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19 January 1966

IN THE PRIVY COUNCIL No. 42 of 1964

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG

(Appellate Jurisdiction)

B E T W E E N:

COMMISSIONER OF INLAND REVENUE Appellant

- and -

MUTUAL INVESTMENT COMPANY LIMITED Respondent

RECORD OF PROCEEDINGS

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IN THE PRIVY COUNCIL No. 42 of 1964

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B E T W E E N:

COMMISSIONER OF INLAND REVENUE

Appellant

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Respondent

RECORD OF PROCEEDINGS

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IN THE PRIVY COUNCIL No. 42 of 1964.

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG

(Appellate Jurisdiction)

B E T W E E N:

COMMISSIONER OF INLAND REVENUE

Appellant

- and -

MUTUAL INVESTMENT COMPANY LIMITED

Respondent

RECORD OF PROCEEDINGS

---

10 NO. 1

In the Supreme Court of Hong Kong (Original Jurisdiction)

No. 1
Case Stated
3rd May 1963

CASE STATED

Commissioner of Inland Revenue

Appellant

v.

Mutual Investment Co. Ltd.,

Respondents

CASE STATED under S.69 of Cap. 112 by the Board of Review for the Opinion of the Supreme Court in pursuance of an application by the
20 Appellant dated 10.4.63.

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1. This Appeal is against a Decision of the Board whereby assessments determined by the Commissioner were (a) in part remitted to him to hear further evidence relative thereto and (b) in part annulled.

2. The following are the facts material to this Appeal.

In the Supreme Court of Hong Kong (Original Jurisdiction)

No. 1

Case Stated

3rd May 1963 - continued.

(a) The Mutual Investment Co. Ltd. was incorporated in Hong Kong on 23rd November, 1956. Its registered office is 604 Edinburgh House, Hong Kong.

(b) The Company commenced business on 23rd November, 1956, and acquired investments in the form of shares in the following companies:

(i)	Lee Hysan Estate Co. Ltd.	$370,000
(ii)	Spa Food Products (F.E.) Ltd.	233,000
(iii)	General Bottling Co. Ltd.	132,000
(iv)	International Beverages Co. Ltd.	115,000
		$850,000

(c) Up until the year ended 31st March, 1959, the Company's only income was by way of dividends and a small amount of bank interest.

(d) For the years of assessment 1956/57 to 1959/60 the Company was assessed as being under no liability to tax.

(e) During the year ended 31st March, 1960, the Company borrowed money which it in turn lent out on interest to another company.

(f) There have been no other activities entered into by the Company and there have been no additions or changes in the share investments.

(g) During the years ended 31st March, 1960, and 1961, the Company received income from dividends and interest and incurred expenditure, as shown in the following tabulation: (see page 4).

(h) In accordance with Section 26(a) of

the Inland Revenue Ordinance the dividend profits were excluded from the assessable profits for the purpose of assessing the profits liable to tax.

(i) After adding back the items of expenditure which he considered not allowable as deductions for tax purposes, the Assessor apportioned the balance of the expenses in the proportion of the non-assessable income (i.e. the dividends) to the total income, and disallowed the sum so calculated as being expenses applicable to the production of non-assessable income.

(j) At the Appeal to the Commissioner, the Assessor having reconsidered the apportionment of the expenses was prepared to amend the assessments to allow the whole of the interest paid as a direct charge against the interest received; and to treat an amount of $100 paid as a gratuity to an employee among the balance of apportionable expenses.

REF. No. 6/489

MUTUAL INVESTMENT CO. LTD.

PROFIT & LOSS ACCOUNTS FOR YEARS ENDED 31st MARCH, 1960 AND 1961

		1960	1961			1960	1961	
TO	Business Registration Fee	25	25	BY	Share Dividends			
	Wages		510		Lee Hysan Estate Co.Ltd.	22,200	22,200	
	Entertainment		340		International Beverages Co. Ltd.		13,500	35,700
	Vehicle Maintenance	355	1,800		Interest:-			
	Sundry Expenses	113	111		Shanghai Commercial Bank	94	88	
	Interest Expenses	4,620	9,240		Sun Nam Yan Construction & Investment Co. Ltd.	10,920	21,840	21,928
	Auditor's Fee	200	200					
	Depreciation	765	650					
	Organization Expense written off		5,259					
		6,078	18,135					
		27,136	39,493					
		$33,214	$57,628			$33,214		$57,628

3. As to that part of his assessment remitted, as stated above, to the Commissioner,

(a) it was contended by the Company that an item to be considered for allowance was Depreciation in the sums of $765 and $650 for the years of assessment 1960/61 and 1961/62 being in respect of a motor car which the Company alleged was used in the business.

(b) The Commissioner considered that the above amounts were "correctly disallowed as it would be difficult to see how a car was used for the purpose of the Company's trade as evidenced by" the facts set out in paragraph 2(g) hereof. He went on to say "It is not sufficient to my mind to say that an expense of this nature is for the purpose of the trade. It must also be for the purpose of earning the profits of the trade".

(c) For the Company it was argued that the Commissioner was wrong in holding that, to be allowable, an expense of this nature, i.e. the purchase of the car in question, must be an expenditure for the purpose of earning the profits of the trade; s.37 being plain and mendatory, there can be no question of the taxpayer having to show that the car was used for such purposes.

(d) In support of the Commissioner's Determination, it was contended before this Board that the Commissioner was right in so holding; and further that the evidence did not show that the car was used for the Company's trade or business.

(e) With regard to the evidence, it was stated to this Board by the Company's Managing Director that the Commissioner had been informed by

In the Supreme Court of Hong Kong (Original Jurisdiction)

No. 1

Case Stated

3rd May 1963 - continued.

him that the car had been used by him in that capacity. There was no mention of this statement in the Commissioner's Determination, and this Board considered it possible that he forgot it when he wrote his Determination. Further, this Board considered that, the Commissioner having stated in his Determination that "it is difficult to see how a car was used for the purposes of the trade of the Company", it would be unsatisfactory in the circumstances to infer from this that he made a definite finding of fact.

(f) This Board was of the opinion that by virtue of section 16 of Cap. 112, whereas in the case of the outgoings and expenses set out therein as deductible, certain items, viz. those enumerated in subsections (a), (b), (e), (f) and (g), must be for the purpose of producing or acquiring or incurred in the production of profits in respect of which a person is chargeable to tax, such qualification was absent in the case of other sub-sections, such as subsections (c) (the allowances by way of Depreciation provided by Part IV, in which part s.37 is to be found) and (d) bad debts; that the word "including" in s.16(1) was a word of extension, wherefore, reading sections 37 and s.16(1) together, there cannot be any question of the depreciation having to be in respect of an item used for the purpose of earning the profit of the trade concerned before it is deductible.

(g) For the reasons set out in (e) and (f) above, this Board deemed the fairest way to deal with this matter would be to remit the case on this point to the Commissioner under s. 68(8) with this opinion, for him to hear evidence upon the point. If the evidence satisfied him that the car was used for the purposes of the Company's trade, he would revise

his assessment as required by the view of this Board.

4. As to that part of the Commissioner's assessment that was annulled by this Board:

(a) this constituted an affirmation by the Commissioner of the Assessor who having disallowed certain items of expenditure, apportioned the balance of the expenses in the proportion of non-assessable income (i.e., the dividends, by virtue of s.26(a)) to total income, and then disallowed the sum so arrived at on the ground that it comprised expenses applicable to the production of non-assessable income.

(b) for the Company it was contended that:

(i) by virtue of s.14(1), the charging section, their profits included the profits received by way of dividends from corporations chargeable to tax, the only profits excluded by the section from charge being the following: profits not arising in or derived from the Colony (as provided by s.14(1)), and, (under s.14(2)), profits from the sale of capital assets; by s.16(1) it is enacted that to ascertain the assessable profits all outgoings and expenses incurred in the production of profits in respect of which a person is chargeable to tax shall be deducted; the Assessor, in calculating the profits chargeable to tax had wrongly deducted the profits received by way of dividends upon the ground that as these are, by reason of s.26(a) not to be included in the assessable profits of any other person, they are not profits chargeable to tax, and, having so wrongly decided, went on to decide that as s.17(1)(b) precluded the deduction of expenses not being for the purpose

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No. 1

Case Stated

3rd May 1963 - continued.

of producing profits chargeable to tax, these expenses must be disallowed.

(ii) the apportionments made by the Assessor (as set out in paragraph 9 above), are not founded or based upon and cannot be justified by any provision of Cap.112.

(c) In support of the Commissioner's Determination, it was submitted that although by virtue of s.14(2) any sum credited to a corporation (save the sums specifically excepted by the sub-section) is deemed to be a profit of the corporation, not all of such sums constituted profits chargeable to tax, because by s.14(1) corporation profits tax is to be charged "subject to the provisions of this Ordinance". These words, it was contended, are words of restriction, whereby s.26(a) is brought into effect, and by s.26(a) the dividends received by the Company are not chargeable to tax. Furthermore, "profits chargeable to tax" and "assessable profits", it was submitted, are synonymous, save for the qualification that profits chargeable to tax might not all be assessable profits because part of the profits chargeable might not have been received in the basis period. This being so, there could be no question of the expenses being deductible because s.16(1) allows deductions only of expenses incurred in the production of profits in respect of which a person is chargeable to tax. Again, the assessor (and the Commissioner in his Determination) were right in disallowing the deduction of the expenses concerned, in that such a deduction was expressly provided against by s.17(1)(b). On the point that there was nothing in the Ordinance to justify an apportionment such as was carried out in this case because the expenses of the Company in respect of their interest income and their dividend income were not treated separately in their accounts, it was

the Commissioner's contention that in the absence of such separate treatment, the Assessor would have been entitled to disallow the expenses in toto, but that as a matter of practice, apportionments had been made in similar cases in the past.

(d) It was also contended in support of the Determination that by s.51, which deals with returns and information to be furnished, there is no obligation on the tax-payer to make a return in respect of any sum not assessable to tax, in this case the dividends received by the Company: how then, it was argued, could the assessor in dealing with the return, assess such an amount? If this could not be done, it must follow that such sum or sums could not be a profit chargeable to tax.

(e) The argument set out in (d) above was rejected by this Board, having regard to the wording of B.I.R. Form No. 51 (the relevant form) including the warning as to penalties and the "Notes and Instructions", in particular Note 5. This Board was of the opinion that when section 51 requires a person "to furnish a return of any sum assessable to tax" the word "assessable" in the context cannot be so read as to justify exclusion from the return of such sums as dividends falling under s.26(a).

(f) As to the submissions summarised in (b) and (c) above, this Board considered

(i) the material words of s.14(1) to be: "Corporation profits tax shall . . . be charged . . . on every corporation . . . in respect of the profits of the corporation . . ." It noted also that the Commissioner in his Determination said that he agreed with the submission that the profits of the Company are all the profits for the purposes of

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No. 1

Case Stated

3rd May 1963 - continued.

s.14(1); although he went on to say that not all the profits are assessable profits.

(ii) that the submissions on this part of the case under appeal must turn on the meaning of "profits chargeable to tax". This Board was of the opinion that these words may mean in one section profits as laid down by s.14, viz all the profits, and in another section may be said to be limited to these profits upon which tax is leviable in accordance with the provisions of Part IV; and that to decide which of these meanings is to be given to these words as they appear in s.17(1) it was necessary to look at the Ordinance as a whole, so as to ascertain its scope, object and intention. The intention to exempt dividend profits which have already attracted tax is clear from s.26(a). If there were an intention to disallow the expenses incurred in earning these profits, where is this intention expressed in the Ordinance? In support of the Determination it was argued that this is to be found in s.17(1)(b). If this were so, where is the provision for such disallowance to be calculated precisely, or even on an equitable basis? This Board found none. Further, it was common ground that the Company's accounts are kept in accordance with the ordinary principle of commercial accounting, and that such accounts so kept do not show what expenses have been incurred in earning taxable profits and what expenses have been incurred in earning non-taxable profits. These two classes or kinds of expenditure are not segregated. This Board found

it difficult to believe that the Legislature was unaware of this. If the omission to provide for this was inadvertent this Board could see no justification for the rough-and-ready arbitrary method of apportionment adopted in this case to remedy the omission, particularly in that such a method may be entirely inequitable in that a proportionate allocation may result in a disallowance of a sum which does not truly represent the expenses incurred, - it may result in an excessive disallowance. This Board was influenced also by the fact that the result of such an apportionment is in effect to increase the taxable profits of the person concerned.

(iii) that "profits chargeable to tax" in s.17(1)(b) on their true construction refer to and mean the profits in s.14, and notwithstanding the words "subject to the provisions of this Ordinance" in the latter section, s.17 does not disallow a deduction of expenses connected with the profits coming under s.26(a); and that these words do not qualify or limit the subject-matter of the tax, i.e., that they do not exclude any item of profit from the general ambit of s.14. This part of the assessment was therefore annulled.

5. The Decision of this Board being as set out in the first paragraph hereof the questions for the Opinion of the Court upon this Case Stated are whether this Board was right as to either or both parts of its Decision.

Dated this 3rd day of May 1963

In the Supreme Court of Hong Kong (Original Jurisdiction)

No. 2

Judgment

4th October 1963.

NO. 2

JUDGMENT

IN THE SUPREME COURT OF HONG KONG

ORIGINAL JURISDICTION

INLAND REVENUE APPEAL No. 1 of 1963

B E T W E E N:

COMMISSIONER OF INLAND REVENUE Appellant

- and -

MUTUAL INVESTMENT CO. LTD Respondent

J U D G M E N T

This is an appeal under s. 69 of the Inland Revenue Ordinance from a decision of the Board of Review whereby assessments determined by the Commissioner were in part remitted to him to hear further evidence relative thereto and in part annulled.

The facts are set out in the Case as follows :

"(a) The Mutual Investment Co. Ltd. was incorporated in Hong Kong on 23rd November 1956. Its registered office is 604, Edinburgh House, Hong Kong.

(b) The Company commenced business on 23rd November, 1956, and acquired investments in the form of shares in the following companies:

(i)	Lee Hysan Estate Co. Ltd.	$370,000
(ii)	Spa Food Products (F.E.) Ltd.	233,000
(iii)	General Bottling Co. Ltd.	132,000
(iv)	Internation Beverages Co.Ltd.	115,000
		$850,000

(c) Up until the year ended 31st March 1959 the Company's only income was by way of dividends and a small amount of bank interest.

(d) For the years of assessment 1956/57 to 1959/60 the Company was assessed as being under no liability to tax.

(e) During the year ended 31st March, 1960 the Company borrowed money which it in turn lent out on interest to another company.

(f) There have been no other activities entered into by the Company and there have been no additions or changes in the share investments.

(g) During the years ended 31st March, 1960, and 1961. the Company received income from dividends and interest and incurred expenditure, as shown in the following tabulation:

(h) In accordance with Section 26(a) of the Inland Revenue Ordinance the dividend profits were excluded from the assessable profits for the purpose of assessing the profits liable to tax.

(i) After adding back the items of expenditure which he considered not allowable as deductions for tax purposes, the Assessor apportioned the balance of the expenses in the proportion of the non-assessable income (i.e. the dividends) to the total income and disallowed the sum so calculated as being expenses applicable to the production of non-assessable income.

(j) At the Appeal to the Commissioner, the Assessor having reconsidered the

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No. 2

Judgment

4th October 1963 - continued.

apportionment of the expenses was prepared to amend the assessments to allow the whole of the interest paid as a direct charge against the interest received; and to treat an amount of $100 paid as a gratuity to an employee among the balance of apportionable expenses."

"REF. NO. 6/489

MUTUAL INVESTMENT CO. LTD.

PROFIT & LOSS ACCOUNTS FOR YEARS ENDED 31st MARCH 1960 AND 1961.

		1960	1961			1960		1961	
TO	Business Registration Fee	25	25	BY	Share Dividends				
	Wages		510		Lee Hysan Estate Co. Ltd.	22,200	22,200		
	Entertainment		340		International Beverages Co.Ltd.		13,500		35,700
	Vehicle Maintenance,	355	1,800		Interest:-				
	Sundry Expenses	113	111		Shanghai Commercial Bank	94	88		
	Interest Expense	4,620	9,240		Sun Nam Yan Construction & Investment Co. Ltd.	10,920	21,840		21,928
	Auditor's Fee	200	200						
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		6,078	18,135						
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		$33,214	$57,628			$33,214			$57,628

In the Supreme Court of Hong Kong (Original Jurisdiction)

No. 2

Judgment

4th October 1963 - continued.

In the Supreme Court of Hong Kong (Original Jurisdiction)

No. 2

Judgment

4th October 1963 - continued.

The items of "Depreciation" in the accounts related to a motor car which the company alleged was used in the business in the years 1959/60 and 1960/61.

The first part of the appeal is concerned with this motor car. The Commissioner was of opinion that the above amounts "were correctly disallowed because it would be difficult to see how a car was used for the purpose of the company's trade as evidenced by" the facts that during the years in question the company received income only from dividends and interest. The Board remitted the assessment to the Commissioner to make a definite finding of fact as to whether the car was so used.

The claim to the allowance is based upon s.16(1) of which the material part is in these terms:

> "For the purpose of ascertaining the assessable profits... there shall be deducted all outgoings and expenses wholly and exclusively incurred ... in the production of profits in respect of which he is chargeable to tax under this Part, including -
>
> .....
>
> (c) The allowances provided by Part VI (Depreciation)."

Profits "in respect of which a person is chargeable to tax" are defined in s.14(1) which says:

> "Corporation profits tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every corporation carrying on trade or business in the Colony in respect of the profits of the corporation arising in or derived from the Colony from such trade or business".

Sub-s.(2) of that section provides that all income except sums from the sale of capital assets are prima facie to be profits arising from the trade or business. The allowances referred to in para.(c) of s.16(1) are allowances

in respect of machinery or plant "for the purpose of the trade profession or business", being an "initial allowance" equal to one-fifth of the expenditure and an "annual allowance" for depreciation by wear and tear.

The Crown has contended before me that the motor car could not have been used wholly and exclusively in the production of such profits as were made by the Company and that in consequence the allowances under Part VI claimed in respect of that car were not outgoings and expenses wholly and exclusively incurred in the production of those profits. Counsel argues first that the word "including" must be construed in its ordinary meaning and that such allowances are to be deducted only where the machinery or plant is used wholly or exclusively in the production of the profits: he says that it is permissible to construe the word as one of extension only in interpretation sections and that where it is used in the middle of an enacting section it should be given its ordinary meaning. Mr. Litton submits that so to hold would be to make nonsense of the provision for depreciation is not "an outgoing or expense" at all and, even if it were, it could not be "an outgoing or expense wholly and exclusively incurred in the production of profits": accordingly the Legislature must have intended to extend the meaning of the words in the earlier part of the sub-section to include something which in the ordinary way would not be covered by the language used. Similarly, he says, bad debts (which are to be deducted under para. (d)) are not outgoings or expenses. In reply Mr. Sneath argues that depreciation is in fact treated by accountants as an outgoing or expense: it is expenditure of a capital asset. That, with respect, seems to me to be doing violence to the plain meaning of words. Harman, J. in Miles v. Clarke (1) described accountants as "the witch doctors of the modern world" and the fact that accountants regularly commit such violence (and I do not say that if they do there may not here be mitigating circumstances) does not persuade me that it is right. An outgoing or expense is not a mere notion in the

(1) 1953 1 W.L.R. 537 539

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Judgment

4th October 1963 - continued.

mind of an accountant who is seeking to make allowance for the fact that machinery and plant normally cannot be resold at the price at which they were bought and that, if still required, they will eventually have to be replaced: it is a payment out to somebody else or a debt incurred. The expenses incurred with respect to the motor car are the initial cost (which is disallowed by s. 17(1)(c)), the cost of maintenance and the running expenses. In writing off a sum by way of depreciation one merely makes a book entry. In my view, therefore, depreciation is not an outgoing or expense in the ordinary sense and it is clear that the legislature intended to bring the allowances under Part VI within the ambit of a provision which would not otherwise include them.

The second argument is that in any event the principle of Strong & Co., of Romsey, Limited v. Woodfield (2) must be applied to s.37. That was a case where the House of Lords held that a brewer could not deduct a sum paid by way of damages and costs to a customer of one of their inns who was injured as a result of their manager's negligence. Lord Loreburn L.C. said at page 452:

> "The Act does not affirmatively state what losses may be deducted. It furnishes merely negative information. A deduction cannot be allowed on account of loss not connected with or arising out of such trade. That is one indication. And no sum can be deducted unless it be money wholly and exclusively laid out or expended for the purpose of such trade. That is another indication. Beyond that the Act is silent.
>
> In my opinion, however, it does not follow that if a loss is in any sense connected with the trade it must always be allowed as a deduction; for it may be only remotely connected with the trade or it may be connected with something else quite as much as or even

(2) 1906 A.C. 448.

> more than with the trade. I think only such losses can be deducted as are connected with in the sense that they are really incidental to the trade itself. They cannot be deducted if they are mainly incidental to some other vocation or fall on the trader in some character other than that of a trader."

And Lord Davey said at page 453:

> "I think that the payment of these damages was not money expended 'for the purpose of the trade'. These words are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, etc. I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits."

Although Viscount Simon and Lord Oaksey very forcibly argued that Lord Davey's test was a gloss on the words of the statute, the majority of the House of Lords in Smith's Potato Estates Ltd. v Bolland (3) applied it to a case where legal accountancy expenses were incurred in appealing from a decision of the Board of Referees on an appeal against a decision of the Commissioners of Inland Revenue. Spofforth v. Golder (4) was to the same effect but Norman v. Golder (5) does not, I think, turn upon the same principle. In Union Cold Storage Co. Ltd. v. Jones (6) the Court of Appeal applied the test laid down in Usher's Wiltshire Brewery Co. Ltd. v. Bruce (7) viz. "was this expenditure definitely for the benefit of the trade carried on by the subject making the return, if so the deduction is prima facie a proper one even although it may

(3) 1948 A.C. 508
(4) (1945) 26 T.C. 310
(5) (1944) 26 T.C. 293
(6) (1924) 8 T.C. 725
(7) (1912) 6 T.C. 399

In the Supreme Court of Hong Kong (Original Jurisdiction)

No. 2

Judgment

4th October 1963 - continued.

inure to the benefit also of a third party." It was held that the chain of causation was very much too long and very much too weak (if it existed at all) where a British company which had transferred its foreign cold storage business to another company for a term of years in consideration of annual payments to the British company's subsidiaries continued to pay insurance premiums in respect of the premises and also claimed an allowance in respect of wear and tear of the machinery and plant.

Counsel for the respondent points out that the English Act is negative in form as the Lord Chancellor expressly mentioned in Strongs' Case (2): our Ordinance does state affirmatively what may be deducted. Moreover, he says that several of the paragraphs of s.16(1) expressly limit the deduction to sums paid "for the purpose of producing (the) profits" but para. (c) does not expressly limit the allowances to allowances in respect of machinery and plant used "for the purpose of producing profits."

If the Crown's contention is correct then, of course such express limitation was unnecessary but, as it seems to me, it would be an unjustifiable and most undesirable extension of the principle laid down in Strongs' Case to apply it to s.37. We are required to construe a statute in terms different from those of the Act which fell to be considered in that case and I agree with the Board of Review that depreciation is not to be allowed only in respect of an item used for the purpose of earning the profits of the company concerned. No argument has been addressed to me upon the question whether in the circumstances it was proper to remit the case to the Commissioner to hear further evidence and I say no more about it.

The second part of the appeal is concerned with the Board of Review's reversal of the decision of the Commissioner whereby he disallowed certain expenses on the ground that they were not applicable to the production of assessable income. The case for the Crown is that s.26(a)

operates to exclude from the profits which by s.14(1) are chargeable to tax those dividends received from other corporations which were themselves chargeable to tax. The material part of s.26 is in these terms:

> "For the purpose of assessment under this Part -
>
> (a) a dividend from a corporation which is chargeable to tax under this Part shall not be included in the assessable profits of any other person".

Counsel emphasises that there is no question of "deducting" dividends under this section: they are "not to be included". If they are not to be included in the assessable profits and are not to be deducted, then it follows that they are not to be chargeable under s.14(1). Indeed when one looks at s.14(1) one finds that the enacting part is governed by the words "subject to the provisions of this Ordinance" and one of the provisions to which it is subject is s.26(a). Thus the phrase "profits in respect of which he is chargeable to tax under this Part" in s.16(1) does not comprise dividends covered by s.26(a) and there is no provision for deducting the expenses incurred in the production of the dividends. On the contrary, s.17(1)(b) expressly disallows "for the purpose of ascertaining profits in respect of which a person is chargeable to tax ..." deduction of "any disbursements or expenses not being money expended for the purpose of producing such profits". The final result is that the Board was wrong in reversing the Commissioner on this point. The error comes in when the Board says "these words do not qualify or limit the subject-matter of the tax, i.e. that they do not exclude any item of profit from the general ambit of s.14", for the words do precisely that. This argument, it will be seen involves construing the phrases "profits chargeable to tax" and "assessable profits" as

In the Supreme Court of Hong Kong (Original Jurisdiction)

No. 2

Judgment

4th October 1963 - continued.

synonymous save for the qualification that profits chargeable to tax might not all be assessable to profits because part of the profits chargeable might not have been received in the basis period (see s.2).

Mr. Sneath submits that there is no ambiguity in these provisions but he goes on to argue that, if there is the intention of the legislature is clear and that intention can be ascertained from the history of the provisions. Prior to 1955 s.16(1) read:

> "For the purpose of ascertaining the profits of any person there shall be deducted all outgoings and expenses wholly and exclusively incurred during the basis period for the year of assessment by such person in the production of the profits ...".

The Inland Revenue (Amendment) Ordinance 1955 amended that section by inserting the word "assessable" before "profits" where it first appeared and substituting "such" for "the" where it appeared the second time. At the same time the phrase "assessable profits" (which had not appeared in the Ordinance before) was defined as follows:

> "'Assessable profits' means the net profits for any period arising in or derived from the Colony calculated in accordance with the provisions of Part IV but does not include profits arising from the sale of capital assets."

while s.18A was added to provide that tax should "be charged for each year of assessment ... on the assessable profits " Until 1956, therefore, under the principal part of the sub-section the expenses and outgoings were those incurred in earning the profits on which tax would be paid. In that year the definition of "assessable profits" was amended by substituting "the basis period" for "any period" and s.16 was further amended by substituting "profits in respect of which he is chargeable to tax under this Part " for "such profits" (and

it may be noted that a similar change was made in s.17(1)). Thus the argument runs, profits on which tax is now to be paid are those which have come in during the basis period. If s.16 had not been further amended in 1956 deductions could only have been made in respect of expenses incurred in the production of the assessable profits i.e. those on which tax would actually have been paid in that year. That would have excluded expenses incurred in producing the dividends. The legislature in the Ordinance of 1956 nowhere showed an intention to change that situation: what it did was to allow the deduction of expenses incurred during the basis period in producing profits made outside the basis period and therefore assessable in another year - that and no more.

Mr. Litton contends that that is not so. If I follow him aright he submits that the purpose of the 1956 amendment was to remove a manifest absurdity: as the Ordinance stood before that amendment s.16(1) provided that one should deduct the outgoings and expenses incurred in the production of the assessable profits - which in the premises had not yet been ascertained - in order to ascertain those very same assessable profits. He approaches the task of interpretation by tracing the various stages in the scheme of taxation. It is not in dispute that Whitney v Commissioners of Inland Revenue (8) lays down the correct approach to any such scheme. At p.52 Lord Dunedin said:

> "My Lords, I shall now permit myself a general observation. Once that it is fixed that there is liability, it is antecedently highly improbable that the statute should not go on to make that liability effective. A statute is designed to be workable and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable.

(8) 1926 A.C.37

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Now there are three stages in the imposition of a tax: there is the declaration of liability that is the part of the statute which determines what persons in respect of what property are liable. Next there is the assessment. Liability does not depend on assessment. That, ex hypothesi, has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly come the methods of recovery if the person taxed does not voluntarily pay."

In the present case it is agreed that s.14 deals with the first stage: it is one of the sections referred to in The Four Seas Company Limited v The Commissioner of Inland Revenue (9) as those "which may be regarded as the principal charging sections in Part IV of the Ordinance". Mr. Litton says that sub-s. (1) determines what persons are liable and sub-s.(2) determines in respect of what property those persons are to be liable. I do not think anything turns upon it but in my view Mr. Sneath is right when he says that sub-s.(1) is really the provision imposing liability and that sub-s.(2) merely creates an irrebuttable presumption that all income with one exception is "a profit arising in or derived from" the trade or business although some of such income might at first sight not appear to be such.

The second stage of the imposition of this tax (the assessment) is according to the company, provided for by ss. 16 and 17 and 26. Having decided what property is liable to the tax one must then make deductions in order to reach the "assessable profits". Thus s.16 makes it clear what shall be deducted and s.17 what shall not be deducted. Thus they implicitly construe "subject to the provisions of this Ordinance" in s.14(1) as referring to ss.16 or 17 but not to s.26. S.26 it is

(9) 1958 H.K.L.R. 418 at p.423

said, was clearly intended to prevent the incidence of double taxation but if the expenses attributable to the earning of the non-assessable dividends are not deducted the effect will be to create double taxation. (Mr. Sneath submits that this begs what is in substance the very issue I have to decide viz. whether dividends are profits on which tax is chargeable under s.14(1) and I suppose the Crown would say that the company is in reality trying to obtain double relief.) The company's contention is, however, that s.26 in effect provides for a further deduction; although it is drafted in the form of an exclusion it provides for a further deduction from the profits chargeable to tax in order to arrive at the assessable profits. S.26 does not say the dividends shall not be chargeable: it says they shall not be included in the assessable profits. It follows that somewhere between charging and assessment they must be deducted. This argument draws a wider distinction between "profits chargeable to tax" (as being gross commercial profits) and "assessable profits" (as being net profits for the purpose of the tax).

Mr. Litton seeks support for his argument from the form of Return which has, it seems, been prescribed. S.51 entitled the assessor to require a Return of "any sum assessable to ... tax". The form (which has been admitted in evidence before me by consent) does not use that phrase at all but calls for a return of "the profits from ... any trade or business". Space is provided for insertion of the appropriate figure for "Balance of Profit or Loss" and the submission for the company is that this figure is to be what I have called the "gross commercial profit" and is to be taken straight from the Profit and Loss Account, while the Crown's argument involves that the figure should be that of the commercial profit less the dividends. Then there is space under the general heading "Adjustments for tax purposes" for "Additions" and "Deductions". Under "Additions" one should include items listed in s.17(1) and under

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"Deductions" items listed in s.16(1). Logically, therefore, s.17 should have preceded s.16. The resulting total is described as "Adjusted Profits", a phrase which does not (so far as I am aware) appear in the Ordinance but which the argument assumes, is the figure on which the subject has to pay - in other words "the assessable profits". The form also contains extensive Notes and Instructions but Mr. Litton submits there is nothing in the form to suggest that any of the expenses of the company are to be disallowed - no note to the effect that dividends affected by s.26 are to be excluded from the profits or that expenditure incurred in the earning of such dividends is to be added back. (Of course in the present case it is agreed that in any event such expenditure is not identifiable in the accounts that being the reason the assessor seeks to apportion the expenses). It is submitted, therefore that this form supports the tax structure contended for by the company and also that the "Adjusted Profits" shown in the Return - the profits on which the subject is to be charged - cannot be "the profits in respect of which a person is chargeable to tax" referred to in s.16(1) because that would be inconsistent with such tax structure: the phrase in s.16(1) must refer to "gross" profits. (Mr. Sneath has never of course suggested that adjusted or assessable profits are identical to chargeable profits).

Similarly it is argued that to construe the phrase "profits in respect of which he is chargeable to tax" in s.16(1) as meaning "Adjusted Profits" would be inconsistent with other provisions in the Ordinance. Thus s.19(1) refers to "a person chargeable to tax under this Part" where a loss has been incurred in the year of assessment. Clearly a person who has incurred a loss in a particular year is not assessable to tax for that year, yet he can be "chargeable to tax". Mr. Litton, as I understand him, contends that this can only make sense if the subject is "chargeable"

because there are positive gross profits but not "assessable" because the gross profits are reduced to a loss by prescribed deductions. Again s.59 says

> "Every person who is in the opinion of an assessor chargeable with tax ... shall be assessed ..."

This it is said refers to a person who is apparently one who may be liable to tax in the sense that he appears to have gross profits prima facie attracting taxation. And again, the Crown's contention is alleged to exclude dividends of the kind in question from the definition of "profits arising in and derived from the Colony" in s.2 but these words which (so far as we are concerned) appear only in s.14(1) are, in the submission of the Crown governed by the words "subject to the provisions of this Ordinance".

The argument for the company (and the decision of the Board) rests in large measure upon the inconvenience which would arise from the adoption of the interpretation contended for by the Crown. Thus the Board points out that the Crown, having contended that s.26 dividends are not profits chargeable to tax, relies upon s.17(1)(b) as expressing the legislature's intention to disallow the expenses incurred in earning the dividends and the Board poses the question:

> "... where is the provision for such disallowance to be calculated precisely or even on an equitable basis?"

It rejected apportionment as being arbitrary and possibly entirely inequitable. The Crown submits that it is a perfectly proper and usual method of dealing with a case where precise calculation is impossible. Apportionment it is said, is a generally accepted practice where expenses are not wholly and exclusively incurred in the production of a chargeable profit (see London & Northern Estates Co. Ltd. v. Harris (10)) and as was pointed out by the Royal Commission on

(10) 21 T.C. 197

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Taxation of Profits 1955, no statutory recognition of the practice is necessary.

There is, no doubt, a distinction between a case where on a strict application of the statute the assessor could properly disallow the expenses entirely but as a matter of grace and discretion makes an apportionment and allows part, and a case where statute is obligatory in form - "no deduction shall be allowed" (in s.17) and "there shall be deducted" (in s.16). But, as it seems to me, this is not a fatal objection if the statute though not expressed in the most lucid of terms discloses an intention (when properly construed) to disallow the expenses incurred in earning the dividends. Mr. Litton relies upon Hughes v. Bank of New Zealand (11) as authority for the proposition that because there is no express provision for apportionment no such apportionment can be made. The question there was what amount could be deducted for expenses in respect of the general trading profits of the Bank at its London Branch. One of the rules applicable was in these terms:

> "In computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of -
>
> (a) any disbursements or expenses not being money wholly and exclusively laid out or expended for the purposes of the trade ..."

As Lord Wright, M.R. said at p.506:

> "That is put in negative form, but it is generally, and I think correctly, treated as being capable of being converted into a positive enactment, with the result that it provides that 'money wholly and exclusively laid out or expended for the purposes of the trade' may be deducted."

Certain interest was excluded by the

(11) 21 T.C. 472, 506.

provisions of the Act from the assessable profits and the Crown sought to exclude the expenses attributable to the earning of those profits. The Master of the Rolls thought it would have been reasonable and proper to exclude the expense if there were any warrant in the Act for so doing but he could find none - there was no provision for apportionment. However, the Act was not in terms identical to those of our Ordinance and, in particular there appears to have been no equivalent to our s.16(1) where express provision is made for the allowance of expenses. Thus Lawrence, J. in his judgment in the High Court said at p.486:

> "The contention of the Crown is based upon reading (the Rule) as though it read: 'any disbursements or expenses not being money wholly and exclusively laid out or expended for the purposes of earning profits brought into charge'".

Mr. Sneath submits that the contention of the Crown in Hughes' Case was based upon a reading which might have been taken straight from our s. 16(1) not forgetting the affirmative form of that sub-section. Thus he contends that Hughes's Case does not advance the argument for the Respondent and I agree with him: I think there is great danger here (as upon the first point taken on the appeal) in paying too much regard to the comparable but by no means identical provisions in the English legislation.

It is with no little diffidence that I then reject the argument, which weighed so heavily with the Board, but I have come to the conclusion that the considerations of accounting practice and the absence of any express provision for apportionment do not really favour the construction contended for by the company any more than that contended for by the Crown. If any practical difficulty would arise from the Crown's construction the answer would lie in the fact that it is for the subject to show what outgoings and expenses are within s.16

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and if he cannot do so (whatever the reason) he must rely upon the discretion of the assessor in making an apportionment. If there is a danger of an excessive disallowance under s.17 he should endeavour to give the assessor such information as will make apportionment unnecessary - or at least be sufficient to give a basis for a reasonably accurate apportionment. It would not in the circumstances be a fair comment that the legislature had left the assessment of this tax to the discretion of the assessor.

What I have just said would also, I think, dispose of the further argument that even if apportionment were permissible then upon the Crown's construction of the statute the subject would not be compelled by s.51 to make a return of dividends covered by s.26(a) at all and the assessor would not have the material upon which he could make an apportionment. Indeed the Board took the view "that when s.51 requires a person 'to furnish a return of any sum assessable to tax' the word 'assessable' in the context cannot be so read as to justify exclusion from the return of such sums as dividends falling under s.26(a)". Unfortunately this was not elaborated and for my part I have difficulty in seeing how one can escape from the express words of s.26(a) that such dividends "shall not be included in the assessable profits". Even allowing for the fact that the word "assessable" appeared in the section before the definition of "assessable profits" was first enacted by the Ordinance of 1955 it is surprising if the company is right that the legislature did not at the same time amend s.51 by substituting "chargeable" for "assessable". It is to be noted that in 1956 sub-s. (2) was amended: it was replaced by a new sub-section which twice used the word "chargeable", although in a different meaning - in relation to persons and not to profits. I can see that if the Crown's construction is correct it might be possible for a subject to make a return without revealing the existence of s.26(a) dividends and without disclosing that part

of the expenses in respect of which he claimed an allowance under s.16(1) was in fact incurred wholly or in part in producing those dividends, although this might be difficult. In any event it could not be done without making an incorrect return and rendering the subject liable to penalties under Part XIV.

The argument based upon the form of the Return would have more force if the form had been prescribed by the legislature itself. In fact it appears to have been prescribed by the Board of Inland Revenue by virtue of powers conferred by s.86 otherwise than by Regulation. There can be no question of any kind of estoppel arising therefrom. I do not pretend that if the Crown's contention is right this form is entirely satisfactory: in fact read as a whole it might then not unreasonably be described as misleading. However, I suppose there is no reason to believe the assessors would be misled by it and as supporting schedules are required to accompany the Return on this form it may be that the assessors would be able to see if dividends had wrongly been included in the "Balance of Profit or Loss".

In my view there would be no inconsistency with other provisions in the Ordinance if s.16(1) were construed in the sense contended for by the Crown. I incline to think that the company's submission based on s.19 overlooks the reference in that section to s.70 while the Crown's interpretation of the phrase "profits chargeable to tax" would not compel an interpretation of the phrase "person .. chargeable to tax" in s.59 which would be in any way absurd or even strange.

Having found myself driven to reject these various arguments of the company I seem to be left with no obviously compelling guide as to the correct construction of this Ordinance. One must of course endeavour to ascertain the intention of the legislature and one must do so from a consideration of the Ordinance as a whole. I certainly cannot

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4th October 1963 - continued.

agree that the terms of the Ordinance are plain. Indeed, I have rarely come across such obscurity of expression. Nevertheless I have, not without great hesitation and reluctance, come to a conclusion contrary to that reached by the Board on this point. It seems to me that the Crown is not seeking to impose double taxation in respect of the dividends and, like the Master of the Rolls in Hughes's Case, I think it would be reasonable and proper to exclude the expenses incurred in producing those dividends if any warrant can be found for so doing. In saying that I do not overlook the words of Rowlatt J. which were cited with approval by Viscount Simon, L.C. in Canadian Eagle Oil Co. Ltd. v. The King (12):

> "in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used".

There are, however, degrees of clarity and it seems to me that looking fairly at the language of s.51 the phrase "subject to the provisions of this Ordinance" in s.14(1) the words "shall not be included" in s.26(a) and the express directions in s.16(1) and s.17(1) our Ordinance does provide a warrant which was not available to the Court of Appeal in England for the disallowance of the expenses in question.

For these reasons the answer I give to the question put to me is that as to the part of the decision of the Board which was remitted to the Commissioner to hear further evidence the decision was right but that as to the part which annulled the Commissioner's assessment the decision was not right.

(AA. Huggins)

4th October, 1963.

(12) 1946. A.C. 119, 140.

In the Supreme Court of Hong Kong (Appellate Jurisdiction)

No. 3

Notice of Appeal

16th October 1963

NO. 3

NOTICE OF APPEAL

IN THE SUPREME COURT OF HONG KONG

APPELLATE JURISDICTION

APPEAL No. 37 of 1963

(On Appeal from Inland Revenue Appeal No. 1 of 1963)

B E T W E E N:

MUTUAL INVESTMENT COMPANY LIMITED Appellant

- and -

COMMISSIONER OF INLAND REVENUE Respondent

TO: The Registrar of the Supreme Court.

TAKE NOTICE that the Court will be moved at 10 o'clock a.m. on Wednesday, the 27th day of November, 1963 for an Order that so much of the Judgment herein of the Honourable Mr. Justice A.A. Huggins given on the 4th October 1963 as ordered that the assessment to corporation profits tax made by the Respondent and annulled by the Board of Review on the 13th day of March 1963 be restored may be reversed.

AND for an Order for costs

AND further take notice that the grounds of this application are:-

That the learned Judge was wrong in law in determing that the Respondent had correctly disallowed a portion of the Appellant's expenses for the years of assessment ending March 1960 and March 1961 thereby reversing the decision of the Board of Review on the said point.

Dated the 16th day of October, 1963.
28th and 29th November 1963 also reserved.

(sgd) C.M.
p.Registrar, S.C.
16/10/63.

Wilkinson & Grist
Solicitors for the Appellant.

In the Supreme Court of Hong Kong (Appellate Jurisdiction)

No. 4

Notice of Cross Appeal

24th October 1963.

NO. 4

NOTICE OF CROSS APPEAL

IN THE SUPREME COURT OF HONG KONG

APPELLATE JURISDICTION

APPEAL No. 37 of 1963

(On Appeal from Inland Revenue Appeal No. 1 of 1963)

B E T W E E N:

MUTUAL INVESTMENT COMPANY LIMITED Appellant

- and -

COMMISSIONER OF INLAND REVENUE Respondent

Notice by Respondent

TAKE NOTICE that the above named Respondent intends upon the hearing of the appeal under the Appellant's notice of appeal dated the 16th day of October, 1963 from the judgment of the Honourable Mr. Justice A.A. Huggins given on the 4th October, 1963, to contend that so much of the said judgment as directed that as to the part of the decision of the Board which was remitted to the Commissioner to hear further evidence the decision was right should be discharged and that in lieu thereof it should be ordered that as to the part of the decision of the Board which was remitted to the Commissioner to hear further evidence the decision was not right.

AND FURTHER TAKE NOTICE that the Respondent will apply to the Court for an order that the Appellant pay to the Respondent the costs occasioned by this notice.

Dated this 24th day of October, 1963.

Sd. G.R. Sneath.
Counsel for the Respondent.

To: Messrs. Wilkinson & Grist,
Solicitors for the Appellant, and
Registrar of the Supreme Court.

NO. 5

JUDGMENT

In the Supreme Court of Hong Kong (Appellate Jurisdiction)

No. 5

Judgment

25th January 1964.

IN THE SUPREME COURT OF HONG KONG

APPELLATE JURISDICTION

CIVIL APPEAL NO. 37 of 1963

(On Appeal from Inland Revenue Appeal No. 1 of 1963)

B E T W E E N:

MUTUAL INVESTMENT COMPANY LIMITED Appellant

- and -

COMMISSIONER OF INLAND REVENUE Respondent

Coram: Hogan C.J.
Rigby, J.

J U D G M E N T

We have before us an appeal and a cross-appeal, but as the latter related to the earlier part of the judgment in the court below, it was found more convenient at the hearing before us to deal with it first and we propose to follow that course in this judgment.

It is unnecessary to repeat the facts which have already been set out in the case stated and in the judgment of the Court below.

In his cross-appeal, Mr. Sneath, counsel for the Crown takes issue with the judge's conclusions on two matters connected with the Board's decision to refer back to the Commissioner, for a more specific finding of fact, his decision to disallow the depreciation claimed in respect of a motor-car belonging to the appellant company.

In disallowing that iten, the Commissioner

In the Supreme Court of Hong Kong (Appellate Jurisdiction)

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25th January 1964 - continued.

said that it was "difficult to see how a car was used for the purpose of the company's trade" when the company was merely concerned with receiving dividends and interest on its financial investments. He went on to say:-

> "It is not sufficient to my mind to say that an expense of this nature is for the purpose of the trade. It must also be for the purpose of earning the profits of the trade."

The judge appears, implicitly if not explicitly, to have rejected the contention urged by counsel for the Crown before us, in support of the Commissioner's conclusion, that "the depreciation allowance" for which provision is made in section 16(1)(c) of the Inland Revenue Ordinance is only admissible if it satisfies the prescription laid down in the earlier part of the section that it is

> "wholly and exclusively incurred .... in the production of profits in respect of which"

the taxpayer is chargeable to tax. The relevant part of the section reads as follows :-

> "16. (1) For the purpose of ascertaining the assessable profits of any person there shall be deducted all outgoings and expenses wholly and exclusively incurred during the basis period for the year of assessment by such person in the production of profits in respect of which he is chargeable to tax under this Part, including:
>
> (a) sums payable by such person by way of interest upon any money borrowed by him, if such money was borrowed for the purpose of producing such profits;
>
> (b) rent paid by any tenant of land or buildings occupied by him

for the purpose of acquiring such profits;

(c) the allowances provided by Part VI (Depreciation);"

Counsel for the Crown contends that the depreciation on this motor-car could, quite independently of this section, be regarded as an outgoing or expense because, he says, such depreciation is so treated normally by accountants in dealing with company matters and, as Lord Clyde said in Lothian Chemical Co. v. Rogers (1), when determining profits, ordinary principles of commercial accounting should be followed unless they are invaded by statutory provisions. He contends that the word "including" which appears in this Section does not have the effect of extending the ordinary meaning of outgoings and expenses but merely enables the legislature to set out with greater clarity and precision certain types of outgoings and expenses which should be incuded if they satisfy the further requirement of being wholly and exclusively incurred in the production of profits. This argument would, of course, contemplate that the legislature, for the sake of greater clarity, included a provision that logically was unnecessary. Counsel, however, does not shrink from this criticism and calling to his aid the observations of Romer L.J. in Anglo-Persian Oil Co. v. Commissioner of Inland Revenue (2) contends that this is quite a common practice in current tax legislation.

It seems to us, however, that this contention ignores the structure of the section which, in our view, starts by setting out a certain category of payments or disbursements which it calls "outgoings and expenses"; it then limits that category by confining it to those outgoings and expenses which are wholly and exclusively incurred, inter alia, in the production of profits.

(1) 11 Tax Cases, p.508 at 520.
(2) 16 Tax Cases 253, at 272.

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25th January 1964 - continued.

It then goes on to say that that narrower category - not the broad category of outgoings and expenses, in general - but the narrower category of outgoings and expenses incurred for the specified purposes will include a series of specified items of which the third is "the allowances provided by Part VI. (Depreciation)" of the Ordinance. Section 37 of the Ordinance, which appears in Part VI, provides for a depreciation allowance and it seems to us that if this particular depreciation claim falls within the terms of section 37, then it will, by virtue of section 16(1), be included in that deductable category of outgoings and expenses wholly and exclusively incurred for the purposes shown in the opening part of section 16(1). If the item is covered by section 37, it does not appear to us to be necessary to go on from that point and show that it is wholly and exclusively incurred for the purposes set out in the earlier part of section 16(1).

The reintroduction in paragraphs (a) and (b) of references to producing and acquiring profits certainly appears to support this view.

Counsel, however, advances a further argument in support of the Commissioner's determination: an argument which has been rejected both by the judge in the court below and by the Board of Review. Section 37 requires that the "machinery or plant" in question should be used for the purposes of the trade, profession or business of the taxpayer. In construing this provision the Commissioner said that it means that the machinery or plant must be used "for the purpose of earning the profits of the trade". In doing so, he no doubt had in mind the observations of the law lords in the case of Strong and Co. Ltd. v. Woodifield (3). In that case Lord Loreburn L.C. said :-

> ".....The Act does not affirmatively state what losses may be deducted.

(3) (1906) A.C. P.448 at 452.

It furnishes merely negative information. A deduction cannot be allowed on account of loss not connected with or arising out of such trade. That is one indication. And no sum can be deducted unless it be money wholly and exclusively laid out or expended for the purpose of such trade. That is another indication. Beyond that the Act is silent.

In my opinion, however, it does not follow that if a loss is in any sense connected with the trade, it must always be allowed as a deduction, for it may be only remotely connected with the trade, or it may be connected with something else quite as much as or even more than with the trade. I think only such losses can be deducted as are connected with in the sense that they are really incidental to the trade itself. They cannot be deducted if they are mainly incidental to some other vocation or fall on the trader in some character other than that of trader."

Lord Davey said (p.453) -

".....I think that the payment of these damages was not money expended 'for the purpose of the trade.' These words are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, etc. I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits."

These observations have been the subject of much judicial consideration and much judicial comment since they were made. In Smith's Potato Estates Ltd. v. Bolland (4) Lord

(4) (1948) A.C., p.508 at 520.

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Porter said:-

> "It is probably safer to retain the wording of the Act itself and, by applying it to the facts established, to discover whether the deduction falls within its terms or not";

but the majority of opinion seems to support them. In Inland Revenue Commissioners v. Dowdall, O'Mahoney & Co. Ltd. (5) Lord Reid said they had

> "always been regarded as authoritative"

and Lord Radcliffe said they were

> "part of our income tax language".

It is to be noted, however, that the Commissioner appears to regard them as imposing some requirement additional to that implied by the words "for the purpose of the trade". He said :-

> "It is not sufficient to my mind to say that an expense of this nature is for the purpose of the trade. It must also be for the purpose of earning the profits of the trade."

The Board completely rejected this view and said:-

> "There cannot be any question of the depreciation having to be in respect of an item used for the purpose of earning the profit of the trade concerned before it is deductible."

Turning back to the words of Lord Davey, it does not seem to us that he contemplated any requirement additional to those implied by the words "for the purpose of the trade." What he was concerned to do was to show that it was not sufficient that the disbursements were made merely "in the course of, or arising out of, or connected with the trade or

(5) (1952) A.C. p.401 at 417, 423.

made out of the profits of the trade." What in effect he said was that, in determing whether a particular disbursement or payment was expended "for the purpose of the trade", it was necessary to determine whether it was made for the purpose of earning the profits of the trade. He put in the additional words "the profits" merely to clarify and illustrate the meaning of the shorter phrase. Clearly, he would have had no authority to make an addition to the words of the statute and if the words "for the purpose of earning the profits" mean something different from "for the purpose of the trade", the courts would have no authority to substitute them for the words of the Statute.

The Commissioner certainly appears to imply that he regarded them as imposing some additional requirement. We do not think he was right in that approach. Equally, we do not think that the Board was right in their rejection of them.

Possibly, there might be occasions when some distinction could be drawn between the practical effects and the practical application of these two groups of words. In such circumstances and on such occasions, we think there would be no justification for using the longer group if it sets up a more exacting criterion than the shorter group. But, in applying the terms of the Ordinance to the facts of the present case, we can see no effective distinction between these two expressions, just as Lord Davey saw no distinction in the case before him. It seems to us, therefore, that the true answer to this question is that the longer phrase does not set up, at any rate in this case, any additional requirement. If the car is used for the purpose of the trade then the depreciation may be claimed, but in determining whether it is used for this purpose it is necessary to know whether it is used for the purpose of earning the profits of the trade. If it is not used for the purpose of earning these profits, then it cannot properly be said to be used for the purpose of the trade.

In the Supreme Court of Hong Kong (Appellate Jurisdiction)

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Judgment

25th January 1964 - continued.

Whilst desiring a decision on this issue the parties also desired a further opportunity of making submission on what order should be made as a result of the decision.

We turn to the appeal by the taxpayer on the question whether the Commissioner was right in not allowing, as a deduction for tax purposes, the expenses incurred in producing dividends which, under the provisions of section 26 of the Ordinance, were excluded from assessment. In support of his argument that the Commissioner was wrong, Mr. Litton counsel for the appellant referred to the position in England and to Lord Dunedin's judgment in Whitney v. Inland Revenue Commissioners (6) where he said:-

> "Now, there are three stages in the imposition of tax. There is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That ex hypothesi has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."

Mr. Litton contends that the Hong Kong legislation follows a similar pattern; that, for the purpose of corporation profits tax, section 14 of the Inland Revenue Ordinance fixes the liability by specifying who shall pay and in respect of what property, whilst subsequent sections, including sections 16 and 26, indicate the method of assessment.

The relevant part of section 16 has already been quoted above. It has no counterpart in the English legislation

(6) (1926) A.C. 37 at p.52

which contents itself with prescribing, as does section 17 of the Hong Kong Ordinance, what deductions may not be made. The relevant portions of sections 14 and 26 read as follows :-

"14. (1) Corporation profits tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every corporation carrying on trade or business in the Colony in respect of the profits of the corporation arising in or derived from the Colony from such trade or business.

(2) Any sum arising in or derived from the Colony, other than a sum from the sale of capital assets, received by or credited to a corporation carrying on a trade or business in the Colony shall be deemed to arise from the trade or business carried on."

.....

"26. For the purpose of assessment under this Part -

(a) a dividend from a corporation which is chargeable to tax under this Part shall not be included in the assessable profits of any other person, and .....

(b) ....."

The following definitions appear in section 2:-

"'assessable profits' means the net profits for the basis period arising in or derived from the Colony calculated in accordance with the provisions of Part IV but does not include profits arising from the sale of capital assets;"

In the Supreme Court of Hong Kong (Appellate Jurisdiction)

No. 5

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25th January 1964 - continued.

> "'basis period' for any year of assessment is the period on the income or the profits of which tax for that year ultimately falls to be computed."

Mr. Litton also referred us to a passage in Wilson's text book on Income Tax (22nd Edition at p.529) where it is stated that although income such as the dividends in question

> "is to be excluded from profits, it should be noted that there is no provision for excluding any expenses in connection with such income. So long as such expenses are laid out wholly and exclusively for the purposes of the trade or business, they are allowable deductions."

Authority for this proposition can readily be found in the decision of the House of Lords in the case of Hughes v. The New Zealand Bank (7).

This statement must, however, be considered in the light of the difference between the relevant provisions in England and in Hong Kong. The English Income Tax Act admits deductions for expenses "exclusively laid out .... for the purposes of trade ....", whilst section 16 of the Hong Kong Ordinance refers to expenses wholly and exclusively incurred

> ".... in the production of profits in respect of which he (the taxpayer) is chargeable to tax ...."

and similar expressions are used in section 17.

Mr. Litton, however, contends that, despite the difference in the language used, the effect is the same, since, according to his argument, section 14 charges all the profits of the corporation, this being the first stage of the tax structure, and it is only at a later

(7) 21 Tax Cases 516.

stage, at a point when the expenses have already been deducted, that section 26 excludes the dividends on which tax has already been paid. In this connection, he places particular emphasis on the implication arising from the provision in section 16 that "For the purpose of ascertaining the assessable profits," the expenses incurred are to be deducted. The section does not say from what, but he reads it as if it prescribed that they were to be deducted from the profits chargeable to tax or the "gross profits" and maintains that what remains after this deduction, i.e. the assessable profits, cannot be the same as the subject matter from which the deduction is made.

Mr. Sneath, on the other hand, contends that assessable profits and profits chargeable to tax are, in effect, the same thing. To use his own phrase, he says it is "the same rabbit that keeps popping up" irrespective of which of these expressions is used. True, they may not contemplate the same period of time, for Mr. Sneath would not regard profits chargeable to tax as being tied to the same terminal points as assessable profits are tied by the definition in section 2. They may relate to a different period, but Mr. Sneath maintains that chargeable profits contemplate the same kind of things, and only the same kind of things, as are included in assessable profits the rabbit may be older or younger but it is always the same rabbit and no other animal.

He has, very rightly, placed much stress on the word "profits", which he contrasts with the words "any sum arising in or derived from the Colony" appearing in sub-section (2) of section 14; a sub-section that creates an irrebuttable presumption about such a sum. He argues that profits can only be ascertained when you have deducted all outgoings and that consequently section 14(1) only charges what remains after the permissible outgoings have been deducted; and that this is clearly

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implied and emphasised by the presence of the words "subject to the provisions of this Ordinance" before the words "be charged" in this sub-section. This is a powerful argument, put most forcefully and persuasively by Mr. Sneath, and, had it not been for the terms used in sections 16 and 17, an argument that would, we think, be difficult to challenge. It gets much support from judicial pronouncement such as those of Lord Herschell in Russel v. Aberdeen Town and County Bank (8) where he said:-

> "My Lords, the duty is to be charged upon 'a sum not less than the full amount of the balance of the profits or gains of the trade, manufacture, adventure, or concern;' and it appears to me that that language implies that, for the purpose of arriving at the balance of profits, all those deductions from the receipts, all that expenditure which is necessary for the purpose of earning the receipts must be deducted, otherwise you do not arrive at the balance of profits, indeed you do not ascertain and cannot ascertain whether there is such a thing as profit or not. The profit of a trade or business is the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning those receipts. That seems to me to be the meaning of the word 'profits' in relation to any trade or business. Unless and until you have ascertained that there is such a balance, nothing exists to which the name 'profits' can properly be applied.
>
> My Lords, it is quite true that the section provides that 'the duty shall be assessed, charged, and paid without other deduction than is hereinafter allowed', and I will assume, for the purposes of this case, that that does

(8) 2 Tax Cases 321, at p.327.

prohibit (although the words certainly appear to be applicable to the duty) the making of any deductions from the balance except those allowed by the subsequent provisions of the Act. It is to be observed that, properly speaking, there is nothing to which those words are applicable. The provisions of the Act do not expressly allow any deductions. What they do is to prohibit certain deductions with certain exceptions, and therefore it may, perhaps, in any sense be said that, having prohibited certain deductions with certain exceptions, the excepted things are allowed."

The point is reinforced by observations in the case of Vulcan Motor and Engineering Company (1906) Limited v. Hampson (9) where Bankes, L.J. (p.601) said:-

"It has been pointed out that a confusion often arises from the use of the words 'gross profits', that no meaning is properly attributable to that expression; and that to avoid confusion and difficulty it is better not to use the expression 'gross profits', but to use the word 'returns' as contrasted with 'net profits'".

Scrutton, L.J. adopted a similar approach when he said (p.605):-

"Now 'net profits' does not seem to me a very satisfactory expression, because it contrasts with 'gross profits' which appears to me to be a meaningless expression. One may speak of receipts or turnover without deducting the expenses of earning them, but it appears to me meaningless to describe receipts as profits without taking into account the expenses of earning the receipts. When therefore clause 5 (of the agreement form) speaks of 'profit earned by the company', in my view it means profits earned by the company after deducting the expenses of earning them, which is substantially

(9) (1921) 3 K.B. 597 at p.601

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25th January 1964 - continued.

the same as the expression 'net profits' in Etherington's Case, (1919) 2 Ch. 254."

The Hong Kong Ordinance has, by an amendment made in 1935, introduced the expression "net profits", which, if it is to be contrasted simply with "profits" - and it is difficult to see with what else it can be compared - does detract from Mr. Sneath's arguments that the profits mentioned in section 14 as being chargeable are the "end product" and consequently the same thing as net profits.

When one turns to sections 16 and 17 of the Ordinance, the argument runs into further difficulties. Section 16 tells us that "for the purpose of ascertaining assessable profits" certain outgoings and expenses are to be deducted. Whilst the section does not say from what precisely the deduction is to be made it limits the deductible outgoings and expenses to such as were "wholly and exclusively incurred... in the production of profits in respect of which he (the taxpayer) is chargeable to tax". It appears that the legislature is using the latter expression to indicate something different - whether it might be described as "gross profits" or "receipts" or "returns" - from assessable profits. Otherwise presumably the reference at this point would have been, not to profits chargeable to tax, but simply to "such profits" or to "assessable profits". Either of these brief terms would have limited the outgoings and expenses to those incurred in the production of the assessable profits and the fact that they are not used but a different and longer expression has been chosen indicates that something different from assessable profits is contemplated. Mr. Sneath would, however, limit the effect of the difference in the following way.

Prior to 1935, the relevant portion

of section 16 read as follows :-

> "16(1) For the purpose of ascertaining the profits of any person there shall be deducted from all outgoings and expenses wholly and exclusively incurred during the basis period for the year of assessment by such person in the production of the profits....."

There was no definition of "assessable profits" and the definition of "basis period" was "'basis period' for any year of assessment is the period on the profits of which tax for that year falls to be computed".

In 1955 the word "assessable" was inserted before the word "profit" where it first occurs in section 16 and the word "the" was replaced by the word "such" immediately before the word "profits" where it appears for the second time. The definition of "assessable profits", mentioned above, was inserted and an amendment made to that of "basis period", bringing it into the form already quoted, except that it contained the words "any period" instead of the words "the basis period".

In 1956, section 16 and the definition of "basis period" were altered to the form, already quoted, in which they now appear.

Mr. Sneath contends that, whilst it is accepted that, after the amendment in 1955 and prior to that in 1956, only the expenses incurred in producing the assessable profits could be deducted, the effect of the amendment introduced in 1956 was not to authorise the deduction of expenses incurred in the production of profits which would not, at sometime, become assessable profits, but merely to authorise the deduction of expenditure incurred for the purpose of producing assessable profits in a different

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period. This alteration in the time at which the profits might accrue did not, in his view, remove the limitation that the expenditure must have been incurred for the purpose of producing profits which would, in some years, be assessable.

In support of this construction, he has directed attention to a passage from the judgment of Lawrence, J. in Hughes v. Bank of New Zealand (7), dealing with expenses incurred in connection with certain stocks and securities which, by reason of statutory exemptions conferred on them, were not subject to tax. The Bank contended that these expenses were, nevertheless, deductible as being disbursements or expenses laid out or expended for the purpose of their trade. The Inland Revenue Authorities contended that these expenses were not to be deducted because if the corpus, i.e. the income, is excluded, then the accessory, i.e. the expenses of earning it, ought also to be excluded.

As already indicated, the relevant rule of the English Income Tax Act, rule 3 of cases I and II in Schedule D, is not in precisely the same terms as the Hong Kong provision under discussion. Rule 3 says:-

> "No sums shall be deducted in respect of
>
> (a) any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade ...."

Lord Wright, M.R. said (p.506):-

> "That is put in negative form, but it is generally, and I think correctly, treated as being capable of being converted into a positive enactment, with the result that it

(7) 21 Tax Cases. 516

provides that 'money wholly and exclusively laid out or expended for the purpose of the trade' may be deducted."

Lord Thankarton, with the concurrence of the other Law Lords, endorsed (p.524) this approach, which also emerges in the passage already quoted from Lord Herschall's speech.

Lawrence, J., whose judgment in the lower court was upheld on appeal, expressed the view that "for the purposes of the trade" was a wider expression than "for the purpose of earning profits brought into charge." He said (p.486):-

"The contention of the Crown is based upon reading rule 3 applicable to cases I and II as though it read:-

'Any disbursements or expenses, not being money wholly and exclusively laid out or expended for the purposes of earning profits brought into charge'

but that is not what the rule says and again the words of the rule must be strictly adhered to. The expenses may be laid out for the purposes of trade, and undoubtedly were apparently in this case laid out for the purposes of the trade, although they earned profits which, by reason of exemption, are not brought into charge."

Whilst Mr. Sneath finds support for his argument in this passage from Lawrence, J., Mr. Litton seeks to distinguish it by saying that Lawrence, J. had in mind securities which were entirely exempt from tax whereas here we are concerned not with dividends which are, per se, exempt from tax, but which are, by virtue of section 26, excluded from the final figure of assessable profits.

This argument seems to us, however, to give

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25th January 1964 - continued.

too little weight to the terms of the provisions which conferred exemption on the stocks and securities in the English case. Reliance was placed in that case both on section 46, of the English Income Tax Act 1918, a section which speaks of securities issued on condition that interest thereon shall not be liable to tax or super-tax, and on rule 2(d) of Schedule 'C', which says "no tax shall be chargeable". Section 48 was not mentioned but in speaking of securities issued on condition that the interests should be "exempt from assessment to tax" it would seem to imply that no distinction is intended between this phrase and the others just mentioned. We doubt if, on the face of it, Lawrence J. would have seen in the language of exemption any distinction sufficient to remove the present case from the scope of his statement. On the other hand, what Lawrence J. said in this respect was, in effect, obiter. His decision was that the argument of the Crown could not be sustained on the basis of the English rule which gave a wider field of deduction than would have been conferred by the expression "profits brought into charge". He said, in effect:-

> "The Crown are asking me to decide the case as if the rule was couched in such and such terms; it isn't couched in those terms and therefore I reject the Crown's argument."

That is certainly not the same thing as saying "I would accept it if the rule was couched in those terms."

The language used for the purpose of imposing a liability and establishing the Crown's right to recover is not identical in the Hong Kong Ordinance with that used in the English Income Tax Acts, so that one cannot regard the word "charge" and its derivatives as necessarily bearing precisely the same meaning in each system of legislation. Section 71 of the Hong Kong Ordinance, which provides for the recovery

of tax, states:-

> "71. Tax charged under the provisions of this Ordinance shall be paid in the manner directed in the notice of assessment on or before a date specified in such notice."

Section 75(1) states:-

> "75(1) Tax due and payable under this Ordinance shall be recoverable as a civil debt due to the Crown."

These provisions indicate that the tax charged is not due for payment and not in default until it becomes due and payable in the manner that has been directed in the notice of assessment. This is illustrated, for example, by section 76(1) which begins:-

> "76(1) Where either tax payable by a person is in default or a person charged to tax has quitted the Colony without paying all tax charged upon him ..."

and, again, by section 77(1) which states:-

> "77(1) Where the Commissioner is of opinion that any person is about to or likely to leave the Colony without paying all tax assessed upon him ...."

The English Income Tax Act 1918, on the other hand, provides for the recovery of tax in section 169 in the following terms:-

> "169(1) Any tax charged under the provisions of this Act may be sued for and recovered ..... from the person charged therewith in the High Court as a debt due to the Crown."

This indicates that the word "charge" and its derivatives are used in the English legislation in a manner different from their use in the Hong Kong Ordinance, the English section 68 says:-

In the Supreme Court of Hong Kong (Appellate Jurisdiction)

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Judgment

25th January 1964 - continued.

"68. For the purpose of assessing and charging income tax in the cases mentioned in this section ..."

A similar sequence appears in Miscellaneous Rules 4, 5 and 7 of Schedule 'D' which was the expression "assessed and charged" or its equivalent as if the charging followed rather than preceded the assessment. This impression is re-enforced by a section such as section 123(3) which refers to the special commissioners and says:-

"123(3) The special commissioners shall notify the amount of the charge to the person charged who shall pay the tax to the proper officer."

Consequently, it appears quite possible that, in England, a judicial reference might be made to "profits brought into charge" in circumstances where, in Hong Kong the reference would be to "assessable profits." A reference to "chargeable" profits under the English Act could include what in Hong Kong would be either chargeable or assessable profits.

Lawrence, J. was not concerned with the distinction which the appellant seeks to make here between "chargeable" and "assessable" profits and it is by no means clear that if he was referring to the Hong Kong Ordinance, he would have used the word "chargeable" rather than "assessable".

As Huggins, J. has said in the court below, when referring to the Hughes case:-

"There is a great danger here ... in paying too much regard to the comparable but by no means identical provisions in the English legislation."

Mr. Sneath has also placed much weight on the presence of the words "subject to the provision of this Ordinance" before the words "be charged" in section 14(1) and these words undoubtedly require very careful

consideration, and it is a consideration that has caused us more difficulty than any other point in the case. These words govern the operation of the charge and if, at some point elsewhere in the Ordinance, there was a clear indication that the expenses attaching to these dividends were to be excluded from the charge, then we think Mr. Sneath's contention should be accepted but we do not think that the exclusion of the dividend from assessment can have this effect when the Ordinance has drawn a distinction, the exact limits of which may be none too clear, between charging and assessing.

Some argument has been addressed to us on the absence from the Ordinance of a provision for apportionment of expenses such as these, and on the contents of the form used by the Inland Revenue Department for making returns of corporation profits. We agree with Huggins J. that the absence of such a specific provision for apportionment does little to help either side and that no conclusions as to the meaning of the section in question can be drawn from the form used by the Revenue authorities for obtaining returns of profits.

We would summarise our conclusions by saying that these dividends are part of the profits of the company and would only be excluded from such profits by the operation of some statutory provision. Under the provisions of the Ordinance they are to be excluded from the assessable profits. There is nothing to say that they are to be excluded from the chargeable profits. The Ordinance indicates that chargeable profits and assessable profits are not the same thing and the terms of the Ordinance do not seem to us to show that the only distinction between them is that assessable profits are limited by prescribed terminal points. Indeed if the only difference between chargeable and assessable profits is the period within which they are made, then one would expect to find, in the definition of assessable profits, the

In the Supreme Court of Hong Kong (Appellate Jurisdiction)

No. 5

Judgment 25th January 1964 - continued.

expression "chargeable profits" or its equivalent where, in fact, "net profits" appears.

We, like the judges in Hughes's case, reach this conclusion with no sense of satisfaction because we can see no reason, logical, ethical or otherwise, why expenses incurred in earning profits which are not going to bear tax, should be deducted from those profits which are made assessable, but under the provision of the Ordinance, as amended in 1956, we can find no basis for excluding them.

(Michael Hogen)

President.

(I.C.C. Rigby)

Appeal Judge.

25th January, 1964.

In the Supreme Court of Hong Kong (Appellate Jurisdiction)

No.6

Notice of Motion for leave to Appeal to Her Majesty in Council

15th February 1964.

NO. 6

NOTICE OF MOTION FOR LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

IN THE SUPREME COURT OF HONG KONG

APPELLATE JURISDICTION

CIVIL APPEAL NO. 37 of 1963.

(On Appeal from Inland Revenue Appeal No. 1 of 1963)

B E T W E E N:-

MUTUAL INVESTMENT COMPANY LIMITED Appellant

- and -

COMMISSIONER OF INLAND REVENUE Respondent

Notice of Motion for leave to appeal to Her Majesty the Queen in Council

TAKE NOTICE that this Honourable Court will be moved on the 22nd day of February 1964, at 9.30 o'clock in the forenoon or as soon thereafter as Counsel can be heard by Counsel for and on behalf of the above-named Respondent for leave to appeal to Her Majesty the Queen in Council from the judgment of this Honourable Court delivered in the above mentioned Action on the 25th day of January, 1964, whereby the appeal from the judgment of the Supreme Court was upheld, the Respondents undertaking to comply with the Provisions of the Rules and Instructions concerning Appeals to Her Majesty the Queen in Her Privy Council.

Dated at Hong Kong this 15th day of February 1964.

Sd. P.F.X. Leonard
Legal Department.

In the Supreme Court of Hong Kong (Appellate Jurisdiction)

No.6

Notice of Motion for leave to Appeal to Her Majesty in Council

15th February 1964 - continued.

TO:

The Registrar, Supreme Court; and

Wilkinson & Grist, Solicitors for the Appellants.

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No. 7

Decision

22nd February 1964.

NO. 7

DECISION

IN THE SUPREME COURT OF HONG KONG

(APPELLATE JURISDICTION)

CIVIL APPEAL No. 37 of 1963

(On appeal from Inland Revenue Appeal 1 of 1963)

B E T W E E N:

MUTUAL INVESTMENT COMPANY LIMITED Appellant

20

- and -

COMMISSIONER OF INLAND REVENUE Respondent

D E C I S I O N

Upon the authorities we are satisfied that we have no jurisdiction to entertain

this application for leave to appeal out of time to the Privy Council.

We think it right to say, however, that if we had had such jurisdiction we would have granted this application conditional upon the Crown indemnifying the respondent as to the costs of the appeal.

The application is dismissed with costs.

(I.C.C. Rigby)
President
22.2.64

(W.A. Blair-Kerr)
Appeal Judge
22.2.64

In the Supreme Court of Hong Kong (Appellate Jurisdiction)

No. 7

Decision

22nd February 1964 - continued.

In the Supreme Court of Hong Kong (Appellate Jurisdiction)

No. 8

Order

22nd February 1964.

NO. 8

ORDER

IN THE SUPREME COURT OF HONG KONG

APPELLATE JURISDICTION

CIVIL APPEAL No. 37 of 1963

(On Appeal from Inland Revenue Appeal No. 1 of 1963).

B E T W E E N:

MUTUAL INVESTMENT COMPANY LIMITED Appellant

- and -

COMMISSIONER OF INLAND REVENUE Respondent

Before the Honourable Mr. Justice Ivo Charles Clayton Rigby and the Honourable Mr. Justice William Alexander Blair-Kerr in the Full Court.

Dated this 22nd day of February, 1964.

O R D E R

UPON the application of the Respondent by Notice of Motion filed herein on the 15th day of February, 1964 for leave to appeal to Her Majesty the Queen in Council from the judgment of this Honourable Court delivered in the above-mentioned Appeal on the 25th day of January, 1964 and UPON reading the said Notice of Motion and the Affidavit of Graham Rupert Sneath filed herein on the 15th day of February, 1964 and UPON hearing Counsel for the Respondent and Counsel for the Appellant IT IS ORDERED that the application be dismissed with costs.

J.R. Oliver
Registrar.

In the Privy Council

No. 9

Order granting Special Leave to Appeal to Her Majesty in Council.

3rd July 1964.

NO. 9

ORDER GRANTING SPECIAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

AT THE COURT AT BUCKINGHAM PALACE

The 3rd day of July, 1964

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY

LORD PRESIDENT
MR. SECRETARY BROOKE
MR. CARR
SIR PETER RAWLINSON

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 29th day of June 1964 in the words following viz.:-

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of The Commissioner of Inland Revenue in the matter of an Appeal from The Supreme Court of Hong Kong (Appellate Jurisdiction) between the Petitioner (Appellant) and Mutual Investment Company Limited (Respondent) setting forth that the Petitioner seeks special leave to appeal to Your Majesty in Council from a Judgment of the Full Court of the Supreme Court of Hong Kong (Appellate Jurisdiction) dated 25th January 1964 allowing the Respondent's Appeal against a Judgment dated the 4th October 1963 of the said Court in its Original Jurisdiction which (so far as is material) disallowed the Appeal of the Petitioner against a Decision of the Board of Review annulling in part assessments determined by the Petititoner: And humbly praying Your Majesty in Council to grant him special leave to appeal from the Judgment of the Full Court of

In the Privy Council

No.9

Order granting Special Leave to Appeal to Her Majesty in Council.

3rd July 1964 - continued.

the Supreme Court of Hong Kong (Appellate Jurisdiction) dated the 25th Jnauary 1964 so far as it upheld the appeal of the Respondent from the aforesaid Judgment of the Supreme Court of Hong Kong (Original Jurisdiction) and for further or other relief:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment of the Full Court of the Supreme Court of Hong Kong (Appellate Jurisdiction) dated the 25th day of January 1964 and that the Petitioner ought to pay to the Respondent in any event its costs of the Appeal on a Solicitor and Client basis:

"AND Their Lordships do further report to Your Majesty that the proper officer of the said Supreme Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor or Officer administering the Government of Hong Kong for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

W.G. AGNEW

IN THE PRIVY COUNCIL No. 42 of 1964

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG

(Appellate Jurisdiction)

B E T W E E N:

COMMISSIONER OF INLAND REVENUE Appellant

- and -

MUTUAL INVESTMENT COMPANY LIMITED Respondent

RECORD OF PROCEEDINGS

CHARLES RUSSELL & CO.
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Respondent.