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16, 1952

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1951

Supreme Court of Ceylon  
No. 235 (Final) of 1950.

Case stated for the opinion of the  
Supreme Court under the provi-  
sions of section 74 of the Income  
Tax Ordinance (Chapter 188.)

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

BETWEEN

THE COMMISSIONER OF INCOME  
TAX, Colombo .....

~~Respondent~~ Respondent-Appellant

UNIVERSITY OF LONDON  
W.C.1.  
21 JUL 1953  
INSTITUTE OF ADVANCE  
LEGAL STUDIES

AND

Mrs. A. J. SUTHERLAND (Executrix  
of the Estate of R. W. SUTHERLAND,  
deceased) presently of England .....

~~Respondent~~ Appellant-Respondent

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RECORD  
OF PROCEEDINGS

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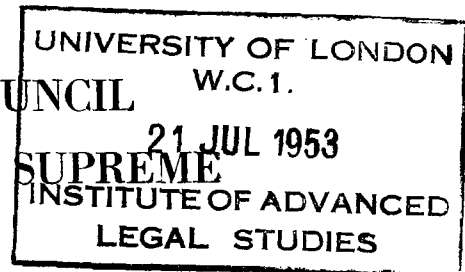
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Supreme Court of Ceylon  
No. 235 (Final) of 1950.

Case stated for the opinion of the  
Supreme Court under the provi-  
sions of section 74 of the Income  
Tax Ordinance (Chapter 188.)

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



BETWEEN

THE COMMISSIONER OF INCOME

TAX, Colombo ..... ~~Respondent~~ - *Respondent - Appellant*

AND

MRS. A. J. SUTHERLAND (Executrix  
of the Estate of R. W. SUTHERLAND,  
deceased) presently of England .....

~~Respondent~~ *Appellant - Respondent*

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RECORD OF PROCEEDINGS

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# PART I

## No. 1

### Case stated by the Board of Review, Income Tax, for the opinion of the Supreme Court

No. 1  
Case stated by  
the Board of  
Review, Income  
Tax, for the  
opinion of the  
Supreme Court  
16-5-50

#### *Case Stated*

10

for the opinion of the Hon'ble the  
Supreme Court under the provisions  
of section 74 of the Income Tax  
Ordinance (Chapter 188), upon the  
application of

MRS. A. J. SUTHERLAND, (Executrix of the Estate of  
R. W. Sutherland, deceased) ..... *Appellant*.

1. The Appellant is the widow and Executrix of the Estate of  
the late R. W. Sutherland (hereinafter referred to as the deceased),  
who died on 12th June, 1946.

2. The deceased was the Managing Director of the Colombo  
Apothecaries Company, Limited (hereinafter referred to as the  
Company), from November, 1939, to the date of his death.

20 3. In regard to the terms of the deceased's employment, which  
were not contained in a written contract, the following statement is  
made by the Company's Accountants, Messrs. Ford, Rhodes,  
Thornton & Company, to the Assessor in a letter (D8) dated 15th  
March, 1949:—

“ We advise that there is no written agreement to show the  
late Mr. Sutherland's contract of service with this Company.  
It has however been the normal practice of the Company to pay  
leave pay in proportion to the length of service which has  
elapsed without leave.

30 Mr. Sutherland took up duties as Managing Director in  
December, 1939, and although there was nothing in writing,  
he was understood to be on a normal 4-year contract, with six  
months' leave on full pay and the passage money to be paid by  
the Company for him and his wife ”.

It is common ground that the Deceased's contract of service was  
for the normal 4-year period with 6 months' full pay leave and the  
cost of passages to the United Kingdom for himself and his wife.

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Case stated by  
the Board of  
Review, Income  
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4. At the date of his death the deceased had not taken the leave referred to in the previous paragraph, and after his death the Company made a payment to Mrs. Sutherland which included the sum of Rs. 15,750. This was the total of the amounts which the Company annually placed to reserve in its accounts to meet the contingent liability of the deceased's leave pay and was computed as stated in the Annexure D 3 hereto.

5. The said sum of Rs. 15,750 was included by the Assessor in the assessment, which was made under section 11 (9) of the Income Tax Ordinance, Chapter 188, of the deceased's income for the period 1.4.46 to 12.6.46 in the year of assessment 1946/47. The Appellant contends that the said sum forms no part of the deceased's income. 10

6. The following references to the deceased's employment and the payment of the said sum of Rs. 15,750 are made in the documents produced at the hearings before the Assistant Commissioner of Income Tax and before the Board of Review:—

(a) By D 2 dated 18.2.48, the Company informed the Assessor that a certain amount of leave pay lapsed and the deceased's Estate was not entitled to it. This statement was amplified by the Company in the following letter, (X 2), dated 1.6.48:— 20

“ With reference to your letter No. 488/41 (CE) of the 31st ultimo, the total amount of leave pay amounted to Rs. 15,750 and the whole of this sum on the death of Mr. Sutherland lapsed and his Estate was not entitled to, and was, therefore, not paid this sum.

This sum was, however, paid to his widow, Mrs. Sutherland, as an *ex gratia* payment in accordance with the following Resolutions:—

“ The Directors having taken note that a sum of Rs. 15,750 had been placed to reserve to meet the contingent liability to pay for Mr. Sutherland's leave pay which, he would have been entitled to, if he had survived, it was decided to pay Mrs. Sutherland's passage to England and to authorise a payment to her of Rs. 15,750 which amount was accordingly paid to Mrs. Sutherland.” 30

(b) In its letter dated 17.12.48 (D4) to the Assessor the Company stated that “ the late Mr. Sutherland was due to leave Ceylon on retirement about September or October, 1946, and that the amount of leave pay earned by him would have been paid before his departure.” 40

(c) By letter (D5) of 1st February, 1949, the Assessor enquired from the Company's Accountants whether the payment to Mrs. Sutherland was made *ex gratia* or in discharge of a legal liability.

(d) The Company's Accountants replied by D6 of 23.2.49 that the payment was in respect of accrued furlough pay due to the Deceased and was not an ex gratia payment. With D6 was sent the following certified extract from the Minutes of a meeting of the Company's Board held on 17.7.46:—

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the Board of  
Review, Income  
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--contd.

10      “ The Directors having taken note that a sum of Rs. 15,750 had been placed to reserve to meet the contingent liability to pay for Mr. Sutherland's leave pay which, he would have been entitled to, if he had survived, it was decided to pay Mrs. Sutherland's passage to England, namely Rs. 1,502, and to authorise a payment to her of Rs. 15,750.”

(e) In D8 (which has already been referred to in the 3rd paragraph of this case) the Company's Accountants refer to the said sum of Rs. 15,750 as “ accumulated leave pay due to Mr. Sutherland at the time of his death ”.

20      7. The Appellant appealed against the assessment to the Commissioner of Income Tax and the Deputy Commissioner of Income Tax, who heard the appeal, confirmed the assessment on the ground that the sum of Rs. 15,750 was a profit from the deceased's employment.

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

- 30      (a) The sum of Rs. 15,750 paid to the widow of the late Mr. Sutherland in terms of the resolution dated 17th July, 1946, does not constitute profits from employment carried on by the late Mr. Sutherland.
- (b) The said sum of Rs. 15,750 is a death gratuity exempted from Income Tax under section 7 (1) (k) of the Income Tax Ordinance.
- (c) In any event the said sum of Rs. 15,750 does not constitute profit or income which accrued between 1st April, 1946, and 12th June, 1946, the date of Mr. Sutherland's death and therefore does not constitute statutory income within the provisions of section 11 (9) of the Income Tax Ordinance.

9. Counsel for the appellant contended, inter alia, that:—

40      (a) the term “ full pay leave ” means leave with pay for the period of leave and that the said sum of Rs. 15,750 became payable only if and when the deceased went on leave.

(b) the true position regarding the payment of the said sum of Rs. 15,750 is stated in the annexure to D6 and in X2, and

(c) the deceased had no legal right to the payment, which was made by the Company to Mrs. Sutherland ex gratia, the Company being moved to make it by the deceased's services to it.

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Case stated by  
the Board of  
Review, Income  
Tax, for the  
opinion of the  
Supreme Court  
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10. It was argued by the Assessor that:—

- (a) the sum of Rs. 15,750 represents leave pay and is, therefore, a profit from employment under section 6 (1) (b) of the Income Tax Ordinance,
- (b) the sum of Rs. 15,750 is not exempt from taxation as a death gratuity under section 7 (1) (k) of the Income Tax Ordinance,
- (c) the deceased became legally entitled to leave pay on completing 4 years' service.

11. The Board of Review, by a majority decision from which the Chairman of the Board dissented, dismissed the Appellant's appeal. A copy of the order of the Board is attached hereto as part of this case, marked Z1, together with the findings of the majority and of the dissenting member of the Board, marked respectively Z2 and Z3. 10

12. Dissatisfied with the order of the Board of Review the appellant has applied to the Board that a case should be stated for the opinion of the Hon'ble the Supreme Court on the questions of law arising in this appeal, and this case is stated accordingly.

13. The questions of law which arise in this appeal are:— 20

- (a) Is the said sum of Rs. 15,750 a profit from the deceased's employment within the meaning of section 6 (1) (b) and section 6 (2) (a) (i) and (v) of the Income Tax Ordinance?
- (b) If the answer to the above question (a) is in the affirmative, is the said sum exempt from taxation on the ground that it is a death gratuity under section 7 (1) (k)?
- (c) If the said sum is a profit from employment and not exempt from taxation as aforesaid, is it a part of the deceased's income under section 11 (9) of the Income Tax Ordinance? 30

14. Copies of the documents produced in the appeals to the Commissioner of Income Tax and to the Board of Review, marked A to E, D1 to D8 and X1 and X2 are annexed hereto as part of this case.

15. The amount of tax in dispute in this appeal is Rs. 7,565.87.

- 1. (Sgd.) W. SANSONI,
- 2. (Sgd.) S. DIAS,
- 3.\*

*Members of the Board of  
Review, Income Tax.*

Colombo, May 16, 1950. 40

\* The signature of Mr. W. S. de Saram, the third member who heard the appeal, is not available as he is now out of the Island on a long holiday.



## Judgment of the Supreme Court

No. 2  
Judgment of  
the Supreme  
Court  
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D. C. (F) 235M/1950.

*Case Stated*

10

for the opinion of the Supreme Court under the provisions of section 74 of the Income Tax Ordinance (Cap. 188), upon the application of Mrs. A. J. Sutherland, Executrix of the Estate of R. W. Sutherland, deceased ..... *Appellant*.

*Present* . JAYATILEKE, C.J. and GUNASEKARA, J.

H. V. PERERA, K.C., with NAVARATNARAJAH  
for the ..... *Assessee-Appellant*.

H. W. R. WEERASOORIYA, Acting Solicitor-General,  
with D. JANSZE, C. C., for the Commissioner of  
Income Tax ..... *Respondent*.

*Argued* : 22nd January, 1951.

20 *Decided* : 27th April, 1951.

GUNASEKARA, J.

30 This is a case stated under section 74 of the Income Tax Ordinance (Cap. 188) upon the application of the appellant, who is the executrix of the estate of her husband, R. W. Sutherland. The deceased had been the Managing Director of the Colombo Apothecaries Company, Limited, from November, 1939, until his death on the 12th June, 1946. The question for decision is whether a sum of Rs. 15,750 that was paid by the Company to the widow in the circumstances set out in the Case Stated was a profit from the deceased's employment within the meaning of section 6 (1) (b) and section 6 (2) (a) (i) and (v) of the Ordinance.

It is stated to be common ground that " the deceased's contract of service was for the normal four-year period with six months' full pay leave and the cost of passages to the United Kingdom for himself and his wife. " His salary was Rs. 1,500 a month and he

had taken no leave at all in the period November, 1939, to 12th June, 1946. On the 17th July, 1946, the Company's board of directors passed the following resolution :

“ The directors having taken note that a sum of Rs. 15,750 had been placed to reserve to meet the contingent liability to pay for Mr. Sutherland's leave pay which he would have been entitled to if he had survived, it was decided to pay Mrs. Sutherland's passage to England, namely Rs. 1,502 and to authorise a payment to her of Rs. 15,750. ”

The Board of Review finds that this sum was “ the total of the amounts which the company annually placed to reserve in its accounts to meet the contingent liability of the deceased's leave pay ”, and also that “ after his death the company made a payment to Mrs. Sutherland which included the sum of Rs. 15,750 ”. 10

This sum was included in the Income Tax Department's assessment of the deceased's income, and the executrix appealed to the Board of Review. The Board, consisting of three members, dismissed the appeal by a decision of the majority, who held that the sum in question was part of the deceased's profits from his employment, being “ leave pay ” that had “ accrued to his account.” They based this conclusion upon their construction of the resolution of the board of directors and certain statements contained in letters written on behalf of the Company that were produced in evidence. 20

Three of these are letters written on behalf of the Company by its secretary to Messrs. Julius & Creasy (the appellant's proctors) on the subject of the deceased's estate. The earliest, which is dated the 8th July, 1946, states that the only amount outstanding as Mr. Sutherland's salary is his salary for June, that the amount earned by him as commission has not yet been ascertained, and that no director's fees or allowances are due. The next, dated the 19th July, 1946—two days after the resolution of the board of directors—states that “ a sum of Rs. 1,502 has already been paid on behalf of Mrs. Sutherland's passage and a further sum of Rs. 15,750 is to be paid to Mrs. Sutherland in respect of the late Mr. Sutherland's overdue leave pay.” The third letter, which is dated the 8th November, 1946, encloses a cheque for Rs. 17,252 “ drawn in your favour on behalf of Mrs. R. W. Sutherland in connection with the above estate. ” The reference in the second letter to “ overdue leave pay ” has been treated by the majority of the Board of Review as evidence that the sum of Rs. 15,750 was a sum that had accrued to Mr. Sutherland's account as leave pay. This view of the statement in that letter regarding the sum in question appears to be based on a misapprehension of its effect, for, read in its context, the statement amounts to nothing more than an attempt to convey the gist of the resolution of the board of directors. 30 40

On the 15th March, 1947, the Company's secretary sent to the assessor a return regarding Mr. Sutherland's remuneration, which included an item described as "overdue leave pay Rs. 15,750 paid Messrs. Julius & Creasy, administrators of the estate", and the covering letter (signed by the secretary on the Company's behalf) states that there "accrued to his account a sum of Rs. 15,750 being overdue leave pay which sum was sent to Messrs. Julius & Creasy, the administrators of the estate." Nevertheless, in a letter of the 15th February, 1948, from the Company to the assessor (which too is signed by the secretary), the Company state that the deceased's remuneration for the period 1st April to 12th June, 1946, was Rs. 4,050 (made up of the salary for April, May and June, 1946, totalling Rs. 3,550 and a valuator's fee of Rs. 500) and that they "confirm that a certain amount of leave pay lapsed at his death and his estate was not entitled to it." Upon receipt of this letter the assessor wrote to the Company's secretary referring to the letter of the 17th March, 1947, and inquiring whether she was to understand "that of the accrued leave pay a sum of Rs. 15,750 was paid and that the balance accrued leave pay lapsed." To this inquiry the Company, through its secretary replied on the 1st June, 1948, as follows :

"..... the total amount of leave pay amounted to Rs. 15,750 and the whole of this sum on the death of Mr. Sutherland lapsed and his Estate was not entitled to, and was therefore not paid, this sum. This sum was, however, paid to his widow, Mrs. Sutherland, as an *ex gratia* payment in accordance with the following resolutions :—

' The Directors having taken note that a sum of Rs. 15,750 had been placed to reserve to meet the contingent liability to pay for Mr. Sutherland's leave pay which he would have been entitled to if he had survived, it was decided to pay Mrs. Sutherland's passage to England and to authorise a payment to her of Rs. 15,750 ' which amount was accordingly paid to Mrs. Sutherland. '

The position taken up on the Company's behalf in this correspondence is that the sum in question represented Mr. Sutherland's "overdue leave pay" that had "accrued to his account" but had "lapsed" upon his death so that "his estate was not entitled to it", and that it was paid to Mrs. Sutherland, through the proctors for the executrix, in pursuance of a resolution of the board of directors to make an *ex gratia* payment to her. Here again it is apparent that what is sought to be conveyed by the Company's letters is no more than the secretary's interpretation of the resolution and the payment; and his interpretation, it seems to me, was not relevant to the question that the Board of Review had to decide. The decision of the Board, however, is to a large extent based on the

description given to the payment in the letter of the 15th March, 1947, (which is marked D1) as appears from the reference to it in the following passage in the " Findings " of the majority :

“ When Mr. Sutherland died on the 12th June, 1946, there accrued to his account a sum of Rs. 15,750 being overdue leave pay (D1) which was sent to Messrs. Julius & Creasy, the Proctors for the Executrix. ”

By a letter dated the 17th December, 1948, written on behalf of the Company, the Managing Director informed the assessor that Mr. Sutherland “ was due to leave Ceylon on retirement about September or October, 1946, and that the amount of leave pay earned by him would have been paid before his departure.” The Company had in the meantime included this sum in a “ passage and furlough claim ” made by them in respect of the year of assessment 1947-48. On the 1st February, 1949, the assessor who was dealing with the question of the income tax payable by the Company wrote to the Company’s accountants stating that it appeared that a sum of Rs. 17,252 had been “ paid to the widow of the late Mr. R. W. Sutherland during the year ended 31.3.47 ” and inquiring “ whether this payment was made *ex gratia* or in discharge of a legal liability. ” He asked them to “ confirm that this sum was included in the passage and furlough claim ” and also to send him “ a copy of the Directors’ minute authorising this payment. ” The accountants replied on the 23rd February, 1949, that they had been informed by the managing director “ that the Rs. 17,252 was in respect of accumulated furlough pay and passage money due to the late Mr. Sutherland to the date of his death. ” They added that the payment was not an *ex gratia* payment, and they also confirmed that the sum was included in the passage and furlough claim that had been referred to and they enclosed a copy of the directors’ resolution of the 17th July, 1946. On the 19th March, 1949, in reply to a further request from the assessor for a copy of Mr. Sutherland’s contract of service, they wrote the letter D8, which is in the following terms :

“ In reply to your letter of the 4th of March, 1949, we have received the following reply from the Company.

‘ We advise that there is no written agreement to show the late Mr. Sutherland’s contract of service with this Company. It has however been the normal practice of the Company to pay leave pay in proportion to the length of service which has elapsed without leave. Mr. Sutherland took up duties as Managing Director in December, 1939, and although there was nothing in writing, he was understood to be on a normal 4-year contract, with six months leave on full pay and the passage money to be paid by the Company for him and his wife. The

accumulated leave pay due to Mr. Sutherland at the time of his death in June, 1946, amounted to Rs. 15,750. Provision was made to pay the above sum of Rs. 15,750 as per the Board of Directors' resolution at a meeting held on 17th July, 1946, reading as follows :—

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the Supreme  
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(The resolution is quoted) ' which amount was accordingly paid to Mrs. Sutherland. ' "

Yours faithfully,  
(Sgd.) Ford, Rhodes, Thornton & Co.

- 10 Upon the statement about the " normal practice of the Company " that is quoted in this letter the majority of the Board has based a finding that under his contract Mr. Sutherland was entitled at any given time to demand in addition to his salary " leave pay " in respect of any period of leave which he was entitled to take but had not taken. Even if it is assumed that " leave pay " means " pay instead of leave " and not exclusively " pay during leave ", and that the quotation in D8 is evidence of the " normal practice of the Company ", there appears to be nothing to shew that this practice was followed in Mr. Sutherland's case, and there is no other
- 40 evidence that his contract included a term entitling him to claim a money payment in lieu of leave. On the contrary, the board of directors has acted on the footing that at the time of his death he had no more than a contingent right to " leave pay ", for that is the basis of the resolution of the 17th July, 1946. The description of the sum of Rs. 15,750 as " the accumulated leave pay due to Mr. Sutherland at the time of his death in June, 1946," which is quoted in D8, may indicate that the person who wrote on the Company's behalf the letter that is quoted by the accountants, held the opinion that Mr. Sutherland had a vested right to that sum
- 30 and not merely a contingent right as is indicated in the resolution; but there is no evidence of the facts upon which that opinion was based. The same thing may be said of the Managing Director's statement that is quoted by the accountants in their letter of the 23rd February, 1947, if it means that Mr. Sutherland had a vested and not merely a contingent right; though it seems very improbable that the Managing Director did purport to say that at the time of Mr. Sutherland's death there was already due to him from the Company the cost of a passage for himself to the United Kingdom, which therefore his estate was entitled to be paid.
- 40 There is no evidence that the sum of Rs. 15,750 was in fact paid to the estate; the case stated itself says that the payment was made to Mrs. Sutherland, and the circumstances that she happened to be the executrix is by itself insufficient to make it a payment to the estate. There is also no evidence that the sum that was paid represented a debt due from the Company to the deceased: the case itself states that it represented a sum placed to reserve in its accounts to meet the *contingent* liability of the deceased's leave

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—contd.

pay.” According to the resolution in pursuance of which the payment was made to Mrs. Sutherland, what induced the board of directors to “authorise a payment *to her* of Rs. 15,750” was the fact that a similar sum “had been placed to reserve to meet the *contingent liability* to pay for Mr. Sutherland’s leave pay which he *would have been entitled to if he had survived.*” The only evidence as regards the nature of the payment is that it was a gift to Mrs. Sutherland from the Company that had been her husband’s employer and that the motive for the gift was the circumstance that it represented a sum of money that her husband “would have been entitled to if he had survived” though he died before he became entitled to it. The circumstance that at various times the Company’s officials chose such expressions as “overdue leave pay” and “accumulated furlough pay and passage money due to the late Mr. Sutherland” to describe the nature of the payment that was made in pursuance of the resolution of the board of directors has no bearing on the question. Moseley J. observed in *Craib v. Commissioner of Income Tax*<sup>1</sup> that the assessee in that case should not “be penalized for the choice of a word, whether it be deliberate or accidental, by the party making the payment”. That observation was made in regard to the language of a resolution of the board of directors of a company in pursuance of which the payment in question was made to the assessee who was an employee of the Company. A similar observation may be made with greater force in the present case regarding the expressions chosen by the Company’s officials. The only proper conclusion from the facts set out in the case stated is that the payment in question was a gift to Mrs. Sutherland personally of a sum of money to which the deceased was not entitled, and was not a payment made to her in her capacity of executrix. It was therefore not a profit from the deceased’s employment within the meaning of section 6 (1.)

I would allow the appeal with costs and direct that the fee of Rs. 50 deposited by the appellant in terms of section 74 (1) of the Ordinance be refunded to her.

(Sgd.) E. H. T. GUNASEKARA,  
*Puisne Justice.*

JAYETILEKE C. J.  
I agree.

(Sgd.) E. G. P. JAYATILEKE,  
*Chief Justice.* 40

<sup>1</sup> (1939) 40 N. L. R. 337 at 340.

**Decree of the Supreme Court**

GEORGE THE SIXTH, BY THE GRACE OF GOD OF GREAT BRITAIN,  
NORTHERN IRELAND AND THE BRITISH DOMINIONS BEYOND THE  
SEAS KING, DEFENDER OF THE FAITH.

IN THE SUPREME COURT OF THE ISLAND OF CEYLON

Mrs. A. J. SUTHERLAND (Executrix of the estate  
of H. W. Sutherland, deceased) ..... *Appellant*.

D.C. (F) 235/1950.

10

*Against*

THE COMMISSIONER OF INCOME TAX ..... *Respondent*.

Case stated for the opinion of the  
Supreme Court under the provi-  
sions of section 74 of the Income  
Tax Ordinance (Cap. 188).

20

This cause coming on for hearing and determination on the  
22nd January and 27th day of April, 1951, and on this day, upon  
an appeal preferred by the Assessee-Appellant before the Hon.  
Sir Edward George Perera Jayetilleke, Kt., K.C., Chief Justice,  
and the Hon. Mr. E. H. T. Gunasekara, Puisne Justice of this  
Court, in the presence of Counsel for the Appellant and  
Respondent.

It is considered and judged that this appeal be and the same is  
hereby allowed with costs and it is directed that the fee of Rs. 50  
deposited by the appellant in terms of section 74 (1) of the  
Ordinance be refunded to her.

30

Witness the Hon. Mr. R. F. Dias, LL.D., Senior Puisne Justice,  
at Colombo, the 8th day of May, in the year of our Lord One  
thousand nine hundred and fifty-one, and of Our Reign the  
Fifteenth.

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

No. 4  
Application for  
Conditional  
Leave to appeal  
to the Privy  
Council  
8-5-51

No. 4

**Application for Conditional Leave to Appeal  
to the Privy Council**

IN THE SUPREME COURT OF THE ISLAND OF CEYLON.

*Case stated*

for the opinion of the Hon'ble the  
Supreme Court under the provisions  
of section 74 of the Income Tax  
Ordinance (Chapter 188) upon the  
application of Mrs. A. J. Suther- 10  
land, Executrix of the estate of  
R. W. Sutherland, deceased.

MRS. A. J. SUTHERLAND, Executrix of the estate  
of R. W. Sutherland, deceased ..... *Appellant.*

D.C. (F) 235 M/1950.

*Vs.*

THE COMMISSIONER OF INCOME TAX,  
Colombo ..... *Respondent.*

THE COMMISSIONER OF INCOME TAX,  
Colombo ..... *Respondent-Petitioner.* 20

*Vs.*

MRS. A. J. SUTHERLAND, Executrix of the  
estate of R. W. Sutherland, deceased, presently of  
England ..... *Appellant-Respondent.*

*To:*

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

On this 8th day of May, 1951.

The humble petition of the Commissioner of Income Tax, the  
Respondent-Petitioner above-named, appearing by Clifford Trevor 30  
de Saram his Proctor states as follows:—

1. That feeling aggrieved by the judgment and decree of this  
Honourable Court pronounced in this case on the 27th day of April,  
1951, the above-named Respondent-Petitioner is desirous of  
appealing therefrom to His Majesty the King in Council.



2. That the said judgment is a final judgment and the matter in dispute on the appeal is of the value of Five thousand rupees.

WHEREFORE the Respondent-Petitioner prays for conditional leave to appeal against the said judgment of this Court dated the 27th day of April, 1951, to His Majesty the King in Council.

No. 4  
Application for  
Conditional  
Leave to appeal  
to the Privy  
Council  
8-5-51  
---contd.

(Sgd.) TREVOR DE SARAM,  
*Proctor for Respondent-Petitioner.*

No. 5  
Decree granting  
Conditional  
Leave to appeal  
to the Privy  
Council  
11-5-51

**Decree granting Conditional Leave to Appeal  
to the Privy Council**

GEORGE THE SIXTH, BY THE GRACE OF GOD OF GREAT BRITAIN,  
NORTHERN IRELAND AND THE BRITISH DOMINIONS BEYOND THE  
SEAS KING, DEFENDER OF THE FAITH.

IN THE SUPREME COURT OF THE ISLAND OF CEYLON.  
THE COMMISSIONER OF INCOME TAX,  
COLOMBO ..... *Respondent-Petitioner.*

*Against*

10

MRS. A. J. SUTHERLAND, Executrix of  
the estate of R. W. Sutherland, deceased,  
presently of England ..... *Appellant-Respondent.*

*Case stated*

for the opinion of the Hon'ble the  
Supreme Court under the provisions  
of section 74 of the Income Tax  
Ordinance (Chapter 188) upon the  
application of Mrs. A. J. Suther-  
land, Executrix of the estate of  
R. W. Sutherland, deceased.

20

Supreme Court No. 235 (Final)

In the matter of an application dated 9th May, 1951, for condi-  
tional leave to Appeal to His Majesty the King in Council, by the  
Respondent-Petitioner above named, against the decree dated 27th  
April, 1951.

This matter coming on for hearing and determination on the 11th  
day of May, 1951, before the Hon. Mr. E. F. N. Gratiaen, K.C.,  
Puisne Justice, and the Hon. Mr. M. F. S. Pulle, K.C., Puisne  
Justice of this Court, in the presence of Counsel for the Respondent-  
Petitioner.

30

It is considered and adjudged that this application be and the  
same is hereby allowed.

Witness the Hon. Mr. R. F. Dias, LL.D., Senior Puisne Justice  
at Colombo the 16th day of May, in the year of Our Lord One  
thousand Nine hundred and Fifty-one, and of Our Reign the  
Fifteenth.

W. G. WOUTERSZ,  
*Deputy-Registrar, S.C.*

**Application for Final Leave to Appeal  
to the Privy Council**

IN THE SUPREME COURT OF THE ISLAND OF CEYLON.

*Case stated*

10

for the opinion of the Hon'ble the  
Supreme Court under the provisions  
of section 74 of the Income Tax  
Ordinance (Chapter 188) upon the  
application of Mrs. A. J. Suther-  
land, Executrix of the estate of  
R. W. Sutherland, deceased.

MRS. A. J. SUTHERLAND, Executrix of the estate  
of R. W. Sutherland, deceased ..... *Appellant.*

D.C. (F) 235 M/1950.

*Vs.*

THE COMMISSIONER OF INCOME TAX,  
COLOMBO ..... *Respondent.*

20 THE COMMISSIONER OF INCOME TAX,  
COLOMBO ..... *Respondent-Petitioner.*

*Vs.*

MRS. A. J. SUTHERLAND, Executrix of the estate  
of R. W. Sutherland, deceased, presently of  
England ..... *Appellant-Respondent.*

On this 11th day of May, 1951.

The humble petition of the Respondent-Petitioner above named  
states as follows:—

30 1. That the Respondent-Petitioner on the 11th day of May, 1951,  
obtained conditional leave to appeal to His Majesty the King in  
Council against the judgment of this Court pronounced on the 27th  
day of April, 1951.

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 Respondent-Petitioner on any appeal

No. 6  
Application for  
Final Leave to  
appeal to the  
Privy Council  
11-5-51  
—contd.

to His Majesty the King 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.

WHEREFORE the Respondent-Petitioner prays that he be granted final leave to appeal against the said judgment of this Court dated the 27th April, 1951, to His Majesty the King in Council.

(Sgd.) TREVOR DE SARAM,  
*Proctor for Respondent-Petitioner.*

**Decree granting Final Leave to Appeal  
to the Privy Council**

No. 7  
Decree granting  
Final Leave to  
Appeal to the  
Privy Council  
17-5-51

GEORGE THE SIXTH, BY THE GRACE OF GOD OF GREAT BRITAIN,  
NORTHERN IRELAND AND THE BRITISH DOMINIONS BEYOND THE  
SEAS KING, DEFENDER OF THE FAITH.

IN THE SUPREME COURT OF THE ISLAND OF CEYLON.

THE COMMISSIONER OF INCOME TAX,  
Colombo ..... *Respondent-Petitioner*

10

*Against*

MRS. A. J. SUTHERLAND, Executrix of the estate  
of R. W. Sutherland, deceased, presently of  
England ..... *Appellant-Respondent.*

*Case stated*

20

for the opinion of the Hon'ble the  
Supreme Court under the provisions  
of section 74 of the Income Tax  
Ordinance (Chapter 188) upon the  
application of Mrs. A. J. Suther-  
land, Executrix of the estate of  
R. W. Sutherland, deceased.

Supreme Court No. 235 (Final)

In the matter of an application by the Respondent-Petitioner  
abovenamed dated 11th May, 1951, for Final Leave to Appeal to  
His Majesty the King in Council from the judgment and decree of  
this Court dated 27th April, 1951.

30

This matter coming on for hearing and determination on the 17th  
day of May, 1951, before the Hon. Mr. E. F. N. Gratiaen, K.C.,  
Puisne Justice and the Hon. Mr. M. F. S. Julle, K.C., Puisne  
Justice of this Court, in the presence of Counsel for the Applicant  
and there being no appearance for the Respondent.

It is ordered that the applicant's application for Final Leave to  
appeal to His Majesty the King in Council be and the same is  
hereby allowed.

Witness the Hon. Mr. E. H. T. Gunasekara, Puisne Justice, at  
Colombo, the 25th day of May, in the year of our Lord One thousand  
Nine hundred and Fifty-one and of Our Reign the Fifteenth.

(Sgd.) W. G. WOUTERSZ,  
*Deputy Registrar, Supreme Court.*

## PART II

## EXHIBITS

## A.

Exhibits

Letter from Secretary, Colombo Apothecaries' Co. Ltd.,  
to Julius & Creasy

THE COLOMBO APOTHECARIES' CO. LTD.

Prince Street,  
Fort, Colombo,  
P. O. Box No. 31.  
8th July, 1946.

A  
Letter from  
Secretary,  
Colombo  
Apothecaries  
Co., Ltd., to  
Julius & Creasy  
8-7-46

10

Messrs. Julius & Creasy,  
Colombo.

Dear Sirs,

*Estate of R. W. Sutherland Deceased—Your Ref. TY.*

We are in receipt of your letter of the 5th inst. and with reference to the memos already rendered in respect of the bungalow and private accounts of the late Mr. Sutherland, as these accounts include items debited to him after his death, we enclose fresh memos showing the purchases made by him up to the time of his death, which we think you may find necessary.

20

With reference to the 2nd paragraph of your letter, salary due up to the end of May was drawn by the late Mr. Sutherland and the only amount outstanding is his salary for June, which matter will be dealt with at the next Board meeting.

The amount of commission will be disclosed only after our accounts for the year ended 31st March 1946 have been audited; this will take at least a further 2 months. No directors fees or allowances are due.

30

With regard to securities, we enclose copy of letter received from Mr. J. W. E. Adamson of Messrs. Forbes & Walker which speaks for itself.

Yours faithfully,  
THE COLOMBO APOTHECARIES' CO. LTD.,  
Sgd./  
Secretary.

## B.

Exhibits  
B  
Letter from  
Secretary,  
Colombo  
Apothecaries'  
Co., Ltd., to  
Julius & Creasy  
19-7-46

**Letter from Secretary, Colombo Apothecaries' Co. Ltd.,  
to Julius & Creasy**  
**THE COLOMBO APOTHECARIES' CO. LTD.**

Prince Street,  
Fort, Colombo,  
P. O. Box No. 31.  
19th July, 1946.

Messrs. Julius & Creasy,  
Colombo.

10

Dear Sirs,

*Estate of R. W. Sutherland Deceased—Your Ref. TY.*

In reply to your letter of the 18th instant we would point out that a sum of Rs. 1,502 has already been paid on behalf of Mrs. Sutherland's passage and a further sum of Rs. 15,750 is to be paid to Mrs. Sutherland in respect of the late Mr. Sutherland's overdue leave pay.

We however very much regret we are not in a position to give you even an estimated figure of the commission payable to the late Mr. R. W. Sutherland till such time as the Board meets and makes their recommendation and reservations out of the profits for the year ending 1946.

20

We however think this can be made available to you at a not distant date.

Yours faithfully,  
THE COLOMBO APOTHECARIES' CO. LTD.,  
Sgd./  
Secretary.

## C.

C  
Letter from  
Secretary,  
Colombo  
Apothecaries'  
Co., Ltd., to  
Julius & Creasy  
8-11-46

**Letter from Secretary, Colombo Apothecaries' Co. Ltd.,  
to Julius & Creasy**

30

**THE COLOMBO APOTHECARIES' CO. LTD.**

Prince Street,  
Fort, Colombo,  
Post Box No. 31,  
8th November, 1946.

Messrs. Julius & Creasy,  
Colombo.

Dear Sirs,

*Estate of R. W. Sutherland Dec'd.*  
*Your Ref: TY.*

40

With reference to your letter of the 7th instant we enclose fresh cheque for Rs. 17,252 drawn in your favour on behalf of Mrs. R. W.

Sutherland in connection with above estate. With regard to the last para. of your letter we regret we are still not in a position to advise you of the amount of commission due to the above estate till the reports and accounts have been passed at the Annual Meeting of Share Holders. This information however will be made available to you by the middle of December, at the latest.

Exhibits  
C  
Letter from  
Secretary,  
Colombo  
Apothecaries'  
Co., Ltd., to  
Julius & Creasy  
8-11-46  
—contd.

Yours faithfully,  
THE COLOMBO APOTHECARIES' CO LTD.,  
(Sgd.)  
Secretary.

10

## D.

**Letter from Adamson to Mrs. R. W. Sutherland**

12th December, 1946.

Dear Audrey,

20

The Lawyers have now sent me a cheque for Rs. 17,252, being payment made to you by the Colombo Apothecaries' Co. on account of Comrade. This amount has nothing to do with Comrade's estate and is free of Death Duties, etc., Julius & Creasy are getting on with the papers, and I think I have signed the last one and the matter should be settled up fairly soon now.

I am sending a duplicate draft by the next mail and if the first one arrives safely, you will just have to tear up the second one.

We have just had a fortnight up in Nuwara Eliya Phillida staying with the Lintott's and Bridget with the Gaddum's. Phillida now has got rather a bad go of whooping-cough. Yesterday we took her up in a plane to 10,000 feet, hoping this would cure her, but she is still not too good.

I am afraid this is a bit late, but all the best wishes for Christmas and New Year.

30

(Sgd.) ADAMSON.

Mrs. R. W. Sutherland,  
Hobbs, Piltdown,  
Near Uckfield,  
Sussex, England.

I certify that this is a copy of the letter addressed by me to Mrs. R. W. Sutherland.

Sgd.



E.

Exhibits

E

Letter from  
Managing  
Director,  
Colombo  
Apothecaries'  
Co., Ltd., to  
Julius & Creasy  
30-6-49

**Letter from Managing Director, Colombo  
Apothecaries' Co. Ltd., to Julius & Creasy  
THE COLOMBO APOTHECARIES' CO. LTD.**

Prince Street,  
Fort, Colombo,  
Post Box No. 31,  
30th June, 1949.

Messrs. Julius & Creasy,  
Colombo.

10

Dear Sirs,

*Estate of Mr. R. W. Sutherland, Decd.*

With reference to the query raised in the 2nd paragraph of your letter, it is quite correct when you state that on the 19th of July we sent a cheque for Rs. 1,502 on account of Mrs. Sutherland's passage.

In sending you the second payment on 11th November 1946 it should have been for Rs. 15,750 but was made out for the whole amount namely Rs. 17,252. The overpayment of Rs. 1,502 was deducted from the final cheque that was sent to you on 24th January 1947 which happened to be for Rs. 42,208.13 and if it had not been for this deduction, would have been for Rs. 43,710.13.

20

We trust you are now in a position to note that the double payment on account of passage had been set off against the final payment made on the 24th of January, 1947.

Yours faithfully,  
THE COLOMBO APOTHECARIES' CO. LTD.,  
Sgd.  
Managing Director.

D 1.

**Letter from Secretary, Colombo Apothecaries' Co. Ltd.,  
to Assessor**

30

THE COLOMBO APOTHECARIES' CO. LTD.

Prince Street,  
Fort, Colombo,  
15th March, 1947.

Assessor, Unit 3,  
Income Tax Office,  
Colombo,

Dear Sir,

With reference to file No. 488/41 and your letter of the 12th instant, we enclose Return showing particulars of salary and other

40

D 1  
Letter from  
Secretary,  
Colombo  
Apothecaries'  
Co., Ltd., to  
Assessor  
15-3-47

remunerations paid to Mr. R. W. Sutherland (decd.) for the period 1st April, 1945, to 31st March, 1946, and 1st April, 1946, to date of death.

2. The sum of Rs. 1,502 which represents passage money, and which amount in the usual course would have been paid to him had he survived, was paid to his widow, Mrs. R. W. Sutherland.

3. There also accrued to his account a sum of Rs. 15,750 being overdue leave pay which sum was sent to Messrs. Julius & Creasy, the Administrators of the Estate.

Exhibits

D 1

Letter from  
Secretary,  
Colombo  
Apothecaries  
Co., Ltd., to  
Assessor  
15-3-47  
-contd.

10

Yours faithfully,  
THE COLOMBO APOTHECARIES CO. LTD.,  
Sgd.  
Secretary.

VERY URGENT.

*Late Mr. R. W. Sutherland*

File No. 488/41

Return of Income from employment for the  
period April 1, 1945 to 31st March, 1946

- 20
1. Gross Salary: Rs. 18,000.
  2. Gross Pension: Rs. —
  3. Fees: (Valuator) Rs. 500.  
of stocks
  4. Bonus: Rs. —
  5. Gratuity: Rs. —
  6. Commission: Rs. 43,160.13
  7. Allowances whether in cash or otherwise—
 

Passage: Rs.	}	Nil
House: Rs.		
Cooly: Rs.		
Leave Pay: Rs.		
Entertainment: Rs.		
  8. Date up to which leave pay is due?
  9. Other remuneration (if any): Rs. Nil
  10. Quarters provided—
 

Free? Nil
At less than the full rental value? Nil
  11. Contribution to approved fund: Rs.
- 30

Exhibits  
 D 1  
 Letter from  
 Secretary,  
 Colombo  
 Apothecaries'  
 Co., Ltd., to  
 Assessor  
 15-3-47  
 —contd.

12. Date of cessation of employment:

I declare that, to the best of my judgment and belief, the foregoing particulars are fully and truly stated.

(Signature of Declarant): Sgd. ....  
 (Designation): .....  
 (Date): 15th March, 1947.

File No. 488/41

Return of income from employment for the period  
 April 1, 1946, to date of death.

- |   |  |
|---|--|
| 1. Gross Salary: Rs. 3,550                  | 10   |
| 2. Gross Pension: Rs. —                     |  |
| 3. Fees: (Valuator) Rs. 500<br>of stocks    |  |
| 4. Bonus: Rs.                               |  |
| 5. Gratuity: Rs.                            |  |
| 6. Commission: Rs.                          | { will not be known till<br>a/cs. are closed pos-<br>sibly in Sept./Oct.                         |
| 7. Allowances whether in cash or otherwise— |  |
| Passage: Rs. 1,502 pd. Mrs. Sutherland.     | 20   |
| House: Rs.                                  |  |
| Cooly: Rs.                                  |  |
| Entertainment: Rs.                          |  |
| Leave Pay: Rs.                              |  |
| 8. Date up to which Leave Pay is due?       |  |
| 9. Other remuneration (if any): Rs.         | Overdue leave<br>pay Rs. 15,750 paid Messrs. Julius & Creasy, Administra-<br>tors of the Estate. |
| 10. Quarters provided—                      |  |
| Free?                                       | 30   |
| At less than the full rental value?         |  |
| 11. Contribution to approved fund: Rs.      |  |
| 12. Date of cessation of employment:        |  |

I declare that, to the best of my judgment and belief, the foregoing particulars are fully and truly stated.

(Signature of Declarant) Sgd. ....  
 (Designation): .....  
 (Date): 15.3.1947.

## D 2.

**Letter from Secretary, Colombo Apothecaries' Co. Ltd.,  
to Assessor**

**THE COLOMBO APOTHECARIES' CO. LTD.**

Prince Street,  
Fort, Colombo.  
18th February, 1948.

Exhibits  
D 2  
Letter from  
Secretary,  
Colombo  
Apothecaries'  
Co., Ltd., to  
Assessor  
18-2-48

The Assessor,  
Unit 3,  
10 Income Tax Office,  
Colombo.

Dear Sir,

*Mr. R. W. Sutherland—Deceased*

In reply to your letter No. 488/41 (DGO) of the 9th instant, we give below particulars of the above deceased's remuneration for the period from 1st April, 1946, to the date of his death:—

	<i>Rs. c.</i>
Salary for April, May to the date of his death in June	3,550.00
Valuator's fee drawn by him before his death ...	500.00
	<hr/>
	Rs. 4,050.00

We confirm that a certain amount of leave pay lapsed at his death and his Estate was not entitled to it.

Yours faithfully,  
**THE COLOMBO APOTHECARIES' CO. LTD.,**  
Sgd.  
*Secretary.*

## X 1.

**Letter from Assessor to Secretary, Colombo  
Apothecaries' Co., Ltd.**

30 My. Ref. 488/41 (CE).

Income Tax Office,  
Colombo, 31st May, 1948.

Sir,

*Mr. R. W. Sutherland, Deceased*

With reference to your letter of 18th February, 1948, it is noted that you state that a certain amount of leave pay lapsed at Mr. Sutherland's death and that his Estate was not entitled to it.

X 1  
Letter from  
Assessor to  
Secretary,  
Colombo  
Apothecaries'  
Co., Ltd.  
31-5-48

Exhibits  
X 1  
Letter from  
Assessor to  
Secretary,  
Colombo  
Apothecaries'  
Co., Ltd.  
31-5-48  
- contd.

2. In your letter of 15th March 1947 you state that a sum of Rs. 15,750 being overdue leave pay was sent to Messrs. Julius & Creasy, the Administrators of the Estate.

3. Am I to understand from the above that of the accrued leave pay a sum of Rs. 15,750 was paid and that the balance accrued leave pay lapsed?

The favour of a reply by return of post is kindly requested.

I am, Sir,  
Your Obedient Servant,  
Sgd.  
Assessor, Unit 3.

10

The Secretary,  
Messrs. Colombo Apothecaries' Co., Ltd.,  
Colombo.

X 2.

**Letter from Secretary, Colombo Apothecaries' Co., Ltd.,  
to Assessor**

1st June, 1948.

X 2  
Letter from  
Secretary,  
Colombo  
Apothecaries'  
Co., Ltd., to  
Assessor  
1-6-48

The Assessor,  
Unit 3,  
Income Tax Office,  
Colombo.

20

Dear Sir,

*Mr. R. W. Sutherland, Deceased*

With reference to your letter No. 488/41 (CE) of the 31st ultimo, the total amount of leave pay amounted to Rs. 15,750 and the whole of this sum on the death of Mr. Sutherland lapsed and his Estate was not entitled to, and was, therefore, not paid this sum.

This sum was, however, paid to his widow, Mrs. Sutherland, as an *ex gratia* payment in accordance with the following Resolutions :—

30

“ The Directors having taken note that a sum of Rs. 15,750 had been placed to reserve to meet the contingent liability to pay for Mr. Sutherland's leave pay which, he would have been entitled to, if he had survived, it was decided to pay Mrs. Sutherland's passage to England and to authorise a payment to her of Rs. 15,750 ” which amount was accordingly paid to Mrs. Sutherland.

Yours faithfully,  
THE COLOMBO APOTHECARIES' CO., LTD.,  
Sgd./J. A. HONTER,  
Secretary.

40

**D 3.**

**Letter from Secretary, Colombo Apothecaries' Co., Ltd.,  
to Assessor**

THE COLOMBO APOTHECARIES' CO., LTD.,

Prince Street,  
Fort, Colombo.

3rd December, 1948.

Exhibits  
D 3  
Letter from  
Secretary,  
Colombo  
Apothecaries'  
Co., Ltd., to  
Assessor  
3-12-48

The Assessor,  
Unit 3,  
10 Income Tax Office,  
Colombo.

Dear Sir,

*The late Mr. R. W. Sutherland*

In reply to your letter No. 488/41/CE of the 2nd instant the computation of Rs. 15,750 is arrived at by a payment of 1½ months salary for every year of service put in by the late Mr. Sutherland, namely 7 years, and was paid out in 1946.

Yours faithfully,

THE COLOMBO APOTHECARIES' CO., LTD.,

Sgd.

*Secretary.*

30

**D 4.**

**Letter from Managing Director, Colombo Apothecaries' Co., Ltd.,  
to Assessor**

THE COLOMBO APOTHECARIES' CO., LTD.,

Prince Street,  
Fort, Colombo.

Post Box No. 31.  
17th December, 1948.

D 4  
Letter from  
Managing  
Director,  
Colombo  
Apothecaries'  
Co., Ltd., to  
Assessor  
17-12-48

30 The Assessor,  
Unit 3,  
Income Tax Office,  
Colombo.

Dear Sir,

*re. the late Mr. R. W. Sutherland*

With reference to your letter of the 16th instant, we confirm that the late Mr. Sutherland was due to leave Ceylon on retirement about September or October, 1946, and that the amount of leave pay earned

Exhibits  
D 4  
Letter from  
Managing  
Director,  
Colombo  
Apothecaries'  
Co., Ltd., to  
Assessor  
17-12-48  
—contd.

by him would have been paid before his departure. His termination with this Company was reported at a meeting of the Board of Directors held on the 7th day of November, 1945, and we attach a certified extract regarding his resignation.

Yours faithfully,  
THE COLOMBO APOTHECARIES' CO., LTD.,  
Sgd. ROSSLYN KOCH,  
*Managing Director.*

**COPY**

Mr. R. W. Sutherland intimated to the Board that he had been offered an appointment in London. He had accepted the appointment on condition that he would not be able to take up his duties until a successor was found to take his place in Colombo and until he was in a position to hand over the Company fully and efficiently controlled. These terms had been agreed. It was arranged, therefore, that he would stay on until September, 1946, and, if absolutely necessary, until the spring of 1947.

Sgd. ROSSLYN KOCH,  
*Chairman.*

Colombo, 17th December, 1948.

20

**D 5.**

**Letter from Assessor to Ford, Rhodes, Thornton & Co.**

D 5  
Letter from  
Assessor to  
Ford, Rhodes,  
Thornton & Co.  
1-2-49

My Refce: 9/17 (SAJ)

Income Tax Office,  
Colombo, February 1, 1949.

Sir,

*Colombo Apothecaries' Co., Ltd.*

It appears that a sum of Rs. 17,252 was paid to the widow of the late Mr. R. W. Sutherland during the year ended 31.3.47. Please be good enough to let me know whether this payment was made *ex gratia* or in discharge of a legal liability. 30

Please confirm that this sum was included in the Passage and Furlough claim of Rs. 30,367. I shall be glad to have a copy of the Directors' Minute, authorising this payment.

I am, Sirs,  
Your Obedient Servant,  
Intd. S. A. J.  
for Assessor Unit 1.

Messrs. Ford, Rhodes, Thornton & Co.,  
P. O. Box 186,  
Colombo.

40

D.6.

**Letter from Ford, Rhodes, Thornton & Co. to Assessor**

Ford, Rhodes, Thornton & Co.,  
Chartered Accountants.

Exhibits  
D 6  
Letter from  
Ford, Rhodes,  
Thornton & Co.,  
to Assessor  
23-2-49

P. O. Box 186,  
Colombo, 23rd Feby., 1949.  
File No. 9/17 (SAJ)

The Assessor,  
Unit 1, Income Tax Office,  
10 Colombo.

Dear Sir,

*Colombo Apothecaries' Co., Ltd., Income Tax 1947-48*

In answer to your letter of 1st February, 1949, we have heard from the Managing Director of the above Company who states that the Rs. 17,252 was in respect of accumulated furlough pay and passage money due to the late Mr. Sutherland to the date of his death. The payment is not an *ex gratia* payment.

We confirm that the sum of Rs. 17,252 was included in the Passage and Furlough claim of Rs. 30,367 in our computation forwarded  
20 to you.

An extract of the minute signed by the Managing Director is enclosed.

Yours faithfully,  
FORD, RHODES, THORNTON & CO.,

COPY

THE COLOMBO APOTHECARIES' CO. LTD.

*Extract of the minutes of a meeting of the Board of Directors  
held on 17th July, 1946*

30 " The Directors having taken note that a sum of Rs. 15,750 had been placed to reserve to meet the contingent liability to pay for Mr. Sutherland's leave pay which, he would have been entitled to, if he had survived, it was decided to pay Mrs. Sutherland's passage to England, namely Rs. 1,502, and to authorise a payment to her of Rs. 15,750."

(Sgd.) Rosslyn Koch,  
Chairman and Managing Director.



## D 7.

**Letter from Assessor to Ford, Rhodes, Thornton & Co.**

Exhibits  
D 7  
Letter from  
Assessor to  
Ford, Rhodes,  
Thornton & Co.  
4-3-49

My Refce. 9/17 (SAJ).

Income Tax Office,  
Colombo, March 4, 1949.

Sirs,

*The Colombo Apothecaries Company Ltd., Income Tax 1947-48*

I thank you for your letter of the 23rd February, 1949.

2. I shall be obliged if you will let me have for reference and return a copy of the late Mr. Sutherland's contract of service with the Company.

10

I am Sirs,  
Your obedient servant,  
Intd. S. A. J.  
for Assessor, Unit 1.

Messrs. Ford, Rhodes, Thornton & Co.,  
P. O. Box No. 186,  
Colombo.

## D 8.

**Letter from Ford, Rhodes, Thornton & Co. to Assessor**

D 8  
Letter from  
Ford, Rhodes,  
Thornton & Co.,  
to Assessor  
15-3-49

Ford, Rhodes, Thornton & Co.,  
Chartered Accountants,

20

P. O. Box 186,  
Colombo, 15th March, 1949.  
Ref. 9/17 (SAJ).

The Assessor,  
Unit 1,  
Income Tax Office,  
Colombo.

Dear Sir,

*The Colombo Apothecaries' Co., Ltd., Ceylon Income Tax 1947-48*

In reply to your letter of the 4th of March, 1949, we have received the following reply from the Company.

30

“ We advise that there is no written agreement to show the late Mr. Sutherland's contract of service with this Company. It has however been the normal practice of the Company to pay leave pay in proportion to the length of service which has elapsed without leave.

Mr. Sutherland took up duties as Managing Director in December, 1939, and although there was nothing in writing, he was understood to be on a normal 4-year contract, with six months' leave on full pay and the passage money to be paid by the Company for him and his wife.

Exhibits  
D 8  
Letter from  
Ford, Rhodes,  
Thornton & Co.,  
to Assessor  
15-3-49  
—contd.

10 The accumulated leave pay due to Mr. Sutherland at the time of his death in June, 1946, amounted to Rs. 15,750. Provision was made to pay the above sum of Rs. 15,750 as per the Board of Directors' resolution at a meeting held on 17th July, 1946, reading as follows:—

' The Directors having taken note that a sum of Rs. 15,750 had been placed to reserve to meet the contingent liability to pay for Mr. Sutherland's leave pay which, he would have been entitled to, if he had survived, it was decided to pay Mrs. Sutherland's passage to England and to authorise a payment to her of Rs. 15,750 ', which amount was accordingly paid to Mrs. Sutherland ''.

Yours faithfully,  
(Sgd.) Ford, Rhodes, Thornton & Co.

20

## Z 1.

**Decision of the Board of Review, Income Tax***Appeal to the Board of Review—Income Tax**Estate of Mr. R. W. Sutherland—(Decd.)**No. BRA—210.**Assessment File No. 488/41.**Members of the Board.*

Mr. W. S. de Saram (Chairman)

Mr. Stanley Dias

Mr. Waldo Sansoni.

30 *Dates of hearing: 15th September, 1949, and 22nd September, 1949.**Present for the Appellant:*

Mr. P. Navaratnarajah with Mr. C. Manohara instructed by Messrs. Julius and Creasy.

*Supporting the Assessment:*

Mrs. M. F. C. Ekanayaka, Assessor.

Z 1  
Decision of the  
Board of  
Review, Income  
Tax  
17-10-49

Exhibits  
Z 1

Decision of the  
Board of  
Review, Income  
Tax  
17-10-49  
---contd.

*Order of the Board.*

In view of the majority decision of the Board, the appeal is dismissed. No order for costs.

The findings of the majority and the finding of the dissenting member of the Board are attached to this order.

(Sgd.) W. S. DE SARAM,  
*Chairman.*

Colombo, 17.10.1949.

Z 2.

Z 2  
Findings of  
Messrs. W.  
Sansoni and  
Stanley Dias  
(undated)

**Findings of Messrs. W. Sansoni and Stanley Dias**

10

*Findings of Messrs. W. Sansoni and Stanley Dias*

Mr. R. W. Sutherland was the Managing Director of the Colombo Apothecaries, Co., Ltd., from November, 1939, until he died on 12th June, 1946.

There was no written agreement in regard to the terms of his contract of service.

The letter D8 however, indicates what the terms of service were. The relevant parts of D8 are:—

- (a) “ It has been the normal practice of the Company to pay leave pay in proportion to the length of service which has elapsed without leave.” 20
- (b) “ He was understood to be on a normal 4 years contract, with six months’ leave on full pay and the passage money to be paid by the Company for him and his wife.”

According to these terms of service, at the end of 4 years Mr. Sutherland would have been entitled to six months’ leave on full pay. If he did not take the leave he was entitled to with full pay, according to the normal practice of the Company he was to be paid leave pay in proportion to his length of service without leave.

The reason for this payment of leave pay to an employee who does not take his leave with full pay is quite apparent and also reasonable. By his not going on leave the Company has his services and is not put to the expense of paying another which would happen if he had gone on leave. 30

In consideration of this saving and also as some compensation to the employee for not going on full pay leave he is paid leave pay without leave.

This practice of paying leave pay is fairly common in mercantile firms.

The leave pay becomes due when the employee who is entitled to leave with full pay does not go on leave, although it is generally paid when he eventually does go on leave or retires.

Mr. Sutherland was entitled to six months' leave with full pay in 1943 but did not go on leave.

10 According to a minute of a meeting of the Board of Directors held on 7th November, 1945 (D4) Mr. Sutherland had accepted an appointment in London and had intimated to the Company that he would not take up his new appointment until a successor was found to take his place in Colombo. These terms had been agreed to and Mr. Sutherland was therefore to stay on until September, 1946, and if absolutely necessary, until the spring of 1947.

During this period he would be earning leave pay.

When Mr. Sutherland died on the 12th June, 1946, there accrued to his account a sum of Rs. 15,750 being overdue leave pay (D1) which was sent to Messrs. Julius and Creasy the Proctors for the Executrix. According to D3 the computation of Rs. 15,750 was arrived at by a payment of 1½ months salary for every year of service, namely 7 years, and was paid out in 1946.

20 This appeal is against the decision of the Deputy Commissioner of Income Tax who held that this sum of Rs. 15,750 is taxable.

The Counsel for the Appellant contended that the payment of Rs. 15,750 to the widow of Mr. Sutherland (who was also Executrix under his Will) was not in discharge of a legal liability but was an *ex gratia* payment and therefore not assessable. In support of his contention he pointed out that the minute of 17th July 1946 (see D8) meant that any leave pay due to Mr. Sutherland lapsed on his death and his estate was not entitled to it.

30 I am unable to accede to this contention. It would be doing violence to the clear wording of the resolution contained in D8 to read into it that the leave pay due to the deceased had lapsed on his death.

What the resolution means seems quite clear. There were certain sums placed in reserve to pay for Mr. Sutherland's leave pay which would have been paid to him if he lived; but as he was no longer alive the Directors merely authorised the payment of this accumulated leave pay to his widow, the executrix under the Will.

40 This seems quite clear from the paragraph immediately preceding the Directors' resolution in D8 which reads "*The accumulated leave pay due to Mr. Sutherland*, at the time of his death in June, 1946, amounted to Rs. 15,750."

That this payment was on account of the deceased's accumulated leave pay and not a payment *ex gratia* to his widow is more emphatically and clearly stated in D6 which states that the Managing Director of the Colombo Apothecaries' Co., Ltd., had stated that this

Exhibits  
Z 2  
Findings of  
Messrs. W.  
Sansoni and  
Stanley Dias  
(undated)  
15-11-49.  
*contd.*

Exhibits  
Z 2  
Findings of  
Messrs. W.  
Sansoni and  
Stanley Dias  
(undated)  
—contd.

money paid “ was in respect of accumulated furlough pay..... due to the late Mr. Sutherland to the date of his death. *The payment is not an ex gratia payment.*”

The only conclusion one can come to as to the “ character ” of this payment was that it was paid as profits from the employment of Mr. Sutherland in view of the contract of service between him and his employer.

By the terms of that contract Mr. Sutherland was entitled to leave pay having fulfilled the conditions of service, that is four years' service. This leave pay which he earned was part of the remuneration due to him for his services as would appear still more clearly from the letter “ B ” dated 19th July, 1946, written to Messrs. Julius and Creasy by the Colombo Apothecaries' Co., Ltd., in reply to a letter dealing with “ The Estate of R. W. Sutherland, deceased ” the Company stated “ A further sum of Rs. 15,750 is to be paid.....in respect of the late Mr. Sutherland's *overdue leave pay.*” If further material is necessary to support this conclusion it is found in D4 where the Managing Director of the Company stated “ the late Mr. Sutherland was due to leave Ceylon on retirement.....and the *amount of leave pay earned by him* would have been paid before his departure.” The fact of his death could not alter this leave pay which was profits from his employment into an *ex gratia* payment. 10 20

The leave pay was earned and had accumulated; only the payment was deferred. The fact that payment was deferred till he went on leave or retired does not affect his right to it. The fact that he died before he was paid it will not alter the situation.

It is common ground that profits from employment are taxable. Profits from employment include “ any wages, salary, leave pay, bonus, gratuity or perquisite.....(vide Income Tax Ordinance, Section 6 (2) (a) ). 30

Even if it be doubted that the deceased had a legal title to the leave pay I still would hold that this payment even if it was paid as a moral obligation was paid as profits from employment. It was a payment arising from and connected only with his employment and it is impossible to come to any other decision.

As against all the evidence in support of the contention that this payment was in respect of overdue leave pay or accumulated furlough pay and therefore profits from employment, there is nothing —no evidence at all—to justify an inference that this was an *ex gratia* payment. 40

In arriving at this conclusion I have not been unmindful of the cases where it has been held that it is immaterial what one party or the other calls a payment and that it is for the Court or Judge to decide what the nature and character of the payment was.

It is impossible to hold on the Directors' resolution that this leave pay due to the deceased lapsed on Mr. Sutherland's death. All that the resolution of the Directors means is that as the amount was due to Mr. Sutherland and would have been paid to him if he survived (whether he was legally entitled to it or not seems to me to be immaterial although I am of opinion that he was legally entitled to it) the Directors merely resolved to authorise payment to his widow who was also executrix.

Exhibits  
Z ?  
Findings of  
Messrs. W.  
Sansoni and  
Stanley Dias  
(undated)  
—contd.

10 I would affirm the decision of the Deputy Commissioner, Income Tax, and dismiss the appeal

I make no order as to costs.

(Sgd.) W. SANSONI.

I agree.

(Sgd.) S. DIAS.

### Z 3.

20

#### Finding of Mr. W. S. de Saram

Z 3  
Finding of  
Mr. W. S. de  
Saram  
(undated)

In my opinion, this appeal should be allowed.

The deceased, during his employment, was entitled to leave after certain periods of service.

If he took his leave, he would not lose pay but would receive pay during his leave. That was called "Leave Pay" and, as I understand it, leave pay means pay during the period of leave taken.

30 In my opinion, if when the time came when he would be entitled to (1) leave plus (2) pay during the period of leave, he decided not to take his leave, it would not be open to him to tell his employers—  
"I am now entitled to leave for such and such a period and for pay during that period, but I will not take the leave. I will go on working drawing my salary. Give me, in addition, the pay I would have received had I taken that leave".

I do not think such an application would have been allowed.

The fundamental idea of leave pay, as I understand it, is to enable a man after a period of service to take leave so as to have a break from his work, a holiday, to go abroad if he wished, to

Exhibits  
Z 3  
Finding of  
Mr. W. S. de  
Saram  
(undated)  
—contd.

recuperate his health; and usually when a man entitled to such leave takes it, he is provided with the funds for the period of leave taken.

If he chooses not to take the leave, he cannot sit at his desk and ask for, in addition to his salary, a sum he would have received had he taken the leave.

A man may wait for a longer period than the minimum period required to entitle him to leave. If he applies for leave after a longer period of work, he would, perhaps, be entitled to a longer period of leave and consequently, a longer period of pay during leave. 10

If however, a man does not take leave there would be no pay to be given him during a period of leave.

It may be that at the time of his death, had he survived and gone on leave, he would have been entitled to leave with the corresponding 'leave pay'. But, once he dies and therefore cannot take leave, the privilege or right is gone and his estate would have no claim on that account. Can his heirs say that had he taken leave he would have been entitled to such and such a sum—"Pay us that sum". I think not. 20

On the death of the deceased, his right to leave obviously was at an end and there was no leave in respect of which payment would be due.

In the present case, a sum of Rs. 15,750 had been put aside by his employers to meet the contingency of his taking leave. That is to say, certain sums were put aside to provide a fund to be drawn on to pay what is called 'Leave Pay' during periods of leave actually taken.

The sum of Rs. 15,750, in this case, was paid by the Company on the Directors' resolution set out in D8 in these terms— 30

"The Directors having taken note that a sum of Rs. 15,750 had been placed to reserve to meet the contingent liability to pay for Mr. Sutherland's leave pay which he would have been entitled to, *if he had survived*, it was decided to pay Mrs. Sutherland's passage to England and to authorise a payment to her of Rs. 15,750, which amount was accordingly paid to Mrs. Sutherland".

To my mind this means this—Mr. Sutherland died; had he not died, there was a certain sum which would have been available to pay him 'leave pay'; owing to his death he could not get this. We will however pay that sum to his widow, although the deceased was not entitled. 40

This, in my opinion, in fact represents the correct position and the payment would be an *ex gratia* payment.

It would not be profits from employment within the purview of the Income Tax Ordinance although, no doubt, it was the fact of his past employment coupled with the misfortune of his death which prevented his getting leave pay that afforded the motive for this *ex gratia* payment.

Exhibits  
Z 3  
Finding of  
Mr. W. S. de  
Saram  
(undated)  
--contd.

It would, therefore, be unnecessary to consider the question whether this sum was a death gratuity within the meaning of Section 7 (1) (k) of the Ordinance.

In my opinion the sum of Rs. 15,750 should be excluded from the  
10 assessment and I would, therefore, allow the appeal.

(Sgd.) W. S. de Saram,  
Chairman.