rule, but this same section 11 establishing that rule contains also the exceptions thereto. The exceptions contained in sub-sections (2), (5), (7), (8) (9) and (10) do not affect the present case stated, but it will be necessary to consider sub-sections (3), (4) and (6) and I will begin with sub-section (6).

This provides for the case of a person "ceasing to carry on an employment" and, omitting words immaterial to the present case, reads as follows: "Where a person.....ceases to carry on..... employment in Ceylon.....his statutory income therefrom (i.e. from the employment) shall be (a) as regards the year of assessment in which the cessation occurs (i.e. April 1, 1934 to March 31, 1935) the amount of the profits of the period beginning on the 1st day of April in that year (i.e., 1934) and ending on the day of cessation (i.e. February 15, 1935), and (b) as regards the year of assessment preceding that in which the cessation occurs (i.e. April 1, 1933 to March 31, 1934), the amount of the statutory income as computed with the foregoing sub-sections or the amount of the profits of such year (i.e. 1933 to 1934), whichever is the greater" and he shall not be deemed to derive statutory income from such employment for the year of assessment (i.e. April 1, 1935 to March 31, 1936) following that in which the cessation occurs. "Statutory income" is defined in section 2 of the Ordinance as "income from any source computed in accordance with Chapter IV," which chapter consists of section 11, the section under consideration, and section 12 which does not concern the present case.

Now it seems clear that on February 15, 1935, the appellant "ceased to carry on an employment in Ceylon." He demitted his duties as Public Trustee and received a pension. No one apparently could henceforward lawfully require him to attend at the Public Trustee's office or any other office and work there, and conversely he had no longer the right to perform any of the duties pertaining to the office of Public Trustee or of any other office. He had ceased to carry on an employment within the meaning of the sub-section, and this was, we understand, conceded by both sides to this appeal.

If then on February 15, 1935, the appellant had ceased to carry on an employment in Ceylon, did he on that date "commence to carry on.....an employment in Ceylon"?, as is contended by the respondent to this appeal. This is the case provided for by section 11, sub-sections (3) and (4).

Sub-section (3), omitting words immaterial to the present case, reads as follows: "Where on a day" (i.e. February 15, 1935) "within the year of assessment" (i.e. April 1, 1934, to March 31, 1935), "any person commences to carry on...employment in Ceylon ...any profit arising therefrom" (i.e. from the employment) "for the period from such day" (i.e. February 15, 1935) "to the end of the year of assessment" (i.e. to March 31, 1935) "shall be the statutory income of such person for such year of assessment" (i.e. for the year April 1, 1934 to March 31, 1935). If then the appellant commenced an employment on February 15, 1935, any profit arising from that employment, for instance, his commuted gratuity and his pension for the next one and half months, would be statutory income of his for the year of assessment April 1, 1934, to March 31, 1935. And note that this constitutes an exception to the rule laid down in section 11 (1), that you tax the income of the year of assessment but measure it by that of the preceding year for, adhering to the facts of the present case, here as regards at any rate the commuted gratuity and the pension for the last one and a half months of the year, April 1, 1934, to March 31, 1935, you are measuring the income of the year of assessment not by that of the preceding year but by the year of assessment itself.

Section 11 (4) would seem to provide for the converse case, that, namely, of commencing an employment within the year preceding the year of assessment, and this sub-section (4), again omitting immaterial words, reads as follows: "Where on a day" (here February 15, 1935), "within the year" (here the year April 1, 1934, to March 31, 1935), "preceding the year of assessment" (which

would be the year April 1, 1935 to March 31, 1936), "any person has commenced to carry on,...employment in Ceylon...his statutory income therefrom for that year of assessment" (in this case the year February 15, 1935, to February 14, 1936), "shall be the amount of the profits for one year from such day," (in this case the year February 15, 1935, to February 14, 1936.)

You would surmise that this sub-section (4) was enacted to catch up cases where the person taxable had commenced to carry on employment but where the Income Tax Department had not become aware of that fact until some time in the next year of assessment, and doubtless it was inserted to provide for other case also, but neither side to this appeal contended that the present case came under sub-section (4), but argued, the appellant that it did not fall within sub-section (3), the respondent that it did. We must return then to sub-section (3) and try to answer the question, did the appellant "commence to carry on employment" within the year of assessment, that is the year April 1, 1934, to March 31 1935, such commencement having occured, if it did occur at all, on February 15, 1935.

It was argued in the case cited, paragraph 5, that "it has always been the practice of the Department of Income Tax to treat an individual who retires on pension as having ceased his employment and commenced a new employment and the practice in the United Kingdom is similar." During the argument, no English case was cited to us to show that this is the practice in the United Kingdom and the cases cited in 35 N.L.R. 169* hardly seems to bear out this contention. In *Davies* v. *Braithwaite* (2). ROWLATT J. discusses fully the meaning of employment in the English Income Tax Act, 1918, and the Finance Act, 1922, trying to distinguish it from "profession" or "vocation," and he points out that a person may well have a profession and yet hold an employment, and he says at page 635: "A musician who holds an office or employment under a permanent engagement can at the same time follow his profession privately." It should also be mentioned that he was dealing with Statutes which on this subject are differently worded from our own section 11 and which seem to have tried to put "profession" or "vocation" into one category, and "office" or "employment" into another. See also section 45 (3) of the Finance Act, 1927, which distinguishes "office" or "employment" from "annuity, pension or stipend." In view of this difference between the English

Commissioner of Income Tax v. *Rodger*, page 1, *supra*.

Acts and our own Ordinance, I doubt that the former are of very much help, and the judgment I have quoted does not seem to contain anything in favour of the proposition that a person going on pension thereby commences an employment. The other case cited in 35 N.L.R. 169, is that of *Seldon* v. *Croome-Johnson* (3), where the head-note says: "held that a junior Barrister on becoming a K.C. does not set up a new profession but, it would seem, continues his former profession." This case was again decided by ROWLATT J. and does not deal with a person going on pension as will be apparent from the portion of the head-note which I have just quoted. If then the practice in the United Kingdom is to treat an individual who retires on pension as having ceased his employment and having commenced a new employment, one can only say that no authority was cited to us in support of that proposition, and even if it is the practice there, the difference between their statutes and our own Ordinance would tend to make English decisions of doubtful authority with us.

This case then narrows down to a point of very small compass. What did the appellant do by going on pension on February 15, 1935? He ceased to carry on an employment in Ceylon, section 11 (6), of that there can be no doubt, and it seems to me equally clear on the plain meaning of words that he did not on that day commence to carry on employment in Ceylon. If you say that he did, it is a necessary question, who was his employer, and what his employment? His employer, if he had one, was the Government of Ceylon paying him his pension; his employment, if he had one, was drawing the pension. It is surely a strain on language to say that drawing a pension is an employment. At least I would ask for statutory or other authority before I agree that it was.

While writing this judgment I have had the advantage of seeing that of my brother DALTON and would respectfully concur in his interpretation of section 6 taken with the definition of "profits" or "income" in section 2. It is true that section 6 (2) enacts that "for the purposes of that section" the term "profits from any employment" includes a "pension" and that section 6 (1) says that "for the purposes of the Ordinance" the term "profits and income" mean "profits from any employment"; consequently a "pension" will be a "profit from an employment" and a "profit and income," but the Ordinance does not anywhere say that a pension, even though a profit from an employment, commences an employment.

Income derived from the investment of a stock exchange

speculation doubtless is "from that speculation" but it does not "commence" the speculation; on the contrary it is a *sine qua non* of the income that the speculation should be a thing of the past before the income "from" it can arise. So here, surely, on any ordinary analysis of the words used, the pension is "from" the employment, or because of the employment but the very term, pension, implies that the employment is over or it would be called "wages" or "salary"—section 6 (2) (*a*) (i)—nor is there anything in the Ordinance that I can discover which says that a pension, though a profit from an employment, yet "commences" an employment.

If the above considerations are correct, it seems to follow that the appellant, though he ceased to carry on employment in Ceylon on February 15, 1935, section 11 (6), did not commence any employment or new employment on that date, section 11 (3), and consequently the answer to the case stated must be, that the commuted gratuity paid after February 15, 1935, but within the year of assessment, and the pension payable for the period commencing February 16, 1935, and ending March 31, 1935, are not liable to income tax for the year 1934 to 1935.

I do not know what effect this may have on the amount which the appellant will ultimately have to pay as income tax on his commuted gratuity and pension. After the conclusion of the argument figures were handed to us, with the consent of both sides, showing what tax the appellant would pay (a) on the basis that there was no cessation of employment, (b) on the basis that there was no cessation of one employment and the commencement of another and (c) on the basis that there was a cessation of employment without the commencement of a new one: but Counsel for appellant earnestly besought us not to go into such questions as they would be outside the case stated to us, and any remarks thereon merely *obiter dicta*. This is certainly correct and it will be sufficient to decide the case stated to us without speculating as to matters not strictly within that case.

For the reasons given above, I am of opinion that this appeal must be allowed with costs, and the question asked of us must be answered, as I have said above, in the negative.

DALTON S.P.J.—It is conceded by the Commissioner that the standard basis for computing the statutory income of every person for each year of assessment is the full amount of the income derived from all sources during the year preceding the year of assessment. The year of assessment referred to in the question raised in the

case stated is the year April 1, 1934 to March 31, 1935. The onus, therefore, is on the Commissioner to establish that the payments made to the appellant for pension and commuted pension between the dates February 15 and March 31, 1935 i.e. during that year of assessment, can be included for the purpose of ascertaining the statutory income of the appellant for that year of assessment.

He purports to do this by seeking to show that the case falls within the provisions of section 11 (3) of the Income Tax Ordinance. That section provides that where on a day within the year of assessment any person commences to carry on or exercise a trade, business, profession, vocation or employment, any profit arising therefrom for the period from such day to the end of the year of assessment shall be the statutory income of such person for such year of assessment. It is urged that on February 15, 1935, the appellant commenced to carry on the employment of a pensioner and, therefore, any profit arising to him as pensioner from February 15, to March 31, 1935, the end of the year of assessment, is statutory income of the appellant for that year of assessment.

In support of the argument that going on pension is the commencement of a new employment, the Commissioner relies on the provisions of section 6 of the Ordinance. It is there enacted that the term "profits from any employment" includes a pension, or any sum received in commutation of pension. It is argued that because the law provides that a pension or commuted pension is for the purpose of that section a profit from an employment, therefore, it necessarily follows that a person on pension is carrying on the employment of a pensioner, and on the day on which he goes on pension he commences the employment of a pensioner. I am quite unable to agree with any such argument.

The word "from" in the term "profits from any employment" can be construed as "by reason of" or "out of" and "profits from any employment" means profits arising by reason of or out of any employment. Reference to an English dictionary as to the meaning of the word "pension" shows that, amongst other things, it means" a stated allowance to a person in consideration of past services" or a periodical payment made to a person retired from service on account of age, disability or the like" or a "yearly sum granted by Government to retired officers...who have served a number of years..." The payments of pension as a general rule, and taking the ordinary meaning of the word "pension", are made in respect of past services or past employment and not because of any

further service to be done or performed after retirement to earn the payment of the pension. Section 2 of the Ordinance provides that for the purpose of that section a pension is to be deemed profit from an employment, and is a statutory recognition of the meaning of the word "pension" which I have set out above for the purpose of this Ordinance, presumably because a pension is in fact a payment for service or employment, although that employment was in the past. This is recognized in section 16 of the Ordinance when the term "earned income" comes to be defined, although it is difficult to understand on what principle a difference is drawn between persons on the score of residence in regard to "earned income" in Ceylon. The definition in section 2, however, in no way supports or justifies the fiction upon which the case for the Commissioner depends, namely, that a pensioner on retirement and going on pension commences a new employment.

For these reasons I am opinion that section 11 (3) of the Ordinance has no reference to this case inasmuch as the appellant did not commence any new employment on February 15, by going on pension on that date.

The reference in the case stated to what is the English practice in these matters is incorrect. There the matter is amply covered by the provisions of the Finance Act, section 45.* There the term "employment," when referring to present employment, is clearly distinguished from such terms as "pension" or "annuity."

I agree, therefore, for the above reasons, that the answer to the question submitted to this Court in the case stated must be that the commuted gratuity paid after February 15, 1935, but within the year of assessment, and the pension payable for the period commencing February 16, 1935, and ending March 31, 1935 are not liable to Income Tax for the year 1934-1935.

The appellant is entitled to his costs of appeal.

POYSER J.—I agree.

Appeal allowed.

[Proctor for assessee-appellant: *Stanley Perera.* Proctors for Commissioner of Income Tax—respondent: *F. J. de Saram & C. T. de Saram.*]

* Finance Act, 1927, (17 & 18 Geo. 5. Ch. 10). S. 45 deals with the basis of assessment for employment, Schedule E. Sub-section (4) (i) of S. 45 enacts, for instance, as follows:—"In the case of income tax chargeable under Schedule E in respect of any office or employment held by any person, or any annuity, pension or stipend to which any person is entitled—

(i) income tax shall be computed as respects the year of assessment in which the person first holds the office or employment, or becomes entitled to the annuity, pension or stipend, on the amount of his emoluments for that year."

[NOTE.—This case was taken up for argument before DALTON S.P.J. and MAARTENSZ J., when their Lordships directed it to be listed before a Bench of three Judges as, in their Lordships' view, the question for determination was of great importance.

The basis adopted in the Ceylon Income Tax Ordinance for ascertaining statutory income is much the same as that of the United Kingdom Act of 1918, as amended by the Finance Acts of 1926 and 1927, and reference may be made to 17 Halsbury (Hailsham Edn.) Art. 202 *et sequa* and Art. 439 *et sequa*.]

Present: MOSELEY AND FERNANDO JJ.

G. N. G. WALLES *v.* COMMISSIONER OF INCOME TAX*

[*S.C. No. 155 (1936)—Special.*]

Decided: *17th February, 1937.*

Stakes won by horses belonging to assessee and his wife—Are they assessable to tax?—Purchase by assessee in 1931, under a mortgage decree, of property mortgaged to him to secure value of horse-fodder sold by him—Realization in 1932, ie, within the year preceding the year of assessment, by sale of the property, of an amount less than the debt due—Is the difference between the realized price and the amount of the debt a bad debt incurred during the period in respect of which the profits were being ascertained?—Loss on realization—Is it allowable?

Observations on what are findings of fact and questions of law—When may the Supreme Court interfere?—Income Tax Ordinance, No. 2 of 1932, Ss. 6 (1) (a); 9 (1) (d); 13 (1) (b) & (c) and 74 (5).

The assessee carried on the business of dealing in horse-fodder and saddling, training race horses and the importing of and selling horses. He and his wife derived during the year preceding the year of assessment 1933-34, in addition to the income from the said business, an income by the stakes won by their horses on the race course belonging to the Turf Club. In December, 1931, the assessee bought under a mortgage decree, for the appraised value of Rs. 7,100/-, a property which one C. had mortgaged to the assessee to secure a debt due for horse-fodder sold to C. In May, 1932, the assessee sold the property and after paying off three prior mortgages, there was left with him a balance sum of Rs. 497/58. The assessee was assessed as having an income of Rs. 35,170/. He was dissatisfied with that assessment on two grounds, viz., that the stakes won by horses belonging to himself and his wife were not assessable and that, in the ascertainment of his income, no deduction was made of a sum of Rs 6,535/-, the difference between the realized price and the amount due to him under the mortgage decree, which he contended was a bad debt incurred within the year preceding the year of assessment. He appealed to the Commissioner of Income Tax, who held against the assessee on both the grounds, and the Board of Review, who upheld the Commissioner's decision and confirmed the assessment, whereupon the assessee required the Board to state a case for the opinion of the Supreme Court.

HELD: (i) that inasmuch as the pursuit of horse-racing as carried on by the assessee and his wife formed no part of his business of trading in and

* Reported in 1 C.L.J.R. 113; 7 C.L.W. 73; 38 N.L.R. 325.

training horses, the stakes won by horses belonging to them were not 'profits or income' within the meaning of S. 6 (1) (*a*) of the Income Tax Ordinance, and, therefore, not assessable to tax and

(ii) that unless and until steps are taken by the assessee to recover the balance due from C. under the decree, it cannot be said that the debt is bad and that, therefore, the claim for the deduction of this amount in the ascertainment of his income under S. 9 (1) (*d*) of the Ordinance was premature.

HELD, further, that as the assessee had suffered a pecuniary loss in connection with the realization of his debt which became apparent within the year preceding the year of assessment, he was entitled to have the amount of this loss deducted under S. 12 of the Ordinance in the ascertainment of his assessable income.

Applied (*on the question of severance of businesses*):
Earl of Derby v. *Bassom*, (1926) 42 T.L.R. 380 ; 10 T.C. 357 ... (1)
Commissioner of Inland Revenue v. *William Ransom & Son, Ltd.*, (1918) 2 K.B. 709 ; 12 T.C. 21 ... (2)
Commissioner of Inland Revenue v. *Maxse*, (1919) 1 K.B. 647 ... (3)

Case stated for the opinion of the Supreme Court by the Board of Review under S. 74 of the Income Tax Ordinance No. 2 of 1932.

The assessee, Mr. G. N. G. Walles, is a veterinary surgeon, a dealer in horse fodder and saddling and a trainer of race horses. He also imports and sells horses. According to the assessee, he indulged, from 1920, in horse-racing from the love or sport and his racing string, at the time material to this case, numbered twenty-two. His wife took up racing on similar lines and owned, at this time, nine horses.

For the year of assessment 1933-1934, the assessee was assessed as having an income of Rs. 35,170/. He was dissatisfied with this assessment and appealed to the Commissioner of Income Tax on the following two grounds :—

(1) That the stakes won by horses belonging to himself and his wife are not assessable and

(2) That no allowance had been made for the alleged bad debt of Rs. 6,535/-, which debt, he contended, became bad within the year preceding the year of assessment and which, he claimed, should be deducted from the assessment of his income.

H. Musker Esq., Assistant Commissioner of Income Tax, who heard the appeal, confirmed the assessment for the following reasons :—

"As regards the claim for an allowance for the bad debt, the appellant bought in a property in satisfaction of the debt in December, 1931, which was prior to the year of the accounts under consideration. Such debt had become bad not later than December, 1931, and no deduction can be allowed in computing the profits of the year to the 31st March, 1933, in

respect of the subsequent realization of this property, just as any surplus on realization would not be assessable.

No evidence was produced to show that the racing of the horses run in the names of (the assessee and his wife) and the occasional sales of these horses did not arise from an enterprise run on commercial lines with a view to profit. The accounts show that profits have been made whilst in his capacity as veterinary surgeon, fodder merchant and importer and trainer of horses. Mr. Walles is in a favourable position to conduct racing on commercial lines."

The Assistant Commissioner held that the profits resulting from the racing of horses by the assessee and his wife arose from an enterprise which is conducted on commercial lines and fall within the meaning of 'profits and income' as defined in S. 6 (1) (*a*) of the Income Tax Ordinance.

The assessee, thereupon, appealed to the Board of Review who dismissed the appeal by the following order :—

"Upon the evidence and the facts stated in the course of the argument, we are of the opinion that the racing of horses by Mr. and Mrs. Walles is an activity which forms part of the business carried on by Mr. Walles, the profits from which formed part of the profits of an enterprise which is conducted on commercial lines and therefore fall within 'profits and income' as defined in section 6 (1) (*a*) of the Ordinance.

On the question of the 'bad debt' we are of opinion that it was not incurred during the period of which the profits have to be ascertained for the purposes of this assessment. It is accordingly disallowed.

The appeal is dismissed and the assessment is confirmed."

The assessee, thereupon, required the Board of Review to state a case for the opinion of the Supreme Court which they did in the manner following :—

CASE STATED

1. The appellant was assessed under the provisions of the Income Tax Ordinance, for the year of assessment commencing 1st April, 1933, and ending on 31st March, 1934, as having an income of Rs. 35,170/- upon which he was called upon to pay income tax amounting to Rs. 2,264/50.

2. Being dissatisfied with the assessment, the appellant appealed to the Commissioner of Income Tax on the grounds that:—

(a) the stakes won by horses belonging to the appellant's wife and to the appellant were not assessable and

(b) that no allowance had been made for an alleged bad debt of Rs. 6,535/- which debt, the appellant contended, became bad within the year preceding the year of assessment and which he claimed should be deducted from the assessment of his income.

3. The Commissioner of Income Tax held that the results of the racing of horses run by the appellant were taxable as their racing formed part of the business carried on by the appellant. He also held that the profits resulting from the racing of horses belonging to Mrs. Walles were profits resulting from an enterprise conducted on commercial lines and fell within the meaning of "profits and income" as defined in section 6 (1) (*a*) of the Ordinance. As regards the bad debt of Rs. 6,535/- he held that it became bad not later than December, 1931, when the appellant bought in the property of the debtor. He accordingly disallowed any deduction of this sum from the computation of the income of the year ending on the 31st March, 1933. In the result the appeal was dismissed by the Commissioner and the assessment confirmed.

4. The appellant, thereupon, appealed to the Board of Review constituted under the Income Tax Ordinance, upon the following grounds:—

(a) that the finding of the Commissioner was wrong in law and against the weight of the evidence,

(b) that the Commissioner was wrong in holding that the racing of horses by the appellant, under the name of "Mr. Douglas", and by Mrs. Walles or either of them, was an enterprise run on commercial lines with a view to profit,

(c) that the Commissioner was wrong in holding that the stakes won by horses owned by the appellant and his wife or either of them arose from an enterprise which is conducted on commercial lines and in holding that such stakes fell within the meaning of "profits and income" as defined in section 6 (1) (*a*) of the Ordinance.

(d) that the Commissioner was wrong in holding that the bad debt of Rs. 6,535/-, shown in the account of the appellant for the year ending 31st March, 1933, became bad not later than December, 1931, when the property of the debtor was bought in by the appellant in satisfaction of the debt.

5. At the hearing before the Board of Review on the 3rd September, 1935, the appellant gave evidence. He deposed to the

facts that he was a veterinary surgeon and had set up in practice as such from the year 1910; that he had been dealing in horse food for 30 years, that he took to horse racing from 1920 purely from the love of sport and not with a view to profit; that at the commencement of his racing career he owned only 3 race horses; that he added to them from time to time; that he now owned 22 race horses; that he still ran them all from the love of sport and that he trained them all himself.

In 1926 Mrs. Walles also took to horse racing out of a similar love of sport, with two horses, which he bought for her; and that at present she owned about 9 race horses.

He earned his income, he said, from his business as a horse trainer, a veterinary surgeon, and from the importing and selling of horses, and saddlery, and from the sale of horse and cattle food.

From the year 1920 to date his winnings from horse-racing exceeded his expenses in that connection in some years, and in others, his winnings were insufficient to meet those expenses.

He deposed to having kept books for his racing for the last 5 or 6 years, in which a separate folio was opened for each horse. He would enter, on one side of the account, expenses incurred, such as food, entry fees, jockey's fees, forfeits etc., and, on the other side, he entered the winnings by that horse.

In cross-examination by the assessor he stated that the cost of feeding, stabling and looking after his racing horses would cost about Rs. 115/- each, approximately; that he debited Mrs. Walles also at the same rate of Rs. 115/- per horse for the same services; and that he would charge others—meaning his customers—Rs. 175/- per month for each horse that he looked after, fed and stabled and trained for them. He had the same system of accounts for others as he had for himself.

He had no profit and loss account in his books, but such an account could be prepared, out of the material in his books, in connection with the horse-racing in which he indulged.

He imported race-horses, trained them, ran them in races and sold them, sometimes at a profit and at others at a loss. During the 3 years ending December, 1934, he thought that his net profit from so importing, training, running and selling race-horses amounted to some Rs. 5,000/-.

All the winnings of stakes either by his horses or by those of Mrs. Walles were sent to him by a single cheque of the Turf

Club and he distributed them out, Mrs. Walles' winnings being entered into the accounts of her various horses. The money, however, went into his account and out of those winnings he always bought her other horses.

In re-examination by his Counsel, he said that he had always been agreeable to being taxed on all profits he made from the sale of horses. Horses which had won a stake or two fetched a better price on sale than those which had not won any stakes. Regarding deduction claimed on the ground that the debt of Rs. 6,535/- was a deductible bad debt, his Counsel submitted a statement showing how it arose and containing the facts material to the claim. A copy of that statement marked 'X'* for identification is annexed to this Case Stated.

6. After hearing the arguments of the appellant's Counsel, and the Assessor, the Board pronounced the following decision:—

***Statement Marked "X."**

WALLES *v.* COOMBER.

1. Walles sued Coomber in D.C. Colombo No. 43140 for the recovery of Rs 11,172/89 due on mortgage bond No. 1083 dated 6th December, 1930. The sum of Rs. 11,172/89 represented the value of horse food supplied to Coomber prior to the execution of the mortgage bond. Action was filed on 23rd March, 1931.

2. Decree was entered on 8th May, 1931.

3. On 22nd December, 1931, Walles bought in the property mortgaged for Rs 7,100 (appraised value) subject to a primary secondary and tertiary mortgage.

4. From time to time Walles made payments to the primary and secondary mortgages as follows:—

			Rs.	Cts.
To the primary mortgagee	—on 22.1.32	...	Rs. 500	00
	on 20.4.32	...	Rs. 250	00
	on 26.4.32	...	Rs. 150	00
To the secondary mortgagee	—on 9.1.32	...	Rs. 5,000	00
	on 18.1.32	...	Rs. 10,000	00
	on 15.4.32	...	Rs. 500	00
	Total payments		Rs. 16,400	00

5. On 23rd May, 1932, Walles sold the property for Rs. 45,000.

He then paid the primary mortgagee ...	Rs. 13,295	00
the secondary mortgagee	Rs. 6,807	42
and the tertiary mortgagee	Rs 4,000	00
Add to this the previous payments of	Rs. 16,400	00
	Rs. 40,502	42
The balance in hand of Walles was therefore	Rs. 4,497	58
He therefore lost a sum of	Rs. 6,675	31
from his claim of..... .....Rs.	11,172	89

"Upon the evidence and the facts stated in the course of the argument, we are of the opinion that the racing of horses by Mr. & Mrs. Walles is an activity which forms part of the business carried on by Mr. Walles, the profits from which formed part of the profits of an enterprise which is conducted on commercial lines and therefore fall within "profits and income" as defined in section 6 (1) (*a*) of the Ordinance.

On the question of the 'bad debt' we are of opinion that it was not incurred during the period of which the profits have to be ascertained for the purposes of this assessment. It is accordingly disallowed.

The appeal is dismissed and the assessment is confirmed."

7. Being dissatisfied with the decision of the Board, the appellant has requested the Board to state a case for the opinion of the Honourable the Supreme Court on a question of law, which case we have stated and signed under the provisions of section 74 (2) of the Income Tax Ordinance.

Colombo,
24th October, 1935.

Sgd. 1. Leonard Peiris.
2. W. Pole Fletcher.
3. J. A. Tarbat.

Members of the Board of Review, Income Tax.

H. V. Perera with him *E. G. P. Jayatileke* and *N. M. de Silva*, for the Assessee-appellant :—

There are two matters for decision :—(1) Is the Board of Review correct in its view that the horse-racing carried on by the appellant is part of an enterprise run on commercial lines? (2) Is the Board correct in its view that Mr. Walles' loss in regard to property purchased by him has to be computed as at the time of the purchase?

On the first question, the decision in the *Earl of Derby* v. *Bassom* (1) is helpful. In that case the House of Lords took the view that where sport and business are combined, the two have to be separated for purposes of assessment. Your Lordships will adopt that principle when deciding the first point. The contention for the Commissioner of Income Tax is that this item comes under S. 6 (1) (*a*) of the Ordinance. It is not claimed that it comes under any other head. The question, therefore, is whether profits from horse-racing carried on systematically are profits from a "trade, business, profession, or vocation."

[FERNANDO J.—What is a vocation?]

Vocation has been defined in *Partridge* v. *Mallandaine* (4) A vocation is a calling. It implies something done on commercial lines for the sake of profit. In *Graham* v *Green* (5), a man who habitually took bets was held not to be engaged upon a "business." The essential of a business is the invitation to others to come and do business, as in the case of a bookmaker. He holds himself out ready for business and invites the public to do business with him. Similarly, the Turf Club does business, but the man who runs his horses on the race course of the Club is an invitee only.

The appellant's activity in horse-racing is not part of a business. Where there are two sets of activities connected together one of which is taxable and the other not, as the same person runs them, you must separate the one from the other. The respondent cannot succeed unless it is his contention that even a professional man, who owns a string of horses and runs them with regularity, should be taxed with regard to his gains on the Turf. If so, then equally losses ought to be deducted. A private individual, who invests his money on the security of a land cannot set off his losses but the money-lender can do so, because it is part of his business.

The only reason that can be urged in support of the assessment is that horse-racing has been done habitually. But this is not the test. In *Graham* v. *Green* (supra), it was proved that the assessee's sole means of livelihood was betting. It was held, nevertheless, that his winnings from betting were not taxable under Schedule D. of the English Act*. A gain of this kind is like picking up something valuable. It is comparable to the gains of a skilful player at the cards who played daily and won money constantly. There is no tax on a habit.

(4) (1886) 18 Q.B.D. 276; 2 T.C. 179. (5) (1925) 2 K.B 37; 9 T.C 309.

**Graham* v. *Green* is a decision under Case I of Schedule D of the United Kingdom Income Tax Act 1918. The relevant Rules of Schedule D. of this Act are:—

1. Tax under this Schedule shall be charged in respect of—

(a) The annual profits or gains arising or accruing—

.....

(ii) to any person residing in the United Kingdom from any trade, profession, employment or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere,

.....

II. Tax under this Schedule shall be charged under the following cases respectively, that is to say,—

Case I.—Tax in respect of any trade not contained in any other Schedule,

Case II.—Tax in respect of any profession, employment, or vocation not contained in any other Schedule,

.....

[FERNANDO A.J.—Suppose he collected money from others and took bets and made a profit ?]

Then he is a betting agent and, as betting would be one element of a business, the profits made in that case would be the result of services to others. You cannot have a business with service only to yourself.

[MOSELEY J.—Could you not do business with one man ? Must you do business with the public generally ?]

That would not be a business but rather a species of employment. A person who runs his own horse accepts the invitation of the Turf Club. He is an invitee. A person who does business is an inviter. He holds out, whether to the public or to an individual, that he is ready to do business and organizes himself for that business. Even a systematic receiver of stolen goods can be taxed. In *Lord Derby's* case horse-racing and horse-breeding were admitted to be a hobby of the Earl, the income from which was not taxable. Incidental to that hobby was another activity which was separable and taxable. Similarly, in the present case Mr. Walles has a business. Connected with that business there is his hobby of racing. The two are separable and must be separated. See the case of *Glanley (Lord)* v. *Wightman* (6), *Commissioners of Inland Revenue* v. *William Ransom & Son Ltd.* (2) and *Commissioners of Inland Revenue* v. *Maxse* (3).

As regards Mrs. Walles' winnings, they cannot be brought into this account at all. The wife's sport cannot be part of the husband's business.

On the second question for decision, the process of realization of this business debt terminated only when we sold the property. It was a transfer taken by a business man, who does not deal in lands, for the purpose of securing a debt for horse fodder sold by him. The loss commenced in 1931, but it could not be ascertained till 1932.

[FERNANDO A.J.—When did you suffer that loss ?]

We suffered the loss in 1932.

[FERNANDO A.J.—The real test is, when did the debt become a bad debt ?]

A debt becomes a bad debt when it becomes irrecoverable, i.e., when it becomes a business loss.

(6) [1933] A.C. 618, 17 T.C. 131.

N. Nadarajah, Crown Counsel, with him *R. R. Crossette-Thambiah*, Crown Counsel, for the Commissioner of Income Tax-respondent:—S. 6 (1) (*h*) † has to be considered in this connection. It provides for the taxation of "income from any other source whatsoever." The wordings of S. 6 (1) (*a*) and S. 6 (1) (*h*) of our Ordinance differ from each other and from the English Statute.* S. 6 of the Indian Act refers to "income, profits and gains."†† These three terms were considered in *Bengalee Urban Co-operative Credit Society Ltd.* v. *Commissioner of Income Tax, Burma* (7). The assessee must either claim a total exemption for stakes won at horse-racing or show that S. 6 (1) (*h*) does not apply. Even if horse-racing was an independent activity, it would be liable under S. 6 (1) (*h*). But it is liable under S. 9 (1) (*a*) if it is an item of a larger "trade, business or vocation." The running of horses is part of the assessee's business of selling horses. That is a question of fact. No appeal lies from a finding of fact if there is evidence in support. [Counsel referred here to the evidence.] The assessee has admitted that what he gained he gained in the course of his business. The English cases cited by learned Counsel for the appellant do not apply, as the English Act specially exempts from super-tax the profits from husbandary and from journalism. It was, therefore, absolutely necessary to separate the one business from the other in the two cases cited for the appellant.

[FERNANDO A.J.— Mr. Perera's argument is that gains from betting are not taxable. Therefore, gains from this activity ought to be separated from the rest of the business.]

In the Ceylon Ordinance there is no exemption for profits from betting carried on recurrently and non-casually. In *Smith* v. *Anderson* (8), the two words "business" and "trade" are considered. If the running of horses took up the assessee's attention and labour for the purpose of profit, then it is a business. "Trade" is also explained in *Grainger & Son* v. *Gough* (9), as a combined fact consisting of a number of items. This was one line of activity of the

† S. 6 (1) (*h*):—"Income from any other source whatsover, not including profits of a casual and non-recurring nature."

* Case VI of Schedule D, is the residual Case and is as follows:—"Tax in respect of any annual profits or gains not falling under any of the foregoing Cases, and not charged by virtue of any other Schedule."

†† S 6:—"Save as otherwise provided by this Act, the following heads of income, profits and gains shall be chargeable to income-tax in the manner hereinafter appearing, namely: ...(iv) Business...(v) Other sources."

(7) 7 Reports of Income Tax Cases (Ind) 61, at p. 66.
(8) [1879] L.R. 15 Ch. 247 at page 258
(9) [1896] A.C. 325; 3 T.C. 462

assessee's business. He had the same set of horses for all lines of his activity. The horses were trained for purposes of sale. They were run on the race-course for purposes of sale. That is a finding of fact. Your Lordships' Court will, under S. 74 (5) of the Ordinance, decide only questions of law arising in a Case Stated. It is also open to this Court to interfere if the finding of the Board of Review is not supported by the evidence before the Board. If, therefore, the finding of fact is that the running of horses on the Turf formed part of the appellant's business of training and selling race horses, no question of law arises for Your Lordships' decision. The appellant ran the horses on the Turf in order to train them and, consequently, it cannot be said that the running of horses was attributable or referable to his love of sport. This position was rejected by the Board of Review. [Counsel cited at this stage *Spiers & Son, Ltd.* v. *Ogden* (10), *Gloucester Railway Carriage & Wagon Co., Ltd.* v. *Inland Revenue Commissioners* (11), *Inland Revenue Commissioners* v. *Hyndland Investment Co., Ltd.* (12), *Hillerns & Fowler* v. *Murray* (13).

[FERNANDO A.J.—Whether the racing of the horses is part of the business is a question of fact; whether it is taxable under the Ordinance is a question of law. Otherwise, why has a case been stated at all ?.]

The question for decision is whether profits of this nature are taxable at all. *Lord Derby's* case (supra) can be distinguished. There, the whole business was not taxable. Here, the whole business is taxable. If exemption is sought for one item of this business, then it is for the assessee to show that that item is exempted. To itemize every single activity of a business would be fallacious. Further, this particular item comes under section 6 (1) (*h*). The question of the taxability of bets does not arise. These are stakes awarded as prizes for merit. They are rewards. [Counsel cited here Sundaram on *The Law of Income Tax*, page 288.] This is income arising from this business, and if it is a form of income which is neither casual nor non-recurring, then it is taxable. The activity of racing is a part of this business. That is a finding of fact. All the horses owned by the assessee were for purposes of his business. He did not own some horses solely for racing and others solely for sale. That is a finding of fact.

As regards the second question for decision by Your Lordships, a bad debt is one which has a legal existence but which cannot

(10) [1932] 17 T.C. 117
(11) [1925] A.C. 469; 12 T.C. 720
(12) [1929] 14 T.C. 694
(13) [1932] 146 L.T. 474; 17 T.C. 77, C.A.

be recovered because the debtor has no property. In law, the assessee had to enter satisfaction for the amount of the decree. Therefore, he must be deemed to have recovered that amount.

H. V. Perera in reply:—The question whether or not this was a bad debt, has to be looked at from a practical point of view.

[MOSELEY J.—The bad debt is the amount Coomber owed to Walles. That was in December 1931. There is no relation between that debt and the date of the subsequent sale].

That is so, from a strictly legal point of view, but not from the point of view of a tradesman.

[FERNANDO A.J.—You are not allowed a deduction for losses, but only for bad debts.]

Section 9 is not exhaustive of the deductions that can be allowed.

[FERNANDO A.J.—Does section 13 (1) (b) affect the position?]

This is not a loss of capital.

[MOSELEY J.—Where is it said that this loss can be split up into two categories?]

The buying and selling of this property was not any part of the assessee's business. The term "bad debt" is not a term of art. It has no precise legal meaning. It must be given the meaning given to it by business men.

[MOSELEY J.—Rs. 2600/- was the loss to the business. The remainder is a bad debt due from Coomber.]

On the first question, even if the finding is that this horse-racing is a part of the business, my submission is that it is a separable part and must be separated. I concede that the one activity is connected with the other. It is in fact a part of the other. But, if in itself it is not the "business," then it must be separated, unless it is an inseparable part of the business.

[FERNANDO A.J.—Cannot racing be carried on as a business?]

There is no such finding.

MOSELEY J.—This is a case stated for the opinion of this Court under the provisions of S. 74 of the Income Tax Ordinance, No. 2 of 1932, by the Board of Review constituted under that Ordinance.

The Assessee, Mr G. N. G. Walles, is a veterinary surgeon, a dealer in horse fodder and saddling and a trainer of race horses.

He also imports and sells horses. According to his own account, since 1926 he has indulged in horse racing purely from the love of sport and his racing string now numbers twentytwo. His wife has taken up racing on similar lines and now owns nine horses.

For the year of assessment 1933-1934, the assessee was assessed as having an income of Rs. 35,170/00. He was dissatisfied with that assessment on two grounds, viz:—

1. That the stakes won by horses belonging to himself and his wife are not assessable and
2. That no allowance had been made for an alleged bad debt of Rs. 6,525/-, which debt, he contended, became bad within the year preceding the year of assessment and which, he claimed, should be deducted from the assessment of his income.

The assessee appealed to the Commissioner of Income Tax on these grounds.

In regard to the first ground the Commissioner held that the racing of horses by the appellant formed part of the business carried on by him and that the profits thereof were taxable. He held also that the profits resulting from the racing of horses belonging to the appellant's wife were profits resulting from an enterprise conducted on commercial lines and fell within the meaning of "profits and income" as defined in S. 6 (1) (*a*) of the Ordinance.

In regard to the second point the Commissioner held that the debt of Rs. 6,535/- became bad not later than December, 1931, at which date the appellant bought in the property of the debtor. He, therefore, disallowed the deduction and the appeal on both grounds was dismissed.

The appellant, thereupon, appealed to the Board of Review who decided as follows:—

"Upon the evidence and the facts stated in the course of the argument, we are of opinion that the racing of horses by Mr. and Mrs. Walles is an activity which forms part of the business carried on by Mr. Walles, the profits from which formed part of the profits of an enterprise which was conducted on commercial lines, and therefore fall within "profits and income" as defined in S. 6 (1) (*a*) of the Ordinance.

On the question of the 'bad debt,' we are of opinion, that it was not incurred during the period of which the profits have to be ascertained for the purposes of this assessment. It is accordingly disallowed. The appeal is dismissed and the assessment is confirmed."

The appellant is still dissatisfied and has requested the Board to state a case.

Now the decision of the Board on a question of fact is final unless, I suppose, this Court should be of opinion that there is no evidence to support such a finding. It becomes necessary therefore to examine the finding of the Board with a view to ascertaining the

dividing line between the finding of fact and the Board's view of the law which should be applied.

It is somewhat difficult to dissect the finding of the Board on the above lines, but if I may be permitted to paraphrase the finding, it seems to me that the question this Court is invited to decide is whether or not the "activity" of racing horses as carried on by Mr. and Mrs. Walles does, for the purposes of section 6 (1) (*a*) of the Ordinance, form part of the business carried on by Mr. Walles.

I think we may take it as common ground that stakes won by an owner who races purely for sport are not liable to taxation under the above-mentioned sub-section or any other provision of the Ordinance.

It was urged before us by Counsel for the Commissioner that the racing of horses was an inseparable part of the appellant's business as a trader in horses, and he relied upon the appellant's evidence to the effect that "he imported race horses, trained them, ran them in races and sold them, sometimes at a profit and at others at a loss." It was pointed out, no doubt with truth, that the winning of a race enhances the value of a horse and that, therefore, the running of a horse with a view to winning races was part and parcel of the business of trading in horses.

Does, however, the business of trading in horses negative the possibility of the same person engaging in racing from the love of sport ?.

A number of authorities were cited by Counsel for the appellant. I shall refer to a few.

In the case of *Earl of Derby* v. *Bassom* (42 Times Law Reports p. 380) (1), it was held that where a person kept a racing and breeding establishment as a hobby and also let out to others the services of his stallions, he was liable to pay income tax on the fees received for such services. The facts are on a converse footing to those existing in the case before us, but the case is authority for the proposition that where a commercial enterprise is carried on in conjunction with a hobby the profits from the former are taxable.

In *Commissioners of Inland Revenue* v. *William Ransom & Son, Ltd.*, (1918, 2 K.B. p. 709) (2), it was held that where two businesses carried on by the same person were taxable on different bases, and it was possible for the Commissioners to separate one from the

other, there was nothing in law to prevent them from doing so. SANKEY J. in the course of his judgment said:—

> "I can conceive of cases where the two branches of the business of a person or a Company are so interlaced that it is impossible to separate them, and, although I express no definite opinion upon the point, it may be that in those circumstances, if the main branch of the business is subject to excess profits duty, the whole business is subject to the duty on the ground of the impossibility of separating the main branch from the rest of the business. There, again, the decision would depend very much on the facts of the case. The case where an individual carries on two separate businesses of which one is liable to the duty and the other is not, is a simple one, but it might be more difficult to arrive at a decision where one business is ancillary and incidental to the other in such a way as to make them nearly inseparable....."

The principle of severance of businesses was approved in *Commissioners of Inland Revenue* v. *Maxse*, (1919, 1 K B. p. 647) (3).

If I am right in my comprehension of the question which we are asked to decide, I am unable to arrive at any conclusion other than that the pursuit of horse-racing as carried on by Mr. Walles, and *a fortiori* as carried on by Mrs. Walles, forms no part of the business of trading in and training horses. In my view, therefore, the stakes won by horses belonging to Mr. and Mrs. Walles are not assessable.

We now come to the matter of the alleged bad debt. This was in respect of an account for horse fodder supplied to Mr. Coomber which amounted to Rs. 11,172/89. To secure this sum, Mr. Coomber executed a mortgage bond which Mr. Walles put in suit on the 23rd March, 1931. Decree was entered on the 8th May, 1931, and on the 22nd December of the same year, Mr. Walles bought in the property for Rs. 7,100/- (appraised value) subject to three mortgages. On the 23rd May, 1932, Mr. Walles sold the property for Rs. 45,000/-. After paying off the three mortgages he had a balance left of Rs. 4,497/58 in his hands. He is, therefore, still Rs. 6,675/31 out of pocket in respect of Mr. Coomber's debt.

Mr. Walles claims that this amount became a bad debt at the date of the realization of the mortgaged property i.e., within the year preceding the year of assessment, and should, therefore, be deducted from the assessment of his income.

The Commissioner, on the contrary, held that it became bad not later than December, 1931, when the appellant bought in this property. The Board of Review contented themselves with expressing the opinion that it was not incurred during the period of which the profits had to be ascertained for the purposes of this assessment.

Now, it does not appear that any steps have been taken to recover the balance due from Mr. Coomber since December, 1931, and unless and until such steps are taken, I do not know how it can be said that the debt is bad. That the date of realization bears no relation to the date at which the debt becomes bad is evident when it is appreciated that Mr. Coomber's debt would have remained even though the property had realized, for the sake of argument, Rs. 100,000/-. It seems to me, therefore, that the claim for deduction is premature and on this point the appeal must fail.

It is, however, apparent that in connection with the realization of the debt the appellant has suffered a pecuniary loss. He bought the property in for Rs. 7,100/- and after paying off the money due under the three mortgages the balance remaining in his hands was Rs. 4,497/58. There was, therefore, a loss on the transaction of Rs. 2,602/42. This loss became apparent on the 23rd May, 1932, and it may be that the appellant is entitled to a deduction in respect of this amount under section 13 of the Ordinance. In view of these findings the appeal is allowed, the assessment made by the Board is annulled, and the case is remitted to the Board for revision of the assessment as set out above. The appellant, having succeeded on the main issue, will be entitled to a refund of the sum of Rs. 50/- deposited by him under section 74 (1) and will also be entitled to his costs of this appeal.

FERNANDO A.J.—I agree, but would like to add the following:—

It was argued before us that in this case the Board had found against the appellant on the facts, and that the question whether the racing of horses was a part of the business of the appellant was itself a finding of fact. In view of the provisions of section 74 of the Ordinance, it is, in my opinion, the duty of the Board to set out separately their decisions on the facts and the questions of law, if any, that arise. The decision in this case as set out by the Board is that "the racing of horses by Mr. and Mrs. Walles is an activity which forms part of the business carried on by Mr. Walles." The contention for the appellant before the

Board, as well as before us, was that the racing of horses by him and his wife was done purely for sport, and it was contended that the profits of such racing were not liable to be taxed as in England, and as admitted by both parties in the case of *Earl of Derby* v. *Bassom*. Now it was open to the Board to find that in fact, the racing of horses by Mr. and Mrs. Walles was not done by them for sport, but was a commercial enterprise; that the racing of horses was part of the business of importing and selling horses as contended by Counsel for the Commissioner, and that the horses that they raced were not, as contended by the appellant, the exclusive property of Mr. and Mrs. Walles kept by them for the purpose of racing, but only some of the horses which had been imported by them for the purpose of sale. Such a finding would be a finding of fact, and it may be that in view of sub-section (5) of section 74, this Court would not interfere with any such finding of fact. On the other hand, it was open to the Board to find that the racing was done for sport, that the horses kept for racing were other than the horses that were imported and sold, but that, nevertheless, the racing done by Mr. and Mrs. Walles was an activity forming part of a business carried on by Mr. Walles, in which event their finding would no longer be a finding of fact but a finding of law, and it would be open to this Court to consider whether such a finding would be correct in law.

Counsel for the Commissioner stated that even on a finding of fact, it was open to this Court to interfere if in fact such a finding was not supported by the evidence before the Board. It is clear from the order made by the Board that certain evidence was recorded when the inquiry took place before the Board. The record of that evidence has not been placed before us as such, but, in the case stated, there are certain extracts from the evidence of Mr. Walles. If we are to assume that these extracts were the only evidence before the Board, then the question would arise whether the Board was justified in holding that the evidence of Mr. Walles that he raced horses for sport was not true, if in fact they did arrive at such a finding.

The appellant spoke of a number of horses which were owned by him, and which were kept by him for the purpose of racing. He also stated that there was another string of horses belonging to his wife also kept for racing. If these horses were kept for racing and if the appellant's evidence that he engaged in racing for sport is to be accepted, then it is difficult to see, how the stakes won by these horses could form part of the business

carried on by Mr. Walles. It is admitted that Mr. Walles trained horses which belonged to others than himself, and I do not think it is suggested that the stakes won by such horses would also be a part of the profits of Mr. Walles' business. I cannot see any reason why Mrs. Walles' horses would be in a different position to those owned by other owners who engaged the services of Mr. Walles as trainer. For these reasons I agree with my brother whose judgment I have had the advantage of reading, that the stakes won by horses belonging to Mr. and Mrs. Walles are not assessable.

It was also argued for the appellant that he should be allowed a deduction in respect of a bad debt of Rs. 6,535/-. That sum was apparently claimed as a deduction under S. 9 (1) (*d*) of the Ordinance, as a bad debt incurred in the business. I agree that the debt due to the appellant from Mr. Coomber cannot be regarded as a bad debt incurred within the period of which the profits were being ascertained, but I agree that the sum of Rs. 2,602/42 was clearly a loss incurred by the appellant on the 23rd May, 1932 and would be a deduction allowable under section 13 (1) (*b*) or (*c*) of the Ordinance. I do not think it necessary to say anything more on this point, and the Board of Review will no doubt have this matter in mind when they fix the final assessment on the appellant.

Appeal allowed.

[Proctors for the Assessee-appellant: *Van Cuylenberg and de Witt.* Proctor for the Commissioner of Income Tax-respondent: *E. G. Gratiaen.*]

[**NOTE.**—The Supreme Court held on the main issue raised in this case that the pursuit of horse-racing, as carried on by the assessee and his wife, formed no part of his business of trading in and training horses, that the stakes won by horses belonging to them were not "profits or income" within the meaning of S. 6 (1) (*a*) of the Income Tax Ordinance and that such stakes were, therefore, not taxable. It is difficult to reconcile the view taken by the Supreme Court in this matter with the corresponding provisions of the United Kingdom and Indian Income Tax Acts and the judicial interpretation of the said provisions, *vide* the provisions relating to Cases I, II and VI of the United Kingdom Act and Ss. 4 & 6 of the Indian Act, particularly sub-section *vii* of S. 4, which provides that the Act shall not apply to:—"Any receipts not being receipts arising from business or the exercise of a profession, vocation or occupation, which are of a *casual and non-recurring nature*, or are not by way of addition to the remuneration of an employee."

It is also difficult to appreciate why the taxing authority did not seek, in the first instance, to lay the charge under S. 6 (1) *(h)* of the Ordinance. If this had been done, it might, perhaps, have been difficult for the assessee to resist the charge. The income in question could not be considered as 'profits of a casual and non recurring nature' and it is, therefore, liable to tax. For explanation of the term 'casual profits', see *Halsbury* (Hailsham), Vol. 17, Article 423, p. 206.]

END OF VOL I.

DIGEST

* S. 47 of the Principal Ordinance was repealed and added, with a slight alteration, as sub-section (3) of S. 9 by the Amending Ordinance No. 27 of 1934.

The assessee, an Afghan carrying on the business of money-lending in Colombo, furnished his return showing his income for the year preceding the year of assessment as having been derived solely from interest at the rate of 18 per cent. per annum which he stated he received on the loans he had advanced on the security of promissory notes and I.O.U.'s. On appeal to the Commissioner of Income Tax and the Board of Review against an assessment made by the assessor on an estimate of the assessee's income from his business, these tribunals found that his profit or income from his business consisted not only of the interest at the said rate which was admitted by him to have been received, but also of a further sum, namely, the difference between the sums appearing on the face of the instruments to have been lent and the smaller sums which were actually lent in respect of each of those instruments.

HELD (i) that as the Board of Review had found as a fact that the assessee would pay to his borrower one sum but would require the borrower to admit his indebtedness in, or to promise repayment of, a larger sum, the difference between the larger sum and the smaller sum was a profit within the meaning of S. 6 (1) (a) of the Income Tax Ordinance and as such was liable to be charged with tax and

(ii) that S. 47 of the Ordinance was not inconsistent with the Crown's right to assess, for the purpose of income tax, the whole of the profits whether it consisted of

* See note at p. 5, *supra*.

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interest or any other form of profit, which a money-lender derived from his business.

Per MACDONELL C. J.— "Loans may produce to the lender that kind of income called interest taxable under the Ordinance as interest, section 47, but they may produce a further profit or income derived otherwise than by way of interest on those loans which further profit or income will be taxable under the Ordinance, by section 11 (1) read in conjunction with section 13 and section 14, if falling within the definition of profit or income given in section 6 (1). On the facts stated, the difference between the sum named by this applicant in his business instruments as the sum repayable and the sum which he actually lent will be a profit within section 6 (1), and the recording in a business instrument one sum as lent, while at the same time lending a smaller sum to the person bound by that instrument, may, possibly, be a disposition not in fact given effect to within section 52 (2), and if so liable to be disregarded under that section. The business instruments of the applicant were not conclusive evidence of the transactions recorded therein but could be contradicted by parol evidence."

—*Hakim Bhai* v. *Commissioner of Income Tax* 21

— — *Interest falling due during the period of which profits are being ascertained but not paid— Does such interest form part of the profits of the business?—Income Tax Ordinance, Ss. 5, 6, 9 & 47.*

The Assessee-firm carried on mainly the business of money-lending in Ceylon. They made a return of their profits or income for the year of assessment 1932—1933 which was not accepted by the Assessor. The Assessor, thereupon, made an estimate of the Assessee's income for the year preceding the year of assessment to be Rs. 170,000/- which included a sum Rs 32,000/- representing arrears of interest which fell due during the year preceding the year of assessment, but was not paid. It was admitted by the Assessee-firm that this unpaid interest was due on good loans, that is to say, that they had no reasonable doubt of its recovery. On objection taken to the assessment, the Assessor reduced the amount of the assessment to Rs. 79,000/- but this included the sum of Rs. 32,200/- referred to above. On appeal to the Commissioner of Income Tax, the Assistant Commissioner affirmed the Assessor's decision on two grounds, firstly, that section 47 [present sub-section (3) of Section 9] applied to the assessment redering this unpaid interest liable to tax and, secondly, that on a true construction of the relevant sections of the Ordinance this sum was part of the profits of the business.

The assessee appealed to the Board of Review. Before the Board, the Assessor admitted that section 47 [present sub-section (3) of Section 9] did not apply to the assessment in dispute, whereupon the Board of Review reduced the assessment by deleting therefrom the said sum of Rs. 32,000/- The Commissioner of Income Tax, thereupon, required the Board of Review to state a case for the opinion of the Supreme Court as to whether in law the assessment should be reduced by this sum of Rs. 32,000/-

HELD (i) that the Crown is not bound by the particular system of accounting adopted by the assessee,

(ii) that inasmuch as sub-section (1) (*d*) of section 9 provides for allowances being made for bad and doubtful debts, good debts must be included in the calculation of profits, as long as they became

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due and payable during the period of which the profits are being ascertained and

(iii) that the amount in dispute, having been agreed upon as an estimate of interest that became due and payable during the year preceding the year of assessment about the recovery of which there was a reasonable certainty, should have been treated as a good debt and, therefore, included in arriving at the profits of the period in question.

HELD, *further*, (i) that the sources of income in heads (*a*) and (*c*) of sub-section (1) of section 6 are alternative heads of charge in the case of a money-lending business,

(ii) that the Crown has the choice of assessing a money-lender under either of the 2 heads of charge and

(iii) that, therefore, by virtue of sub-section (3) of section 9, the sum in dispute should be included in calculating the profits.

Per AKBAR S P.J.—"Our law under chapter III (of the Income Tax Ordinance) is similar in character to the Jamaican Law in that debts are not to be deducted in estimating the profits or income of a trade excepting bad and doubtful debts, the only difference being that such debts are expressly mentioned in the Jamaican Law and they arise by implication in our section 9 (1) (*d*). It will also be seen that our law is expressly worded so as to make it different from the Jamaican Law as regards the year in which bad or doubtful debts are to be deducted."

"...the law applicable to Income Tax and the English rules in Schedule D to the Income Tax Act, 1918, are more or less similar to our provisions, at any rate so far as the fact that tax was levied on profits arising or accruing from a trade is concerned and the fact that deduction was to be made with respect to bad or doubtful debts."

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—Commissioner of Income Tax v. *R.M. A.R. A.R. R.M. Arunachalam Chettiyar* 82

— —Option of the Crown in assessment of money lending business 97

—Is such option excluded by S 47 of the Ordinance? 97

Non-Resident erson

Acts of agent which render non-resident person liable to tax 73

Chargeability of profits of—Agreement made in London between English Company registered in United Kingdom and various ship-owners, by which the English company undertook to supply to ship-owners, and they undertook to take, all the latter's requirements of fuel oil—Oil stored in Colombo in tanks belonging to agents of the English company, a Ceylon company registered in United Kingdom, and delivered to ships in Colombo by the Ceylon company—Payments made in London—Are the profits arising from such transactions deemed to be derived by the English company from business transacted by them in Ceylon?—Do such profits arise to the English company in Ceylon?—Are the profits derived by them from Ceylon?—Income Tax Ordinance No. 2 of 1932, Ss. 5 & 34—Sale of Goods Ordinance No. 11 of 1896, Ss. 4 (1), 17 (2), 18 (Rules 1 and 5 [1]) and 30 (2).

Meaning of the phrase 'business transacted in Ceylon' *in S. 5 (2) and of* 'instrumental in disposing of any property' *in S. 34 (1) discussed.*

The appellant company, registered in the United Kingdom, entered into agreements in London with various ship-owners by which the appellant company undertook to supply, and the ship-owners bound themselves to take, all the latter's requirements of fuel oil. The appellant company had as their agents in Colombo, a Ceylon company registered in the United Kingdom. The

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appellant company's fuel oil was stored in Colombo in tanks belonging to the Ceylon company, where the latter stored their oil also. Delivery of the oil was made by the Ceylon company at Colombo to the ships belonging to the ship-owners who had contracted with the appellant company; but payment was arranged to be made in London on receipt of telegraphic advice of the quantity delivered each time. On appeal against an assessment made upon the appellant company through its agents, the Ceylon company, on the profits which, it was claimed, the appellant company had made from the supply of its oil to ships calling at Colombo,

HELD, on the facts stated,

(i) that the agreements entered into between the appellant company and the shipowners were not merely agreements to sell oil but were contracts of sale by which the property in the oil stored in Colombo passed to the shipping company at the time each contract was signed, the exact quantity being limited by the requirements of the several ships of the shipping companies calling at Colombo and the delivery being made in instalments in Colombo to suit the convenience of the buyers,

(ii) that delivery was not, in the circumstances of this case, an essential requisite of the contract of sale to give it validity, though it may be a necessary consequence that follows in order to implement it,

(iii) that inasmuch as the contracts in this case, forming as they do the essence of the business, were habitually made outside Ceylon, the appellant company did not transact any business in Ceylon either directly or through their agents, the Ceylon company,

(iv) that, therefore, as regards the appellant company, no

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profits arose in or were derived from Ceylon, within the meaning of S 5 of the Ordinance and

(v) that although the appellant company's agents in Ceylon may actually deliver the oil or may be instrumental in such delivery, if they did not actually effect the contracts or if they were not instrumental in effecting them, the non-resident appellant company would not be liable on the profits arising from such contracts witnin the meaning of S. 34 of the Ordinance.

Per AKBAR S.P.J.—In section 5 (2) the words used are 'business transacted in Ceylon whether directly or through an agent', whereas the words in Schedule D of the English Act are 'trade exercised within the United Kingdom' In my opinion the words mean the same thing.....

In my opinion section 34 was inserted in the Ceylon Ordinance to include contracts which have been entered into as a result of the efforts of agents in Ceylon of a foreign principal, even when such contracts have been finally concluded outside Ceylon..... The section is meant.....to catch up acts of canvassing which result in contracts of selling or disposing outside Ceylon if the Crown can prove that the agent was instrumental in getting the sale or disposal fixed.....

The word 'disposal' was used, I suppose, to include contracts other than sales proper disposing of property, e.g. barters or exchanges.....on behalf of his foreign principal as a definite legal act and does not include a mere delivery by an agent in Ceylon of goods sold in pursuance of a contract made outside Ceylon. [KOCH J. also interpreted the word 'disposal' in the same sense in his judgment.]