Privy Council Appeal No. 65 *of* 1943

The British South Africa Company - - - - *Appellant*

v.

The Commissioner of Income Tax - - - - *Respondent*

FROM

THE RHODESIAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF **THE** PRIVY COUNCIL, DELIVERED THE 29TH OCTOBER, 1945

Present at the Hearing:

THE LORD CHANCELLOR (Viscount Simon)
LORD RUSSELL OF KILLOWEN
LORD MACMILLAN
LORD PORTER
LORD SIMONDS

[*Delivered by* VISCOUNT SIMON]

This appeal from a judgment of the Rhodesian Court of Appeal which affirmed a judgment of the High Court of Northern Rhodesia, raises the question whether certain additional assessments to income tax made in Northern Rhodesia upon the appellant company, the British South Africa Company, for the years ending the 31st March, 1938, 1939 and 1940, were validly made and ought to be upheld.

Inasmuch as the issue in their Lordships' opinion ultimately turns upon the nature of the business carried on by the company and of the receipts, in respect of which the assessments in question were made, a consideration of the company's history and of its transactions in relation to these receipts is necessary.

The company was incorporated by Royal Charter on the 29th October, 1889. The Charter recites the petition by the Duke of Abercorn and others associated with him for incorporation and that the existence of a powerful British company controlled by Her Majesty's subjects in whom she had confidence and having its principal field of operations in that region of South Africa lying to the north of Bechuanaland and to the west of Portuguese East Africa would be advantageous to the commercial and other interests of Her Majesty's subjects in the United Kingdom and the Colonies and that the petitioners desired to carry into effect divers concessions and agreements which had been made by certain of the chiefs and tribes inhabiting the said region and such other concessions, agreements, grants and treaties as the petitioners might thereafter obtain within the said region or elsewhere in Africa with the view of promoting trade, commerce, civilisation and good government as therein mentioned and that the success of the enterprise in which the petitioners were engaged would be greatly advanced by a Royal Charter of Incorporation.

By clause 2 of the Charter the company was authorised and empowered to hold, use and retain for the purposes of the company and in the terms of the Charter the full benefit of the concessions and agreements made as aforesaid so far as they were valid or any of them and all interests, authorities and powers comprised or referred to in the said concessions and agreements. Other clauses gave the widest administrative powers to the company and clause 24 gave it special authority (v) to carry on mining and other industries and to make concessions of mining, forestal or other rights, and (xii) to carry on any lawful commerce, trade, pursuit, business operations or dealing whatsoever in connection with the business of the company.

The Charter contemplated that the objects of the company would be further defined by a Deed of Settlement. Such a deed was executed on the 3rd February, 1891, and it was by its 3rd article declared that the company was formed *inter alia*:—

(2) To undertake and carry on the government or administration of any territories districts or places in Africa, and therefor and therein to make laws and ordinances, and to impose and levy taxes, and raise revenue, and to establish and maintain a force of police.

(3) To provide for and promote the welfare of the inhabitants of Africa, the advancement of civilization, and the development of trade.

(4) To negotiate and carry into effect treaties and arrangements with any Chiefs, Rulers, Governments or Authorities (Supreme Local or otherwise) in Africa and elsewhere; and to subsidize any such Chiefs, Rulers, Governments or Authorities.

(6) To prospect explore examine and investigate countries territories places undertakings properties and claims of all kinds, and to organize conduct assist and subsidize expeditions surveys investigations experiments and testing operations of all kinds, and to collect train employ and furnish experts for any such purposes.

(7) To form organize promote subsidize and assist companies syndicates partnerships institutions and associations for any purposes conducive to the interests of the Company, and to hold shares in any company or corporation.

The principal concession in existence at the date of the Charter was that dated the 30th October, 1888, by which Lobengula, King of Matabeleland, Mashonaland and other adjoining territories granted to a Mr. Rudd (who assigned it to, or held it on behalf of, the company) " the complete and exclusive charge over all metals and minerals situated and contained in my Kingdoms, Principalities and Dominions together with full powers to do all things that they may deem necessary to win and procure the same and to hold collect and enjoy the profits and revenues, if any, derivable from the said metals and minerals, etc." The territory over which these rights were granted corresponds roughly with what is now Southern Rhodesia.

Subsequently the company acquired numerous further concessions of which may be noted:—

(1) on the 25th July, 1893, the sole and exclusive right to search for, work and win precious stones and minerals in the Khamis country (now the Bechuanaland Protectorate);

(2) on the 25th September, 1893, under documents styled " Certificate of Claim ", the sole mining rights over certain territories in Central Africa (now included in the territories of Northern Rhodesia and Nyasaland);

(3) on the 17th October, 1900, from Lewanika, the Paramount Chief or King of the Barotse nation, the sole and exclusive right to carry on any trade and to search for, win and keep precious stones and minerals in the territory of Barotseland (now included in Northern Rhodesia); and

(4) on the 11th August, 1909, from Lewanika the right to certain Barotseland land subject to certain conditions.

The company thus incorporated with powers of the widest range for upwards of 30 years administered at its own expense the territory now known as Southern Rhodesia and the territories north of the Zambesi river which were subsequently amalgamated and are now comprised in the Protectorate of Northern Rhodesia.

In the year 1923 a great change in the character of the company took place. On the 29th September of that year it made an agreement with the then Duke of Devonshire, as Secretary of State for the Colonies, whereby it agreed to relinquish its administration of Southern Rhodesia as from the 1st October, 1923, and of Northern Rhodesia as from the 1st April, 1924. This agreement it duly carried out and thereafter became a purely trading and commercial company. Under the same agreement, which was a comprehensive settlement of matters in dispute between the Crown and the Company in relation to both territories, the company received from the Crown the sum of £3,750,000, being the agreed excess of its administrative expenditure over its administration revenue in the two territories, and was also recognised by the Crown as the owner of the mineral rights throughout Southern and Northern Rhodesia.

The company appears throughout to have distinguished between its administration and its commercial outgoings and receipts. It had during the same period incurred very large expenditure of a commercial character upon the acquisition, maintenance and development of its trading assets and it was a fact agreed between the parties in the proceedings, in which this appeal is brought, that " as at the 30th September, 1923, the unrecouped balance of the cost to the British South Africa Company of the mineral rights, concessions, land and land rights situate in Southern Rhodesia, Northern Rhodesia, Nyasaland and Bechuanaland Protectorates belonging to the British South Africa Company amounted to £5,140,383 17s. 2d."

In 1933 the company sold its mineral rights in Southern Rhodesia to the Government of that Colony for £2,000,000 and it is a further agreed fact that as a result of the receipt of this sum and of the disposal of other assets of the company the abovementioned unrecouped balance was reduced on the 30th September, 1939, to £924,289 15s. 5d.

Before examining the specific transactions which led to the assessments now under review it will be convenient to refer to the law and practice in regard to mining rights in Northern Rhodesia. As appears from the preamble to the Mining Proclamation of 1912, it is based upon a recognition of the title of the company to the right of searching and mining for and disposing of all minerals and mineral oils in Northern Rhodesia.

It is therefore from the company that any mining rights under the Proclamation must be derived. These are either in the form of a " Prospecting Licence " or a " Special Grant ". The former is defined by the Proclamation as a " licence granted by the company to any person authorising him to acquire any mining right within the limits of this Proclamation," and in regard to the latter it is provided that " the following shall be deemed to be special grants:—(1) any mining right within the limits of this Proclamation acquired from the British South Africa Company subsequent to the commencement of this Proclamation otherwise than by issue of or under a Prospecting Licence; (2) any mining right acquired from the British South Africa Company within the limits of this Proclamation and before its commencement which relates to areas of greater extent than the forms of location ordinarily applicable to reef or other deposits ".

It is with certain " special grants " that this appeal is concerned but it is necessary first to consider the nature of a Prospecting Licence.

The common form of Prospecting Licence is annexed to the Proclamation. It is expressed to be " Available for one year only from date of issue " and to be " Not transferable " and to be issued by the company to the named licensee who agrees to the accompanying conditions. These conditions constitute the contract between the holder of the licence and

the company and their importance for the present purpose lies in this, that clause 53 of the Proclamation which deals mainly with Prospecting Licences provides that its provisions shall, except where they are inconsistent with the provisions of a Special Grant, apply to such grant and the holders thereof. The conditions provide *inter alia* (by clause 4) for the company having a paramount first charge for rents, royalties and other moneys due to it upon the licence and every mining location and interest whatsoever acquired under it and other property as therein mentioned, (by clause 6) for forfeiture in certain events, (by clause 7) for registration of the licence, (by clause 8) for the rights of the licensee for one year from the date of issue to prospect and work for minerals in Northern Rhodesia in accordance with the conditions of the licence and the provision of the mining laws for the time being in force and during the same to acquire under it and peg off one mining location. Clause 10 defines the form and extent of mining locations. Clause 14 provides that (except as therein mentioned) every registered mining location shall be held by the registered holder thereof on joint account with the company in the proportion of two-thirds by the registered holder and one-third by the company, and clause 15 that no registered mining location shall be worked for profit, except as therein mentioned, until the terms upon which such working for profit shall be permitted have been arranged with the company. Clause 16 enables the holder to submit to the company details of a scheme whereby his location may be discharged from the two preceding conditions and worked for profit. Clause 17 provides for the payment of rents and royalties by a registered holder, and clause 18 for development by him. In an annexe to the conditions the company gives notice that if satisfied upon the matters therein mentioned it will entertain proposals for the commutation of its interest in the property (that is, its one-third interest under clause 14) upon a share basis (that is, the company taking shares in a company formed to acquire the property) or upon a royalty basis.

The Proclamation repeats and gives effect to some of the contractual conditions of the Prospecting Licence and makes certain other provisions. Under section 6 the holder of a Prospecting Licence must first register his licence. By section 7 he is given in addition to the rights of prospecting for and working minerals and of pegging off a mining location thereby conferred certain ancillary rights on and over a prescribed area of land. Section 9 authorises him if he exposes or opens up a reef as therein mentioned to post a " discovery notice ", and under section 10 the posting of a discovery notice confers on him for 31 days the exclusive privilege of prospecting over the area defined in the section. Section 11 authorises him within the same period to peg off a mining location of such form and area as may be authorised by the licence and to post a " registration notice " in respect of it. Under section 13 he must apply for and obtain a certificate of registration of his mining location. By section 23 the holder of a mining location is given certain surface rights, and by section 26 he is given " so long as he is *bona fide* in pursuit of his *primâ facie* rights " the right of working and extracting any of the minerals which he is entitled to win under the Prospecting Licence by virtue of which the location was acquired until such time as is mentioned in the section. Section 27 enables the holder of a mining location, if he is entitled to do so under the terms of his licence, to apply for and obtain a certificate of " special registration ", and under section 28 such a certificate, subject to the provisions of the Proclamation, confers upon the holder an indefeasible title to all the surface and mining rights appertaining to such location and such a location is not thereafter to be subject to forfeiture, though the registered holder will continue to be subject to all other obligations, liabilities and provisions subject to which the location was held before the issue of this certificate. Sections 36 and 38 provide for the abandonment in certain events by the holders of unregistered and registered locations. Section 53 (dealing with special grants) has already been mentioned. Section 57 provides that so soon as a certificate of registration has been issued in respect of any special grant (for which provision is now made by the amending Ordinance No. 6 of 1927) the provisions of the

Proclamation shall *mutatis mutandis* and in so far as they are not inconsistent with the provisions of such grant be deemed to apply to such grant as if such grant were a mining location.

Having referred to the constitution of the company under its Charter, to certain events in its history and to the background of mining law and practice under which it operated, their Lordships must now consider the particular transactions which gave rise to the disputed assessments.

These transactions fall into three groups in which three separate limited companies were concerned (1) Loangwa Concessions (Northern Rhodesia), Ltd., which will be called " Loangwa ", (2) Rhokana Corporation, Ltd., which will be called " Rhokana ", and (3) N'changa Consolidated Copper Mines, Ltd., which will be called " N'changa ". It is not disputed that the agreements into which the company entered with those companies constituted " special grants " within the meaning of the Proclamation.

The transaction with Loangwa was briefly as follows:—

(1) By an agreement of the 17th May, 1928, the company granted to Loangwa the exclusive right to prospect for minerals other than precious stones until the 30th April, 1933, and the right within that period of marking out mining claims over a prescribed area. The consideration for this grant included (*a*) 200,000 fully paid shares of 5s. each in Loangwa and a right to subscribe for further shares, (*b*) the right to an allotment of shares in such other company as was therein mentioned and to subscribe for shares in such company, and (*c*) the right of appointing certain directors. Under this agreement Loangwa undertook to spend certain minimum amounts varying between £60,000 and £100,000 annually in the areas comprised in the grant and were entitled to obtain further extensions of the period of the grant up to the 30th April, 1935. Provision was also made for payment of royalties to the company.

(2) By a second agreement of the 14th November, 1929, the company made a special grant to Loangwa over an additional area upon substantially the same terms.

(3) By a third agreement of the 5th January, 1933, the company extended the period of the aforesaid grants to the 31st December, 1940, in consideration of receiving further shares in Loangwa.

(4) By a fourth agreement of the 11th July, 1935, the consideration payable under the preceding agreement was varied and became 50,000 fully paid shares of 5s. each. The par value of these shares was £12,500, and it is the sum of £12,500 which is the first item of assessment disputed in this appeal.

The transaction with Rhokana was as follows:—

(1) By an agreement of the 14th June, 1928, the company granted Bwana M'kubwa Copper Mining Co., Ltd. (hereinafter called " Bwana M'kubwa ") rights substantially similar to those granted to Loangwa in respect of another area for the period from the 1st December, 1929, to the 31st December, 1930, subject to a right of extension. The consideration was the payment to the company of £5,000 and in the event of the period of the grant being extended a further £5,000 annually during such extension. This agreement will be referred to as " the new M'kana grant ".

(2) By an agreement of the 9th December, 1929, the company granted to Rhokana under its then name of The Rhodesian Congo Border Concession, Ltd., rights under certain conditions to mark out mining areas in defined localities and to receive subject to the terms of the agreement special grants in respect of such mining areas and also the exclusive right to prospect for minerals from the 1st January, 1930, to the 30th April, 1935. The consideration was to be (*inter alia*) a specified proportion of shares in any companies formed to work the areas for profit and Rhokana undertook not to work the areas for profit except through a company or companies formed for the purpose. This agreement will be called " the R.C.B. grant ".

(3) By an agreement of the 1st April, 1931, between the company, Bwana M'kubwa and Rhokana the rights and obligations under the new M'kana grant were assigned to Rhokana.

(4) By an agreement of the 28th August, 1931, the company granted to Rhokana for the period from the 6th March, 1931, to the 30th April, 1935, the exclusive right within the area known as the Balovale area in Northern Rhodesia to prospect for minerals (other than as therein mentioned) and to mark out mining locations. This agreement will be referred to as "the Balovale grant".

(5) By a further agreement of the 24th February, 1932, between the company and Rhokana the terms of the new M'kana, R.C.B. and Balovale grants were varied for the consideration therein mentioned.

(6) By a final agreement of the 20th October, 1932, between the company and Rhokana expressed to be supplemental to the foregoing agreements, the period of the rights thereby conferred was extended from the 30th April, 1935, to the 31st December, 1940, subject to the spending of specified amounts on prospecting. For this extension Rhokana agreed to pay to the company the sum of £5,000 on the 1st January in each of the years 1935 to 1940 inclusive.

The first three of these sums of £5,000 are the second of the items of disputed assessment.

The transaction with N'changa was as follows:—

By an agreement of the 1st September, 1937, between the company, Rhokana and N'changa after recitals whereby it appeared that Rhokana was desirous of exercising its right under the R.C.B. grant to mark out two specified mining areas, that Rhokana had agreed to assign this right to N'changa and that the company had agreed to make to N'changa a special grant of mining rights in the selected areas, Rhokana surrendered its rights under the R.C.B. grant over the areas in question and the company granted to N'changa the sole and exclusive right of searching and mining for and keeping or disposing of minerals found therein. The consideration for this grant was 2,500 fully paid shares of £1 each in N'changa to be allotted to the company.

The sum of £2,500, the par value of these shares, is the third item of disputed assessment.

These several items can now be conveniently summarised. The company received:—

In respect of the year ending 30th September, 1936:

(*a*) 50,000 5s. shares in Loangwa at par	£12,500
(*b*) in cash from Rhokana	£5,000
	£17,500

In respect of the year ending 30th September, 1937:

(*c*) 2,500 shares of £1 each in N'changa at par ...	£2,500
(*d*) in cash from Rhokana	£5,000
	£7,500

In respect of the year ending 30th September, 1938:

(*e*) in cash from Rhokana	£5,000

On the 26th March, 1940, the respondent, the Commissioner of Income Tax in Northern Rhodesia, made additional assessments on the company for the years ending the 31st March, 1938, 1939, and 1940 in respect of the items specified above. The amounts of such assessments were the full sums of £17,500, £7,500 and £5,000, respectively.

The Ordinance, under which the assessments were made, was the Income Tax Ordinance of Northern Rhodesia of the 16th October, 1926, as from time to time amended. It is necessary to refer only to a few of its provisions.

By section 2 " chargeable income " is defined to mean the aggregate amount of the income of any person from the sources specified in section 5 after allowing the appropriate deductions and exemptions under the Ordinance. Section 5 is the charging section and provides " Income Tax shall, subject to the provisions of this Ordinance, be payable at the rate or rates specified hereafter for the year of assessment commencing on the 1st day of April, 1928 and for each subsequent year of assessment upon the income of any person accruing in, derived from or received in the territory in respect of:—

" (*a*) gains or profits from any trade, business, profession or vocation . . . ;

" (*c*) the annual value of land and improvements thereon used by or on behalf of the owner or used rent free by the occupier for the purpose of residence or enjoyment and not for the purpose of gain or profit . . . ;

" (*f*) rents, royalties, premiums and any other profits arising from property ".

Section 6 provides that tax shall be charged, levied and collected for each year of assessment upon the chargeable income of any person for the year immediately preceding the year of assessment, while section 7 provides for special periods of assessment. Section 10 provides that for the purpose of ascertaining the chargeable income of any person there shall be deducted all outgoings and expenses wholly and exclusively incurred during the year preceding the year of assessment by such person in the production of the income. Amendments have been made to this section since the relevant date which can be disregarded.

Certain other provisions of the Ordinance will be referred to later.

It is now necessary to recur to the additional assessments which are in dispute. These were all made in the first place upon the footing that all the receipts in question came under section 5 (*f*) of the Ordinance. They were all described in the notices of assessment as " Rents, royalties, premiums and profits arising from property ". To these notices objection was duly taken by the company. The grounds of objection to the assessment in the sum of £17,500 for the year ending the 31st March, 1938, may be taken as typical. They were (1) that neither the said sum of £17,500 nor any part thereof (whether representing cash or shares) consisted of rents, royalties, premiums or profits arising from property; (2) that neither the said sum of £17,500 nor any part thereof was income within the meaning of the Ordinance but was a gross receipt of the company's trade which so far had yielded no ascertainable profit; (3) that in any event neither the said sum of £17,500 nor any part thereof was " income, accruing, derived from or received in the territory " but accrued in, was derived from and was received in the United Kingdom; (4) that the whole of the said sum of £17,500 was a capital receipt, and (5) that the said assessment was excessive in amount.

The third ground of objection was not argued before their Lordships. It was rightly conceded that it was not tenable in view of their earlier decision in *Liquidator, Rhodesia Metals, Ltd.* v. *Commissioner of Taxes* [1940] A.C. 774.

The fifth ground of objection does not appear to raise any further point.

The Commissioner for Income Tax disallowed the objections and, in disallowing them, made the alternative claim (to which anticipatory objection had been raised) that the receipts in question were " alternatively gains or profits from a trade or business ", thus falling within section 5 (*a*) of the Ordinance.

From the Commissioner's disallowance the company appealed to the High Court of Northern Rhodesia. The learned Chief Justice (Sir Charles Law, C.J.) dismissed the appeal, rejecting the contention that the receipts in question fell within section 5 (*f*) of the Ordinance but upholding the alternative claim of the Commissioner that they were gains or profits from the company's trade. From this judgment the company appealed to the Rhodesian Court of Appeal, while the Commissioner cross-appealed against the judgment that the receipts in question did not fall within section 5 (*f*). The Court of Appeal (Hudson, P. and Lewis and Robinson, J.J.) unanimously dismissed the company's appeal holding that the case fell within section 5 (*a*) and did not find it necessary to express any final opinion upon the cross-appeal.

The company has now appealed: there has been no cross-appeal by the Commissioner but it is conceded, and the argument before their Lordships has proceeded on the footing, that it is open to him to support the assessments under either section 5 (*a*) or section 5 (*f*).

It is convenient first to deal with the claim that the sums in question fall within section 5 (*f*). Upon this point their Lordships are in agreement with the learned Chief Justice. After an examination of the several transactions he came to the conclusion that in each case the sum received was the price paid upon a transfer of property: thus the sum of £2,500 (being the par value of the shares received from N'changa) was in his opinion " a fixed price paid on an outright transfer of certain benefits ": the several sums of £5,000 in cash received from Rhokana were the consideration received upon a transfer: " the transaction was a transfer for a price, or, in other words, a sale ": and so also with the other items. In their Lordships' opinion this is an accurate analysis of the transactions, and, if so, the sums received cannot be regarded as " rents, royalties, premiums or any other profits arising from property ", an expression which implies that the property, from which the rents, royalties, premiums or other profits arise, remains in substantially the same condition in the possession of its owner, and is not consistent with the property itself being transferred. This is sufficient to dispose of the claim under this head but it appears to their Lordships that it fails on another ground. It may be possible—upon this question no decision is necessary—for the same receipts to fall under more than one subsection of section 5. But since it is clear that the company carries on a trade, the exact nature of which will presently be discussed, and the sums in question were received in the course of that trade, it does not appear a legitimate application of the section to segregate these sums from the other earnings of the company which fall to be taxed under section 5 (*a*) and tax them separately under section 5 (*f*).

The more difficult question arises under section 5 (*a*). In the Courts of Rhodesia the argument of the company was largely influenced and directed by a fact which was agreed between the parties, viz., " that it is impossible to allocate any part of such cost (i.e., the sums of £5,140,383 17s. 2d. and £924,289 15s. 5d. to which reference has already been made) to any one or other of the individual assets described above (i.e., the mineral rights, concessions, land and land rights acquired by the company) or any blocks of such assets or as between the total of such assets situate in Northern Rhodesia and the total of such assets situate in all or any of the other territories ". Therefore the company, while contending that there could be no gains or profits from its trade in respect of the sums in question until the cost of the assets realised had been brought into account, was faced by the fact that by its own admission the cost could not be ascertained. It therefore contended that the proper and indeed the only method by which its gains or profits could be determined was to wait until the whole of the unrecouped balance of expenditure had been made good and thereafter to assess all receipts in full. In this contention the company claimed the support of the expert evidence of accountants that thus only could its profits be ascertained and of an arrangement made with the Inland Revenue Authorities in the United Kingdom that for the purpose of British income tax it should be thus

assessed. Their Lordships can see no justification in law for this contention. It is no doubt true from the point of view of accountancy that there is no other way of finding the company's ultimate profit and equally it may be a convenient arrangement if the taxing authority chooses to adopt it. But it is impossible to find support for it in the terms of the Ordinance. The question under the Ordinance is, what is the income of the company in the particular year of assessment, and it must be answered by applying its relevant provisions as best they can be applied, not by introducing some new and supposedly more convenient method of ascertainment.

But while their Lordships cannot uphold this, the primary argument of the company, they are yet of opinion that the judgments of the Courts of Rhodesia cannot be supported. For the question still remains what is the nature of the receipts in question. The Commissioner claims that they must be brought into account as gains or profits under section 5 (*a*) without any deduction, not because the cost of any particular asset is not ascertainable, but because in law no deduction is permissible, and this contention has found favour with the Courts in Northern Rhodesia, though in the judgment of Law, C.J., and to a lesser degree in the judgment of the Court of Appeal, importance is attached to the admission that cost could not be ascertained.

The principles applicable to such a case as this are not in doubt.

For the purpose of assessment to income tax (and here there appears to be no distinction between British and Northern Rhodesian tax) the proceeds of sale of an asset are brought into account if the sale is in the course of the taxpayer's trade or business. Thus if it is his trade or business to make and to sell, or to acquire and to sell, shoe-making machinery, then the proceeds of sale of such machinery are brought into account: if it is his trade to make and sell shoes and for that purpose he owns and uses shoe-making machinery, then if he sells such machinery, the proceeds of such sale are not brought into account. In the former case the machinery is sometimes called " floating " or " circulating " capital, in the latter " fixed " capital. In the former case the gain or profit arising from the sale cannot be ascertained until its cost has been ascertained: in the latter no question of cost arises, the receipts are sometimes referred to as " capital receipts " and no tax is payable. In the present case the company has contended as an alternative ground of objection to assessment that the sums in question were " capital receipts ", but this contention appears to their Lordships to be not well founded and indeed was not seriously pressed in argument. The company's substantial claim is that the receipts were in the course of its trade: it was its trade (so runs the argument) to acquire and dispose of (*inter alia*) mining rights and upon a sale or other disposition of such rights there could be no gain or profit under section 5 (*a*) until the cost had been brought into account.

The answer to this contention is thus stated in the judgment of Hudson, P. " Such payments are income derived from the business of turning to account its rights under the concessions of winning and disposing of minerals by participating in the proceeds of the exploitation of such rights by its licensees: the income is therefore taxable under section 5 (*a*) of the Ordinance as being the profits or gains of a trade or business and the only deductions allowable are the administrative expenses of the company ", a statement which was substantially embodied in the formal reasons presented by the respondent to their Lordships' Board.

If, however, the business of the company was (as in their Lordships' opinion it was) to " turn to account " its mining rights or other property, it does not follow that the proceeds of such turning to account are chargeable to tax without any deduction for the cost of acquisition. Rather it would seem that the ordinary rule must apply and that no gain or profit can be said to arise unless and until a balance has been struck between the cost of acquisition and the proceeds of sale. Nor is it in their Lordships' opinion material that in dealing with its mineral

rights the company has retained an interest either by way of a possible reverter of the property or by a shareholding in a company to which it made a special grant.

The present case finds an analogy in *Thew* v. *S.W. Africa Coy.*, 9 Tax Cases 141, though it is not desirable to press too closely decisions under a different taxing Act. In that case the question, which arose under the English Income Tax Act, was whether " in computing the profits arising from the trade adventure or concern in the nature of trade carried on by the company profits derived from the sales of land ought to be taken into account ". The company had been formed to acquire, purchase, and turn to account certain concessions which included rights in respect of minerals, railways and lands. Rowlatt, J. stated the question simply and decisively: " Is the article acquired for the purpose of trade? " and, coming to the conclusion that it was, decided that the profits arising from its sale must be brought into account. But it is to be observed that no question was raised as to the set off of the cost of the article. This was assumed, but the company contended that the proceeds of sale of land were " capital receipts " and need not be brought into account at all, as had been successfully contended in *Hudson's Bay Coy.* v. *Stevens*, 5 Tax Cases 424.

There is however another class of case upon which the respondent relies. The learned Chief Justice had to some extent founded on the decision in *Coltness Iron Coy.* v. *Black*, 6 A.C. 315, a case which arose under the English Income Tax Act then in force in relation to the profits derived from working a mine. The respondent, properly appreciating that that decision turned upon statutory provisions which had no counterpart in the Ordinance, did not press the case before their Lordships, but he urged that the true analogy is to be found in such cases, decided under the English Income Tax Acts, as *Alianza Coy. Ltd.* v. *Bell* [1905] 1 K.B. 184 and [1906] A.C. 18, 5 Tax Cases 60, which establish that where the income of a taxpayer is derived from the exhaustion of a capital asset no deduction can be allowed for the cost of that asset. Their Lordships do not wish to throw any doubt upon the validity of that principle in English law in cases to which it can be properly applied and, without deciding it, are content to assume that it may be applicable also under the income tax law of Northern Rhodesia. But it appears to them that it is excluded as soon as the conclusion is reached that the article sold is that which it was the business of the company to acquire and to sell. So here though the mixed character of the company's objects as stated in the preamble of its Charter makes it difficult to define its trade or business, yet it appears reasonably clear that in order to effectuate its desire (to use the words of the preamble) " to carry into effect divers concessions and agreements . . . and such other concessions agreements, grants and treaties as the petitioners may hereafter obtain " the acquisition and realisation of mining rights must take a leading place.

If this conclusion is reached, it becomes, as has already been pointed out, immaterial what method is adopted by the company for the development and realisation of its asset. In his elaborate and careful judgment in the Court of Appeal the learned President lays great stress on the fact that the company in effect " participated in the results of the winning of minerals by prospectors ", and it is this consideration that leads him to the conclusion that against the profits derived from such participation no allowance for cost can be made. The relevant transactions have already been stated in sufficient detail: they are in their Lordships' opinion in substance indistinguishable from outright sales of mining rights. But even if they are to be distinguished by the fact that the company remains interested as a shareholder in other companies in the winning of minerals, this is not a difference which affects the position for income tax purposes. The company is still realising in the way that appears most advantageous the asset which it is its business to acquire and realise. It is to be observed that, if the company itself embarked on mining operations, different considerations would arise. It would then be subject to, and entitled to the benefits of the provisions of section 11 (2) of the Ordinance and its amendments.

Their Lordships are of opinion therefore that the judgment of the Court of Appeal cannot stand as it is. The question remains, what is the proper course now to be taken? It was agreed by Counsel upon the hearing of this appeal that the figures, upon which the additional assessments now under review were based, appeared in the returns made by the company. It is provided by section 40 (2) of the Ordinance that " where a person has delivered a return the Commissioner may (*a*) accept the return and make an assessment accordingly; or (*b*) refuse to accept the return and to the best of his judgment determine the amount of the chargeable income of the person and assess him accordingly ". The Commissioner acting presumably under this subsection and under section 41 of the Ordinance has made the disputed additional assessments. In doing so he has exercised his judgment on a wrong principle, for he has assumed that the receipts in question are chargeable without deduction. The company has, in their Lordships' opinion, discharged the onus which lies upon it of proving that the assessments are excessive, for it is clear that some deduction should be allowed. In the circumstances it appears to their Lordships to be the proper course to refer the matter back to the Commissioner for re-assessment " to the best of his judgment ". An opportunity will thus be given to the company to submit such considerations in regard to deductions in respect of these particular receipts as appear to them relevant and reasonable and to the Commissioner, having weighed them, to make a re-assessment upon the proper basis at what he judges to be the appropriate figure. The Commissioner must pay the costs of the company of this appeal and in the Courts of Northern Rhodesia.

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In the Privy Council

THE BRITISH SOUTH AFRICA COMPANY

v.

THE COMMISSIONER OF INCOME TAX

DELIVERED BY VISCOUNT SIMON

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