

Judgment 6, 1958

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Supreme Court of Ceylon
No. 175 (Final) of 1955

Case stated for the opinion of the
Supreme Court under the Income
Tax Ordinance

IN HER MAJESTY'S PRIVY COUNCIL
ON AN APPEAL FROM
THE SUPREME COURT OF CEYLON

BETWEEN

CECIL ALEXANDER SPELDEWINDE,
Commissioner of Income Tax, Colombo *Appellant*

AND

CYRIL SHIRLEY DE ZOYSA of "Nihal", Boosa,
Gintota *Respondent*

RECORD
OF PROCEEDINGS

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Commissioner of Income Tax, Colombo *Appellant*

AND

Cyril Shirley de Zoysa of "Nihal", Boosa,
Gintota *Respondent*

RECORD OF PROCEEDINGS

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LIST OF DOCUMENTS NOT PRINTED

<i>Exhibit Mark</i>	<i>Description of Document</i>
A 8	A copy of the form of notice that is sent by the Assistant Government Agent to any person whose premises are requisitioned under regulation 34 of the Defence (Miscellaneous) Regulations
A 9	Deed of Gift No. 713 dated 1.7.1937
A10	A copy each of the Answers filed by the 1st defendant (C. S. de Zoysa's wife) and by the 10th and 13th defendants jointly in D. C. Galle Case No. L. 5266
A11	Copies of Journal Entries and pleadings in Case No. L. 4845 D. C. Galle
A12	Notice given under the provisions of the Land Acquisition Ordinance of the Government's intention to take possession of lands mentioned in such notice (Extract from the <i>Ceylon Government Gazette</i> No. 10,127 of 21.7.50)
A13	D. R. de Zoysa's acknowledgment (dated 22.11.53) of the receipt of Rs. 500 as compensation
A14	Letter (dated 22.11.53) from D. R. de Zoysa stating that D. R. de S. Seneviratne received Rs. 500 as compensation in his presence
A15	D. U. Seneviratne's acknowledgment (of 23.11.53) of the payment of Rs. 1,000
X 3	Letter dated 21.1.1953 from Commissioner of Income Tax to the Clerk, Board of Review, requesting that a case be stated

Case stated for the opinion of the Supreme Court

No. 1.
Case stated for
the opinion of
the Supreme
Court.
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CASE STATED—For the opinion of the Honourable the Supreme Court under the provisions of Section 74 of the Income Tax Ordinance Chapter 188 upon the application of the Commissioner of Income Tax *Appellant*.

The facts are as follows:—

10 1. The assessee's wife owned a 4-acre block of land at Boosa and other surrounding lands in undivided shares. These lands had been requisitioned during the war and the Admiralty had erected 10 hangars and some buildings thereon.

20 2. By the end of 1947 it became known that the Admiralty was about to move out of the land and the assessee approached the Senior Surveyor of Lands with a view to purchasing the hangars. In contacting the Senior Surveyor the assessee sought and obtained the assistance of Mr. H. W. Gunatilleke of Messrs. H. W. Gunatilleke & Co. Ltd., who were dealing in the purchase and sale of surplus war materials and supplies. The policy of the Naval Authorities was to give the owners of the land requisitioned the option of purchasing the buildings erected thereon.

30 3. The assessee arranged with the co-owners of the lands to permit him to negotiate with the Authorities for the purchase of the hangars. He paid them certain sums for surrendering their rights in the option to purchase and to compensation for damage. After the assessee had commenced negotiations with the Naval Authorities, the Ceylon Government acquired the lands for the use of the Railway. He then continued negotiations with the Railway and agreed to purchase 9 of the hangars at Rs. 90,000. The tenth hangar was sold to a third party later. The assessee himself had no money to purchase the hangars. Mr. H. W. Gunatilleke agreed to find the money on condition that he received a 1/3rd share of the net profits.

4. There was a great demand for these hangars in India and Mr. Gunatilleke attempted to get the money required by advertising in the Indian newspapers. Both he and the assessee went to India in this connection. Many offers were received but the highest tenderer withdrew his offer after inspection. Mr. Gunatilleke found a local purchaser, Mr. T. B. Beddewala, who agreed to buy the 9 hangars for Rs. 288,000. An advance of Rs. 5,000

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was paid and he undertook to pay the balance on fixed dates—
Document R 1—He however failed to keep to the terms. The
Railway was pressing for payment and the hangars were rapidly
deteriorating. Mr. Gunatilleke was unable to find the money and
gave up the quest retaining for himself the advance paid by
Beddewala.

5. At this stage the assessee obtained Rs. 45,000 from his father
and received the balance Rs. 45,000 from Senator Cyril de Zoysa
on the basis of the agreement R 2 dated June 14, 1954. The Rail-
way was paid in full on June 15, 1948.

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6. The assessee advertised the hangars for sale in the local news-
papers. Mr. Beddewala came forward again and the 9 hangars
were sold to him, who had found a purchaser in Pakistan, for
Rs 279,000. Senator Cyril de Zoysa accepted a $\frac{1}{4}$ share of the
profit calculated as follows:—

		<i>Rs.</i>	
Total sale price of 9 hangars	279,000
Less purchase price	90,000
			<hr/> 189,000
Senator Cyril de Zoysa's $\frac{1}{4}$ share	47,250

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7. The assessee's share of profit was agreed with the assessor at
Rs. 144,000 as follows:—

		<i>Rs.</i>	
Three-fourth share	..	..	141,750
Sale of corrugated sheets	..	..	20,250
			<hr/> 162,000
Less advance retained by Mr. Gunatilleke	..	5,000	
Expenses—including payments to co-owners	..	13,000	
			<hr/> 18,000
			<hr/> 144,000

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8. The assessee 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.

9. The assessee appealed to the Commissioner of Income Tax
against the assessments on the ground—

- (1) that the profits sought to be assessed are in fact a capital
accretion and not liable to tax.
- (2) that the profits are of a casual and non-recurring nature
and therefore not liable to tax.

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10. The Commissioner of Income Tax heard the appeal and gave
his decision fixing the statutory income from this source for the
year of assessment 1948-49 at Rs. 144,000 and (the taxable profits

from this source) for the Profits Tax year 1949 at Rs. 144,000. The Commissioner allowed the appeal against the assessment to Income Tax for the year of assessment 1949-50. The determination and reasons of the Commissioner of Income Tax are annexed hereto as part of the case marked XI.

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11. The assessee thereupon appealed to the Board of Review constituted under the Income Tax Ordinance on the following grounds:—

- (1) The said determination is wrong and contrary to law.
- 10 (2) The facts of the case have not been correctly set out by the learned Commissioner and his determination of the 7th July, 1954, contains several mis-statements of facts.
- (3) The learned Commissioner in his determination states as follows:—

20 “ It was further contended that the profits in this case were of a capital accretion and as such not liable to tax. The basis of this claim must surely be that the Appellant was the owner of the land and that the hangars became part of the land. The appellant was not the owner of the land and therefore it is not necessary for me to consider the effect of the two cases—Tissera vs. Tissera (42 N. L. R. p. 60) and Jafferjee vs. Cyril de Zoysa (55 N. L. R. p. 124).”

On this point it is respectfully urged that it was mentioned at the hearing that the Appellant had authority from his wife, the owner of the land, to act on her behalf.

- 30 (4) Even assuming that there was no Power of Attorney, it is very clear from the facts and circumstances of this case that the Appellant was acting throughout as the Agent of his wife in the negotiations relating to the hangars. It is submitted that this is a case where agency is clearly inferable from the circumstances. In any event the husband and wife were treated as one for the purposes of the de-requisition, and transfer of possession of the property, including the hangars.
- 40 (5) The Appellant and the owner being husband and wife, the Commissioner was wrong in holding against the Appellant on the ground that he himself was not the owner in view of the provisions of Section 21 of the Income Tax Ordinance.

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- (6) Therefore the Commissioner should have considered the argument of Counsel for the Appellant that the hangars being an immovable improvement accrued to the soil and that therefore this was a case of capital accretion and not one of buying and selling.
- (7) The learned Commissioner was wrong in holding that the profit was not of a casual and non-recurring nature.
- (8) It is respectfully submitted that these profits are profits which are excluded from liability under Section 6 (1) (h) of the Ordinance. The words "casual and non-recurring nature" have been expressly introduced into our Ordinance and effect should therefore be given to these words. English cases will not be applicable because in the English Schedules these words are nowhere expressly used. 10
- (9) In any event it is submitted that the transaction is not a trade or business within the meaning of Section 6 (1) (a).
- (10) It is respectfully submitted that even if these profits are regarded as taxable, the appellant's liability for Profits Tax would have arisen if at all for the Profits Tax Year 1948 and not for the Profits Tax Year 1949 as held by the Commissioner. In the circumstances it is submitted that the Assessment of the Profits Tax for the year 1949 is bad and should be quashed. 20

12. The counsel for the assessee at the hearing of the appeal contended inter alia as follows:—

- (1) That the profits were in the nature of a capital accretion as the hangars had become part of the land.
- (2) That it was not a mere buying and selling transaction.
- (3) That the profits were of a casual and non-recurring nature. 30
- (4) That the transaction was not a trade nor an adventure in the nature of a trade.
- (5) That Section 6 (1) (h) does not apply to this case.
- (6) That the appellant, if at all should be taxed to Profits Tax for the year 1948 and not for the year 1949.

13. It was argued on behalf of the Assessor as follows:—

- (1) That this income is not "a casual or non-recurring" income.
- (2) The transaction was an adventure in the nature of a trade.
- (3) The assessee was bound by his agreement to pay profits tax for the year 1949. 40

14. The Board of Review by a majority of two to one decided that the appeal against the income tax assessment for 1948-49 should be allowed. The Board also decided that the appeal against the profits tax assessment for 1949 should be allowed. The copy of the findings of the majority and of the dissenting member are annexed hereto as part of this case marked X2.

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the Supreme
Court.
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15. Dissatisfied with the decision of the Board of Review, the appellant (The Commissioner of Income Tax) has by his letter dated 21st January, 1955, marked X3 applied to the Board to state a case for the opinion of the Hon'ble the Supreme Court on the questions of law arising in this case and this case is stated accordingly.

16. The question of law which arises in this case is as follows:—

On the facts established in this case, is the sum of Rs. 144,000 earned by the assessee by the purchase and resale of hangars liable to tax as being profits falling within the meaning of Section 6 (1) (a) of the Income Tax Ordinance?

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17. Copies of documents produced in the appeal marked A1-A15, R1-R5, and documents X1-X3 are annexed as part of this case.

18. The amount of tax in dispute is:—

Income Tax 1948-49	...	Rs.54,173.00
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1. (Sgd.) E. A. L. WIJEYWARDENE
2. (Sgd.) R. R. SELVADURAI
3. *

Members of the Board of Review,
Income Tax.

Colombo 1, May 20, 1955.

* The signature of Mr. R. P. Gaddum the 3rd member who heard the appeal is not available as he is now out of the Island in U. K. for medical treatment.

Judgment of the Supreme Court

S. C. 175.

Income Tax Case
No. 53/2260/BRA. 236.

In the matter of a Case Stated under Section 74 of the Income Tax Ordinance (Chapter 188).

COMMISSIONER OF INCOME TAX

Vs.

C. S. DE ZOYSA

Present: Basnayake, C. J., and de Silva, J.

10

Counsel: M. Tiruchelvam, Deputy Solicitor-General with A. Mahendrarajah, Crown Counsel, and H. L. de Silva, Crown Counsel, for Appellant.

No appearance for Respondent.

Argued on: 26th and 27th March, 1956.

Decided on: 29th May, 1956.

Basnayake, C. J.

The assessee's wife owned a four-acre block of land at Boosa and also undivided shares in other surrounding lands. These lands had been requisitioned during the war and the Admiralty had erected 10 hangars and some buildings thereon. By the end of 1947 it became known that the Admiralty was about to move out of the land. As the policy of the Admiralty was to give the owners of land on which it had erected buildings the option of purchasing them, the assessee 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 four-acre block to negotiate on their behalf with the Admiralty for the purchase of the hangars, and he also paid them certain sums of money for the surrender of their option to purchase and the right to damage compensation. His negotiations with the Senior Surveyor were conducted through one H. W. Gunatilleke of H. W. Gunatilleke & Company Limited, whose business was the purchase and sale of surplus war materials and supplies.

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30

After the assessee had commenced negotiations with the Admiralty, the Ceylon Government acquired the land for the use of the Railway. Thereafter the assessee continued negotiations with the Railway and agreed to purchase 9 of the hangars at Rs. 90,000. The tenth was sold to a third party later. The assessee himself had no money to purchase the hangars, and H. W. Gunatilleke agreed to arrange the finance on condition that he received one-third share of the net profits. As hangars were in great demand in India, Gunatilleke advertised in the Indian papers and visited India along with the assessee. Many offers were received from India but no sale was concluded as the highest tenderer withdrew his offer after inspection. Ultimately Gunatilleke found a Ceylonese purchaser, one T. B. Beddewela, who agreed to buy the 9 hangars for Rs. 288,000. An advance of Rs. 5,000 was paid and he undertook to pay the balance in instalments but failed to do so. Unable to find the money Gunatilleke gave up the quest retaining for himself the sum of Rs. 5,000 which Beddewela had paid him as an advance. As the Railway was pressing the assessee for payment, he sought the aid of his father, from whom he obtained Rs. 45,000, and the balance Rs. 45,000 he obtained from Senator Cyril de Zoysa. He paid the Railway the full sum of Rs. 90,000 on 15th June, 1954. The assessee advertised the sale of the hangars once more, and Beddewela, the previous defaulting purchaser, made a second offer of Rs. 279,000 for a purchaser from Pakistan. The offer was accepted and the sale 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. 47,250 for the advance made by him. The Assessor agreed to fixing the assessee's share of the profit at Rs. 144,000. It was made up as follows:—

	<i>Rs.</i>
1/3 share of profit	141,750
Sale of corrugated sheets	20,250
	162,000
	<i>Rs.</i>
Less retained by Gunatilleke	5,000
Expenses including payment to co-owners at Boossa ..	13,000
	18,000
	144,000

40 The assessee's income was assessed for the income tax year of assessment 1948-49 at Rs. 200,000 and for the year 1949-50 at Rs. 200,000. He was also assessed for profits tax for the year 1949 at Rs. 200,000. The assessee appealed against these assessments on the ground—

(a) that the profits sought to be taxed were in fact capital accretions and not liable to tax, and

(b) that the profits were of a casual and non-recurring nature and therefore not liable to tax.

The Commissioner of Income Tax fixed the statutory income from the sale of the hangars for the year 1948-49 at Rs. 144,000 and the profits tax assessment for the year 1949 at the same amount. He allowed the appeal against the assessment for 1949-50. Thereupon the assessee appealed to the Board of Review. The Board by a majority of two to one decided that the appeal against the income tax assessment for 1948-49 should be allowed. The Board also decided that the appeal against the profits tax assessment for 1949 should be allowed. Thereupon the Commissioner of Income Tax, who was dissatisfied with the decision of the Board, applied for a case stated. 10

The question of law stated for the opinion of this Court is as follows:—

“ 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? ”

It was urged by counsel 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 therefore the profits he made on the sale of the hangars fell within the ambit of section 6 (1) (a) of the Ordinance. 20

It will be convenient, before proceeding further, to examine the relevant provisions of the Income Tax Ordinance. Section 5 of the Ordinance provides that income tax shall subject to the provisions of the Ordinance be charged in respect of the profits and income of every person for the year preceding the year of assessment wherever arising in the case of a person resident in Ceylon. Section 6 (1) defines the expressions “ profits and income ”, “ profits ”, and “ income ”. Among other meanings, these expressions also mean the profits from any trade, business, profession, or vocation for however short a period carried on or exercised. Paragraph (h) of section 6 (1) excludes profits of a casual and non-recurring nature from the definition of profits. 30

I shall now proceed to examine the meaning and content of section 6 (1) (a). It is not contended that the assessee carried on any profession or vocation. These expressions need not therefore be considered. It is urged that the purchase and re-sale of the hangars comes within the expression “ trade ” or “ business ”. These expressions are defined in section 2 of the Ordinance. I shall therefore quote these definitions. “ Trade ” includes every trade and 40

manufacture, and every adventure and concern in the nature of trade; "business" includes agricultural undertaking. The expression "trade" is generally used in connexion with the activity of buying and selling¹. Trade is a term of the widest scope. In its widest sense it indicates a way of life or an occupation. It may in certain contexts have an extended meaning so as to include manufactures² as in a law which prohibits offensive or dangerous trades. In ordinary usage it may mean the occupation of a small shopkeeper equally with that of a commercial magnate. 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. In this connexion it would be appropriate to quote the words of Scrutton L. J. in *Brighton College v. Marriott*³:

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Judgment of the
Supreme Court.
29.5.56.
—contd.

"In my view, when any person habitually and as a matter of contract supplies money's worth for full money payment, he "trades" within the meaning of Schedule D".

This idea is elaborated by Rowlatt J. in the case of *Pickford v. Commissioners of Inland Revenue*⁴.

He says:

"Now of course it is very well known that one transaction of buying and selling a thing does not make a man a trader, but if it is repeated and becomes systematic, then he becomes a trader and the profits of the transaction, not taxable so long as they remain isolated, become taxable as items in a trade as a whole, setting losses against profits, of course, and combining them all into one trade".

This view of the meaning of the expression "trade" in the Income Tax Acts runs through the decisions. 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 acts⁵. 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".

In *Greinger & Son v. Gough*⁶, Lord Morris said:

"There can be no definition of the words 'exercising a trade'. It is only another mode of expressing 'carrying on a business', but it certainly carries with it the meaning that the business or trade must be habitually or systematically exercised, and that it cannot apply to isolated transactions."

No. 2.
Judgment of the
Supreme Court.
29.5.56.
—contd.

The expression “business” also in a context such as section 6 (1) (a) means an activity continuously carried on. Here we have an isolated transaction of sale. The appellant sought to take advantage, as he was entitled to do, of the concession granted to owners of requisitioned land of purchasing the buildings erected thereon. It has been repeatedly held in England that an isolated transaction does not amount to carrying on or exercising a trade or business. The decisions on the point are too numerous to be quoted here; but I shall content myself with citing the *dicta* from two of the better known cases.

10

In the case of *Commissioners of Inland Revenue v. Livingston and others* Lord Blackburn said:

“It is well settled that an isolated trading transaction of a simple character outside a man’s ordinary business does not amount to the carrying on of a trade within the meaning of the section so as to render the profits of the transaction liable to taxation. They are casual profits which do not form part of his regular income.”

In *Pickford v. Commissioners of Inland Revenue (supra)*, Sargant L. J. said (at page 275):

20

“It seems to me perfectly simple and straightforward to come to the conclusion that one transaction was not in itself a carrying on of a trade or business. . . .”

Learned counsel for the Commissioner of Income Tax urged that if the transaction in question was not a trade or business it was an adventure or concern in the nature of a trade as contemplated in the definition of trade. For anything to be in the nature of a trade it must have the characteristics of “trade.” As I have said earlier “trade” involves a repetition of activity, and an adventure or concern in which there is no repetition of acts cannot be said to be in the nature of trade.

30

In the case of *Commissioners of Inland Revenue v. Livingston and others (supra)*, Lord President Clyde said (at page 542):

“I think the profits of an isolated venture, such as that in which the respondents engaged, may be taxable under Schedule D provided the venture is ‘in the nature of a trade.’ I say ‘may be’ because in my view regard must be had to the character and circumstances of the particular venture. If the venture was one consisting simply in an isolated purchase of some article against an expected rise in price and a subsequent sale it might be impossible to say that the venture was ‘in the nature of “trade”’; because the only trade in

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the nature of which it could participate would be the trade of a dealer in such articles, and a single transaction falls as far short of constituting a dealer's trade, as the appearance of a single swallow does of making a summer."

No. 2.
Judgment of the
Supreme Court.
29.5.56.
—contd.

It is clear from the decisions I have quoted that the purchase and sale of the hangars in the instant case does not come within section 6 (1) (a).

10 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."

I am of opinion that the Board of Review is right in their decision that the assessee's profit is not liable to tax, and I would accordingly state my opinion in answer to the question 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.

20 There will be no costs as there has been no appearance for the respondent.

(Sgd.) HEMA H. BASNAYAKE,
Chief Justice.

de Silva J.

I agree.

(Sgd.) K. D. de SILVA,
Puisne Justice.

1. Harris v. Amery, L.R. 1 C.P. 148.
2. Commissioner of Taxation v. Kirk, 1900, A.C. 588.
3. 10 T.C. 213 at 227.
- 30 4. 13 T.C. 262 at 263.
5. Smith v. Anderson (1880) L.R. 15 Ch.D. 247 at 277.
6. 3 T.C. 462 at 472.
7. 11 T.C. 538 at 546.

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Supreme Court.
29.5.56.

No. 3
Decree of the Supreme Court

S. C. 175/'55 (F)

ELIZABETH THE SECOND, QUEEN OF CEYLON AND OF
HER OTHER REALMS AND TERRITORIES,
HEAD OF THE COMMONWEALTH

IN THE SUPREME COURT OF THE ISLAND
OF CEYLON

In the Matter of a case stated under Section 74 of the Income
Tax Ordinance (Cap. 188).

10

THE COMMISSIONER OF INCOME TAX *Assessor-
Appellant.*

against

C. S. DE ZOYSA *Assessee-Respondent.*

Income Tax Case No. 53/2260/B.R.A. 236.

This cause coming on for hearing and determination on the 26th
and 27th March and 29th May, 1956, and on this day, upon an
appeal preferred by the Assessor-Appellant before the Hon. H. H.
Basnayake, Q.C., Chief Justice, and the Hon. K. D. de Silva,
Puisne Justice of this Court, in the presence of Counsel for the
Appellant and there being no appearance for the Respondent.

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It is considered and adjudged that the finding of the Board of
Review be and the same is hereby affirmed. There will be no costs.

This Court holds 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.

Witness the Hon. Hema Henry Basnayake, Q.C., Chief Justice,
at Colombo, the 8th day of June in the year One thousand Nine
hundred and Fifty-six and of Our Reign the Fifth.

30

(Sgd.) W. G. WOUTERSZ,
Deputy Registrar, S.C.

Application for conditional Leave to Appeal to the Privy Council

No. 4.
Application for
Conditional
Leave to appeal
to the Privy
Council.
12.6.56.

IN THE SUPREME COURT OF THE ISLAND
OF CEYLON

A case stated for the opinion of the Honourable the Supreme Court of Ceylon under the provisions of Section 74 of the Income Tax Ordinance (Cap. 188) upon the application of the Commissioner of Income Tax.

THE COMMISSIONER OF INCOME TAX *Appellant.*

10 S. C. (F) No. 175 of 1955.

Vs.

C. S. DE ZOYSA of " Nihal ", Boosa, Gintota *Respondent.*

and

In the Matter of an Application for conditional leave to appeal to Her Majesty the Queen in Council.

CECIL ALEXANDER SPELDEWINDE, Commissioner of
Income Tax *Appellant-Appellant.*

Vs.

20

C. S. DE ZOYSA of " Nihal ", Boosa, Gintota *Respondent-Respondent.*

To: THE HONOURABLE THE CHIEF JUSTICE AND THE OTHER JUSTICES
OF THE SUPREME COURT OF THE ISLAND OF CEYLON.

On this 12th day of June, 1956.

The petition of the Appellant-Appellant above named appearing by Berham Kaikhushroo Billimoria and his assistants Abdul Hameed Mohamed Sulaiman and Solomon Christoffel Obeysekere de Livera, his Proctors, states as follows:—

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1. Upon a case stated for the opinion of the Supreme Court by the Income Tax Board of Review at the instance of the Appellant-Appellant above named under Section 74 of the Income Tax Ordinance (Cap. 188) the Supreme Court made order thereon on the 29th May, 1956. The case stated is numbered S. C. (F) No. 175 of 1955 and is hereinafter referred to as " the said case ".

No. 4.
Application for
conditional
Leave to appeal
to the Privy
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2. That feeling aggrieved by the judgment and order of this Honourable Court pronounced on the 29th day of May, 1956, in the said case, the Appellant-Appellant is desirous of appealing therefrom to Her Majesty the Queen in Council.

3. That the said Order is by virtue of the provisions of Section 74 (7) of the Income Tax Ordinance (Cap. 188) a final judgment in a civil action and the matter in dispute on the appeal amounts to or is of the value of Rupees Five thousand or upwards.

4. That notice of the intended application for leave to appeal was served on the Respondent-Respondent on the 2nd day of June, 1956, in terms of Rule 2 of the Rules in the Schedule to the Appeals (Privy Council) Ordinance (Cap. 85) as appears from the affidavit and document marked ' A ' annexed hereto. 10

Wherefore the Appellant-Appellant prays for conditional leave to appeal against the said judgment of this Court dated the 29th May, 1956, to Her Majesty the Queen in Council.

(Sgd.) A. H. M. SULAIMAN,
Proctor for Appellant-Appellant.

No. 5

No. 5.
Decree granting
Conditional
Leave to appeal
to the Privy
Council.
6.9.56.

Decree Granting Conditional Leave to Appeal to the Privy Council 20

ELIZABETH THE SECOND, QUEEN OF CEYLON AND OF
HER OTHER REALMS AND TERRITORIES,
HEAD OF THE COMMONWEALTH

IN THE SUPREME COURT OF THE ISLAND
OF CEYLON

In the Matter of an Application dated 12th June, 1956, by the Appellant for Conditional Leave to appeal to Her Majesty the Queen in Council against the decree of this Court dated 29th May, 1956.

THE COMMISSIONER OF INCOME TAX *Appellant.* 30

against

C. S. DE ZOYSA of " Nihal ", Boosa, Gintota *Respondent.*

Case stated for the opinion of the Supreme Court—53/2260—
BRA. 239.

This cause coming on for hearing and determination on the 6th day of September, 1956, before the Hon. E. H. T. Gunasekera, Puisne Justice and the Hon. T. S. Fernando, Q.C., Puisne Justice of this Court, in the presence of Counsel for the Appellant.

No. 5.
Decree granting conditional leave to appeal to the Privy Council. 6.9.56.
—contd.

It is considered and adjudged that this application be and the same is hereby allowed, subject to the usual conditions except that the Commissioner is not required to make any deposit or pay any fee or furnish any security prescribed under The Appeals (Privy Council) Ordinance.

10 Witness the Hon. Hema Henry Basnayake, Q.C., Chief Justice at Colombo, the twelfth day of September, in the year One thousand Nine hundred and Fifty-six and of Our Reign the Fifth.

(Sgd.) W. G. WOUTERSZ,
Deputy Registrar, S.C.

No. 6

Application for Final Leave to Appeal to the Privy Council

No. 6.
Application for Final Leave to appeal to the Privy Council. 22.9.56.

IN THE SUPREME COURT OF THE ISLAND
OF CEYLON

20 A case stated for the opinion of the Honourable the Supreme Court of Ceylon under the provisions of Section 74 of the Income Tax Ordinance (Cap. 188) upon the Application of the Commissioner of Income Tax.

THE COMMISSIONER OF INCOME TAX *Appellant.*

S. C. (F) No. 175 of 1955. *Vs.*

C. S. DE ZOYSA of " Nihal ", Boosa, Gintota *Respondent.*

and

In the Matter of an Application for final leave to appeal to Her Majesty the Queen in Council.

THE COMMISSIONER of Income Tax ... *Appellant-Appellant.*

30 *Vs.*

C S. DE ZOYSA of " Nihal ", Boosa, Gintota ... *Respondent-Respondent.*

No. 6.
Application for
Final Leave
to appeal
to the Privy
Council.
22.9.56.
—contd.

To the Honourable the Chief Justice and the other Justices of the Supreme Court of the Island of Ceylon.

On this 22nd day of September, 1956.

The petition of the Appellant-Appellant appearing by Behram Kaikhushroo Billimoria and his assistants Abdul Hameed Mohamed Sulaiman and Solomon Christoffel Obeysekere de Livera, his Proctors, states as follows:—

1. That the Appellant-Appellant obtained on the 6th September, 1956, conditional leave from this Honourable Court to appeal to Her Majesty the Queen in Her Privy Council against the judgment of this Court pronounced on the 29th day of May, 1956, in Supreme Court appeal No. S.C. (F) 175 of 1955. 10

2. That in view of the provisions of Section 74 (7) (c) of the Income Tax Ordinance (Chapter 188) as amended by Section 2 of Ordinance No. 26 of 1939 the Appellant-Appellant on appeal to Her Majesty the Queen in Council is not required to make any deposit or pay any fee or furnish any security prescribed by or under the Appeals (Privy Council) Ordinance (Chapter 85).

3. That no conditions were imposed under Rule 3 (b) of the Rules contained in the Schedule to the Appeals (Privy Council) Ordinance (Chapter 85). 20

Wherefore the Appellant-Appellant prays that he be granted final leave to appeal to Her Majesty the Queen in Her Privy Council against the said judgment of this Court pronounced on the 29th day of May, 1956.

(Sgd.) A. H. M. SULAIMAN,
Proctor for Appellant-Appellant.

No. 7

Decree Granting Final Leave to Appeal to the Privy Council

No. 7.
Decree granting
Final Leave to
appeal to the
Privy Council.
6.11.56.

ELIZABETH THE SECOND, QUEEN OF CEYLON AND OF
HER OTHER REALMS AND TERRITORIES,
HEAD OF THE COMMONWEALTH.

IN THE SUPREME COURT OF THE ISLAND OF CEYLON.

In the Matter of an Application dated 22nd September, 1956,
by the appellant for Final Leave to appeal to Her Majesty the
Queen in Council against the decree of this Court dated 29th
May, 1956.

THE COMMISSIONER of Income Tax *Appellant.*

Against

C S. DE ZOYSA of " Nihal ", Boosa, Gintota *Respondent.*

Case stated for the opinion of the
Supreme Court—53/2260-BRA. 239

20 This cause coming on for hearing and determination on the 6th
day of November, 1956, before the Hon. H. N. G. Fernando, Puisne
Justice and the Hon. T. S. Fernando, Q.C., Puisne Justice of this
Court, in the presence of Counsel for the Appellant and there being
no appearance for the Respondent.

The appellant has complied with the conditions imposed on him
by the order of this Court dated 6th September, 1956, granting
Conditional Leave to Appeal.

It is considered and adjudged that the applicant's application
for Final Leave to appeal to Her Majesty the Queen in Council be
and the same is hereby allowed.

Witness the Hon. Hema Henry Basnayake, Q.C., Chief Justice
at Colombo, the sixteenth day of November, in the year One
Thousand Nine hundred and Fifty-six and of Our Reign the Fifth,

(Sgd.) W. G. WOUTERSZ,
Deputy Registrar, S. C.

PART II—EXHIBITS

Exhibits

A 1.
Letter from
C. S. de Zoysa
to the Senior
Surveyor of
Lands,
18.11.47.

A 1

Letter from C. S. de Zoysa to the Senior Surveyor of Lands

“ Nihal ”,
Boosa,
Gintota,
18/11/47.

The Senior Surveyor of Lands,
Colombo.

Sir,

BOOSA HANGARS AND BUILDINGS

10

On behalf of the owners of the lands on which the above structures stand, I wish to inform you that we intend purchasing these and will be submitting our offer shortly.

Please acknowledge.

Yours faithfully,
(Sgd.) C. S. DE ZOÏSA.

A 2.
Letter from the
Senior Surveyor
of Lands to
C. S. de Zoysa.
13.12.47.

A 2

Letter from the Senior Surveyor of Lands to C. S. de Zoysa

Lands Branch,
Naval Works Office,
Church Road,
Galle Face,
Colombo.

20

12/13th December, 1947.

Ref. No. L. 152/13/196A.

C. S. de Zoysa, Esq.,
“ Nihal ”,
Boosa.

Dear Sir,

R. N. DEPOT, BOOSA

30

With reference to your post card dated 9th December, 1947, I visited this site last week and inspected these buildings and do not contemplate another visit for some time.

2. As there is now a possibility of the Ceylon Government acquiring the buildings it would be as well to leave your proposal in abeyance until I have some definite information for you.

Yours faithfully,
(Sgd.) A. HOLDEN,
for Senior Surveyor of Lands, 40
CEYLON.

A 3
Letter from C. S. de Zoysa to the Senior Surveyor of Lands

" Nihal " .
 Boosa,
 17/12/47.

Exhibits

A 3.
 Letter from
 C. S. de Zoysa
 to the Senior
 Surveyor of
 Lands.
 17.12.47.

The Senior Surveyor of Lands,
 Colombo.

Sir,

10 Further to my interview with you and your letter dated 12th/13th
 December, 1947, I offer Rs. 90,000 for the 9 hangars standing on
 the land side of the railway line of the R. N. Yard, Boosa, together
 with the other small huts standing thereon. If the 10th hangar is
 also available, I offer the whole lot for Rs. 100,000.

I am authorised by the other owners, and as a owner of the largest
 portion to make this offer.

As you informed that I could offer for the 9 hangars just now I
 am doing so. All are in a dilapidated condition, and we have got to
 forego our compensation too.

Hoping to hear from you as early as possible.

20

I remain,
 Yours faithfully,

A 4
Letter from the Senior Surveyor of Lands to C. S. de Zoysa

Naval Works Office,
 Church Road,
 Galle Face,
 Colombo.
 20th/22nd December, 1947.

A 4.
 Letter from the
 Senior Surveyor
 of Lands to
 C. S. de Zoysa.
 22.12.47.

Ref. No. L. 152/13/199A.

30 C. S. de Zoysa, Esq.,
 " Nihal " ,
 Boosa.

Dear Sir,

R. N. DEPOT, BOOSA

I have to thank you for your letter of the 17th instant offering
 Rs. 90,000 for the nine hangars standing on the land to the east
 of the railway.

2. This offer is being considered and a further communication
 will be sent as soon as possible.

40

Yours faithfully,
 (Sgd.) A. HOLDEN,
 for Senior Surveyor of Lands,
 CEYLON.

Exhibits

A 5.
Letter from the
Chief Engineer,
Ceylon Govern-
ment Railway,
to C. S. de
Zoysa.
20.4.48.

A 5

**Letter from the Chief Engineer, Ceylon Government Railway,
to C. S. de Zoysa**

My No. NA. 768 of 20.4.48.
Chief Engineer's Office,
Way and Works Department,
C. G. R., Colombo 10.

C. S. de Zoysa, Esq.,
H. W. Gunatilleke, Ltd.,
Ivans Buildings,
Galle Face,
Colombo.

10

NAVAL STORES—BOOSA

Sir,

I have the honour to advise acceptance of your offer of Rs. 90,000 for the nine hangars at Boosa. On your payment of this sum to the Chief Accountant, Railways, Maradana, arrangements will be made to have the hangars handed over to you.

I am, Sir,
Your obedient servant, 20
(Sgd.)
for Chief Engineer, C. G. R.

A 6

Letter from the Senior Surveyor of Lands to C. S. de Zoysa

A 6.
Letter from the
Senior Surveyor
of Lands to
C. S. de Zoysa.
12.1.48.

Lands Branch
Naval Works Office,
Church Road,
Galle Face,
Colombo,
12th January, 1948.

30

Ref. No. L. 152/13/219A.
Mr. C. S. de Zoysa,
" Nihal ",
Boosa, Galle.

Dear Sir,

HANGARS AT BOOSA

With reference to your letter of the 5th instant, this Depot has now been taken over by the Ceylon Government and I am unable to proceed further with your recent offer to purchase the Pentad hangars.

40

2. I understand from the General Manager, Ceylon Government Railway, that it is possible all the hangars will not be required for his department and, in that event, you may be hearing from him.

Exhibits

A 6.
Letter from the
Senior Surveyor
of Lands to
C. S. de Zoysa.
12.1.48—*contd.*

Yours faithfully,
(Sgd.) A. HOLDEN,
for Senior Surveyor of Lands,
CEYLON.

A 7

10 Letter from C. S. de Zoysa to the General Manager, Ceylon
Government Railway

A 7.
Letter from
C. S. de Zoysa
to the General
Manager, Ceylon
Government
Railway.
11.3.48.

H. W. Gunatilleke Ltd.,
Ivans Building,
Galle Face, COLOMBO.

11th March, 1948.

The General Manager,
Ceylon Government Railway,
Colombo.

Sir,

9 HANGARS AT BOOSA, GALLE

20 With reference to my interview with you this morning,
as requested, I am making my formal offer of Rs. 90,000 for the
above Hangars.

It will be appreciated that a few months will be necessary to
dismantle and remove the Hangars.

I shall be greatly obliged of an early confirmation of your accep-
tance of my offer.

I am, Sir,
Your obedient servant,

Exhibits

R 1.

Agreement
between C. S. de
Zoysa and
H. W. Gunetilleke.
(undated).

R 1

Agreement between C. S. de Zoysa and H. W. Gunetilleke

We the undersigned, CYRIL SHIRLEY DE ZOYSA of "Nihal", Boosa, and HENRY WILLIAM GUNETILLEKE of "Fruit Grove", Makola, hereby agree as follows:—

- (1) I the said Cyril Shirley de Zoysa, declare that I have arranged for the purchase of (9) Nine Pentad Type Hangars lying at Boosa for Rs. 90,000.
- (2) I the said Henry William Gunetilleke, have agreed to pay Rs. 90,000 for the said (9) Nine Hangars on or before the 31st May, 1948. 10
- (3) I the said Henry William Gunetilleke have agreed with T. B. Bedewella for the sale to him of the said Hangars for Rs. 288,000 at site. All expenses for dismantling and removal to be borne by Mr. Bedewella and in the event of any dispute all such charges to be borne by Mr. H. W. Gunetilleke.
- (4) It is mutually agreed between us that the nett profit from the sale of the said Hangars to the said T. B. Bedewella shall be divided between us in the ratio of 2/3 thereof to me the said Cyril Shirley de Zoysa and 1/3 thereof to me the said Henry William Gunetilleke. 20
- (5) All payments made by the said T. B. Bedewella shall be deposited with Messrs. de Silva & Mendis, Proctors, until the last payment is received and these monies cannot be drawn by either party. Thereafter the divisions shall be effected as provided in clause (4) hereof.
- (6) Payment of Rs. 180,000 by Mr. T. B. Bedewella to be made on 1.4.48 and the balance on 31st July, 1948.
- (7) Any violation of the above terms will forfeit Mr. T. B. Bedewella's right to any monies deposited by him. The only obligation of the said Cyril Shirley de Zoysa will be the return to the said Henry William Gunetilleke of the sum of Rs. 90,000 only. 30

Original with de Silva & Mendis.

R 2
Agreement between C. S. de Zoysa and Senator Cyril de Zoysa

Exhibits

R 2.

Agreement
between C. S. de
Zoysa and
Senator Cyril
de Zoysa.
14.6.48.

This is the DUPLICATE the Original of
which has been stamped with a stamp
duty of Rs.-/50 cts.

10 THIS AGREEMENT is made between CYRIL SHIRLEY DE ZOYSA of Colombo in the Island of Ceylon (hereinafter referred to as "the party of the first part") of the one part and SENATOR CYRIL DE ZOYSA also of Colombo in the said Island (hereinafter referred to as "the party of the second part") of the other part.

WHEREAS the party of the first part *has purchased* from the Ceylon Government Railway nine Pentad Hangars erected on land in possession of the Ceylon Government Railway, situated in Boosa in the District of Galle.

20 AND WHEREAS in consideration of the party of the second part paying to the party of the first part a sum of Forty-five Thousand Rupees (Rs. 45,000) of lawful money of Ceylon and in further consideration of the mutual benefits to be secured hereunder by them respectively the parties hereto have agreed to enter into this agreement upon the terms and conditions hereinafter mentioned.

NOW IT IS HEREBY AGREED AS FOLLOWS:—

1. This agreement shall be in force and be binding on the parties hereto and their respective heirs, executors and administrators for a period of four months from the date of the execution of this agreement.
2. The party of the second part shall make arrangements for the sale to a party in India of the said Hangars for a sum of Sixty-five Thousand Rupees (Rs. 65,000) for each Hangar.
- 30 3. The nett profits derived from the sale of the said Hangars shall be shared equally by the parties hereto.
4. The nett profits shall be the profits arrived at after deducting—
 - (a) the cost of dismantling, cleaning and building the said Hangars
 - (b) the cost of transport to Colombo

Exhibits
 R 2.
 Agreement
 between C. S. de
 Zoysa and
 Senator Cyril de
 Zoysa.
 14.6.48—*contd.*

- (c) the cost of freight to India and
 (d) the commission to be paid in respect of the sale of the said Hangars

all of which are calculated to cost approximately Twenty-two Thousand Six Hundred Rupees (Rs. 22,600) in respect of each Hangar.

5. The party of the second part shall be entitled to commence dismantling the said Hangars after the sale of the said hangars has been confirmed and credit established. Provided however that no parts of the said Hangars shall be removed from the premises but such parts shall be stored in one of the Hangars on the said premises and shall be in the custody and charge of the party of the first part until such time as he is paid at least a sum of One Hundred Thousand Rupees (Rs. 100,000) of lawful money of Ceylon aforesaid. 10

6. The party of the first part shall be entitled to inspect all agreements, contracts and other documents in connection with the sale of the said Hangars.

7. Should the purchase price of any one Hangar exceed the said sum of Sixty-five Thousand Rupees (Rs. 65,000) as hereinbefore provided the party of the first part shall be entitled to receive fifty per cent. (50%) of such excess. 20

8. Immediately after the said Hangars have been shipped from Colombo the parties hereto shall look into the accounts and the party of the first part shall be paid all moneys due to him under this agreement.

9. Should the Hangars not be sold within a period of four months from the date hereof the party of the first part shall repay to the party of the second part the said sum of Forty-five Thousand Rupees (Rs. 45,000) and until such repayment the party of the first part shall hold the said Hangars at the disposal of the party of the second part and shall not sell or dispose of the same except with the consent in writing of the party of the second part. 30

10. This agreement shall be determined by effluxion of the stipulated time or the death insolvency, bankruptcy or composition with creditors of either of the parties hereto. In the event of the breach of any of the conditions herein contained by either party hereto the other party shall be entitled to cancel this agreement forthwith on giving written notice to the party guilty of such breach and upon such notice being sent this agreement shall be deemed to be cancelled and discharged anything herein contained to the contrary notwithstanding. 40

11. Nothing herein contained shall be construed as in any way creating a partnership between the parties hereto or as giving to either party hereto any of the rights or rendering him subject to any liabilities of a partner.

Exhibits
—
R 2.
Agreement
between C. S. de
Zoysa and
Senator Cyril de
Zoysa.
14.6.48—contd.

IN WITNESS WHEREOF the parties hereto have set their respective hands to these presents at Colombo in the Island of Ceylon this 14th day of June One Thousand Nine Hundred and Forty-eight.

WITNESSES:

10

Sgd.:
(C. S. de Zoysa)

Sgd.:
(Cyril de Zoysa)

- 1. Sgd.: (Illegible)
- 2. Sgd.: (Illegible)

R 3

**Letter from the Chief Engineer, Ceylon Government Railway,
to C. S. de Zoysa**

R 3.
Letter from the
Chief Engineer,
Ceylon Govern-
ment Railway,
to C. S. de
Zoysa.
26.5.48.

20

My No. NA 768 of 26.5.48,
Chief Engineer's Office,
Way and Works Department,
C G. R., Colombo 10.

C. S. de Zoysa, Esq.,
Messrs. H. W. Gunatilleke, Ltd.,
Ivans Buildings,
Galle Face,
Colombo.

NAVAL STORES—BOOSA

Your Letter dated 29.4.48

30

Sir,

I have been unable to obtain confirmatory reports as per the information you passed on.

2. The only damage found was that due to normal corrosion resulting in several sheets falling off the roof. The accusation against the Railway Watchers is not accepted as correct.

3. I have to advise that it is now 5 weeks since the visit of Mr. C. S. de Zoysa to this office requesting final acceptance of the offer of Rs. 90,000 for the hangars and the transaction I now note is postponed to about the 5th of June.

40

I am, Sir,
Your obedient servant,

for CHIEF ENGINEER.

Exhibits

R 4.

Letter from the
Permanent
Secretary,
Ministry of
Transport and
Works to
T. Guneris
Silva.
10.8.48.

R 4

**Letter from the Permanent Secretary, Ministry of Transport and
Works to T. Guneris Silva**

Copy to: P. H. W. de Silva, Esq., M. P., with reference to his
endorsement on petition.

The G. M. R.

(intd) KS.

No. C. 4/99/1/154.
Ministry of Transport and Works,
P. O. Box No. 547,
Colombo, 10 August, 1948.

10

Sir,

Hangars at Boosa

With reference to the petition dated 14th June, 1948, signed by
you and others and forwarded by Mr. P. H. W. de Silva, M.P.,
I have the honour to inform you that the General Manager of the
Railway took over from the Admiralty the grounds on which the
Naval Depot at Boosa was situated together with the fixed assets
thereon. The grounds are under requisition until acquisition is com-
pleted under the Land Acquisition Ordinance. The grounds were
taken over for Government purposes and cost of acquisition will
be met by the Departments concerned.

20

As the Government Agent, Southern Province, reported that the
hangars were deteriorating, it was decided to dispose of them early.
Mr. C. S. de Zoysa had made an offer for the nine hangars to the
Admiralty while they were in its charge. Mr. de Zoysa repeated
the same offer to the Railway Department and the offer was accepted
in April, 1948, after consulting the Treasury and the Admiralty.

It is regretted that your request cannot be complied with.

I am, Sir,
Your obedient servant,
(Sgd.) K. SAMARATUNGA.
for Permanent Secretary,
Ministry of Transport & Works.

30

T. Guneris Silva, Esq.,
Boosa.

My No. G. 4,802/13.

C. E. W.—Yr. papers No. NA. 768.

C. A. R.—Yr. papers No. CA. 2,196/48.

Hangars at Boosa

Copy forwarded for information further to my endt.
No. G. 4,802/13 of 13.8.48.

Sgd. Illegible.
for Actg. G. M. R.

Colombo, 18.8.48.

Exhibits

R 4.

Letter from the
Permanent
Secretary,
Ministry of
Transport and
Works to
T. Guneris
Silva.
10.8.48.
—contd.

R 5**Notes of the Interview C. S. de Zoysa had with the Assessor**

Notes of Interview of 13th October, 1953.

R 5.

Notes of the
interview
C. S. de Zoysa
had with the
Assessor.
13.10.53.

10 Assessee is present with Mr. L. D. D. Rajasekera, Assistant of
Mr. Tudor V. Perera.

20 2. Assessee says the co-owners of Kappinamudiyanselagawatta
could not agree to the allocation of the compensation due to them
on acquisition of this land by the C. G. R. Some of the co-owners
are claiming a share out of the amount due to the Assessee. The
Government Agent who was to have paid the compensation, deposit-
ed the total amount at the District Court, Galle, and the settlement
of the case is still pending. He had handed the title deeds to the
court in connection with the dispute mentioned above. He says he
is entitled to Rs. 6,000 as compensation (on acquisition) at the rate
of Rs. 1,500 per acre.

30 3. Assessee has no written authority now to support his state-
ment that he was authorised by the other co-owners to purchase
the hangars. He says he had such written authority when he pur-
chased the hangars. This authority was produced only before the
senior surveyor of lands Mr. Holden. By his letter dated 17.12.47,
he undertook to waive off the compensation due in respect of the
damages done to the property, if the hangars were sold to him.
To give this undertaking he got the consent of the other co-owners
not to claim any compensation for the damages done to this prop-
erty during the period of military occupation. The payments he
made to the other co-owners were in respect of their share of this
compensation due to them. He made the payments in cash just
before the last hangar was removed by Mr. Beddewela. He has
no receipts now in support of these payments. However he will now
obtain receipts from them and also a certificate from the D. R. O.
giving the extent of the share owned by each (including the assessee
himself) in this land where the nine hangars were constructed.

Exhibits

R 5.

Notes of the
interview
C. S. de Zoysa
had with the
Assessor.
13.10.53.
—contd.

4. The tenth hangar on this land has been sold by the C. G. R. at a later date to Mr. T. B. Beddewela. Assessee was not informed of this sale either by the C. G. R. or by Mr. T. B. Beddewela, nor did he receive any compensation. He is not aware whether any of the other co-owners were informed of this sale or whether they got any compensation. The only other constructions on this land were two stores which are presently used by the Food Control Department to store rice. Assessee says that as far as he is aware neither the Admiralty nor the G. M. R. advertised for sale any of these hangars. Nor did they request him to buy the hangars. In none of their letters to him is any recognition made of any right he has to these hangars. 10

5. Assessee agrees to let me have following particulars relating to the payments made by the Admiralty and the Ceylon Government:—

1. Period during which the Admiralty occupied the land.
2. The total rent paid per annum and how distributed.
3. The date on which the Admiralty handed over the property to the C. G. R.
4. Full particulars of any other payments by the Admiralty. 20
5. The date of acquisition of the land by the Ceylon Government.
6. Full particulars of any payments by the Ceylon Government in respect of the period of occupation up to the date of acquisition.

6. Assessee confirms that Mr. H. W. Gunatilleke met him in 1947 and informed him of Mr. Beddewela's intention to buy the hangars on his land. Mr. Gunatilleke, Assessee says, has been sent by Mr. Beddewela to meet him and arrange for the purchase of the hangars from the Admiralty, and then later sell to Mr. Beddewela. In November, 1947, he met Mr. Holden of the Admiralty with Mr. Gunatilleke who knew Mr. Holden well. After the interview he addressed a letter to the Senior Surveyor of lands making the offer to purchase the hangars. Subsequently he learnt from Mr. Holden that the hangars were transferred to the C. G. R. at Rs. 10,000 each. Then he repeated the same offer to the G. M. R. The G. M. R. however was not willing to sell all the ten hangars. He was agreeable to sell nine hangars at Rs. 10,000 each. Accordingly the assessee made a fresh offer for the nine hangars. When his offer was accepted, Mr. Gunatilleke sent him to Madras to advertise in the daily papers. He admits that he accordingly went to India and advertised the sale of the hangars (before they were purchased) in four Indian papers two days successively. Mr. Gunatilleke joined him three days later and went through the replies. Four of five prospective 40

buyers were interviewed in Madras during the week's stay there. Of these prospective buyers one Mr. Naidu made the highest offer of Rs. 30,000 for each hangar, and a few days later visited Ceylon and along with Mr. Gunatilleke and Assessee inspected the hangars. After inspection Mr. Naidu did not wish to buy the hangars as he found that they were fast deteriorating.

Exhibits
R 5.
Notes of the
interview
C. S. de Zoysa
had with the
Assessor.
13.10.53.
—*contd.*

7. At this time the G. M. R. was pressing the Assessee to pay and remove the nine hangars as they were fast deteriorating. Then Mr. Gunatilleke finding that he could not finance the purchase as undertaken withdrew from the transactions.

Then the Assessee obtained Rs. 45,000 from his father and made the first payment on 3.6.48. He obtained the balance sum of Rs. 45,000 from Senator Cyril de Zoysa by entering into an agreement to sell the hangars to an Indian and sharing the profits equally with the Senator. Assessee says this agreement was entered into at the request of Mr. Beddewela who had found a buyer in India. The last payment to the G. M. R. accordingly was able to be made on 15.6.48.

Sgd.
A. 6.

20 (Sgd.) C. S. de Zoysa.
15.10.53.

X 1
Determination and Reasons of the Commissioner of Income Tax

COPY X 1

53/2260.

*Determination and Reasons under Section 71 (2) of the
Income Tax Ordinance*

X 1.
Determination
and Reasons of
the Commis-
sioner of
Income Tax.
7.7.54.

Appeals of Mr. C. S. de Zoysa against assessments made on him—

- 30 (1) for Income Tax for the years of assessment 1948/49 and 1949/50, and
(2) for Profits Tax for the Profits Tax year 1949,

heard by the Commissioner of Income Tax on 26th May, 1954, and 17th June, 1954.

Present for the appellant: Mr. L. G. Weeramantry, Advocate, instructed by Messrs. L. B. and L. M. Fernando, Proctors. Mr. Tudor V. Perera, Accountant, Mr. L. D. D. Rajasekera. Mr. C. S. de Zoysa, Appellant.

Supporting the assessment: Mr. K. Wijeweera, Assessor.

Exhibits		<i>Income Tax</i> 1948-49 Rs.		<i>Income Tax</i> 1949-50 Rs.		<i>Profits Tax</i> 1949 Rs.
X 1.						
Determination and Reasons of the Commissioner of Income Tax. 7.7.54.	Amount of assessment ..	200,000	..	200,000	..	200,000
—contd.	Income tax ..	85,820	..	85,820	..	30,000
	Tax in dispute ..	85,820	..	85,820	..	30,000

Grounds of appeal:—

- (1) The profits sought to be assessed are in fact a capital accretion and not liable to tax; or
- (2) The profits are of a casual and non-recurring nature and therefore not liable to tax. 10

Productions—

By the appellant:—

- A1 Appellant's letter dated 18.11.47 to the Senior Surveyor of Lands.
- A2 Letter dated 13.12.47 from the Senior Surveyor of Lands to the Appellant.
- A3 Letter dated 17.12.47 from the Appellant to the Senior Surveyor of Lands.
- A4 Letter dated 22.12.47 from the Senior Surveyor of Lands to the Appellant. 20
- A5 Letter dated 20.4.48 from the Chief Engineer, C. G. R. to the Appellant.
- A6 Letter dated 12.1.48 from the Senior Surveyor of Lands to the Appellant.
- A7 Letter dated 11.3.48 from the Appellant to the General Manager, C. G. R.
- A8 A copy of the form of notice that is sent by the Assistant Government Agent to any person whose premises are requisitioned under Regulation 34 of the Defence (Miscellaneous) Regulations. 30
- A9 Deed of Gift No. 713 dated 12.7.37.
- A10 A copy of the Answer filed by the defendant (appellant's wife) in D. C. Galle case No. L 5,266).
- A11 Copies of pleadings in case No. L. 4,845 D. C. Galle.
- A12 Notice given under the provisions of the Land Acquisition Ordinance of the Government's intention to take possession of lands mentioned in such notice (extract from the *Ceylon Government Gazette* No. 10,127 of 21.7.50).
- A13 D. R. de Zoysa's acknowledgment (dated 22.11.53) of the receipt of Rs. 500 as compensation. 40
- A14 Letter (dated 22.11.53) from D. R. de Zoysa stating that D. N. de S. Seneviratne received Rs. 500 as compensation in her presence.
- A15 D. U. Seneviratne's acknowledgment (of 23.11.53) of the payment of Rs. 1,000 as compensation.

By the Assessor:—

- R1 Undated agreement the appellant entered into with Mr. H. W. Gunatilleke *re* purchase of the 9 hangars and the subsequent sale to Mr. T. B. Beddewela and *re* division of profits.
- R2 Agreement (dated 14.6.48) between the appellant and Senator Cyril de Zoysa.
- R3 Letter dated 26.5.48 from the Chief Engineer, Railway, to appellant (in addition to the appellant's letter dated 17.12.47—*vide* A3).
- R4 Letter dated 10.8.48 from the Permanent Secretary to the Ministry of Transport and Works to (a petitioner) Mr. T. Guneris Silva of Boosa.
- R5 Notes of the interview the appellant had with the Assessor on 13.10.53.

*Facts:—*The appellant's wife was the owner of a four-acre block of land at Boosa and is said to have some undivided shares in the surrounding lands.

These lands were requisitioned during the war and the Admiralty had erected ten hangars and some buildings thereon.

Towards the end of 1947 it became known that the Admiralty was about to move out of the land and the appellant approached the Senior Surveyor of Lands with a view to purchasing the hangars. In contacting the Senior Surveyor appellant sought and obtained the assistance of Mr. H. W. Gunatilleke of Messrs. H. W. Gunatilleke & Co. Ltd., who were dealing in the purchase and sale of surplus war materials and supplies.

It is well known that the policy of the Naval and Military authorities was to give the owners of the land requisitioned the option of purchasing the buildings erected thereon.

The appellant says he came to some arrangements with the co-owners to permit him to negotiate with the authorities and purchase the hangars. They were paid by the appellant certain sums for surrendering their rights in the option above referred to and to their rights to compensation for damages, if any.

After appellant had commenced negotiations with the Naval authorities, the Ceylon Government acquired the lands for the use of the Railway and the appellant continued negotiations with the Railway authorities and agreed to purchase nine of the hangars for Rs. 90,000. The 10th hangar was sold to a third party later.

Appellant himself had no money to purchase the hangars. Mr. H. W. Gunatilleke agreed to find the Rs. 90,000 on condition that he received a 1/3rd share of the net profits.

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and Reasons of
the Commis-
sioner of
Income Tax.
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—*contd.*

Exhibits

x 1.

Determination
and Reasons of
the Commis-
sioner of
Income Tax.
7.7.54.

—contd.

There was a great demand for these hangars in India and Mr. Gunatilleke attempted to get the money required to pay the Railway for the hangars by advertising in the Indian papers. Both he and the appellant went over to India in connection therewith. Many offers were received but unfortunately the highest tenderer withdrew his offer after inspection.

Mr. Gunatilleke found a local purchaser in Mr. T. B. Beddewela who agreed to buy the nine hangars at Rs. 288,000. Mr. Beddewela paid an advance of Rs. 5,000 and promised to pay the balance on fixed dates—*vide* R1. He failed to keep to the terms.

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The Railway were pressing for payment and the hangars were rapidly deteriorating. Mr. Gunatilleke was unable to find the money as originally agreed with appellant and he gave up, retaining for himself the advance paid by Mr. Beddewela.

The appellant at this stage obtained Rs. 45,000 from his father and received the balance Rs. 45,000 from Senator Cyril de Zoysa on the basis of an agreement R2 dated 14.6.54. The Railway was paid in full on 15th June, 1948.

Senator Cyril de Zoysa does not appear to have been able to keep closely to the terms of the agreement. The appellant again advertised the hangars for sale. This time in the local papers. Mr. Beddewela came on the scene again, and finally the nine hangars were sold to Mr. Beddewela, who had found a purchaser in Pakistan, for a sum of Rs. 279,000, and Senator Cyril de Zoysa accepted a $\frac{1}{4}$ th share of the profit calculated as follows:—

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				<i>Rs.</i>
Total sale price of 9 hangars	279,000
Less purchase price	90,000
				<hr/> 189,000
Senator Cyril de Zoysa's $\frac{1}{4}$ share	47,250
				<hr/> 30

Appellant's share of the profit was agreed with the Assessor at Rs. 144,000 arrived at as follows:—

				<i>Rs.</i>
Three-fourths share	..	..	..	141,750
By Sale of corrugated sheets	..	..	..	20,250
				<hr/> 162,000
Less advance retained by Mr. Gunatilleke	..	..	5,000	
Expenses including payments to co-owners	..	..	13,000	
				<hr/> 18,000
				<hr/> 144,000
				<hr/> 40

Arguments for appellant.—

1. There was really no buying and selling—the improvements accrued to the soil and what the appellant got was compensation—
42 N. L. R., 55 N. L. R.

2. This was an isolated transaction and the profits are of a casual and non-recurring nature. Ceylon law is different to English law.

3. If 1 and 2 fail, the profit is a capital accretion.

Arguments of Assessor.—

The phrase “ casual and non-recurring ” is interpreted in Wick-remasinghe *vs.* Commissioner of Income Tax, 48 N. L. R., 481 to mean profit in the nature of a windfall.

10 This was definitely an adventure in Trade—the appellant set himself to do this business. Section 6 (1) (a) applies.

Determination.—

The appeal against the assessment for 1948/49 is dismissed, the assessable income being fixed at Rs. 145,850.

The appeal against the assessment for 1949/50 is allowed and the assessment is discharged.

The appeal against the Profits Tax assessment for 1949 is dismissed, the taxable profits being fixed at Rs. 145,000.

Reasons for the determination.—

20 The facts of this case which I have set out fairly fully above make it quite clear that the appellant in this case set out definitely to purchase the hangars in question with a view to making a profit by re-selling them to a third party or parties.

His wife had some interests in the property on which the hangars stood and the first step he took was to get the co-owners to give him, for a consideration, the option which they had of purchasing the hangars from the Naval authorities.

30 The appellant had no money and had to find somebody who would supply the capital required for the purchase. This he did by promising Mr. H. W. Gunatilleke who was buying and selling surplus war supplies and who had useful contacts with the Naval and Military authorities.

He next offered for the hangars and had his offer accepted. Mr. Gunatilleke, however, could not keep his part of the contract and the appellant had to look elsewhere for the purchase price and finally got the capital required from his father and Senator Cyril de Zoysa.

The purchase of the hangars was completed on the 15th June, 1948, and the sales completed by November that year. These transactions gave him a profit of Rs. 144,000.

Exhibits

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sioner of
Income Tax.
7.7.51.

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Exhibits

X 1.

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and Reasons of
the Commis-
sioner of
Income Tax.
7.7.54.
—contd.

On the facts as admitted in this case and set out above I cannot but hold that the appellant 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.

It was contended on behalf of the appellant that this profit is of a casual and non-recurring nature to which liability to Income Tax does not attach.

It is good law that each case in which this question comes up has to be decided on its particular facts. On the facts of this case and taking into account the observations of Howard, C.J., in his judgment in the case of Wickremasinghe *vs.* Commissioner of Income Tax—48 N. L. R., 481, I have no difficulty in holding that these profits are not of the nature excluded from liability under section 6 (1) (h).

It was further contended that the profits in this case was a capital accretion and as such not liable to tax. The basis of this claim must surely be that the appellant was the owner of the land and that the hangars became part of the land. The appellant was not the owner of the land and therefore it is not necessary for me to consider the effect of the two cases—Tissera *vs.* Tissera, 42 N. L. R., 60, and A. A. Jafferjee *vs.* Cyril de Zoysa, 55 N. L. R., 124. On this contention too I hold against the appellant.

Appellant had other sources of income. Profits from these sources were agreed on at the hearing. It was also agreed that if liability attaches to the profits from the purchase and sale of the hangars these profits would be liable to income tax for the year of assessment 1948/49 and for profits tax 1949.

The assessable income for 1948/49 is therefore fixed as follows:—

				Rs.
Trade	..	..	..	144,000
Agriculture	..	..	..	1,000
Rent	..	..	..	600
Annual value of residence	..	..	..	250
				145,850

The assessment for 1948/49 will be revised accordingly. The assessable income for 1949/50 was fixed as follows:—

				Rs.
Trade	..	..	..	—
Agriculture	..	..	..	1,000
Rent	..	..	..	600
Annual value of residence	..	..	..	250
				1,850

The assessment for 1949/50 is therefore discharged.

The taxable profits for the Profits Tax year 1949 was fixed as follows:—

	<i>Rs.</i>
Trade	144,000
Agriculture	1,000
	<hr/>
	145,000

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sioner of
Income Tax.
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—contd.

The Profits Tax assessment for 1949 will be revised accordingly.

(Sgd.) C. A. SPELDEWINDE,
Commissioner of Income Tax.

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July 7, 1954.

X 2

Decision and Reasons of the Board of Review

Income Tax and Profits Tax Appeal to the Board of
Review—Mr. C. S. de Zoysa

X 2.
Decision and
Reasons of the
Board of
Review.
21.12.54.

My No. BRA—239.

Assessment File No. 53/2260.

Members of the Board: Sir Arthur Wijeyewardene, Kt. Q.C.
(Chairman), Mr. R. P. Gaddum, J.P.U.M., Mr. R. R.
Selvadurai.

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Dates of hearing: 26th October, 1954, and 27th November, 1954.

Present for the Appellant: Mr. H. W. Jayawardene, Q.C., with
Mr. L. G. Weeramantry, Advocate, instructed by Messrs.
L. B. and L. M. Fernando, Proctors, Mr. Tudor V.
Perera, Accountant.

Supporting the Assessment: Mr. K. Wijeweera, Assessor.

Order of the Board: The Board by a majority of two to one de-
cides that the appeal in respect of Income Tax should be
allowed. The Board decides that the appeal in respect of
the profits tax for 1949 should be allowed.

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The findings of the majority and of the dissenting mem-
ber are attached to this order.

(Sgd.) E. A. L. WIJEYEWARDENE,
Chairman.

Colombo 1, December 21, 1954.

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Exhibits

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X 2.Decision and
Reasons of the
Board of
Review.
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—contd.*FINDINGS OF MESSRS. R. R. SELVADURAI AND
R. P. GADDUM*

Except with regard to the statement in the 'Reasons for determination' given by the Commissioner that it was agreed that if liability attaches to the profits from the purchase and sale of the hangars these profits would be liable for the Profits Tax 1949, the facts as set out by the Commissioner were admitted by Mr. Adv. Jayawardene who appeared for the assessee as being substantially correct. It is therefore unnecessary to restate the facts in detail.

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In coming to the conclusion that the profits derived by the assessee by the purchase and sale of the hangars are taxable the Commissioner has not given sufficient importance to the fact that the assessee is the husband of the lady who owned the larger portion of the land on which the hangars stood and who was a co-owner of the other portions. In the view of the majority of the Board the assessee cannot be treated as an outsider. Section 21 of the Income Tax Ordinance says that for the purposes of the Ordinance the assessable income of a married woman shall be deemed to be part of the assessable income of her husband except under certain circumstances which do not exist in this case. The husband is charged by that section with the liability to pay the tax on the income derived by a wife. Apart from it a husband is the person who naturally looks after the affairs of his wife. Whether the profits arising from the transaction considered in this case are the profits of the husband or of the wife is immaterial. If the assessee had signed his letters in dealing with this transaction per pro his wife he should not be in a better position than if he signed them without the per pro. In the view of the majority of the Board no distinction should be made between husband and wife in dealing with this matter.

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Now the facts are that the Admiralty gave an option to the owners of the requisitioned lands to purchase the hangars. It was open to the Admiralty to remove the materials with which the hangars were composed before derequisitioning the lands, in which event the Admiralty (or the Competent Authority under the Defence Regulations empowering the requisitioning) would be liable to pay compensation to the owners for the damage caused to the land by the erection and removal of the hangars. If the lands had been leased by mutual consent of parties a lessee who had erected buildings with the lessor's consent would have the right to remove the materials of the buildings erected by him prior to the termination of the lease or to hand over possession with the buildings, and to recover the cost of the materials of the buildings from the lessor. Though the lands in this case were not leased by mutual consent but were compulsorily requisitioned the Admiralty (and subsequently the Railway which

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acquired the lands compulsorily under the Land Acquisition Act) apparently treated the possession as under a lease and allowed the original owners of the lands to retain possession of the hangars and to pay for the materials. It may be regarded as such or as an option given to the owners of the lands to purchase the hangars as they stood if they would be of any use to them. It is immaterial how the matter is viewed. There are two points to be noted. One is that the authorities recognized the assessee as standing in the position of his wife and allowed him to exercise the option and the other is that

10 the assessee did not purchase the option. The option accrued as a result of ownership of the land. Of course it accrued to the other co-owners as well. In order to avoid competition among themselves the assessee paid them some consideration and they allowed him to exercise his right without any rivalry.

The assessee then negotiated with the authorities as to the price to be paid for the hangars and this was agreed upon at Rs. 90,000. The fact that the assessee did not have the money to be paid and had to go about devising ways and means of raising the money has no bearing on the case. Eventually he found the money and paid off the

20 Authorities and became the owner. He undoubtedly purchased with the intention of re-selling and he sold the hangars to Mr. Beddewela, for Rs. 279,000. The question is whether the profits less the expenses incurred are taxable under the Income Tax Ordinance.

The relevant sections of the Income Tax Ordinance are sections 6 (1) (a) and section 6 (1) (h). The Assessor, very properly in our view, did not press the case under section 6 (1) (h). Section 6 (1) (a) states " For the purposes of this Ordinance ' profits and income ' or ' profits ' or ' income ' means the profits from any trade for how-

30 ever short a period carried on or exercised ". Section 2 defines trade as " includes every trade and manufacture, and every adventure and concern in the nature of trade " There is a distinction to be drawn between " trade " and " an adventure and concern in the nature of trade ". Trade imports the meaning of a continuity of transactions of purchase and sale either executed or contemplated. Lord Clyde stated in the case of Commissioners of Inland Revenue *vs.* Livingstone and others (11 T. C. 538) as follows: " The trade of a dealer necessarily consists of a course of dealing, either actually engaged in or at rate contemplated and intended to continue ". A

40 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. In the case under consideration 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. Is it an adventure and concern in the nature of trade? In the case of Commissioners of Inland Revenue *vs.* Livingstone referred to above

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 X 2.
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 21.12.54.
 —contd.

Lord Clyde proceeded to say “ I think the test which must be used to determine whether a venture such as we are considering is, or is not, in the nature of trade, is whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made ”. A number of cases were cited before the Board where single instances of transactions of purchase and sale were held to be adventures in the nature of trade. Some of them have been reviewed by Justice Rowlatt in *Leeming vs. Jones* (15 T. C. 333) in the following words:— “ Where an important and large asset is bought and it is sub-divided and so made more marketable and the sub-division is advertised, and so on, as in the linen case (*Martin vs. Lowry* 11 T. C. 297) that is one thing; where you get a thing altered and treated and dealt with in an expert way and also sub-divided, such as the Cape Brandy Syndicate case 12 T. C. 358, that is another; and when you get a thing, although it is not altered and sub-divided, yet it is in this sense, that is thoroughly repaired and converted into a new and better article, like the steam-drifter case (*Commissioners of Inland Revenue vs. Livingstone* 11 T. C. 538), that is another. It will be seen that the case under consideration has no similarities to the features pointed out by Justice Rowlatt. There are two other cases it would be useful to refer to. In *Rutledge vs. Commissioners of Inland Revenue* (14 T. C. 490) Lord Clyde describes the assessee as “ the appellant is a business man with many interests; he lends money, he is connected with the film business, and he deals in real property. ” The assessee whose case is under consideration is not a business man at all. His interests are purely agricultural. Rutledge purchased a large quantity of toilet paper in Germany when he found it was going cheap and sold it in England at a large profit. The profits were held to be taxable. In the case of *Commissioners of Revenue vs. Fraser* (24 T. C. 498) a wood-cutter bought through an agent for re-sale whisky in bond in 1937 and 1938. In 1940 after the price had risen he had it sold at a large profit. It was held that the transaction was an adventure in the nature of trade. The facts set out with regard to that case mention that the purchase and sale of whisky in similar circumstances was a common type of transaction in the neighbourhood. (*Vide* page 499 of T. C. 24). It will be noted that in every case where a single transaction has been held to be an adventure in the nature of trade the dealing was in an ordinary marketable commodity. Linen, brandy, ship, paper and whisky can be purchased at any time and sold at any time. The assessee in those cases purchased wherever these articles of merchandise were to be had cheap and sold when and where they could be sold at a high price. That is exactly what is understood by commerce. Apart from the points of difference indicated by Justice Rowlatt, another point of difference between the case under consideration and the cases referred to above is that the article purchased was not an

ordinary article or merchandise usually bought and sold. Hangars are not in common use. There may be hundreds of persons to whom linen, ships, brandy, paper and whisky may be sold. The purchasers for hangars by their very nature must be limited. Though an attempt was made to find purchasers in India it was found not possible. Mr. Beddewela who purchased from the assessee managed to find a purchaser in Pakistan, where a considerable amount of construction works is going on subsequent to its partition from India. Still another difference is that the option to purchase was an accretion to the land of the assessee's wife. It is thus a stronger case than the case of *Leeming vs. Jones* (15 T. C. 333) where though the option was purchased it was held that the profits of sale of the property were not taxable. If the assessee had not exercised the option and purchased the hangars he would have received compensation for the damage to the land. Such compensation would not be taxable. The fact that by exercising the option he has received more than what he would have received by way of compensation cannot render what he has received taxable.

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The case of *Wickremasinghe vs. Commissioner of Income Tax* (18 N.L.R. 481) which was cited by the Assessor has no application. The fees which the late Mr. Wickremasinghe earned were fees from an employment under section 6 (1) (b) of the Income Tax Ordinance. In the case of *Ryall vs. Hoare* (8 T. C. 521) Justice Rowlatt observed as follows:—"Again take the case of a person who is appointed to perform some services, which might possibly be by way of an office, a person appointed not carrying on any trade or business, but who happens to be appointed—as a retired Judge was appointed some years ago to hold a very important arbitration in connection with the London water—appointed with a lump sum remuneration to do a particular piece of work, or, to take a humbler instance, which is more familiar to us here, the case of a Judge's Marshal, who gets a little appointment for a week or two, in the experience of everybody (many certainly who hear me now) he suffers a deduction of Income Tax when his modest emolument is paid to him" Those words describe the Wickremasinghe case.

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If the profits are not taxable under the Income Tax Ordinance they are not taxable under the Profits Tax Act. If the profits were taxable under the Income Tax Ordinance they would be taxable under the Profits Tax Act for 1948 and not for 1949. This was admitted by the Assessor. He also admitted that no claim could be made in respect of 1948 as it was time-barred at the time that the matter came up for consideration by the Commissioner. He, however, urged that the assessee had agreed at the Commissioner's inquiry that it would be liable for Profits Tax for the year 1949 if it were liable for Income Tax and that he is now bound by the agreement. As it has been stated earlier in this judgment the

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 X 2.
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assessee denies the agreement. Mr. Adv. Weeramantri who represented the assessee before the Commissioner and who was Junior to Mr. Adv. Jayawardene at the hearing of the Board denied that he agreed on behalf of the assessee. However, that may be, it takes two parties to arrive at an agreement. If the Commissioner made an error in thinking that the profits were liable for the year 1949 the assessee's error cannot be held against him.

In the result the decision of the majority of the Board is that the profits under consideration are not taxable under the Income Tax Ordinance or under the Profits Tax Act.

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(Sgd.) R. R. SELVADURAI,
 8.12.1954.

I agree.

(Sgd.) R. P. GADDUM,
 14.12.54.

FINDINGS OF SIR ARTHUR WIJEYWARDENE

- (1) I think that the transaction of the appellant in respect of the hangars was an adventure in the nature of trade and that the profits accruing from such re-sale was not in the nature of a capital accretion. The transaction was clearly an adventure. The activities of the appellant even before he purchased the hangars including the agreements he made with Mr. Goonetilleke and Mr. Cyril de Zoysa support this view. Is it an adventure in the nature of trade? No doubt, it is difficult very often to say that a single transaction in the form of a purchase and sale constitute a trade but I am satisfied that the appellant's transaction was an adventure in the nature of trade. He did not buy the hangars for his private amusement. Nor was the transaction a mere investment as a purchase of shares referred to by the appellant's Counsel. Moreover, he bought the hangars when they were deteriorating in value. I hold that the transaction was an adventure in the nature of trade and that the profits accruing from the transaction attracted income tax under section 6 (1) (a) as explained in section 2 of the Income Tax Ordinance.

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- 10 (2) There is some difficulty with regard to the Profits Tax for 1949. The appellant's Counsel submitted to us that the Commissioner of Income Tax has made a mistake in recording that the appellant's Counsel who appeared before the Commissioner admitted that the profits of the transaction would be liable for Profits Tax for 1949 if they became liable for Income Tax for 1948-49. The transaction itself was complete in 1948 and the Assessor who appeared before us admitted that the profit would have become liable for Profits Tax for 1948 and not 1949. A document referred to by appellant's Counsel seems to show that the Commissioner of Income Tax has made a mistake in recording the alleged admission by appellant's Counsel.
- (?) I would dismiss the appeal as regards Income Tax for 1948-1949 and allow the appeal in respect of Profits Tax for 1949. I would make no order as to costs.

Exhibits
X 2.
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(Sgd.) E. A. L. WIJEYWARDENE,
Chairman.