

Tanganyika
21,4957

~~P.C.C. 2~~

No. 3 of 1956.

In the Privy Council.

ON APPEAL
FROM THE COURT OF APPEAL FOR EASTERN AFRICA

BETWEEN
COMMISSIONER OF INCOME TAX *Appellant*
AND
WILLIAMSON DIAMONDS LIMITED *Respondent.*

RECORD OF PROCEEDINGS

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~~GIT-6-2~~.

In the Privy Council.

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COMMISSIONER OF INCOME TAX *Appellant*

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RECORD OF PROCEEDINGS

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In the Privy Council.

ON APPEAL FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

BETWEEN
COMMISSIONER OF INCOME TAX *Appellant*
AND
WILLIAMSON DIAMONDS LIMITED *Respondent.*

RECORD OF PROCEEDINGS

10

No. 1.
DECISION.

23rd January, 1954.

*In the
Local
Committee,
Trust
Territory,
Tanganyika.*

I certify that the following is a copy of the decision notified to me by the Local Committee for the Trust Territory of Tanganyika under the provisions of Section 77 (4) Income Tax (Management) Act 1952 in the case of *Williamson Diamonds Limited v. Commissioner of Income Tax*, Assessment No. 14782, Year of Income 1951.

No. 1.
Decision,
23rd
January
1954.

20

“The Committee has considered the Appeal and confirms the assessment No. 14782 year of income 1951 of £9,740 and finds it correct under Section 22 of the East African Income Tax (Management) Act 1952.”

V. H. MERTTENS,
Commissioner.

*In the
High Court
of
Tanganyika.*

No. 2.
Memoran-
dum of
Appeal.

No. 2.

MEMORANDUM OF APPEAL.

**IN HER MAJESTY'S HIGH COURT OF TANGANYIKA
at Dar-es-Salaam.**

Civil Appeal No. 3 of 1954.

WILLIAMSON DIAMONDS LIMITED . . . Appellant

versus

THE COMMISSIONER OF INCOME TAX . . . Respondent.

The Appellant above named, being aggrieved by the decision of the Local Committee (certified copy of which accompanies this Memorandum) 10 in relation to Assessment No. 14782, of the year of income 1951, made on the 3rd December, 1953, at Dar-es-Salaam, appeals to this Honourable Court against the said Assessment on the following amongst other grounds :—

1. The Local Committee according to the said decision purported to find that Assessment No. 14782 of the year of income 1951, on £9,740 (tax being charged thereon at Shs. 9740/-) was correct under section 22 of the East African Income Tax (Management) Act, 1952, whereas the said enactment was not in force at the relevant date and the relevant distribution was, in fact, deemed to have been made under another 20 enactment.

2. The said Assessment fails to take into account the fact that section 21 of the Income Tax (Consolidation) Ordinance, 1950, of Tanganyika, cannot or should not be applied where at the date to which the accounts of the taxpayer for the relevant period are made up, the said accounts show an overall capital deficiency.

3. The said Assessment is misconceived and erroneous in law and in fact, and in particular is based upon failure :—

(A) to interpret the word " losses " in the context of section 21 of the Income Tax (Consolidation) Ordinance, 1950, of Tanganyika, 30 so as to include capital losses ; and

(B) to pay sufficient regard to capital losses previously incurred by Buhemba Mines Ltd., (in which the Appellant is a shareholder) and to hold that in the circumstances there were no profits available for dividend ; and

(C) to hold that in the circumstances the payment of a dividend for the year 1950 would have been unreasonable.

4. Without prejudice to the foregoing grounds of appeal if, in the circumstances a distribution could have been directed under section 21 of the Income Tax (Consolidation) Ordinance 1950 (which is denied) or, 40 if in the circumstances such a distribution would have been reasonable (which is also denied), then, having regard to the rights attaching to Redeemable Preference Shares under the Articles of Association of Buhemba Mines Ltd., no part of any dividend, deemed to have been distributed for

the year 1950, could have been attributed to the holders of Founders' or Ordinary Shares in the said Company prior to the redemption of the Preference Shares.

*In the
High Court
of
Tanganyika.*

Pursuant to Rule 6 of the Income Tax (Consolidation) (Appeal to the High Court) Rules, 1950, the Appellant attaches a statement of facts.

*No. 2.
Memoran-
dum of
Appeal,
continued.*

The Appellant therefore prays that :—

(A) Assessment No. 14782 of the year of income 1951 be annulled ; and

10 (B) for such further or other relief as this Honourable Court may seem fit to grant, together with the costs of this appeal.

K. BECHGAARD,

Advocate for Appellant :—

WILLIAMSON DIAMONDS LTD.

No. 3.

STATEMENT OF FACTS of Williamson Diamonds Ltd.

(Rule 6 of G.N. 285 of 1950).

*No. 3.
Statement
of Facts of
Williamson
Diamonds
Ltd.*

1. The Appellant is the holder of 156 Founders' and 1,139 Ordinary Shares in Buhemba Mines Ltd. The nominal capital of Buhemba Mines Ltd., is £150,000 divided into Founders' and Ordinary Shares. In addition, at 31/12/50, 847 Preference Shares of £50 remained unredeemed. Details of the holders of Founders', Ordinary and Preference Shares in Buhemba Mines Ltd., are given in Appendix " A " hereto.

2. In respect of Buhemba Mines Ltd. :—

(A) the rights attaching to the Preference Shares are determined by the Articles of Association as revised and in force at the material date ;

(B) subject to sub-paragraph (F) hereof, the Cumulative Preference Dividend was in arrears as from 1st January, 1947 ;

30 (C) The Income Tax Profits for the years 1939–1950 inclusive agreed by the Respondent, are as given in Appendix " B " hereto ;

*In the
High Court
of
Tanganyika.*

No. 3.
Statement
of Facts of
Williamson
Diamonds
Ltd.,
continued.

(D) The total income for Income Tax purposes (having regard to income tax losses for the years 1945/7 as reduced by income tax profits for the years 1948/9) for 1950 was £38,160 on which Income Tax at the appropriate company rate has been duly paid. 60% of £38,160 amounts to £22,896 or Shs. 457,920/-;

(E) by an order dated 25th April, 1952 the Respondent ordered that the said amount of Shs. 457,920/- should be deemed to have been distributed to the shareholders in respect of the year ending 31/12/50;

(F) in relation to the Shareholders the proportionate amounts 10 deemed to have been so distributed are set out in Appendix "C" hereto. In respect of the Preference Shareholders the proportionate amounts represent a dividend of 28½%, being the cumulative preference dividend at 6% for 1947/50 and nine months of 1951.

3. With reference to paragraph 2 hereof, the Appellant's gross proportionate dividend is thus Shs. 194,800/32, and the tax on this, amounting to Shs. 9,740/- is the subject-matter of the assessment under appeal.

4. In the balance sheet and Accounts for the year ending 31st December, 1950, prepared by the auditors of Buhemba Mines Ltd., 20 an item of Shs. 1,174,935/30 is included as an asset representing the balance of old development to be written off. The said amount does not now represent any available reserves of ore and should therefore be disregarded in any realistic appreciation of the company's financial position. To the extent that this amount is not counterbalanced in the Appropriation Account or otherwise, it must be regarded as a capital deficiency.

5. At the hearing of this appeal the Appellant will, subject to admission by the Respondent, produce out of proper custody:—

(A) The Memorandum and Articles of Association of Buhemba Mines Ltd., and 30

(B) The audited Balance Sheet of the said company as at 31st December, 1950,

and will refer to legal authorities including especially the judgment of Her Majesty's Court of Appeal for Eastern Africa in:—

Sverre Haug and others v. Buhemba Mines Ltd.,

(Civil Appeal No. 52 of 1952).

K. BECHGAARD,
Advocate for Appellant:—

WILLIAMSON DIAMONDS LTD.

APPENDIX "A."
 DETAILS OF THE HOLDERS OF FOUNDERS' ORDINARY AND PREFERENCE
 SHARES IN BUHEMBA MINES LTD.

*In the
High Court
of
Tanganyika.*

Name and Address of persons to whom paid		Founders' Shares	Ord. Shares	Pref. Shares	No. 3.
Williamson Diamonds Ltd., Private Bag, NBI ..		156	1,139	—	Statement of Facts of Williamson Diamonds Limited, <i>continued.</i> Appendix "A." Details of Share- holders in Buhemba Mines Ltd.
Est. V. Koren, decd., c/o Hamilton, Harrison & Mathews, Nairobi		—	262	215	
B. Kopperud, P.O. Ruiru		—	2	8	
10	S. Haug, Elburgon, Kenya	—	12	50	
P. K. Nilsen, Vikersund, Norway		—	12	122	
H. S. Lewis, Elburgon, Kenya		—	12	157	
I. C. Chopra, P.O. Box 1, Mwanza T.T.		—	1	—	
Mrs. A. Y. P. Moore, Glen Thego, Nyeri Stn. ..		—	—	140	
O. C. Arensen, Lriego Est., P.O. Kipkabus		—	—	10	
W. R. Wrench, c/o Nat. Bank India, Entebbe ..		—	—	100	
Mrs. D. Espeland, Kolbtn, Norway		—	—	2	
B. I. Solly, P.O. Box 1, Broken Hill, N. Rhod. ..		—	—	43	
TOTAL ..		156	1,440	847	

20

APPENDIX "B."

The Income Tax Profits of the Company as agreed by the Company
with the Income Tax Department have been as follows:—

Appendix
"B."
Details of
Income
Tax
Profits.

	Profit before Deduction for Capital Exp.	Deductions Allowed for Capital Exp.	Net Taxable Profit or Loss	Development Expenditure written off by Company
1938 (No Income Tax in Force)				
1939 ..	£35,692	14,014	21,678	9,811
1940 ..	64,092	15,417	48,675	27,734
1941 ..	31,063	16,103	14,960	11,543
30 1942 ..	31,747	16,146	15,601	16,147
1943 ..	20,085	16,287	3,798	16,285
1944 ..	21,436	18,731	2,705	16,405
1945 ..	12,238	16,090	Loss 3,852	8,076
1946 ..	6,856	18,849	Loss 11,993	5,546
A 1947 ..	9,031	20,332	Loss 11,301	3,580
1948 ..	25,121	21,303	3,818	37,107
1949 ..	34,993	21,112	13,981	40,940
1950 ..	71,104	23,593	47,511	46,858
	£363,458	£217,877	£145,581	£240,032

40

Total 1939/1950
A/cs

A. Losses offset against subsequent profits and £38,160 assessed to 1950 accounts
(NIL 1945-1949)—(difference £4 not pursued).

In the
High Court
of
Tanganyika.

No. 3.
Statement
of Facts of
Williamson
Diamonds
Ltd.,
continued.

Appendix
"C."
Return of
Dividends.

APPENDIX "C."

BUHEMBA MINES LTD. RETURN OF DIVIDENDS IN THE YEAR ENDED 31ST DECEMBER 1951.

Name and Address of person to whom paid	Founders' Shares	"O" Ord. Shares	"P" Pref. Shares	Date Declared (Deemed)	Gross Dividend Shs.	Income Tax deducted Shs.	Actual Amount Shs.
Williamson Diamonds Ltd. Priv. Bag. NBI ..	156	1,139	-	30.9.51	o 194,800.32	38,960.06	155,840.26
Est. V. Koren decd. c/o Hamilton Harrison & Mathews, Nairobi	-	262	215	30.9.51	p 61,275.00 o 18,909.85	12,255.00 3,781.97	49,020.00 15,127.88
B. Kopperud, P.O. Ruiru ..	-	2	8	30.9.51	p 2,280.00 o 144.35	456.00 28.87	1,824.00 115.48
S. Haug, Elburgon, Kenya ..	-	12	50	30.9.51	p 14,250.00 o 866.10	2,850.00 173.22	11,400.00 692.88
P. K. Nilsen, Vikersund, Norway ..	-	12	122	30.9.51	p 34,770.00 o 866.10	6,954.00 173.22	27,816.00 692.88
H. S. Lewis, Elburgon, Kenya ..	-	12	157	30.9.51	p 44,745.00 o 866.10	8,949.00 173.22	35,796.00 692.88
I. C. Chopra, P.O. Box 1, Mwanza T.T. ..	-	1	-	30.9.51	o 72.18	14.44	57.74
Mrs. A. Y. P. Moore, Glen Thego, Nyeri Stn.	-	-	140	30.9.51	p 39,900.00	7,980.00	31,920.00
C. C. Aresen, Lriego Est. Kipkabus ..	-	-	10	30.9.51	p 2,850.00	570.00	2,280.00
W. E. Wrench, c/o Nat. Bank India, Entebbe	-	-	100	30.9.51	p 28,500.00	5,700.00	22,800.00
Mrs. D. Espeland, Kolborn, Norway ..	-	-	2	30.9.51	p 570.00	114.00	456.00
B. I. Solly, Box 1, Broken Hill, N. Rhodesia	-	-	43	30.9.51	p 12,255.00	2,451.00	9,804.00
TOTAL :	156	1,440	847		457,920.00	91,584.00	366,336.00

No. 4.
JUDGE'S NOTES of Hearing.

*In the
High Court
of
Tanganyika.*

IN HER MAJESTY'S HIGH COURT OF TANGANYIKA at Dar-es-Salaam.

Miscellaneous Civil Appeal No. 3 of 1954.

WILLIAMSON DIAMONDS LIMITED . . . Appellant

versus

THE COMMISSIONER OF INCOME TAX . . . Respondent.

No. 4.
Judge's
Notes of
Hearing,
4th and 5th
May 1954.

10 30.1.54. Appeal admitted.

(Sgd.) H. R. F. BUTTERFIELD,
Registrar.

4.5.54.

Bechgaard for Appellant.

Newbold for Respondent.

Bechgaard.

Appellant a major shareholder in Buhemba Mines Ltd.

This is a rehearing in fact: Court has complete discrimination to make any finding of fact.

Not disputed that Section 21 1950 Consolidated Ordinance.

20 No dispute we have made profit.

Statement 2 (d) what are subject to tax.

I hand in memorandum and articles of association, audited balance sheet (Marked Exs. 1, 2 & 3 respectively).

Memo of appeal: para. 1—largely formal.

Statement 2 (e): order issued under the 1950 Ordinance.

Assessment issued under 1950 Ordinance.

Para. 1: formal error but it effects nothing material: this Court can correct it.

Para. 2: Sec. 21 of 1950 Ordinance.

30 Income tax first introduced in 1939 and in that Ordinance there is nothing which bears much resemblance to 21.

1940 War Revenue Income Tax Replacement Ordinance: Sec. 21 of that Ordinance reads as follows “. . .”

This is embryo of Section 21 of 1950 (p. 76).

This first appear War Revenue Income Tax (Amendment) Ordinance 1943.

Since then there has been no material alteration.

*In the
High Court
of
Tanganyika.*

No. 4.
Judge's
Notes of
Hearing,
4th and 5th
May 1954,
continued.

This legislation originated in United Kingdom in 1922 in order to overcome difficulties created by *Blott* case and two others.

Effect of their decisions was that when a one-man company had not distributed its profit and subsequently went into liquidation all these profits became capital and so not chargeable in the tax.

Section 245 United Kingdom Tax Ordinance 1952. This resembles Sec. 21 of 1940 Ordinance.

Evict at which this section is aimed in United Kingdom is transmutation of revenue profits into capital.

This presupposes existence of a capital profit.

10

Submit section is never aimed at a situation like present where there is a capital deficiency.

In United Kingdom legislation differs from that out here.

In Tanganyika only two things to be taken into account.

Underlying principles the same.

In United Kingdom this particular section allows it more facts being taken into account.

Montague Burton Ltd. vs. Inland Revenue.

20 Tax Case p. 48 : this case does mention capital deficiency : p. 69 of judgment.

20

Master of Rolls accepted fact that if there had been a capital depletion it might have been a valid reason for not distributing the profits.

Nature of section generally: *Fattorini Ltd. vs. I.R.C.* [1942] 1 A.E.R. 619 : headnote (3).

Viscount Simon at p. 625.

Section 21 I.T. (c) Ordinance 1950.

Important words underlined (in red).

Total income, losses, profits and unreasonable are important words in 21 (1).

Total income defined.

30

No statutory definition of loss or profits : this Court must, therefore, interpret them.

Regard must be had to mischief at which section directed.

This section cannot apply to a case where there is a capital deficiency.

In United Kingdom profits and losses not definedly legislation but have been considered by Court.

C.I.R. v. Morrison 17 T.C. 325.

History of previous litigation.

Unreasonable :

Submit in this case eminently reasonable that there should be no distribution of profits.

This Court and East African Court of Appeal has considered position of this company and have come to conclusion no profit available from 1950. How then can revenue authorities say that it would have been reasonable to make a distribution.

10 If this Court came to same conclusion as committee then this Court would say at once and see this that there were not profits available for distribution and that directors had acted unreasonably in not making a distribution.

Profit and loss :

If a meaning is to be given to losses it cannot be a revenue loss except in a very restricted sense because it could be only an unexhausted loss under Section 13 (m).

If loss to be so understood it is too restricted: if that had been introduced Sec. 13 (m) could have been referred.

In Sec. 21 profits and loss are used with general meaning and should not be given any restricted meaning.

20 *John Hudson & Co. v. Kirkness* [1954] 1 A.E.R. 29 at p. 32 foot.

I contend that ordinary meaning must be given to words losses and profit.

Boarland vs. Madras Electric Corporation [1954] 1 A.E.R. 52 and 57.

Question then authorities to show no justification for restricting meaning of profit and loss and that the word loss should include capital losses.

Section 21 probably taken from 23 (a) Indian Income Tax Ordinance 1922.

Kanga and Palbuila on Income Tax 2nd Edition at p. 638.

30 Profits and loss refers to some quite different from total income.

We say it is one thing to make a profit and pay tax on it and quite a different thing to receive notice directing a national distribution. *Extra Property Estate Ltd. v. C.I.T. Jain Current* . . . I.T. at p. 527.

This is authority that when no profits available for dividend it is improper for income tax authorities to issue any direction.

Para. 3 (a) dealt with.

Para. 3 (b). Balance Sheet Ex. 3.

Figure of Shs. 1,174,935,30/- is referred to para. 4 of Statement of facts.

40 Contend that this balance sheet is in reality £58,000 odd in the red.

*In the
High Court
of
Tanganyika.*

No. 4.
Judge's
Notes of
Hearing,
4th and 5th
May 1954,
continued.

*In the
High Court
of
Tanganyika.*

Total share capital is £150,000, ignoring preference share capital of £42,000.

£58,000 deficiency on £150, is so great that there is a serious capital deficiency.

No. 4.
Judge's
Notes of
Hearing,
4th and 5th
May 1954,
continued.

· This Court and East African Court of Appeal have said management not justified in pay dividends.

Para. 3 (c) dealt with.

Para. 4. Different ground of appeal arising out of judgments in two previous cases in which it was held no specific date for redemption of redeemable preference shares. If this Court now said there were profits in existence which should reasonably have been distributed they cannot be so distributed until redeemable preference shares have been redeemed : Sec. 47 Companies Ordinance ;

Submit my first ground should succeed.

Gilbertian situation if appellant is to be assessed on profit which Court has said do not exist. It would be absurd.

In brief I contend :—

(1) Having regard to origin of Section 21 it should never be applied to a case when accounts show an overall capital deficiency.

(2) As far as Section 21 is concerned “ losses ” should be widely interpreted to include capital losses.

(3) Having regard to such capital losses and to claim of this Court and East African Court of Appeal Commission should incidentally has held that it was unreasonable to distribute a dividend. *Fattorini* case—Section is a penal one and burden of proving. Unreliability—on Crown. Matter is almost *res judicator*.

(4) If I am wrong on (1), (2) and (3), I say it would be wrong to distribute profits to any person other than preference shareholders because it would contravene Companies Ordinance and articles of association.

30

Newbold

First ground of appeal.

Income subject of order was income for year 1950.

That year came under 1950 Ordinance.

E.A.I.T. Act 1952 takes effect from 1.1.52 and states in 5th Schedule that 1950 Ord. in former in respect of prior to 1951.

Old Ordinance applies up to and including year of income to you of income 1950 and new Ordinance from 1951 onwards.

Order under Section 21 should have been order under section 21 of 1950 Ordinance.

40

The company's income was in respect of 1950 : Order made in respect of it which had effect of making it income of shareholder for 1951 and

income of company for year 1950. Directors have not distributed profits for 1950 and so revenue made the order under section 21 and this is considered as correct.

Result is that it becomes income of shareholders for 1950 and assessment is made under new act under Section 71 of Act.

Procedure was this in order.

The committee refer to Section 22 of 77.

That disposes of first ground of appeal.

*In the
High Court
of
Tanganyika.*

No. 4.
Judge's
Notes of
Hearing,
4th and 5th
May 1954,
continued.

Grounds 2 & 3.

- 10 Section is a question of law : in deciding whether an order should be made under section 21 regard must be had to capital losses ?

Bechgaard

It only applies when there is a capital profit.

Newbold

Ground 3—is there a capital deficiency and would it, therefore, be unreasonable to make the order.

Vast majority of share in Buhemba Mines Ltd. held by appellant company : Appellant can contract Buhemba Mines.

Directors of Buhemba decided to apply.

- 20 Undisputed profits to writing down a capital asset.

It is said there is an over-all deficiency of the company.

No tax at all upon capital.

In determining income, with one exception, no reduction is made for capital expenditure.

Section 14 (c) Ord. 27/50.

What is charged is income without regard to capital appreciation or loss.

You are being asked to interpret a section in a manner which is basically contrary to basic principles of income tax legislation.

- 30 You are being asked to have regard to capital loss and this is contrary to basic rule of income tax legislation.

The one exception occurs in Second Schedule effect of which is that in relation to certain types of capital expenditure in mining operations the person undertaking the expenditure is entitled to write off or deduct from his income profits certain capital expenditure.

Appendix B—1945—Revenue authorities allowed a deduction in excess of that written off by the company.

- 40 In 1949 the Company write off more than revenue authorities allowed to be deducted. At end of each year a Company has its balance sheet and profit and loss account.

*In the
High Court
of
Tanganyika.*

Latter account shows its revenue position in relation to its transactions during the year.

No. 4.
Judge's
Notes of
Hearing,
4th and 5th
May 1954,
continued.

Balance Sheet shows position of a Company in relation to its assets and liabilities.

A balance sheet may be very proper but may not disclose true position of Company.

In this case an asset of Shs.1,174,935/90 of £58,009 odd is shown. It represents ore which does not exist. There may be hidden reserves, e.g. Shs.521,929/39 in No. 2 account.

Impossible to say balance sheet shows an over-all deficiency. 10

Other judgments given in a petition for the compulsory winding up of a Company. Objection was led to action of directors in not paying dividends.

All that was decided was that action of directors in not paying dividends was not so unreasonable as to justify a compulsory winding-up of the Company.

*20
E.A.C.A.
28.

*E.A.C.A. Civ. Appeal 91/52 Judgment of Vice-President at page 37. The £29,000 odd in balance forms part of £46,853 in appendix B.

Section 21 Ordinance 27/50.

Losses defined. 20

If losses include capital losses profits must include capital profits.

This is directly contrary to basic principles of income tax legislature.

It would have been better to define profits.

Profits, I submit, is synonymous with income in this Ordinance.

“ Profits ” appears in a large number of sections in Sec. 7, e.g. where “ income ” could have been used. See also Sec. 9, 13 (c) (1) and 16. *Fattorini* case at p. 342 24 T.C.

Submit losses have to be interpreted as profits and can only mean revenue losses or profits and not capital losses and capital profits.

It is not open to this Court to have regard to capital losses in deciding whether an order should be made under Sec. 21. *Hudson Bay* case 5 T.C. 437. 30

Assuming that I am wrong and that you can have regard to it as a matter of fact in this case there is no evidence before this Court to show that it is unreasonable not to make the Order.

I concede that the £58,000 represents an amount which has no value but I do not concede that the result of that figure results in an over-all deficiency because the other figures are not necessarily true representations of the value of the assets.

Sec. 78 (5) of the Act onus of proving that an assessment is excessive is on assessee. Appellant has to do this in this case. This appeal is only before the Court because the assessment is attached. 40

If the assessment is not attached the Appellant has no case at all. Sec. 21 is not penal here. 15 E.A.C.A. 45. No evidence of a capital loss here. This Court not bound by finding of local committee but will not likely disregard view of the committee.

*In the
High Court
of
Tanganyika.*

Para. 4 of memo of appeal.

No dividends paid for $4\frac{3}{4}$ years so preference shares were first charged on profits of company. They amounted to $28\frac{1}{2}\%$ on their preference shares.

No. 4.
Judge's
Notes of
Hearing,
4th and 5th
May 1954,
continued.

10 Remainder of profits of year Appellant says should be applied to capital redemption of preference shares. I do not agree in view of Sec. 21 (1): 16 E.A.C.A. 43.

Montague Burton case at p. 71 20 T.C. shows that an order can be made although amount expected by company during year in excess of income.

Company can borrow money to pay dividends.

(Sgd.) G. M. MAHON.
4.5.54.

Further hearing adjourned to 9.15 a.m. 5.5.54.

20

5.5.54.

Court as before.

(Sgd.) G. M. MAHON.
4.5.54.

Newbold.

Meaning of profits and income: Section 21 (a).

This makes it clear that profits can mean nothing but total income.

Total income is subject of order.

My friend said not legally possible for directors to declare a dividend on founders and ordinary shares so long as preference shares not redeemed.

Submit no foundation for this statement.

30 As a result of judgment of East African Court of Appeal there is no redemption date for these preference shares.

Bechgaard.

These preference shares—no due date.

They do become due when profits available for dividends.

My friend is contending for an

His attempts to apply Sec. 21 to a case where there is a capital deficiency.

My statement of facts—I defend—a capital deficiency.

In the High Court of Tanganyika.

No. 4. Judge's Notes of Hearing, 4th and 5th May 1954, continued.

We have a capital deficiency of £58,000 which in relation to a capital of £150,000 is a serious deficiency.

The whole section is directed at unlawful withholding of dividends with a view to their conversion into non-taxable money.

I am not contending that there should be an allowance in respect of company's taxable income.

We are dealing with factors which can determine whether or not a direction under Section 21 should be issued and these are quite different to those which apply in deciding what is taxable income.

Montague Burton Case—Lord Hanworth at p. 69. 10

Court's main task is interpretation of Sec. 21.

Illustration for U.K. useful but have not of the Indian authority on the section.

Profits & loss in section 21 are said by my friend to mean total income if so this expression should have been used.

31 Halsbury para. 600 p. 482.

If income on total income was intended the word should have been used. I say profit and loss are used there a sense opposed to that of total income. I say as profits and losses not defined in the Act—they must be interpreted in the ordinary sense—*Morrison's case*. *Long Acre Press & Odhams Press* [1930] 2 Ch. 196 at 202: referred to by Sinclair, J., and E.A.C.A. 20

Profits in Sec. 21 if interpreted with its commercial meaning includes reserves for capital depletion or deficiency.

To say that profits are synonymous with income is far-fitted and if this was legislature's intention it should have been made clear.

Penal Section 16 E.A.C.A. 45 H. of Lords in *Fattorini's case* said it was not.

In India Profits and losses are distinguished from total income.

Sinclair, J., at top of pp. 5, 6, 7. 30

*Hearne, C.J., pp. 29, 30 & 32.

*20 E.A.C.A. 28.

*Worley, V.P., at pp. 37–38 only referred to of revenue position.

This is a case where this Court and East African Court of Appeal acted rights.

I ask that appeal be allowed with costs.

Burden that proving a person is liable to tax is always on the Crown.

(Sgd.) G. M. MAHON.

5.5.54. 40

Judgment reserved.

(Sgd.) G. M. MAHON.

5.5.54.

No. 5.
JUDGMENT.

*In the
High Court
of
Tanganyika.*

No. 5.
Judgment,
11th May
1954.

This is an appeal by Williamson Diamonds Limited (hereinafter referred to as the Appellant) against Income Tax Assessment No. 14782 of the year of income 1951 of £9,740. The Appellant is the holder of approximately 90 per cent. of the ordinary shares in Buhemba Mines Limited (hereinafter referred to as the company) and in the year 1950 the total income for income tax purposes of the company was £38,160. Sixty per cent. of £38,160 is £22,896 or Shs. 457,920, and by an order
10 dated the 25th April 1952 the Respondent ordered under section 21 (1) of the Income Tax Consolidation Ordinance 1950 (Ordinance No. 27/50) that this amount of Shs. 457,920 should be deemed to have been distributed to the shareholders in respect of the year ending 31st December 1950. The Appellant's gross proportionate dividend is Shs. 194,800/32, on which tax has been assessed at Shs. 9,740. As I understand this case the Appellant does not challenge this figure. His contention is that it was not reasonable in the circumstances for the order in question to be made, and he bases his argument on four grounds:—

20 (A) that section 21 of Ordinance 27/50 should never be applied to a case where the accounts show an over-all capital deficiency,

(B) that the word "losses" in section 21 should be widely interpreted to include capital losses, and

30 (C) that having regard to such capital losses and the decisions of this Court and of the Court of Appeal for Eastern Africa in Miscellaneous Civil Cause No. 51/51 and Civil Appeal 91/52 respectively, the Respondent should have held that it was unreasonable to distribute a dividend. Alternatively it is argued that it would be wrong to distribute profits to any persons other than the preference shareholders because such a distribution would contravene the Companies Ordinance and the Articles of Association.

40 The first part of the argument of learned counsel for the Appellant is then based on the existence in the company's accounts for 1950 of an over-all or serious capital deficiency. The question therefore arises as to whether or not there was in fact such a deficiency. If there was not, then his argument under this head must fail. It is said that the total share capital, ignoring preference share capital of £42,000, was £150,000 and that a deficiency of £58,000 on a capital of £150,000 is so great that there was a serious capital deficiency. As the learned counsel for Respondent has observed, a balance sheet although properly drawn up
40 may not disclose the true position of a company. In this case an asset of Shs. 1,174,935.30, or £58,000 odd is shown in the company's balance sheet for 1950 and it is admitted that this represents ore which does not exist. In like manner, it is submitted, there may be hidden reserves in a balance sheet. In Miscellaneous Civil Cause 51/51 the petitioners asked that the company be wound up owing to the directors' failure to redeem certain preference shares which were said to be redeemable on the 1st January, 1950, to enable the shareholders to obtain payment of their capital. Sinclair, J., who heard that petition was satisfied that "the

*In the
High Court
of
Tanganyika.*

No. 5.
Judgment,
11th May
1954,
continued.

*20
E.A.C.A.
28.

figure at which the Development Account appeared in the balance sheets was greatly in excess of the value of what it purported to represent, namely the reserves of ore." He was not, however, of the opinion that the company was suffering or was likely to suffer any financial embarrassment. On the contrary, he expressed the view that there seemed to be "every prospect of the company making profits out of which the shares can be redeemed and the dividends paid." The petition was dismissed and the shareholders' appeal to the *Court of Appeal for Eastern Africa, but nowhere in the judgment delivered in that Court can be found any word to suggest that the company was not in a perfectly sound financial position. *Worley, V.P., for example said, at pages 37-38 of his judgment, "On such evidence as we have before us it seems clear that in the four years immediately preceding the petition the company was working at a substantial profit, and there is no ground for assuming that it has not continued to do so." The petition was filed in August 1951. With all due respect to learned counsel for the Appellant, I can find no ground for holding that the balance sheet of the company for 1950 shows an over-all deficiency of capital. That being so, it becomes unnecessary for the purpose of deciding this appeal to construe the meaning of "losses" in section 21. 10

Whether or not it would be wrong to distribute profits to any person other than the preference shareholders would, I think, depend on whether or not such distribution were made before or after the date on which the preference shares were redeemable, and it is not possible to decide upon that date. As Hearne, C.J., said in the appeal above referred to, "The date for their redemption has not been defined and cannot be determined." 20

There remains one further point which is raised in paragraph 1 of the appeal, and this can be simply dealt with. The committee purported to find the assessment correct under section 22, East African Income Tax (Management) Act 1952. It is agreed between the parties that the correct section was section 71. 30

One point which seems to be of interest in this case is whether on the strict interpretation of section 78 of the Act of 1952 this appeal lies at all. The point has not been taken and I do not propose to decide it. It would, however, appear that the section is confined to appeals against assessments only. Sub-section 5 provides that the onus of proving that an assessment is excessive shall be upon the person assessed. No appeal against any order of the Commissioner appears to be given in the Act, and yet that is clearly what has been asked in this appeal. The assessment itself has not been attacked. If I am correct it may well be desirable to remove any doubt which may exist by amending the Act to give a right of appeal against an order of the Commissioner in addition to the right to appeal against assessments. 40

For the reasons given this appeal must be and is hereby dismissed with costs.

Judge.

Dar-es-Salaam.
11th May 1954.

No. 6.

MEMORANDUM OF APPEAL.

*In the
Court of
Appeal for
Eastern
Africa.*

Williamson Diamonds Limited, the Appellant above-named, appeals to Her Majesty's Court of Appeal for Eastern Africa against the whole of the decisions above-mentioned on the following grounds, namely :—

No. 6.
Memoran-
dum of
Appeal,
30th
August
1954.

1. The learned Judge was wrong in law in holding that the audited accounts of Buhemba Mines Limited, in which the Appellant Company is a Shareholder, did not as at 31/12/1950 show a capital deficiency because (a) there was not evidence to support his finding of fact to the contrary ;
10 and (b) he appears to have overlooked the differing incidents of the capital and the revenue position of Buhemba Mines Limited.

2. The learned Judge was wrong in law in holding that if there was not in fact a capital deficiency, it was not necessary to construe section 21 of the Income Tax (Consolidation) Ordinance 1950, because the second and third grounds of appeal in the Court below were and are not necessarily interdependent.

3. The learned Judge was wrong in law in holding that if profits were in fact held to be available for dividend, it was not possible to decide upon the date of the redemption of the Preference Shares in Buhemba
20 Mines Ltd.

The Appellant therefore prays :

(A) That the decisions of the High Court be reversed ; and

(B) that assessment No. 14782 of the year of Income 1951 be annulled ; and

(C) for such further and other relief as this Honourable Court may seem fit to grant,

together with the costs of this appeal and of the appeal in the Court below.

Dated at Nairobi this 30th day of August, 1954.

(Sgd.) K. BECHGAARD,
Advocate for Appellant.

*In the
Court of
Appeal for
Eastern
Africa.*

14.3.55.

No. 7.
Notes of
Arguments.
Nihill, P.,
14th
March
1955.

Coram : NIHILL, P.

WORLEY, V.-P.

BRIGGS, J. A.

Bechgaard and O'Donovan for Appellant.

Newbold, Q.C., for Respondent.

Bechgaard :

Reads Judgment at p. 15.

10

Briggs, J. :

You did not attempt to show a capital loss. You have no property account. You have not valued your mining rights.

On a proper construction of Sec. 21 Commissioner should adopt commercial principles.

The 2 development accounts relate to 2 different areas.

Judge mixed up the bonussing revenue with loss or development.

There was a deficiency of £58,000. We proved a capital deficiency on ore account.

There was a capital deficiency. Therefore Sec. 21 never meant to 20 apply.

Sec. 21 must be read in the light of the list it was meant to deal.

Judge did not deal with my ground 2.

Even if judge right here, he should have considered possible capital losses during 1950.

Consider of shipowner owning 10 ships.

I asked Court to interpret Sec. 21. Judge did not. What is meaning of losses.

Ord. 27 of 1950. Sec. 21.

2nd Ed. Simon's Income Tax Vol. 1 p. 42.

30

Sec. 21.

line 3—the profits distributed as dividends.

line 8. “are less than 60% of the total income.”

line 11. “losses previously incurred.”

“Profits made.”

line 14. "60% of such total income."
means. Commercial profits—

Commercially we faced a loss of £2,000 odd.

(1) a different word refer to a different matter.

31 Halsbury para. 600, page 482.

1 Burrows, para. 98, page 42.

Sec. 21 is based on Sec. 23 (A) Indian Income Tax Act.

cf. Sec. 245 U.K. I. Tax Act 1952.

Kanga Income Tax p. 638.

10 This Section considered by Indian Courts in (1949), 17 Indian Tax Reports at p. 493, at p. 497.

Must consider actual profits made by the Coy. If my profits are arrived at by proper commercial accounting, Commissioner must accept figures shown.

Sec. 255 (3) U.K. Act.

Therefore in U.K. the yardstick is by statutory definition the taxable income.

In East Africa no definition of profits.

If not defined, profits & loss must have commercial meaning.

20 *Court* :

Commissioner must be satisfied that it would be unreasonable to pay more than 60%.

Newbold :

Not called on re 'overall deficiency.'

Left really only with the question of reasonableness of the order.

"profits" means almost same thing as "total income."

"total income." See definition.

"profits" not defined. Can only mean profits has—at under the Ord. because that is what is chargeable. No ground for saying profits means
30 commercial profits.

"profits" throughout Ord. means profits assessed in accordance with principles of Part V.

In E.A. Commissioner does not have to have regard to every factor as in England because in E.A. Commissioner cannot than 60%.

Adjourned to 2.30 p.m.

J. H. B. NIHILL, P.

*In the
Court of
Appeal for
Eastern
Africa.*

No. 7.
Notes of
Arguments.
Nihill, P.,
14th
March
1955,
continued.

*In the
Court of
Appeal for
Eastern
Africa.*

2.30 p.m. Bench & Bar as before.

Newbold continues :—

Profits must mean profits for income tax purposes.

No. 7.
Notes of
Arguments.
Nihill, P.,
14th
March
1955,
continued.

Commercial profits means the balance carried down from your expenditure account to your appropriation account. Fact that no profits available for distribution does not mean that there has been no commercial profit. Capital expenditure is not permitted as a deduction with one exception. Second Schedule permits a mining coy. to deduct capital expenditure estimated on life of the mine.

Question of reasonableness matter of fact for Commissioner. You 10 cannot take into account any capital feature.

If capital loss comes within term losses the capital profits comes within term profits.

“ share ” in Indian Section not “ may.”

Commissioner cannot have regard to possible capital appreciation or depreciation.

Only 2 factors can be taken into account.

Previous losses, a smallness of profits.

The whole basis of the case is on a capital loss which cannot be taken into account. 20

Bechgaard.

I agree losses in Development A/C.

I concede is a capital loss.

Losses previously incurred—can mean capital losses which exist.

Fattorini's case p. 625.

C.I.R. v. Morrison 17 Tax Cases 325.

On a question of interpretation & the Indian case only conclusion is that phrase can take into account capital losses.

Judgment reserved.

J. H. B. NIHILL, 30
President.

NOTES OF ARGUMENTS. Worley, V.-P.

14.3.55.

Coram : NIHILL, P.
 WORLEY, V.-P.
 BRIGGS, J.A.

Bechgaard & O'Donovan for Appellant.
 Newbold, Q.C., for Respondent.

*In the
 Court of
 Appeal for
 Eastern
 Africa.*

No. 8.
 Notes of
 Arguments.
 Worley,
 V.-P.,
 14th
 March
 1955.

Bechgaard :

10 Memo. of Appeal.
 p. 15. Judgment.

l. 23—not quite correct. See Memo to High Court para. 3 (c).
 T.T. Ord. No. 27/50 Sect. 21.

p. 15 (c) Articles not included in record—I don't propose to argue that point in this appeal but propose to reserve it.

I say the deficiency was £58,000 only after we had written off £29,000, i.e. in reality £87,000 commercial loss.

Briggs :

You haven't property statement or valuation of your assets.

20 *Bechgaard :*

No : but we aren't concerned with the future. The fact is that in 1950 we were £89,000 worse off.

I say capital deficiency should be calculated on commercial basis, not on income tax principles.

Newbold admitted that the amount in No. 1 development fund did not represent reserves of ore.

Newbold :

Yes : but I didn't admit it represented a capital deficiency. Two years later it was all written off and still a profit was shown.

30 *Bechgaard :*

It represented expenditure on a mine which didn't pay.

p. 15, l. 43. "hidden reserves" is speculation.

Reference to Sinclair J.—Mahon treats this as ? finding on facts. I say the judgment of Sinclair, J., has been misunderstood. Misdirected here.

Judgment of Sinclair, J.—p. 10.

"I have no intention etc.

*In the
Court of
Appeal for
Eastern
Africa.*

I say that Sinclair, J., was dealing with the future—correct enough there but irrelevant to present case.

(My main ground is para. 2 of this Appeal (= ground 3 in High Court). I say Mahon, J., completely ignored this.)

No. 8.
Notes of
Arguments.
Worley,
V.-P.,
14th
March
1955,
continued.

Mahon, J., quotes Worley, V-P.* (pp. 37–38 of his judgment but the latter is dealing with future prospects).

Judgment p. 16—find no overall deficiency of capital. I say this is speculative. But even if the finding is correct, I still say J. wrong in refusing to construe “losses” in § 21. Certainly I had shown loss. A capital asset which has been lost must appear in balance sheet and be 10 written off.

*20
E.A.C.A.
28.

This is the main point.

See arguendo at p. 14 of record.

Judgment—re distribution of profits—I am not arguing this but wish to reserve it.

Ord. 29/50 Sect. 21 (1).

Not a charging section. Coy. is charged under § 27.

Section 21—impersonal tax on Coy. is charged by way of personal tax on shareholders.

Cannot have element of reasonability in charging section. 20

Purpose of Section.

Simon—Vol. I : general principles of interpretation p. 43. 2nd Ed.

Sec. 21 (1) 1. 3 “the profits distributed”.

1. 8 “60% of total income of Coy. etc.”

1. 11. “profits made”.

1. 14. “such total income”.

I contend in this section use of phrase “unless he is satisfied . . . profits made”, these words are used in commercial sense, translated in terms of cash : Newbold says it means total income.

I say we had loss of £2,000—he says profit of £38,000. 30

My two principles :—

(A) If in same section different word used it is *prima facie* intended to refer to different matter : Halsbury Vol. 31, para. 600. Words & Phrases Vol. I para. 98 : converse.

T.T. § 21 (1) based on India I.T. Act 1922 § 23 A.

cf : § 245 U.K. I.T. Consolidation Act 1952.

Ind. Section considered in :—

17 I.T.R. 493 *Sir Kasturchand Ltd.* 1949 at p. 497 C.J. I say question whether order should be made depends on commercial profits—not the taxable income. 40

cf. Eng. Sect. “ a reasonable part of actual income ”, “ actual income ” being defined in § 255 (3)—the taxable income is there made the yardstick—in E.A. no definition of profits & losses.—but see § 2 definition of “ loss ”.

—no definition of “ profit ”=commercial profits.

*In the
Court of
Appeal for
Eastern
Africa.*

Briggs :

By what other standard could you determine “ reasonableness ”.

Bechgaard :

I say Ind. case concludes the matter. It is purely question of construction.

No. 8.
Notes of
Arguments.
Worley,
V.-P.,
14th
March
1955,
continued.

10 *Newbold.*

Court :

Not called on to answer on question of “ capital loss.”

Newbold :

Only question there is what has Court to consider in deciding what is “ reasonable.”

I say “ profits ” means almost same as total income but can never be the same.

Definition of “ total income ” § 2.

Sources specified in Pt. III means “ profits.”

20 I don't agree that profits in 7 (a) means commercial profits—it must mean profits as construed in Part V.

Difference between profits and total income is this :—

Have any part of profits been exempted from tax. Total income starts and is founded on “ profits ” as computed in Ordce. No ground for saying in § 21 (1) it means commercial profits.

What are “ commercial profits.” Must depend on opinion of particular Bd. of Directors. Might mean amount distributed or might mean gross profits, before appropriation.

30 In I.T. Ordce. it can mean only profits as understood by principles set out in Pt. V.

Same word to be construed in same way throughout Ordce.

Our Section not based on Eng. Section. In England no statutory percentage : all or nothing.

S.O. to 2.30 p.m.

2.30 p.m. Bench & Bar as before.

Newbold continues :

“ Commercial profits ” vague phrase. At least must mean balance c/d from income and expenditure a/c to appropriation a/c.

*In the
Court of
Appeal for
Eastern
Africa.*

No. 8.
Notes of
Arguments.
Worley,
V.-P.,
14th
March
1955,
continued.

Rate of depreciation—for I.T. purposes is fixed.

Directors may provide for greater %.

Mode of appropriation is Company's concern—may be nothing left for distribution for dividend—but still amount carried down is “commercial profit.”

Refers to P & L A/C pp. 43–44.

—shows “commercial profit” of 1,000,000 Shs.

For calculation of “losses previously incurred” I don't know how the Sh.509,000 was bt. forward.

P. 5. App. “B.”

10

Capital expenditure not allowed except for amount allowed under 2nd Sched. to mining companies. Based on estimate of life of mine : I.T. authorities normally accept Director's estimate.

1945 £12,238 profit.

£16,090 allowed for capital loss.

Taxable loss £3,852.

But Coy. only wrote off £8,076.

So also in 1946 & 1947.

i.e. the Coy.'s commercial profit *must* have been greater than profit allowed for I.T. I say that “losses previously incurred” means losses 20 incurred for I.T. purposes : must be calculated exactly as profits are. If put on that footing it is question of fact for Local Committee & the High Court.

Concurrent findings.

Bechgaard :

Reasonableness never before Court.

Newbold :

Then it is not before this Court. I say under § 21 you cannot take into account any capital losses or profits : see definition. There are provisions in Second Sched. for allowances for capital depreciation. Refers to Kanga 30 2nd Ed. p. 646.

—*Fattorini Ltd.* does not apply in India.

As to *Sir Kasturchand's case*—I do not disagree with what was held—but we do not know where the assessable income came from. In India, assessable value per I.T. of property may be greater than actual income from the property : See Ind. § 3.

Those *may* be the facts of that case—report not full.

I am not concerned now with what may or may not be reasonable. I am only concerned here to argue that the phrase “losses previously incurred” cannot include capital losses.

40

Bechgaard :

I agree losses on Development No. 1 must be treated as capital losses.

I say that in the Section "losses previously incurred" and "profits" must mean commercial profits.

If Newbold correct, losses must be revenue losses which no longer exist, because written off.

I say it means capital losses which still exist.

10 tax. I say in the exception clause in § 21 (1) we are not dealing with income

Cites *Fattorini's case* : reasonableness is a question of fact.

Clause includes all matters which affect the balance sheet.

*Hearne, C.J., at p. 20.

To Court :

I do not agree that I am giving a different meaning to "profits" in § 21 to rest of Ordee. "Profits" means commercial profits.

C.I.R. v. Morrison (H.L.) 17 T.C. 325.

Ld. Morison—p. 332 "profits."

20 Proviso (a) to § 21 (1). Cites : *Montague Burton Ltd. v. C.I.R.* 20 T.C. 43. Refers to

C. A. V.

N. A. WORLEY,
Vice-President.

No. 9.

NOTES OF ARGUMENTS. Briggs, J.A.

14.3.1955.

Coram : NIHILL, P.
WORLEY, V.-P.
BRIGGS, J. A.

30 *Bechgaard & O'Donovan* for Appellant.
Newbold, Q.C., for Respondent.

Bechgaard.

Grounds.

Judgment.

p. 15.

Capital deficiency £58,000 + 29,000 already written off. "Hidden reserves."

*In the
Court of
Appeal for
Eastern
Africa.*

—
No. 8.
Notes of
Arguments.
Worley,
V.-P.,
14th
March
1955,
continued.

*20
E.A.C.A.
28.

•
No. 9.
Notes of
Arguments.
Briggs, J.A.,
14th
March
1955.

*In the
Court of
Appeal for
Eastern
Africa.*

This is mere speculation.

(Unvalued asset—not hidden reserve.)

Second point.

No. 9.
Notes of
Arguments.
Briggs, J.A.,
14th
March
1955,
continued.

Whether or not there is an overall capital deficiency, there was certainly a substantial capital loss on one item, D. A/C No. 1.

p. 40.

Court must now interpret § 21.

I am not arguing the point about redeemable preference shares, but I do not actually abandon it. The jurisdiction point will also not concern the Court. 10

§ 21. Income Tax (Consolidation) Ord. 1950.

First, it is all discretionary.

cf. § 245 Income Tax (Consolidation) Act.

Simon Income Tax Vol. 1, 43 § 55.

In § 21.

“ Unless he is satisfied etc. . . .”
is dealing with commercial losses & profits.

Different words *prima facie* refer to different matters.

31 Hailsham 482 § 598 Seqy.

1 Burrows. 42. 20

§ 23 A Indian Income Tax Act.

Sir Kasturchand Ltd. v. C.I.T. Bombay (1949) 17 I.T.R. 493, Chaggra, C.J., 497.

To avoid the potential incidence of § 21 one must distribute 60% of the taxable income.

To show that in discretion of Commr. an order should not be made, commercial profits must be considered.

(Commr. says ‘ profits ’ here means practically the same as ‘ taxable income ’).

cf. “ actual income ” in § 245. 30

Defined in § 255.

Newbold.

(Not called on as to “ overall capital deficiency ”). Only point is now construction of § 21.

What must the Commr. consider ?

Meaning of “ losses previously incurred ” and “ profits made ” in § 21.

“Profits” not quite = total income, because of exemptions and manner of computation.

“Profits”—See § 7 (a)—always means profits as computed in accordance with the Act.

Difference between “profits” and “total income” is only “exemptions” under Pt. IV.

Commercial profits are vague and may mean any number of different things.

10 “Profits” means “Profits computed in accordance with principles set out in Part V.”

*In the
Court of
Appeal for
Eastern
Africa.*

No. 9.
Notes of
Arguments.
Briggs, J.A.,
14th
March
1955,
continued.

2.30 p.m.

Appearances as afore.

Newbold continues :

Court must wholly disregard capital losses, just as it must disregard capital profits.

This applies to § 21 as to the rest of the Ord.

Bechgaard.

§ 21 raises different consors : from most of the rest of the Act.

20 It is reasonable for *this* purpose to consider the capital situation, although one does not do so for most income tax purposes.

Fattorini Ltd. v. T.R.C. [1942] 1 A.E.R. 619, 625.

C.I.R. v. Morrison 17 T.C. 332.

Not strange to consider capital position for *this* purpose

Montague Burton 20 T.C.

Should not use § 21 to prevent replacement of depletions of capital.

C. A. V.

F. A. BRIGGS,
Justice of Appeal.

No. 10.

JUDGMENT.

30

(a) BRIGGS—Justice of Appeal.

The Appellant is a shareholder in Buhemba Mines Limited, which I shall call “the Company.” On 25th April, 1952, the Respondent Commissioner made an order under section 21 of the Income Tax (Consolidation) Ordinance, 1950, of Tanganyika that a sum of Shs.457,920

No. 10.
Judgment,
7th April
1955.

(a) Briggs,
J.A.

*In the
Court of
Appeal for
Eastern
Africa.*

No. 10.
Judgment,
7th April
1955.

(a) Briggs,
J.A.,
continued.

should be deemed to have been distributed to the shareholders of the Company by way of dividend in respect of the year ending 31st December, 1950. The Appellant's share of this sum was Shs.194,800.32 and income tax was assessed thereon at Shs.9,740. The Appellant contended that the order should not have been made and on this ground appealed against the assessment to the Local Committee and later to the High Court of Tanganyika, which both upheld the assessment. The Appellant appeals again to this Court.

There seems to be some doubt whether it is competent to appeal against an order made under section 21, and it might be suggested that its propriety cannot in strict law be examined by means of an appeal against an assessment correctly based on the order; but this point was not taken for the Respondent and I assume that an appeal of this kind will lie. It is certainly just and reasonable that the Courts should be able to decide whether such an order was rightly made, and this method of raising the question is simple and convenient.

One of the grounds raised by the Appellant was that part of the issued capital of the Company consists of redeemable preference shares and that the payment of any dividend to the holders of founders' or ordinary shares before redemption of the outstanding preference shares would have been an invasion of the rights of the preference shareholders. No argument was addressed to the High Court or to us on this point, and the Articles of Association of the Company were not included in the record before us. The point was not abandoned, but it has not been, and in the circumstances could not be, substantiated.

The first ground of appeal argued before us was that, although the Company had made a profit in 1950, it had previously incurred capital losses and there was still an overall capital deficiency. It was contended that this fact made it either unlawful, or at least unreasonable and improper, to make an order under section 21. No oral evidence was led and the Appellant relied entirely on the Company's annual accounts for 1950, together with an admission to which I shall refer later. The balance sheet is in a form perfectly usual and proper for a mining company. Under "fixed assets at cost less depreciation, except where otherwise stated," it opens with "Development" under three heads "No. 1 Account," "No. 2 Account" and "Nigoti claims." The last is apparently of minor importance; the amount is only Shs.5,000. No. 1 Account appears as follows:—

" As per last balance sheet	1,762,402.95	
Less : Amount w/off 20% approximately		587,469.65	40
		<hr/>	
Representing old Development to be written off	1,174,933.30	"

It might fairly be guessed, and in any event is agreed, that this refers to a mine on the development of which some Shs.2,900,000 had been spent, and which in or about 1948 was abandoned and decided to be worthless. It was expressly admitted that the item of Shs.1,174,935.30 did not represent any reserves of workable ore. It seems that the Company's

intention was to write off the whole of this development over the five years 1948–1952 inclusive—an entirely proper procedure. The No. 2 Development account is in the following form :—

	“ As per last balance sheet	393,401.67	<i>In the Court of Appeal for Eastern Africa.</i>
	Additions during year	368,485.24	
			761,886.91	No. 10. Judgment, 7th April 1955.
	Less : Redemption—33,052 tons @ Shs.7/26		239,957.52	
10	Representing Current Development	521,929.39 ”	(a) Briggs, J.A., <i>continued.</i>

This refers to the Company’s other mine, which was working, and from which was derived in 1950 a net profit of over a million shillings, as carried from the profit and loss account to the appropriation account. It may be noted that current depreciation, including “ development redemption ” or depletion on No. 2 Account, is charged in the profit and loss account, but “ Redemption Development Account No. 1 ” is charged in the appropriation account. That account opens with a debit item of Shs.509,856.35 brought forward from 1949, and closes with a reduced adverse balance of Shs.40,662.88 carried forward to 1951. The balance sheet contains no
20 property account and no reference whatever to land or rights over land except as described.

On this material the Appellant invited the High Court, and invites us, to say that the Company is suffering from an overall capital deficiency. I think we cannot possibly do so. The facts established seem to me to be these. The Company has two mines of which one is worthless. A large sum spent on that worthless mine has been lost and is being written off. The other mine is working and producing profits. A large sum spent on developing it is rightly regarded as an asset ; but no attempt has been made to show in the balance sheet or otherwise the value of the
30 mine itself. We do not know whether the Company has a freehold or other title. It may have a mere licence and there may be many good reasons which might induce a valuer to say that the value of the working mine is small. If the balance sheet were so drawn as to give a valuation of the Company’s interest in the mine as such, it might be right to accept that valuation as correct in the absence of other evidence, even if a very low figure were shown. My difficulty is that on the face of the accounts it appears that the Company must have an asset, the mine, which can produce profits and is presumably of some value, but which has not been
40 valued in the accounts at all. No doubt it may be good conservative accounting practice for a mining company to refuse to value its mine in a balance sheet at anything more than the amount spent on development thereof less depletion ; but, if this practice is adopted, the balance sheet will be of no service to establish an overall capital deficiency in any sense which would bind a third party such as the Respondent. As between the board and shareholders eager for dividends, these accounts would fully justify the board in paying no dividend for 1950, but they do not in my view establish an overall capital deficiency such as should or might influence the conduct of the Respondent. The learned Judge below spoke of the possibility of hidden reserves. I prefer to say that there is

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(a) Briggs,
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continued.

a patent omission to value the Company's principal asset, which makes the balance sheet valueless for the purpose of estimating the Company's true capital position.

The learned trial Judge said in his judgment :—

“ I can find no ground for holding that the balance sheet of the company for 1950 shows an overall deficiency of capital. That being so, it becomes unnecessary for the purpose of deciding this appeal to construe the meaning of “ losses ” in section 21.”

With the first sentence of this passage I respectfully agree, but the Appellant contends that the second sentence is based on a misapprehension, 10 since, even if no overall capital deficiency is established, the Commissioner ought to have been satisfied that “ having regard to losses previously incurred by the company or to the smallness of the profits made the payment of a dividend . . . would be unreasonable.” This contention was clearly raised in the Court below and it certainly appears at first sight that the learned Judge either misunderstood it, or failed to deal with it.

Counsel for the Appellant puts the matter in this way. Section 21 is not a charging section and deals with a special mischief, namely, that if a company persistently refrains from distributing its profits and then is wound up, its shareholders will receive those profits in the form of a 20 capital gain and no further tax will be payable thereon beyond that already paid by the company. He cites section 245 of the English Income Tax Act, 1952, where this is specifically stated. Certainly it must be accepted that that was the general purpose of the section. Counsel then argues that the power to make an order under section 21 is entirely discretionary, and that before such an order can properly be made it must appear, not only that the company has had a taxable income for the relevant period of which under 60% has been distributed, which is a condition precedent to the general application of the section, but 30 also that in the commercial sense there are available profits out of which a dividend ought to be declared. This depends on the further contention that “ losses previously incurred ” may include capital losses and that “ profits made ” is to be interpreted according to commercial practice and not according to income tax rules. Applying those principles to this case, it is contended that, although the profit and loss account for 1950 shows a net profit of Shs.1,081,630.78 carried down to appropriation account, the appropriation account shows that it would be quite un- 40 reasonable to expect the Company to pay any dividend at all. If the principles are correct, I think the conclusion drawn from them on the special facts could hardly be challenged.

The Respondent, however, attacks the principles themselves. He submits that the words “ losses ” and “ profits ” in this context must bear the same meaning as they do in every other part of the Ordinance, in other words, that losses are strictly confined to revenue losses, and losses and profits alike must be such as are ascertained in accordance with income tax law. Any other construction, he says, would lead to impossible confusion, because a dozen sets of accounts may be drawn up on the same facts without commercial impropriety, and each may show a different

“profit.” He further contends that, if capital losses must be taken into account, then capital profits should equally be taken into account, a position which, he suggests, no tax-payer would welcome.

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I think a number of objections may be taken to this argument. In the first place there is some direct authority from India against it. In *Sir Kasturchand Ltd. v. C.I.T., Bombay* (1949), 17 I.T.R. 493, at p. 497, the Bombay High Court in construing section 23 (a) of the Indian Income Tax Act, 1922, which for this purpose is in *pari materia* with the relevant part of section 21 of the Ordinance, held that the Income Tax Officer must consider “the smallness of the profit made by the Company in contra-distinction to the assessable income of the company . . . not the assessable income of the company but the actual profits made by the company” and added :—

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(a) Briggs,
J.A.,
continued.

“It is hardly necessary to emphasise the very great distinction that may exist between the assessable income of the company and the actual accounting profits made by the company, and what the Income-tax Officer has got to consider is the actual accounting profits made by the company and not the profits assessed to income-tax or super-tax by the Income-tax Officer.”

20 This certainly supports one side of the Appellant’s argument. Again, if the Respondent’s construction is right, the only difference between “profits” and “total income” would presumably depend on exemptions under Part IV of the Ordinance. In either case the total income or profits would have been diminished by any deduction in respect of revenue losses in previous years. It is, I think, important to note that that was in fact done in this case. The income of the Company for 1950 for income tax purposes would have been £47,511, but was reduced by income tax losses for 1945, 1946 and 1947 less income tax profits for 1948 and 1949, to £38,160. If “losses previously incurred” bears the limited meaning for
30 which the Respondent contends, those losses have already been allowed for in arriving at the total income for the year under consideration and it is difficult to see why the Commissioner should pay any further attention to them in deciding whether to make an order. In the same way, if “profits” has the sense submitted, the direction that the Commissioner shall have regard to the “smallness of the profits made” becomes merely a direction to ignore cases not involving substantial sums of money. Counsel sought to meet these objections by saying that a company might deserve consideration if its results fluctuated violently; but added that the Appellant’s case had never been put forward on that footing, and that
40 the order ought not to be disturbed now on that narrow ground alone. With this last submission I agree. I should not wish, in view of the substantial issues put forward, to decide this appeal on that somewhat tenuous ground.

The Respondent next argued that the provisions of Part III of the Second Schedule—Deductions in respect of Mining Operations—show that there is no need for the Commissioner to take into account capital expenditure on development which has been proved to be of no value, since the allowances made under that part in effect provide for that situation. The allowances actually made in this case increased gradually
50 from about £14,000 in 1939 to about £23,000 in 1950, and it is stressed

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(a) Briggs,
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that in some unprosperous years the allowance for income tax substantially exceeded the amounts of development expenditure written off by the Company in its own accounts. However, over the twelve years the Company has written off rather more than it has been allowed—some £240,000 against £218,000. This provision for allowances for depletion is certainly a factor to be borne in mind. If the Commissioner is allowed to consider capital losses at all, he will no doubt keep in mind the capital allowances and the invariable problem that mines suffer depletion and have a limited life; but I do not think the provisions of Part III can themselves provide an answer to the general question of construction. 10

I derive little help from English law. Section 245 of the 1952 Act is very different from section 21 of the Ordinance, but the provisions of section 246 have at least this importance, that in England, where the ultimate mischief is the same as in Tanganyika, it is thought right that the Commissioners should examine the “current requirements of the Company’s business” and also requirements “for the maintenance and development of that business,” and may, with certain specified exceptions, consider the whole capital position of the Company. See also *Montague Burton Ltd. v. C.I.R.*, 20 T.C. 48, at 68–9. This is no direct authority for the construction of section 21, but I think it has just this importance, that 20 where a section deals with these particular problems there is no reason to be surprised if it departs from ordinary income tax rules and methods and requires the Commissioner to consider the position of the Company from a commercial point of view. On the best consideration I can give to the question, I think that is the true effect of section 21. I do not mean, of course, that the Commissioner is absolutely bound by the accounts put forward by the directors. He might in any case say, “This provision is not a matter of prudent or cautious commercial accounting, but a mere concealment of profits which should be distributed.” That, however, 30 should be the exceptional case, and unless it arises I think the Commissioner’s approach to the matter should be to consider the accounts put before him as a prudent business man would, and if on the whole he is of opinion that on that footing the board could not fairly be expected to pay a dividend, he should not make an order under section 21.

If I am right, I think it is clear that the High Court at least has not considered the matter on the correct footing, and, although we have no means of knowing the reasoning on which the Commissioner or the Local Committee based their respective decisions, I do not think it would be disputed that their approach to the question was based on the view of the law which the Respondent has put forward to us, and which is in my 40 opinion an incorrect view. It is therefore necessary that the matter should be re-examined with a view to a decision based on different principles. I have felt some doubt whether it would be sufficient to remit the matter to the High Court, which in most income tax matters has the wide powers of a Court of first instance, but I think this is rather a special case. Section 21 vests a special discretion in the Commissioner. He has exercised it in this case, as I think, on wrong principles. The present order was wrongly made and the assessment based on it should be quashed; but he remains the proper person to exercise that discretion, and it is not for us to say that in this case he could not possibly make an order in accordance with the 50 principles which we have laid down. I think the matter should be

remitted to him with a direction that the existing order was unlawfully made and must be treated as a nullity. In consequence it is open to him to reconsider the whole matter and to take such steps as may be proper. I think this appeal must be allowed. The Respondent should pay the Appellant's costs of this appeal and of the appeal to the High Court.

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F. A. BRIGGS,
Justice of Appeal.

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Judgment,
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1955.

(a) Briggs,
J.A.,
continued.

(b) NIHILL—President.

(b) Nihill, P.

I concur in the judgment prepared by the learned Justice of Appeal
10 and have nothing to add.

An order will be made in the terms he has proposed.

J. H. B. NIHILL,
President.

(c) WORLEY—Vice-President.

(c) Worley,
V.-P.

I have had the advantage of reading the judgment prepared by the learned Justice of Appeal. I agree with it and have nothing to add.

N. A. WORLEY,
Vice-President.

Nairobi.

20 7th April, 1955.

*In the
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No. 11.
Order
allowing
Appeal,
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1955.

No. 11.
ORDER ALLOWING APPEAL.

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA.
At Nairobi.

—————
Civil Appeal No. 73 of 1954.
—————

Between WILLIAMSON DIAMONDS LIMITED . Appellant
and
THE COMMISSIONER OF INCOME TAX Respondent.

(Appeal from a Judgment of the High Court of Tanganyika at Dar-
es-Salaam (Mr. Justice Mahon) dated 11th May, 1954, in Miscellaneous 10
Civil Appeal No. 3 of 1954

Between WILLIAMSON DIAMONDS LIMITED . Appellant
and
THE COMMISSIONER OF INCOME TAX Respondent.

—————
In Court this 7th day of April, 1955.

Before the Honourable the President, Sir BARCLAY NIHILL, the
Honourable the Vice-President, Sir NEWNHAM WORLEY and the
Honourable Mr. Justice BRIGGS, the Justice of Appeal.

ORDER.

THIS APPEAL coming on the 14th day of March, 1955, for hearing 20
in the presence of Mr. K. Bechgaard and Mr. B. O'Donovan advocates
for the Appellant and Mr. C. D. Newbold, Q.C., advocate for the
Respondent, when it was ordered that this appeal do stand for judgment
and upon the same coming for judgment this day IT IS ORDERED :—

- (1) That this appeal be allowed ;
- (2) That the matter be remitted to the Commissioner of Income
Tax with a direction that the existing order was unlawfully made
and must be treated as a nullity ;
- (3) That the assessment based on said existing order be
annulled ;

(4) That the Commissioner of Income Tax reconsider the whole matter and do take such steps as may be proper ;

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(5) That the Commissioner of Income Tax, in determining whether an order should be made under Section 21 of the Income Tax (Consolidation) Ordinance, 1950, should consider the position of the Company from a commercial point of view, regarding the accounts as a prudent business man would, and should not make any such order if, having regard to such considerations, he is of opinion that a dividend could not fairly be paid ;

No. 11.
Order
allowing
Appeal,
7th April
1955,
continued.

10

(6) That the Respondent pay the Appellant's costs of this Appeal and of the Appeal to the High Court of Tanganyika ;

(7) That the Respondent pay the Appellant's costs for two counsel in this Appeal.

Dated at Nairobi this 7th day of April, 1955.

C. G. WRENSCH,
Registrar,
H.M. Court of Appeal for Eastern Africa.

No. 12.

ORDER granting Conditional Leave to Appeal to Her Majesty in Council.*In the
Court of
Appeal for
Eastern
Africa.***IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA
at Nairobi.**

No. 12.

Order
granting
Conditional
Leave to
Appeal to
Her
Majesty
in Council,
14th
November
1955.

Civil Application No. 5 of 1955.

**IN THE MATTER of an INTENDED APPEAL to Her Majesty in
Council.**

Between COMMISSIONER OF INCOME TAX . . Applicant
and
WILLIAMSON DIAMONDS LIMITED . Respondent. 10

**(Appeal from a judgment and order of Her Majesty's Court of Appeal for
Eastern Africa at Nairobi dated 7th April, 1955)**

in

Civil Appeal No. 73 of 1954.

Between WILLIAMSON DIAMONDS LIMITED . Appellant
and
COMMISSIONER OF INCOME TAX . Respondent.

In Court this 14th day of November, 1955.

Before—

The Honourable the PRESIDENT (Sir NEWNHAM WORLEY), 20
The Honourable Mr. Justice BACON, a Justice of Appeal,
and
The Honourable Mr. Justice DE LESTANG, a Judge of the Court.

ORDER.

UPON APPLICATION made to this Court by Counsel for the above-named Applicant on the 17th day of June, 1955 for conditional leave to appeal to Her Majesty in Council under sub-section (B) of section 3 of the Eastern African (Appeal to Privy Council) Order in Council, 1951, AND UPON HEARING Counsel for the Applicant and for the Respondent THIS COURT DOTH ORDER that the Applicant do have leave to appeal as a matter of right to Her Majesty in Council from the judgment and order above-mentioned subject to the following conditions :— 30

(1) that the Applicant shall apply as soon as practicable to the Registrar of this Court, for an appointment to settle the record and the Registrar shall thereupon settle the record with all convenient speed, and that the said record shall be prepared and shall be certified as ready within ninety days of the date hereof ;

(2) that the Registrar, when settling the record shall state whether the Applicant or the Registrar shall prepare the record, and if the Registrar undertakes to prepare the same he shall do so accordingly, or if, having so undertaken, he finds he cannot do or complete it, he shall pass on the same to the Applicant in such time as not to prejudice the Applicant in the matter of the preparation of the record within ninety days from the date hereof ;

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1955,
continued.

10

(3) that if the record is prepared by the Applicant, the Registrar of this Court shall at the time of the settling of the record state the minimum time required by him for examination and verification of the record, and shall later examine and verify the same so as not to prejudice the Applicant in the matter of the preparation of the record within the said ninety days ;

(4) that the Registrar of this Court shall certify (if such be the case) that the record (other than the part of the record pertaining to final leave) is or was ready within the said period of ninety days ;

(5) that the Applicant shall have liberty to apply for extension of the times aforesaid for just cause ;

20

(6) that the Applicant shall lodge his application for final leave to appeal within fourteen days from the date of the Registrar's certificate above-mentioned ;

(7) that the Applicant, if so required by the Registrar of this Court, shall engage to the satisfaction of the said Registrar, to pay for a typewritten copy of the record (if prepared by the Registrar) or for its verification by the Registrar, and for the cost of postage payable on transmission of the typewritten copy of the record officially to England, and shall if so required deposit in Court the estimated amount of such charges ;

(8) Liberty to apply.

30

AND IT IS FURTHER ORDERED that the costs of and incidental to this application be costs in the intended appeal.

Dated at Nairobi this 14th day of November, 1955.

M. D. DESAI,
Acting Registrar,
H.M. Court of Appeal for Eastern Africa.

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No. 13.
Order
granting
Final
Leave to
Appeal to
Her
Majesty in
Council,
3rd
February
1956.

No. 13.

ORDER Granting Final Leave to Appeal to Her Majesty in Council.

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA
at Nairobi.

Civil Application No. 5 of 1955 (P.C.)

IN THE MATTER of an INTENDED APPEAL to Her Majesty in
Council .

Between THE COMMISSIONER OF INCOME TAX . Applicant
and
WILLIAMSON DIAMONDS LIMITED . . Respondent. 10

(Appeal from a Judgment and Order of Her Majesty's Court of Appeal
for Eastern Africa at Nairobi dated 7th April, 1955, in Civil Appeal
No. 73 of 1954.)

Between WILLIAMSON DIAMONDS LIMITED . . Appellant
and
THE COMMISSIONER OF INCOME TAX . Respondent.

In Chambers this 3rd day of February 1956.

Before—

The Honourable the ACTING VICE-PRESIDENT (Mr. Justice BRIGGS)

UPON the application presented to this Court on the 25th day of 20
January, 1956, by Counsel for the above-named Applicant for final leave
to appeal to Her Majesty in Council coming on for hearing this day in
the presence of Mr. C. D. Newbold, Q.C., Counsel for the Applicant and of
Mr. A. B. Patel, Counsel for the Respondent AND UPON READING
the Affidavit of Charles Demoree Newbold, Q.C., sworn on 24th January,
1956, in support thereof IT IS ORDERED that the application for final
leave to appeal to Her Majesty in Council be granted AND that the costs
of this application be costs in the appeal to Her Majesty in Council.

Given under my hand and the Seal of the Court at Nairobi, the 3rd day
of February, 1956.

M. D. DESAI,
Acting Registrar,
H.M. Court of Appeal for Eastern Africa.

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Issued this 6th day of February, 1956.

OTHER DOCUMENTS.

No. 14.

BALANCE SHEET of Buhemba Mines Ltd.

BUHEMBA MINES LIMITED—MUSOMA, T.T.

BALANCE SHEET AT 31ST DECEMBER, 1950

CAPITAL & LIABILITIES

Capital—Nominal Issued :			
156 Founders Shares @ Sh.10,000/- each fully paid up	1,560,000.00		
1,440 Ordinary Shares @ Sh.1000/- each fully paid up	1,440,000.00	3,000,000.00	
847 Preference Shares @ Sh.1,000/- each fully paid up		847,000.00	
CAPITAL REDEMPTION RESERVE		153,000.00	
(NOTE: The Preference Shares are redeemable subject to the provisions of Section 47 of the Companies Ordinance 1931)		<u>4,000,000.00</u>	
CREDITORS :			
Native Wages	12,910.93		
Sundry Creditors	253,876.07		
Williamson Diamonds Ltd.			
Loan for Bukura Machinery	120,000.00		
Other charges	226,639.60		
	346,639.60		
Dr. J. T. Williamson	9,150.00		
	<u>622,576.60</u>		
PROVISIONS :			
Income Tax 1945	14,872.00		
(NOTE: The liability, if any, for Excess Profits Tax on past Profits is undetermined)			
Provisions for Directors' Fees	6,000.00		
	<u>20,872.00</u>		
(NOTE: No provision has been made in these Accounts for the remuneration of the Governing Director, which in terms of Article 99 of the Articles of Association of the Coy. shall be at the rate of Sh.60,000/- per annum.)			
(NOTE: The undertaking with all present and future assets are charged to Barclays Bank (D. C. & O.) to secure overdrafts facilities if and when required.)			
(NOTE: There are contingent liabilities in respect of the following :—			
Special Castings for Ball Mill Liners and Steel Balls	40,507.45		
Headframe and Cyanide Treatment Tanks	133,500.00		
Total	<u>Sh.174,007.45</u>		
(NOTE: The accrued interest 1947/1950 on 6% Pref. Shares amounts to Sh.203,280/-)			
Carried forward		<u>Sh.4,643,448.60</u>	

Other Documents.

No. 14.
Balance Sheet of Buhemba Mines Limited, 31st December 1950.

ASSETS & LOSSES

Fixed Assets at Cost less Depreciation : (Except where otherwise stated)			
DEVELOPMENT :			
No. 1 Account			
As per last Balance Sheet	1,762,402.95		
Less : Amount w/off 20% approx.	587,469.65		
Representing old Development to be written off			1,174,935.30
No. 2 Account			
As per last Balance Sheet	393,401.67		
Additions during year	368,485.24		
	761,886.91		
Less : Redemption—33,052 tons @ Sh.7/26	239,957.52		
Representing Current Development			521,929.39
Nigoti Claims			
As per last Balance Sheet	20,318.61		
Additions during year	451.05		
	20,769.66		
Less : Loss Claims Nos. 7588/89 7592 & 7594 abandoned	4,000.00		
Amount w/off	11,769.66		
	<u>15,769.66</u>		
			5,000.00
			<u>1,701,864.69</u>
BUILDING ACCOUNT :			
As per last Balance Sheet	138,252.98		
Additions during year	32,483.72		
	170,736.70		
Less : Depreciation @ 10%	17,073.67		
PLANT & MACHINERY :			153,663.03
As per last Balance Sheet	431,367.48		
Additions during year	135,015.08		
	569,382.56		
Less : Depreciation @ 12½%	71,172.82		
	<u>498,209.74</u>		
Bukura Machinery			
As per Balance Sheet	53,418.61		
Less : Sold, installed & transferred during year	15,900.00		
	<u>37,518.61</u>		
			535,728.35
Carried forward			<u>Sh.2,391,256.07</u>

BUHEMBA MINES LIMITED—MUSOMA, T.T.

BALANCE SHEET AT 31ST DECEMBER, 1950

CAPITAL & LIABILITIES			ASSETS & LOSSES	Other Documents.
Brought forward	Sh.4,643,448.60		Brought forward	Sh.2,391,256.07
		MOTOR VEHICLES :		
		(At Revaluation less Depreciation) as per last B/S.	32,317.93	
		Less : Sold during year	300.00	
			<hr/>	
		Less : Depreciation @ 25%	32,017.93	
			8,011.98	21,035.95
			<hr/>	
		FURNITURE & FITTINGS :		
		As per last Balance Sheet	6,744.19	
		Additions during year	15,175.69	
			<hr/>	
		Less : Depreciation @ 10%	21,919.88	
			2,191.98	19,727.90
			<hr/>	
		TOOLS AND EQUIPMENT :		
		Purchases during year	8,003.19	
		Less : Depreciation @ 10%	800.31	
			<hr/>	
		TOTAL OF FIXED ASSETS		7,202.88
				2,442,222.80
		FLOATING ASSETS :		
		STORES :		
		At Cost (as per Ledger but unchecked)	918,620.49	
		SUNDRY DEBTORS	9,146.33	
		BANK CASH, CASH, GOLD IN TRANSIT :		
		Gold in transit, estimated	400,000.00	
		Cash in Bank	26,607.73	
		Barclays Bank (D. C. & O.)	806,188.37	
			<hr/>	
			1,232,796.10	
		TOTAL OF FLOATING ASSETS		2,160,562.92
		PROFIT AND LOSS APPROPRIATION ACCOUNT (Attached)		40,662.88
	<hr/>			<hr/>
	Sh.4,643,448.60			Sh.4,643,448.60

AUDITORS' REPORT TO THE SHAREHOLDERS OF BUHEMBA MINES LIMITED.

We have audited the above Balance Sheet with the books and accounts of the Company and have received all the information and explanation we have required, subject to the various qualifying remarks on the face of the Balance Sheet, we are of the opinion that the above shows a true and correct view of the state of the Company's affairs as at 31st December, 1950, according to the best of our information and the explanations given to us and shown by the books of the Company.

Signed J. T. WILLIAMSON, *Director.*
 „ I. C. CHOPRA, *Director.*
 „ FREEMAN ALDERSON, *Secretary.*

NAIROBI, 25th September, 1951.

GILL & JOHNSON,
Chartered Accountants and Auditors,
 Nairobi,
 Kenya Colony.

No. 15.
PROFIT AND LOSS ACCOUNT of Buhemba Mines Ltd.

BUHEMBA MINES LIMITED—MUSOTA, T.T.

PROFIT AND LOSS ACCOUNT FOR THE YEAR ENDED 31ST DECEMBER, 1950

To Operating Expenses—		
Mining	480,300.94	
Ore Transport	47,746.80	
Milling	239,565.79	
Cyaniding		
Sands	102,955.56	
Limes	88,190.00	
	191,145.56	
Smelting	10,271.39	
Assaying	28,922.37	
Power Station (at Buhemba)	222,285.08	
Compound	34,781.52	
Workshops	6,885.57	
General Transport	66,398.30	
Overheads	110,685.68	
Bank Interest	210.50	
House Maintenance	17,583.24	
Roads	30,030.72	
	1,486,813.46	
Total Operating Expenses		1,486,813.46
Depreciation—		
Buildings	17,073.67	
Plant and Machinery	71,172.82	
Furniture and Fittings	2,191.98	
Tools and Equipment	800.31	
Motor Vehicles	8,011.98	
Depreciation Charges on vehicles and Equipment from Williamson Diamonds Limited	10,480.20	
	109,730.96	
Development Redemption No. 2 Account	239,957.52	
Balance—Net Profit for year carried to Appropriation Account	1,081,630.78	
	Sh.2,918,132.72	

By Net Gold Sales	2,518,132.72
Estimated Value of Gold in Transit	400,000.00

Other Documents.

No. 15.
Profit and Loss
Account of
Buhemba
Mines
Limited,
31st
December
1950.

Sh.2,918,132.72

APPROPRIATION ACCOUNT FOR THE YEAR ENDED 31ST DECEMBER 1950

To Balance brought forward from 1949	509,856.35
Redemption Development Account No. 1	587,467.65
Interest on Williamson Diamonds Ltd. Loan for Purchase of Bukura Mining Machinery	7,200.00
Nigoti—Claims No. 7588/89, 7592 & 7594 abandoned	4,000.00
Development Expenditure w/off	11,769.66
	15,769.66
Provision for Directors' Fees (Subject to Approval of Members)	6,000.00
	Sh.1,126,293.66

By Balance—Net Profit for 1950 as per profit and loss account	1,081,630.78
Payment Directors' Fees 1949 waived by Dr. J. T. Williamson & Mr. I. C. Chopra	4,000.00
Balance carried forward to 1951	40,662.88

Sh.1,126,293.66

In the Privy Council.

ON APPEAL
FROM THE COURT OF APPEAL FOR EASTERN AFRICA

BETWEEN

COMMISSIONER OF INCOME TAX *Appellant*

AND

WILLIAMSON DIAMONDS LIMITED *Respondent.*

RECORD OF PROCEEDINGS

CHARLES RUSSELL & CO.,
37 NORFOLK STREET,
STRAND, W.C.2,
Solicitors for the Appellant.

T. L. WILSON & CO.,
6 WESTMINSTER PALACE GARDENS,
VICTORIA STREET, S.W.1,
Solicitors for the Respondent.