

11, 1957

No. 16 of 1956.

In the Privy Council.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

UNIVERSITY OF LONDON

25 FEB 1958

INSTITUTE OF ADVANCED
LEGAL STUDIES

BETWEEN

CECIL ALEXANDER SPELDEWINDE, Commis-
sioner of Income Tax, Colombo *Appellant*

49850

AND

EMIL SAVUNDRANAYAGAM *Respondent.*

10

Case for the Appellant

RECORD.

1. This is an appeal from a Judgment and Decree of the Supreme Court of Ceylon, dated the 4th March, 1955, on a Case Stated under the Income Tax Ordinance (C. 188), Section 74, by the Board of Review upon the application of the Respondent (hereinafter called "the assessee") in respect of a Determination of the Board, dated the 6th May, 1953, whereby an appeal by the Respondent against an assessment to income tax was dismissed and the assessment was affirmed (subject to a reduction in amount which is not in dispute in the appeal). pp. 10-15.
p. 16.

20 2. The main question for determination in this appeal is whether, on the one hand (as the Appellant, the Commissioner of Income Tax, contends) certain sums undoubtedly received by the Respondent assessee, or, as to some of them, by his wife and treated under the said Ordinance as having been received by him, were profits of a trade rightly chargeable to income tax under the Ordinance, or whether, on the other hand (as the Respondent assessee contends) the view that the said sums were paid out of moneys paid under a common mistake, or as a result of fraudulent acts of others, or were not in law earned by him, is an answer to the charge to income tax on the sums received by him and his wife.

30 3. Portions of Ceylon Ordinances relevant to this appeal are included in an Annexure hereto.

4. The facts appear from the Case Stated by the Board of Review and the annexed documents, and, summarised, are as follows :—

In October, 1949, the assessee floated Transworld Enterprises Ltd. (hereinafter called the "T.W.E. Ltd.") a private company with an issued capital of Rs.100/- of which his wife and himself owned 6/10ths, i.e., 6 shares of Rs.10/- each. p. 1, ll. 9-12.

p. 1, ll. 16-23.

In May, 1950, the assessee floated Eastern Traders Ltd., also a private company but with a share capital of Rs.1,000 of which the T.W.E. Ltd. controlled 93 per cent. the balance being held by 7 persons among whom were the assessee and his wife.

p. 1, ll. 27-36.

Between August, 1950, and October, 1950, the assessee entered into negotiations in Colombo with a representative of the Hwa Shih Co. (hereinafter called "the Chinese Company") for the supply of a large quantity of oil to be shipped direct to Tsingtao (China); and, in pursuance thereof, on the 23rd October, 1950, he accepted, on behalf of the T.W.E. Ltd., an order for the supply of 45,000 drums of oil (at various specifications) for \$1,230,000* c.i.f., stipulating for the opening of a letter of credit in Ceylon, India or Switzerland, to cover the cost of the purchase. The letter of credit was to be "in favour of our subsidiary firm, Messrs. Eastern Enterprises Company." A letter of credit dated the 6th November, 1950, for \$1,230,000 was duly opened at the Eastern Bank, Colombo, in favour of the Eastern Enterprises Company (hereinafter called "the partnership") a firm of which the only two partners were the aforesaid companies, T.W.E. Ltd. and Eastern Traders Ltd., and which was registered under the Business Names Ordinance (C.120) as a partnership on the 8th November, 1950, and as, having commenced business on the 27th October, 1950. The partnership subsequently applied to the Exchange Controller in Ceylon for an outgoing credit for \$900,000 but this was refused and the letter of credit at the Eastern Bank was thereupon cancelled.

* Throughout this Case the sign \$ denotes U.S. currency.

p. 1, l. 28-p. 2, l. 2.

p. 11, ll. 2-9.

Ex. A.27, pp. 50-51.

5. On the 29th November, 1950, as a result of arrangements made by the Chinese Company a fresh letter of credit was opened with the Union Bank of Switzerland (hereinafter called "the Union Bank") at Zurich for the sum of \$1,230,000 in favour of the partnership payable upon presentment of bills (sight drafts) drawn by the partnership upon the Chinese Company accompanied by: (1) commercial invoice in duplicate; (2) full set clean on board bills of lading; (3) Lloyd's Survey Certificate confirming cargo loaded on board; (4) analysis certificate of quality; and (5) insurance policy.

p. 2, ll. 13-20.

p. 11, ll. 21-31.

Ex. A.2, pp. 24-25.

p. 11, ll. 24-31.

On the previous day—the 28th November, 1950—the assessee, armed with a comprehensive power of attorney in his favour executed by the partnership, left Ceylon for Europe to negotiate the deal with those who were in a position to supply the oil. The representative of the Chinese Company (who knew of course that the assessee was not himself a supplier of oil) had given him certain names of likely suppliers and he got into contact with one of these, the Société Méditerranéenne De Produits Pétroliers (hereinafter referred to as "the French Company") which purported to have offices at an address in Marseilles. He negotiated the deal with the French Company and arranged with one Duval, who purported to be one of its directors, for the shipment of the oil from Marseilles to Tsingtao for the sum of \$825,552/50, the relative shipping documents to be sent by Duval to the assessee for presentment by the latter at the Union Bank at Zurich in order to receive payment under the said letter of credit.

p. 2, ll. 27-31.

6. The said documents—subsequently discovered to be forgeries—were duly received from Duval by the assessee and, as attorney of the partnership, the assessee presented them at the Union Bank on the 13th January, 1951.

On the 17th January, 1951, the Bank, after four days' delay and presumably satisfied with the documents so presented, paid to the assessee, under the said letter of credit, the full amount thereof, viz. \$1,230,000. p. 246, ll. 9-18.

Out of the sum so received the assessee, as attorney of the partnership, paid Duval \$825,552/50. Further, as attorney of the partnership he drew out the sum of \$235,000 in cash at the Bank's counter and paid it to himself in his personal capacity as commission earned by him for his part in this transaction. Also as attorney he transferred \$169,447/50 by 10 telegraph to the credit of T.W.E. Ltd. at the Bank of Ceylon, Colombo. p. 2, ll. 32-43.
p. 246, ll. 19-22, 32-36.

7. On the 22nd January, 1951, the assessee returned to Ceylon and, on arrival, declared to the Customs Authorities the said sum of \$235,000 which he had drawn from the Union Bank in U.S. currency notes. The Customs Authorities kept the said currency notes in bond and, in return, the assessee was paid by the Controller of Exchange their equivalent in Ceylon currency—about Rs.1,108,934. On receiving this sum the assessee did not transfer it, or any portion of it, to the credit of either of the two companies which together constituted the partnership. He dealt with this money as his personal assets. p. 3, ll. 7-15.
p. 3, ll. 16-20.

20 The partnership (which was formed expressly for the purpose of the oil deal) was dissolved immediately after his return; and, on the 7th February, 1951, steps were taken by the assessee to wind up each of the two partners. No intimation of the dissolution of the partnership was given either to the Union Bank or to the Chinese Company. p. 3, ll. 16-20.
p. 245, ll. 1-3.

On the 22nd January, 1951, the T.W.E. Ltd. declared a dividend of Rs.30,000 per share of Rs.10 and, in accordance with this declaration, the assessee and his wife received in respect of their 6 shares the sum of Rs.180,000. In addition the assessee received a sum of Rs.5,000 as Director's fees. p. 3, ll. 21-28.

30 8. The s.s. "Saga" on which the oil was alleged to have been shipped did not arrive in Canton on the 6th March, 1951, as had been indicated, and this led to enquiries by the Chinese Company which resulted in the discovery that the Swedish East Asia Co., who were alleged to be owners of the "Saga," owned no such ship, and that the Union Bank had paid to the assessee the sum of \$1,230,000 on forged shipping documents. p. 3, ll. 34-41.
Ex. A.56, p. 74, ll. 8-26.
p. 12, ll. 12-14.
p. 246, ll. 2-8.

This information was known to the assessee on the 6th April, 1951, for on that date he cabled to the French Company for a clarification of the position. p. 4, ll. 2-7.

40 9. On the 3rd April, 1951, the Union Bank wrote to the assessee asking for an explanation. In reply, by his letter dated the 9th April, 1951, the assessee, purporting to act as attorney and agent of the partnership (which had been dissolved earlier), denied liability for what had occurred and maintained that all claims on any ground whatsoever were matters for the Chinese Company to take up with the French Company and/or for the Union Bank to take up with the Chinese Company, and that the Bank having accepted the documents after being given every opportunity to check on every aspect of them (including their genuineness) must bear the responsibility of its action. Ex. A. 74, p. 87.
Ex. A.76, pp. 88-89.
p. 89, ll. 7-20.

Ex. A.57, p. 75,
ll. 41-44.

Similarly, in reply to a letter by the Chinese Company, the assessee, by his letter dated the 25th April, 1951, denied that the partnership was liable to repay the money paid out by the Union Bank and suggested that the Chinese Company should claim against the Bank.

p. 4, ll. 13-17.

Ex. A.64, pp. 80-81.

Ex. A.86, p. 97.

Ex. A.87, pp. 97-98.

10. Subsequently, after some correspondence, the partnership, by its letter, dated the 4th July, 1951, written "without prejudice," informed the Chinese Company that it would be prepared to settle the issue "fully and finally" by a payment of Rs.1,000,000 after the moneys had been released by the Ceylon Government. In the ensuing correspondence the Chinese Company pressed the partnership to increase its offer to \$404,442/50 10 which amount, by its letters dated the 14th May, 1952, and the 15th July, 1952, it indicated it would be prepared to accept in settlement, provided the payment was made immediately after the release of the funds.

Ex. 2, p. 251,
ll. 46-49.

p. 252, l. 1.

No payment upon the facts disclosed in the Case or the annexed documents has in fact been made by the assessee to either the Chinese Company or the Swiss Bank in respect of the moneys received by him from the Bank. It is further found in the Case that up to the 6th May, 1953 (being the date of the Determination of the Board of Review) no action in the nature of a tracing order had been filed against the assessee either by the Chinese Company or the Swiss Bank in respect of any part of 20 the amount received by the assessee from the Bank.

p. 4, ll. 21-25.

11. For the year of assessment 1950-51, the assessee was assessed, by an additional assessment, in a sum of Rs.1,870,000, on the basis that the sum of \$169,447/50 (Rs.804,825) which he had transferred by telegraph to the credit of the T.W.E. Ltd. at the Bank of Ceylon, Colombo, and the sum of \$235,000 (Rs.1,108,934) which he had brought to Ceylon on his person (see paragraphs 6 and 7 hereof) were really his money.

p. 4, ll. 26-32.

The assessee appealed against the additional assessment to the Commissioner of Income Tax, under Section 69 of the Income Tax Ordinance (C. 188), on the ground that the money in question was had and received 30 by him for the use of the Chinese Company and/or the Union Bank, that therefore it was not part of his income and that in any event it belonged to the partnership or to the partners thereof, viz., the two limited liability companies.

p. 4, ll. 33-39.

Ex. X.1, pp. 210-228, p. 224, ll. 6-30,
p. 227, ll. 1-10,
41-42.

p. 227, ll. 41-42.
p. 226, ll. 21-22.

p. 224, ll. 3-4.

The Commissioner gave his decision upon the appeal on the 20th November, 1952. He held, on such evidence as was then before him, that the contract alleged to have existed between the Chinese Company and the partnership in terms of the letter of credit had not been proved and that the legal title to the money was in the assessee. The Commissioner held also that the burden of showing that the assessee had been wrongly 40 assessed was on the assessee. He reduced the assessment from Rs.1,870,000 to Rs.1,621,343 and dismissed the assessee's appeal.

12. From the Commissioner's decision the assessee appealed to the Board of Review constituted under Sections 70 to 73 of the Income Tax Ordinance (C.188).

By its Determination, dated the 6th May, 1953, the Board of Review held that the assessee was assessable for the year of assessment 1950/51 as follows :—

		Rs.	
	(1) The equivalent of the \$235,000 received by the assessee at the counter of the Union Bank ..	1,110,264	p. 247, ll. 1-12.
	(2) The sum paid to the assessee and his wife as dividends in terms of the Resolution of the T.W.E. Ltd.	180,000	
10	(3) Director's fees	5,000	
	(4) Other income as shown in the assessee's return ..	28,624	
		<u>1,323,888</u>	

13. After a consideration of all the evidence before it the Board of Review arrived at the following findings of fact upon which its said Determination was based :—

20 (A) There was a contract between the Chinese Company and the partnership in terms of the letter of credit. The Commissioner was in error in deciding to the contrary but he had not an opportunity of considering the effect of certain documents which were in code. The code was produced before the Board of Review but not before the Commissioner. p. 246, l. 1.
p. 245, ll. 4-11.

(B) The assessee had, on the 17th January, 1951, received payment of \$1,230,000 from the Union Bank upon documents which, when presenting them to the Bank in accordance with the terms of the letters of credit, the assessee believed to be genuine. p. 246, ll. 2-8.

The assessee became aware of the fraud and the forgery for the first time about the end of March or the beginning of April, 1951. p. 246, ll. 28-31.

30 (C) The partnership had done all that it was necessary for it to do under its contract with the Chinese Company. It had, in effectuating the shipment of the oil, earned the profit to which it was entitled. p. 246, ll. 7-8.
p. 248, ll. 1-3.

(D) The assessee had received the said payment from the Union Bank in his capacity as attorney of the partnership and in that capacity had paid to Duval the sum of \$825,552.50 which was the full amount of the purchase price of the lubricants alleged to have been despatched to Tsingtao by the s.s. "Saga." The full purchase price was not, as was alleged by the assessee, \$1,060,552.50. p. 246, l. 1.
p. 246, ll. 9-18.
p. 245, ll. 4-11.
p. 246, ll. 16-18.

40 (E) In the same capacity, the assessee had, on the day he received payment from the Union Bank, transferred by telegraph to the credit of the T.W.E. Ltd. the sum of \$169,447.50 to be disposed of as directed by him in his cable of the 18th January, 1951 (Ex. R 16 at pp. 115-116 of the Record). p. 246, ll. 19-22.

p. 246, ll. 32-36.

(F) After receiving payment from the Union Bank in the said capacity the assessee had, in the same capacity, paid to himself in his personal capacity, as commission earned by him for the part he had played in the transaction, the sum of \$235,000.

p. 246, ll. 44-47.

(G) Out of the said sum of \$169,447.50 (Rs.804,875) transferred by telegraph to the credit of the T.W.E. Ltd. the assessee and his wife, as shareholders of the said company, had received a total sum of Rs.180,000, in respect of their 6 shares, a dividend of Rs.30,000 per share of Rs.10 having been declared by the company. Further, the assessee had received, out of the said sum telegraphically 10 transferred, a sum of Rs.5,000 as Director's fees.

p. 250, ll. 8-28.

14. As to the law applicable to the facts as found by it the Board of Review referred to the arguments advanced on behalf of the assessee in support of his case that, on an application of the principles laid down in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* (1942) 2 All E.R. 122, H.L. and in *Tattersall v. Morley (Inspector of Taxes)* (1938) 22 T.C. 51, (1938) 3 All E.R. 296, C.A., the money he had received from the Union Bank should, in the circumstances that had developed, be regarded as money had and received by him to the use of the Chinese Company and/or the Union Bank and not as part of his income liable to taxation. 20 Rejecting the argument, the Board of Review pointed out that while the *Fibrosa* case, *supra*, had decided that money paid by mistake or on consideration that had failed was recoverable from the payee it had not laid down that the money could be followed in the hands of a third party who had received it from the payee *bona fide* and for consideration.

p. 250, ll. 29-31.

p. 251, ll. 1-6.

p. 251, ll. 38-41.

15. On the subject of income tax in relation to contingent liabilities, the Board of Review pointed out that even where a third party received money without consideration or *mala fide* the liability to repay it was only a contingent liability which according to *Tattersall's* case, *supra*, could be disregarded for income tax purposes. Continuing, the Board said :— 30

p. 251, ll. 42-45.

“ In this case the appellant received the money for consideration and *bona fide*, i.e. without notice of any defect in title at the time he received the \$235,000. It is therefore income liable to be taxed.

p. 251, l. 46-
p. 252, l. 5.

“ Further no action in the nature of a tracing order has yet been filed either by the Hwa Shih Co.” (the Chinese Company) “ and/or the Swiss Bank for the full amount or even part of the amount of \$235,000 against the appellant; so that even on the assumption that the appellant did not receive it *bona fide* or for consideration (we have held otherwise) he could dispose of the 40 money in any way he liked and avoid all personal liability.

p. 254, ll. 15-23.

“ The appellant's liability at the most is a contingent liability.” The Board pointed out that there was no harshness in the rule in Ceylon which disregards a contingent liability for tax purposes. Section 13 (1) (b) (c) and (2) of the Income Tax Ordinance could be invoked to get relief if it was subsequently found that an item regarded as a profit of the recipient at the time of receipt was found not to be a profit.

Annexure.

p. 252, ll. 13-17.

It was the Board's view that the assessee had done all that was necessary to earn his commission, that the commission had been obtained

by him *bona fide* and without notice of any defect in title, and that therefore from the time he received it it was earned by the assessee on this enterprise of his.

16. As to the assessability of the said sum of \$169,447.50 which the assessee, as the partnership's attorney, had transferred by telegraph to the credit of the T.W.E. Ltd. in Colombo, and which had been regarded as profits of the oil deal, the Board of Review, for reasons that it gave, held that that sum might also be subject to a contingent liability which would not, however, affect its liability to income tax.

p. 252, ll. 40-46.

p. 253, ll. 1-4.

- 10 Analysing the principles underlying the decisions in *Tattersall v. Morley (Inspector of Taxes)* (1938), 22 T.C. 51 ; [1938] 3 All E.R. 296, C.A., and in *Jay's The Jewellers Ltd. v. I.R. Commissioners* (1947), 29 T.C. 274 ; [1947] 2 All E.R. 762, the Board held that those principles could not be relied on in their entirety in support of the assessee's case with regard to the said sum of \$169,447.50, on which, in its view, the partnership was liable to be taxed.

p. 253, ll. 42-44.

p. 255, l. 14.

p. 254, ll. 1-2.

p. 255, ll. 9-14.

- 20 The assessment as to this item had been made on the assessee in his personal capacity, the assessor being of opinion that the partnership was an "artificial" or "fictitious" creation of the assessee to cloak his transactions and that, therefore, under Section 52 (2) of the Income Tax Ordinance, the assessee was liable to be personally assessed in respect of 3/5ths of the partnership's profits. The Board of Review held that although the partnership and the partners thereof, viz., the two limited liability companies, had a legal basis they were, as the assessor had maintained, "artificial" or "fictitious" within the said Section 52 (2) ; but that out of the said sum of \$169,447.50 (about Rs.804,875) the assessee's liability to tax should be restricted to the sum of Rs.180,000 which he and his wife had received as dividends and to the sum of Rs.5,000 which he had received as Director's fees.

p. 255, ll. 19-28.

p. 257, ll. 18-28.

p. 258, ll. 1-4.

- 30 17. The Board of Review expressed the further opinion that when, through the assessee, the partnership had obtained the said sum of \$169,447.50 from the Union Bank, it had acquired legal title to the same having received it *bona fide* ; and it could therefore give legal title to the whole, or part, of the said sum by transfers to *bona fide* recipients for value without notice of any defect in title so that the money could not be followed in their hands.

p. 258, ll. 18-33.

- 40 The said sums of Rs.180,000 and Rs.5,000 had been paid in pursuance of lawful declarations of a dividend and Director's fees—the money was treated as profits at the time—and could not now, in the Board's opinion, be followed in the hands of the assessee by the Chinese Company and/or the Union Bank.

Applying the said Section 52 (2) the Board held that for tax purposes the said sums fell under the category of "profits from trade" within Section 6 (1) (a) of the Income Tax Ordinance and were taxable as such under Section 11 (3) and (6) thereof.

p. 258, l. 46-

p. 259, l. 12.

18. Dissatisfied with the Determination of the Board of Review the assessee applied to the Board to state a case on questions of law which arose on his appeal for the opinion of the Supreme Court.

pp. 259-261.

Annexure

The application was made under Section 74 of the Income Tax Ordinance, the proviso to subsection (1) of which enables either side to require the Board of Review to state a case on a question of law, and subsection (5) of which provides, *inter alia*, that any two or more Judges of the Supreme Court "shall hear and determine any question of law arising on the stated case."

pp. 260-261.

In his application, dated the 4th June, 1953, the assessee set out no less than 14 questions of law on which a case could be stated. The Board of Review incorporated these questions *verbatim* in their Statement of the Case, dated the 28th August, 1953, without any amendment or addition. All fourteen questions are printed on pages 7 to 9 of the Record.

pp. 7-9.

pp. 10-15.

19. By its Judgment, dated the 4th March, 1955, the Supreme Court (Gratiaen and Sansoni, JJ.), held that the assessment determined by the Board of Review (see paragraph 12 hereof) should be reduced by deleting therefrom the said sums of Rs.1,110,264, Rs. 180,000 and Rs.5,000 in respect of all of which sums the assessee was not, in the opinion of the Court, assessable. The assessee was awarded the costs of his appeal.

p. 12, l. 33-
p. 13, l. 16.

20. Delivering the main Judgment of the Supreme Court, Gratiaen, J. (with whom Sansoni, J., agreed), after setting out the facts, referred to, and accepted, the assessee's argument that, in the circumstances of this case, the payment of the purchase price was void *ab initio* and that the property therein had not passed to the partnership.

p. 13, ll. 3-14.

The learned Judge did not agree with the Board of Review's finding that the partnership had done all that it had contracted to do in order to earn the profit to which it was entitled. It was his view that the partnership had assumed the obligations of a seller, that it could not therefore earn the purchase price unless upon presentation of genuine documents and that "the passing of property in the goods to the buyers and in the purchase price to the seller were intended to take place simultaneously."

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p. 13, ll. 16-21.

p. 13, ll. 36-41.

p. 13, l. 42-
p. 14, l. 5.

21. The learned Judge (Gratiaen, J.), said that the payment by the Union Bank had been made, and received, as the result of a common mistake of a fundamental character which had rendered the transaction and the payment void *ab initio* so that the Bank's consent to the transfer of the property in the money had been nullified. He said that both sides had correctly assumed that the law applicable to the case was the law of England and the effect of common mistake upon the validity of the transaction would have to be determined by that law; for, in his view, the payment made by the Union Bank was intended as consideration under a concluded contract for the sale of goods and, therefore, by Section 58 (2) of the Sale of Goods Ordinance (C. 70) the law applicable was the law of England and not Roman-Dutch Law (the Common law of Ceylon). Continuing, the learned Judge said that the question as to which law was to be applied was only of academic interest, for even under the Roman-Dutch law the true position was that the common mistake vitiated the payment.

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Annexure.

p. 14, ll. 5-13.

p. 14, ll. 14-26.

22. The learned Judge conceded that the case for the taxing authority was not necessarily concluded by the circumstance that the money

received from the Union Bank never passed into the ownership of the partnership; for the question still remained "whether all or any of the relevant sums subsequently received by the assessee from the partnership by way of commission, dividends and Director's fees can properly be regarded as having become his 'income' for taxing purposes although the money did not belong to the partnership at any stage." The learned Judge answered the question in the negative. In his view the assessee's "mandate was to secure an *actual* fulfilment of the seller's obligations under the contract of sale and to obtain the stipulated purchase price in exchange for *genuine* documents securing for the seller (*sic.* buyer?) title in the goods and indemnifying him against risks during shipment." He said that the assessee himself was wrong to entertain the belief that he had earned his commission for although he had received the money bona fide "the ownership in this part of the fund never passed to him for the same reason that it had previously not passed to the partnership from the Bank. Similarly with regard to the dividend and the Director's fees."

p. 14, ll. 36-40.

p. 14, l. 40-
p. 15, l. 1.

The learned Judge referred to the assessee's undertaking to refund to the Chinese Company such part of the purchase price as was still within his control and said :—

p. 15, ll. 6-12.

20 "Whether he fulfils that undertaking or not, the fact remains that the money is not (and never was) the property of himself or his principals."

23. The learned Supreme Court Judge did not give detailed answers to the specific questions which had been submitted to the Supreme Court for its opinion because he did not think it was necessary to do so.

p. 15, ll. 13-14.

He dismissed also a connected appeal by the Commissioner in which it was sought to increase the assessment on the assessee by the addition of other items representing a further distribution of the partnership profits. No question as to this connected appeal is now before the Judicial Committee.

p. 15, ll. 20-27.

24. A Decree in accordance with the Judgment of the Supreme Court was entered on the 4th March, 1955, and against the said Judgment and Decree this appeal to Her Majesty in Council is now preferred, the Appellant having been granted leave to appeal by decrees of the Supreme Court, dated the 27th October, 1955, and the 7th November, 1955.

p. 16.

pp. 19, 22.

In the appellant's respectful submission the appeal should be allowed, with costs throughout, the said Decree of the Supreme Court, dated the 4th March, 1955, should be set aside and the Determination of the Board of Review, dated the 6th May, 1953, should be restored, for the following among other

REASONS

- (1) BECAUSE, on the facts, the assessee was engaged in an adventure or concern in the nature of trade, viz., the oil venture, and therefore in a "trade" within the meaning of Section 2 of the Income Tax Ordinance (Cap. 188) ("the Ordinance").
- (2) BECAUSE the sum of Rs.1,110,264 was received by the assessee as a profit of that trade.

- (3) BECAUSE the sum of Rs.5,000 was received by the assessee as a profit of that trade, and the sum of Rs.180,000 received by the assessee and his wife was deemed to be a profit of that trade by virtue of Section 52 (2) of the Ordinance.
- (4) BECAUSE all the said sums of Rs.1,110,264 and Rs.5,000 and Rs.180,000 are thus chargeable to income tax under Sections 5 (1), 6 (1) (a) and 11 (3) and (6) of the Ordinance.
- (5) BECAUSE the Board of Review has determined that the 10 said sums were rightly so charged to income tax and there was evidence before the Board upon which the Board could so determine.
- (6) BECAUSE the said sums were lawfully received by the assessee and his wife.
- (7) BECAUSE the origin or character of the moneys out of which the said sums were paid to the assessee or his wife does not affect their taxability as profits of his trade in his hands unless there is an adverse claim amounting to an actual liability affecting his retention 20 of the said sums.
- (8) BECAUSE, on the facts found, in particular the dissolution of the partnership, the winding up of its two constituent members, the absence of any undistributed assets, the absence of any tracing order and the prolonged failure of any possible claimants to prosecute their claims, there is no reasonable possibility of any contingent claims being effectively made against the said sums.
- (9) BECAUSE the assessee's assessable income for the year 30 of assessment in question would not be correctly stated if the said sums are omitted.
- (10) BECAUSE it is not a natural construction of the Ordinance to read it as permitting persons who come within its terms to defeat taxation by setting up defects in their entitlement to moneys which they have actually received and which are not the subject of any effective adverse claim.
- (11) BECAUSE, on the facts found by the Board of Review, the Supreme Court was wrong in law in reversing the 40 Determination of the Board of Review.
- (12) BECAUSE the Board of Review was right, on the facts found, in holding that the said sums were rightly assessed and its Determination should be restored.

JOHN SENTER.

REGINALD HILLS.

R. K. HANDOO.

ANNEXURE.

THE INCOME TAX ORDINANCE.

(C. 188.)

2. In this Ordinance, unless the context otherwise requires—

* * * * *

“ trade ” includes every trade and manufacture, and every adventure
and concern in the nature of trade ;

* * * * *

5.—(1) Income tax shall, subject to the provisions of this Ordinance and notwithstanding anything contained in any other written law or in any convention, grant, or agreement, be charged at the rate or rates
10 specified hereinafter for the year of assessment commencing on the first day of April, nineteen hundred and thirty-two, and for each subsequent year of assessment 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,

but without prejudice to any provisions of this Ordinance which enact that tax is to be charged in particular cases in respect of the profits and income of a period other than the year preceding the year of assessment.

20 (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.

6.—(1) For the purposes of this Ordinance, “ profits and income ” or “ profits ” or “ 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 ;

30 (c) the net annual value of any land and improvements thereon occupied by or on behalf of the owner in so far as it is not so occupied for the purposes of a trade, business, profession or vocation ;

(d) the net annual value of any land and improvements thereon used rent-free by the occupier which is not included in paragraphs (a), (b), or (c) of this subsection, or, where the rent paid for such land and improvements is less than the net annual value, the excess of such net annual value over the rent, to be deemed in each case the income of the occupier ;

- (e) dividends, interest, or discounts ;
- (f) any charge or annuity ;
- (g) rents, royalties, and premiums ; and
- (h) income from any other source whatsoever, not including profits of a casual and non-recurring nature.

* * * * *

11.—(1) 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. 10

* * * * *

(3) Where on a day within a year of assessment any person whether resident or non-resident commences to carry on or exercise a trade, business, profession, vocation, or employment in Ceylon, or, being a resident person, elsewhere, any profits arising therefrom for the period from such day to the end of the year of assessment shall be a statutory income of such person for such year of assessment.

* * * * *

(6) Where a person whether resident or non-resident ceases to carry on or exercise a trade, business, profession, vocation, or employment in Ceylon, or, being a resident person, elsewhere, his statutory income therefrom shall be— 20

- (a) as regards the year of assessment in which the cessation occurs, the amount of the profits of the period beginning on the first day of April in that year and ending on the date of cessation ; and
- (b) as regards the year of assessment preceding that in which the cessation occurs, the amount of the statutory income as computed in accordance with the foregoing subsections, or the amount of the profits of such year, whichever is the greater, 30

and he shall not be deemed to derive statutory income from such trade, business, profession, vocation, or employment for the year of assessment following that in which the cessation occurs :

Provided that where any such person becomes entitled to receive after the date on which such cessation occurs a pension or any sum payable in commutation of pension, such person shall be deemed to have commenced a new employment on the date next succeeding the date of such cessation and such pension or sum payable in commutation of pension shall be deemed to be profits arising from such new employment ; and the provisions of this subsection and of subsections (3), (4) and (5) shall apply accordingly. 40
This proviso shall have no application in any case where such cessation

occurs on any date in any year of assessment prior to the year of assessment commencing on the first day of April, nineteen hundred and thirty-six.

* * * * *

13.—(1) The assessable income of a person for any year of assessment shall be his total statutory income for that year subject to the following deductions :—

(a) . . .

10 (b) the amount of a loss incurred by him during the year of assessment in any trade, business, profession, or vocation, which, if it had been a profit, would have been assessable under this Ordinance :

Provided that no such deduction shall be made unless it is claimed by notice in writing within six months of the end of the year of assessment ;

(c) the amount of a loss similarly incurred by him in any such trade, business, profession, or vocation during any of the three years preceding the year of assessment which has not been allowed against his statutory income of a prior year :

Provided that—

20 (i) in no circumstances shall the aggregate deduction from statutory income in respect of any loss exceed the amount of such loss ; and

(ii) a deduction under this paragraph shall be made as far as possible from the statutory income of the first year of assessment after that in which the loss was incurred, and, so far as it cannot be so made, then from the statutory income of the next year of assessment, and so on.

30 (2) For the purpose of subsection (1) (b) and (c), the loss incurred during any year of assessment shall be computed where the Commissioner so decides by reference to the year ending on the day in such year of assessment which would have been adopted under Section 11 (2) for the computation of statutory income of the following year of assessment if a profit had arisen.

52.—(1) . . .

(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.

* * * * *

40 71.—(1) Any appellant, or the authorised representative of any appellant, who is dissatisfied with the determination by the Commissioner of an appeal under section 69 may declare his dissatisfaction with that determination. Such declaration shall be made orally immediately after

the announcement by the Commissioner of his determination or shall be communicated in writing to the Commissioner within one week from the date of such announcement.

(2) Where the appellant has declared or communicated his dissatisfaction in accordance with subsection (1), the Commissioner shall, within one month of the determination of the appeal, transmit in writing to the appellant or his authorised representative his determination and reasons therefor.

(3) Within one month of the transmission of such written determination and reasons by the Commissioner, the appellant may give notice 10 of appeal to the Board. Such notice shall not be entertained unless it is given in writing to the Clerk to the Board and is accompanied by a copy of the Commissioner's written determination, together with a statement of the grounds of appeal therefrom.

(4) Save with the consent of the Board and on such terms as the Board may determine the appellant may not at the hearing by the Board rely on any grounds of appeal other than the grounds stated in accordance with subsection (3), and may not adduce any evidence other than evidence adduced at the hearing of the appeal before the Commissioner.

* * * * *

*Board of Review

74.—(1) The decision of the Board* shall be final :

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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.

* * * * *

(5) Any two or more Judges of 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, 30 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. When a case is so remitted by the Court, the Board shall revise the assessment as the opinion of the Court may require.

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THE SALE OF GOODS ORDINANCE.

(C. 70.)

58.—(1) . . .

(2) The rules of the English law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Ordinance, and in particular the rules relating to the law of principal 40 and agent and the effect of fraud, misrepresentation, duress, or coercion, mistake, or other invalidating cause, shall apply to contracts for the sale of goods.

In the Privy Council.

ON APPEAL

from the Supreme Court of Ceylon.

BETWEEN

CECIL ALEXANDER

**SPELDEWINDE, Commis-
sioner of Income Tax,**

Colombo Appellant

AND

EMIL SAVUNDRANAYAGAM Respondent

Case for the Appellant

T. L. WILSON & CO.,

6 Westminster Palace Gardens,

London, S.W.1,

Solicitors for the Appellant.