

6, 1958

No. 3 of 1957.

In the Privy Council.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

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BETWEEN

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

and

CYRIL SHIRLEY DE ZOYSA *Respondent.*

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Case for the Appellant

RECORD

1. This is an appeal from a Judgment and Decree of the Supreme Court of Ceylon, dated the 29th May, 1956, on a Case Stated, under the Income Tax Ordinance (C. 188), Section 74, by the Board of Review, upon the Appellant's application, in respect of a Decision of the Board, dated the 21st December, 1954, whereby an appeal by the Respondent (hereinafter also referred to as "the assessee") against an assessment to income tax was allowed. pp. 6, 12.
pp. 35-41

20 The Supreme Court, in deciding in the assessee's favour, affirmed the decision of the Board of Review. Both tribunals have held that the profit admittedly made by the assessee from the re-sale of property purchased by him expressly for the purpose of re-sale is not liable to income tax.

30 2. The main question for determination on this appeal is whether, on the facts established in the case, a sum of Rs. 144,000 earned by the assessee by a single transaction of purchase and re-sale of hangars in Ceylon is liable to income tax as "profits" within the meaning of Section 6 (1) (a) of the Income Tax Ordinance (C. 188) which, for the purposes of the Ordinance, defines "profits and income" or "profits" or "income" as "the profits from any trade, business, profession, or vocation for however short a period carried on or exercised."

3. Relevant portions of the said Income Tax Ordinance (hereinafter called "the Ordinance") are included in an Annexure hereto.

4. The facts, as set out in the Case Stated and in the Judgment of the Supreme Court, are summarised as follows :—

p. 1, ll. 6-11.

The assessee's wife owned a four-acre block of land at a place called Boosa and also undivided shares in other surrounding lands. All these lands were requisitioned during the last World War and upon them the Admiralty erected 10 hangars and some buildings.

p. 1, ll. 12-24.

p. 6, ll. 19-30.

Towards the end of the year 1947 it became known that the Admiralty was about to vacate the lands and the assessee, aware of the policy of the Naval Authorities to give owners of requisitioned lands the option of purchasing buildings erected thereon, approached the Senior Surveyor of Lands with a view to buying the hangars. He obtained the permission of the other co-owners of the lands surrounding the said four-acre block to negotiate on their behalf with the Admiralty for the purchase of the hangars and he paid them certain sums of money for the surrender of their rights in the option to purchase and the right to compensation for damage. 10

p. 1, ll. 15-18.
p. 38, ll. 26-27.

The assessee—whose interests were agricultural—conducted his negotiations with the Senior Surveyor through one H. W. Gunatilleke of H. W. Gunatilleke & Co. Ltd. whose business was the purchase and sale of surplus war materials and supplies. 20

p. 1, ll. 25-30.

5. After the assessee had commenced negotiations with the Admiralty, the Ceylon Government acquired the lands for the use of the Railway. Thereafter the assessee continued negotiations with the Railway and agreed to purchase 9 of the 10 hangars for the sum of Rs. 90,000. The tenth hangar was sold to a third party later.

p. 1, l. 33-p. 2, l. 6.

The assessee arranged for the financing of the purchase of the 9 hangars by the said Gunatilleke who agreed to do so upon the condition that he received one-third share of the net profits. Together with Gunatilleke the assessee visited India in an effort to sell the hangars in that country where they were in good demand and where Gunatilleke had advertised them for sale. Many offers were received from Indian sources but no sale was concluded. Ultimately Gunatilleke found a Ceylonese purchaser, one T. B. Beddewela who agreed to buy the 9 hangars for Rs. 288,000. Beddewela made an advance payment of Rs. 5,000 to Gunatilleke and undertook to pay the balance in instalments but failed to do so. The hangars began to deteriorate rapidly and the Railway pressed for payment. Unable to find the money himself Gunatilleke gave up the search but retained for himself the said sum of Rs. 5,000. 30

p. 2, ll. 7-10.

Ex. R2, p. 23.

p. 2, ll. 11-13.

6. The assessee subsequently obtained a sum of Rs. 45,000 from his father and the balance of Rs. 45,000 from one Senator Cyril de Zoysa upon the basis of an agreement (Ex. R2) dated the 14th June, 1948. Having thus obtained the agreed purchase price, he paid the Railway the full sum of Rs. 90,000 on the 15th June, 1948. He then advertised the hangars for sale in the local newspapers. Beddewela, the previous defaulting purchaser, came on the scene again and made a second offer of Rs. 279,000 which was accepted. Beddewela had found a purchaser in Pakistan. 40

From the sale thus concluded a profit of Rs. 189,000 accrued to the assessee out of which he paid Senator Cyril de Zoysa, one-fourth share (amounting to Rs. 47,520) in respect of the sum of Rs. 45,000 advanced by him. p. 2, ll. 14-20.
p. 7, ll. 25-28.

7. By agreement with the assessee the Income Tax Assessor fixed the assessee's share of the profit at Rs. 144,000 made up as follows:— p. 2, ll. 21-30.

	Rs.	Rs.
$\frac{3}{4}$ share of the profit		141,750
Sale of corrugated sheets		20,250
		162,000
Less advance retained by Gunatilleke ..	5,000	
Expenses including payment to co-owners	13,000	18,000
		144,000

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8. The assessee's income was assessed to income tax for the year of assessment 1948-49 at Rs. 200,000 and for the year of assessment 1949-50 at Rs. 200,000 and for profits tax for the year 1949 at Rs. 200,000. p. 2, ll. 31-34.

The assessee appealed against the assessments to the Commissioner of Income Tax (hereinafter called "the Commissioner") on the following grounds:— p. 2, ll. 35-40.

(A) The profit in question was a capital accretion and therefore not liable to tax.

(B) The profit was of a casual and non-recurring nature (within the meaning of Section 6 (1) (h) of the Ordinance which excludes such profit from the definition of "profits" or "income" chargeable with tax).

9. By his Determination, dated the 7th July, 1954, the Commissioner of Income Tax fixed the assessee's statutory income from the sale of the hangars for the year of assessment 1948-49 at Rs. 144,000 and the profits tax assessment for the year 1949 at the same amount. p. 2, l. 41-p. 3, l. 3.
pp. 29-35.

He allowed the appeal against the assessment to income tax for the year of assessment 1949-50.

10. Giving his Reasons for his Determination the Commissioner said that on the admitted facts it was clear that the assessee "was doing business although for a short time or that the whole transaction was in the nature of an adventure in trade, the profits of which are liable to tax under Section 6 (1) (a) of the Income Tax Ordinance." He rejected the plea that the profit was of a "casual and non-recurring nature" within Section 6 (1) (h) to which liability to income tax did not attach. He rejected also the argument that the profit was a capital accretion and as such not subject to tax. p. 34, ll. 1-5.
p. 34, ll. 6-15.
p. 34, ll. 16-23.

pp. 3-4.

11. Against the Commissioner's Determination the assessee appealed to the Board of Review (constituted under Sections 70 to 73 of the Ordinance) upon grounds set out in paragraph 11 of the Case Stated (see pp. 3-4 of the Record).

p. 5, ll. 1-6.

pp. 35-41.

12. By its Decision, dated the 21st December, 1954, the Board of Review, by a majority of two to one (Messrs. R. R. Selvadurai and R. P. Gaddum—Sir E. A. L. Wijeyewardene, Chairman, *dissenting*) held that the appeal against the income tax assessment for the year 1948-1949 should be allowed.

As to the profits tax assessment for the year 1949—with which the present appeal is not concerned—the Board of Review decided unanimously to allow the appeal. 10

pp. 36-40.

p. 37, ll. 24-33.

13. In deciding to allow the appeal against the income tax assessment for the year 1948-49, Mr. R. R. Selvadurai (a member of the Board of Review with whom Mr. R. P. Gaddum agreed) referred to the definitions of "profits and income" or "profits" or "income" in Section 6 (1) (a) of the Ordinance and to the definition of "trade" in Section 2 thereof. Continuing, he expressed himself to the following effect:—

p. 37, ll. 32-34.

p. 37, ll. 38-45.

(A) "Trade" (which term is to be distinguished from the expression "adventure and concern in the nature of trade") imports the meaning of a continuity of transactions of purchase and sale either executed or contemplated. "A single isolated transaction of a purchase and sale without the intention to continue may be a transaction of an adventure in the nature of trade but cannot be trade . . . The purchase and sale of the hangars was an isolated transaction without the least intention to continue and therefore it cannot be said to be trade. There was no continuity of transactions for the words 'however short a period' of time to apply." 20

p. 37, l. 45-p. 39, l. 8.

p. 38, l. 38-p. 39, l. 8.

(B) The purchase and sale of the hangars was not a transaction for the purchase and sale of an ordinary marketable commodity and was not therefore an "adventure and concern in the nature of trade" within the definition of "trade" in Section 2 of the Ordinance. 30

p. 39, ll. 8-18.

(C) The option to purchase the hangars was an accretion to the land owned by the assessee's wife. The assessee would have received tax-free compensation for damage to the land had the option not been exercised. He was therefore entitled to receive the sum due as a result of the exercise of the option tax free even if the amount exceeded that which he would have received by way of compensation. 40

pp. 40-41.

14. Dissenting from the said Decision of the majority of the Members of the Board of Review, Sir E. A. L. Wijeyewardene, Chairman of the Board, held that:—

p. 40, ll. 34-38.

(A) "The transaction was an adventure in the nature of trade and . . . the profits accruing from the transaction attracted income tax under Section 6 (1) (a) as explained in Section 2 of the Income Tax Ordinance."

(B) The assessee “ did not buy the hangars for his private amusement. Nor was the transaction a mere investment as a purchase of shares . . . Moreover he bought the hangars when they were deteriorating in value.” p. 40, ll. 29-34.

(c) “ The profit accruing from such re-sale was not in the nature of a capital accretion.”

15. Dissatisfied with the Decision of the Board of Review, the Commissioner, by his letter, dated the 21st January, 1955, applied to the Board of Review, under Section 74 of the Ordinance, to state a case for the opinion of the Supreme Court on the question of law arising in the case. p. 1, ll. 3-6.

In its Statement of the Case, dated the 20th May, 1955, the Board of Review, after setting out the facts, stated the question of law which arose in the following terms :— pp. 1-5.

“ On the facts established in this case, is the sum of Rs. 144,000 earned by the assessee by the purchase and re-sale of hangars liable to tax as being profits falling within the meaning of Section 6 (1) (a) of the Income Tax Ordinance ? ” p. 5, ll. 13-17.

16. By its Judgment, dated the 29th May, 1956, the Supreme Court (Basnayake, C.J., and de Silva, J.), affirming the Decision of the Board of Review, held that “ on the facts established in the case the sum of Rs. 144,000 earned by the assessee by the purchase and re-sale of hangars is not liable to tax as profits coming within the ambit of Section 6 (1) (a) of the Income Tax Ordinance.” pp. 6-11.
p. 11, ll. 13-18.

17. In his Judgment, Basnayake, C.J. (with whom de Silva, J., agreed), referred to, but did not accept, the argument for the Commissioner that the assessee had engaged in a trade or business even though it was one act of purchase and sale and that the profits he had made as a result of the transaction fell within the said Section 6 (1) (a). The learned Chief Justice’s rejection of the argument appears to have been based upon his interpretation of certain English decisions and generally upon the following reasoning :— p. 8, l. 20-p. 11, l. 7.

(A) “ For buying and selling to come within the ambit of the expression ‘ trade ’ there must be some amount of repetition in the acts of buying and selling.” p. 9, ll. 9-11.

(B) “ Here we have something more than the mere expressions ‘ trade ’ and ‘ business.’ These expressions are used in association with the expression ‘ carried on or exercised.’ The expression ‘ carried on ’ implies a repetition of acts. When the expression ‘ trade,’ which even when used by itself implies the concept of a repetition of acts of buying and selling, is coupled with such words as ‘ carried on or exercised,’ then it is beyond question that there should be a repetition of acts of buying and selling to constitute ‘ trade ’ . . . It has been repeatedly held in England that an isolated transaction does not amount to carrying on or exercising a trade or business.” p. 9, ll. 28-37.
p. 10, ll. 6-7.

p. 10, ll. 24-31.

(c) The transaction in question was not an "adventure or concern in the nature of trade" as contemplated in the definition of "trade" in Section 2 of the Ordinance because it did not have the characteristics of "trade" which, as already stated, involves a repetition of activity. "An adventure or concern in which there is no repetition of acts cannot be said to be in the nature of trade."

p. 11, ll. 8-11.

(d) "There is another fact that must not be overlooked in a consideration of Section 6 (1) of our Ordinance and that is that paragraph (h) excludes 'profits of a casual and non-recurring nature' from the definition of 'profits' or 'income'." 10

p. 12.

18. A Decree in accordance with the Judgment of the Supreme Court was drawn up on the 29th May, 1956, 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 6th September, 1956, and the 6th November, 1956.

pp. 14, 17.

In the Appellant's respectful submission the appeal should be allowed, with costs, the said Decree of the Supreme Court, dated the 29th May, 1956, and, on the subject-matter of this appeal, the Decision of the Board of Review, dated the 21st December, 1954, should be set aside, and the Determination of the Commissioner, dated the 7th July, 1954, should be 20 restored, for the following among other

REASONS

- (1) BECAUSE, on the established facts, the assessee, who had purchased the hangars for the express purpose of re-selling them at a profit, had thereby engaged in a "trade" within the meaning of Section 6 (1) (a) of the Ordinance.
- (2) BECAUSE, on the said facts, the assessee had engaged in an "adventure and concern in the nature of trade" within the definition of "trade" in Section 2 of the 30 Ordinance.
- (3) BECAUSE the said sum of Rs. 144,000 was received by the assessee as a profit of the "trade" which he had carried on or exercised, viz., the purchase and re-sale of the said hangars.
- (4) BECAUSE the said sum is chargeable to income tax under Sections 5 (1) and 6 (1) (a) of the Ordinance.
- (5) BECAUSE, on the established facts, and on any reasonable interpretation of the relevant Sections of the Ordinance, the profits sought to be taxed must be 40 regarded as having been derived from a trading venture entered into the course of a scheme of profit-making and therefore subject to tax.

(6) BECAUSE the true and only reasonable conclusion on the facts found contradicts the determination of the Board of Review on the issue relevant to this appeal.

(7) BECAUSE, in arriving at their respective decisions on matters relevant to this appeal, both the Board of Review and the Supreme Court acted upon a view of the established facts which could not be reasonably entertained and which was due to an insufficient appreciation of the relevant law.

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(8) BECAUSE the said profits, being those of a trade carried on or exercised by the assessee, are not exempt from liability to tax on the ground that they were of a "casual and non-recurring nature" within the meaning of Section 6 (1) (h) of the Ordinance.

JOHN SENTER.

R. K. HANDOO.

ANNEXURE

THE INCOME TAX ORDINANCE

(CHAPTER 188)

(9th February, 1932.)

(Reprinted 2nd July, 1956.)

Interpretation.

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

* * * * *

“ profits ” or “ income ” means the net profits or income from any source for any period calculated in accordance with the provisions of this Ordinance ;

* * * * *

“ statutory income ” means income from any source computed in accordance with Chapter IV ;

* * * * *

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

* * * * *

CHAPTER II.

IMPOSITION OF INCOME TAX

Incidence of Income Tax.

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 specified hereinafter or fixed by resolution under Section 20A, 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. 30

(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 Income chargeable with tax.

(a) the profits from any trade, business, profession, or vocation for however short a period carried on or exercised ;

* * * * *

(h) income from any other source whatsoever, not including profits of a casual and non-recurring nature.

* * * * *

In the Privy Council

ON APPEAL
from the Supreme Court of Ceylon

BETWEEN
**CECIL ALEXANDER
SPELDEWINDE, Com-
missioner of Income Tax,
Colombo Appellant**

AND
CYRIL SHIRLEY DE ZOYSA Respondent

Case for the Appellant

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