18 of 1975

IN THE PRIVY COUNCIL No. 6 of 1975

ON APPEAL

FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN:

SIDNEY BOYD ASHTON First Appellant

- and -

JOHN WORRALL WHEELANS Second Appellant

- and -

COMMISSIONER OF INLAND REVENUE Respondent

CASE FOR THE APPELLANTS

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1. This is an appeal from a judgment of the Court of Appeal of New Zealand (McCarthy P., Richmond and Speight JJ.) given on 29 May 1974, allowing an appeal from judgments of the Supreme Court of New Zealand (Wilson J.) given on 22 September 1972. p.115 pp.97 and 98

2. The question in this appeal is whether the Respondent acted incorrectly in making amended assessments of income tax under the Land and Income Tax Act 1954 in respect of the respective Appellants for the income year ended 31 March 1967 by increasing the assessable incomes for those years by the amount of £2111.12.2d. in the case of the First Appellant and £2105.5.1d. in the case of the Second Appellant which sums were the assessable incomes returned for income tax purposes for that same income year by two family trusts the beneficiaries under which were broadly the members of the families of the First Appellant and the Second Appellant respectively. p.5,L.28-36 p.4,L.16-38 p.62,L.3-11 p.60,L.35 - p.61,L.13

3. The circumstances giving rise to this question may be broadly outlined as follows. For some years

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the Appellants had carried on practice as Public Accountants in partnership at Christchurch, New
p.67,L.16-21 Zealand under the firm name of Ashton and Wheelans. Late in 1965 they decided to form a new firm with one Derek Robert Hegan who had been on the staff of Ashton
p.68,L.44-47 and Wheelans, each partner to have equal shares in the
p.72,L.36-43 new firm. The Ashton and Wheelans partnership had derived substantial income from four finance companies (Cresta Finance Limited, Warwick Credits Limited,
p.68,L.8-41 Westburn Investments Limited and Worcester Holdings Limited) both in respect of accounting services per-
p.69,L.8-18 formed for those companies and in respect of what was
p.75,L.15-19 termed "office charges", which were fees paid initially by hirers of motor vehicles under hire purchase agreements from motor vehicle dealers the agreements being assigned by the dealers to the finance companies and
p.76,L.8-46 which were paid to the Ashton and Wheelans partnership
p.90,L.42- under the agreements between the finance companies and
p.91,L.22 that partnership. Because Mr Hegan considered the office charges insecure income of the firm, he was not
p.64,L.9-30 prepared to include income from those charges in the
p.91,L.22-35 goodwill which he was to pay to the Appellants. The Appellants considered that the office charges, which
p.69,L.13-18 represented the developed finance connection with the dealers, was a valuable asset. They were also concerned to see that in the event of the death of one of them the income from those office charges would be
p.69,L.46- retained by his family, the point having been under-
p.70,L.9 lined by a severe illness suffered by the First Appellant early in 1965. These factors led to
p.70,L.10-12 consideration of the establishment of family trusts. It was decided to exclude office charges completely from the new partnership of Ashton, Wheelans and Hegan and that the right to them would accrue to family trusts of the First Appellant and the Second Appellant.

4. The following transactions were entered into :

p.70,L.14-15 (i) The partnership between the First Appellant and the Second Appellant was dissolved;

p.70,L.15-17 (ii) A new partnership was formed as from 1 November 1965 between the First Appellant, the Second Appellant and Mr Hegan in which each held equal shares and since that date the partnership has carried on practice as Public Accountants and subsequently as Chartered Accountants at Christchurch;

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(iii) By deed dated 26 November 1965 the Second Appellant created a trust (hereinafter referred to as "the Ashton Trust") for the benefit of the wife and children and certain other members of the family of the First Appellant, the trustees being the Second Appellant and Geoffrey Charles Pitt Beadel of Christchurch, Solicitor; — Annexure A to Case Stated p.6-p.22

(iv) By deed dated 26 November 1965 the First Appellant created a trust (hereinafter referred to as "the Wheelans Trust") for the benefit of the wife and children and certain members of the family of the Second Appellant, the trustees being the First Appellant and Geoffrey Charles Pitt Beadel of Christchurch, Solicitor. — Annexure A 1 to Case Stated p.23 - p.39

Discussions as to the formation of the two trusts had been completed, instructions for preparation of the necessary documents given and the documents themselves completed at the time that the documents referred to in subparagraphs (v) (vi) and (vii) of this paragraph were executed. — p.71,L.7-17; Annexure C to Case Stated p.45 - p.46

(v) By four separate letters to Ashton and Wheelans each dated 26 October 1965 the four finance companies withdrew instructions for that firm to act for the company as Public Accountants as from 1 November 1965; — Exhibit H p.83 p.70,L.19-29

(vi) By four separate letters each dated 26 October 1965 the four finance companies each appointed the First Appellant, the Second Appellant and Geoffrey Charles Pitt Beadel to act in the capacity of accountants for the four finance companies, the appointment of the First Appellant and Geoffrey Charles Pitt Beadel being in their capacity as trustees of the Wheelans Trust and the appointment of the Second Appellant and Geoffrey Charles Pitt Beadel being in their capacities as trustees of the Ashton Trust; — Annexures B,B1, B2 and B3 to Case Stated p.40 - p.44

(vii) By letter dated 27 October 1965 Saunders, Heney and Beadel of Christchurch, Solicitors, as solicitors for the First Appellant, the Second Appellant and Geoffrey Charles Pitt Beadel requested the partnership of Ashton, Wheelans and Hegan to act professionally in the capacity of public accountants and carry out on behalf of — Annexure C to Case Stated p.45 - p.46

Annexure C1 to Case Stated p.46 - p.47

the trustees the accountancy work required by the four companies and Ashton, Wheelans and Hegan accepted the appointment.

p.65,L.10-23

5. Ashton, Wheelans and Hegan was paid for the accountancy services it performed in relation to the finance companies according to the New Zealand Society

p.71,L.18-39

of Accountants' scale. The practice followed in relation to payment by the finance companies to the trustees of the trusts and by the trustees to Ashton, Wheelans and Hegan was for cheques to be drawn monthly by each finance company in favour of Ashton Wheelans and Beadel and paid into the respective accounts of the trusts at the ANZ Bank splitting each cheque 50:50 to each Trust and for each trust to draw and pay a cheque monthly to Ashton, Wheelans and Hegan.

6. The income of the Ashton Trust for the year ended 31 March 1967 was dealt with as follows :

Exhibit J p.85

£200 was appropriated and credited to the wife of the First Appellant, £741.12.2d. was accumulated and added to the capital of the Trust Fund and the balance of the income amounting to £1170 was vested absolutely in the three children of the First Appellant living at 31

p.81,L.23-33

March 1967 in equal shares of £390 each. The availability of the trust funds to the children for that and subsequent years enabled the First Appellant to send one child to a private school and to provide for the purchase of land on which to build a family home and for the building up of assets in the Trust of a net worth at the date of hearing in the Supreme Court of between $30,000 and $32,000.

7. The income of the Wheelans Trust for the year ended 31 March 1967 was dealt with as follows :

Exhibit K p.86-p.87

£200 was appropriated and credited to the wife of the Second Appellant, £705.5.1d. was accumulated and added to the capital of the trust fund and the balance of the income amounting to £1200 was vested equally in the four children of the First Appellant living at 31 March 1967. The

p.73,L.34-41

£200 was paid to the wife of the First Appellant and used by her for overseas travel purposes.

The £1200 vested in the four children was used in the purchase of a larger home for the family and for their maintenance and support.

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8. In July 1972 the trustees of the two Trusts sold to the Broadlands Dominion Group for $40,000, of which one half accrued to each Trust, the goodwill of their business which they had conducted under the letters of appointment referred to in paragraph 4(vi). p.74,L.12-20 Exhibit L, p.87 - p.88

9. The return of income of the partnership of Ashton, Wheelans and Hegan for the income year ended 31 March 1967 disclosed assessable income of £10479. 16. 8d. allocated as follows : p.3,L.21-31

First Appellant	£3659. 18. 11d.
Second Appellant	£3659. 18. 10d.
Mr Hegan	£3159. 18. 11d.

10. The returns of income of the Ashton Trust and the Wheelans Trust for the same years disclosed assessable income of £2111. 12. 2d. in the case of the Ashton Trust and £2105. 5. 1d. in the case of the Wheelans Trust. p.3,L.35 - p.4,L.8

11. The Respondent considered that the arrangements between the respective trustees of the Ashton and Wheelans Trusts of the one part and the First Appellant and the Second Appellant of the other part were void by virtue of the provisions of s.108 of the Land and Income Tax Act 1954 and he p.4,L.9-15

(i) Increased the income returned by the partnership of Ashton, Wheelans and Hegan by adding thereto the income returned by the two Trusts and p.4,L.16-25

(ii) Allocated the partnership income in shares different from the shares as returned by, in effect, adding to the share of the First Appellant in the partnership the income derived by the Ashton Trust and adding to the share of the Second Appellant in the partnership the income derived by the Wheelans Trust. p.4,L.26-29

12. At all material times s.108 provided as follows :

"Every contract, agreement, or arrangement made or entered into, whether before or after the commencement of this Act, shall be absolutely void in so far as, directly or indirectly, it

has or purports to have the purpose or effect of in any way altering the incidence of income tax, or relieving any person from his liability to pay income tax".

13. In addition to s.108 the following provisions of the Land and Income Tax Act 1954 are material :

(a) The definition of "assessable income" in s.2 which unless the context of the Act otherwise requires is as follows :

"'Assessable income' means income of any kind which is not exempted from income tax otherwise than by way of special exemption expressly authorised as such by this Act:"

(b) The definition of "taxable income" in s.2 which at the material times unless the context of the Act otherwise required was as follows :

"'Taxable income' -

(a) In relation to ordinary income tax, means the residue of assessable income after deducting the amount of all special exemptions to which the taxpayer is entitled in respect of ordinary income tax:

(b) In relation to social security income tax, means the residue of assessable income after deducting the amount of all special exemptions to which the taxpayer is entitled in respect of social security income tax":

(c) Section 10(1) which provided that in the case of income derived by two or more persons jointly :

"(b) In the case of partners -

(i) They shall make a joint return of the income of the firm, setting forth the amount of that income, and the shares of the several partners therein:

(ii) Each partner shall make a separate return of all income derived by

him and not included in any such joint return:

(iii) There shall be no joint assessment, but each partner shall be separately assessed and liable for the tax payable on his total income, including his share of the income of any firm in which he is a partner:"

(d) Section 77(1) and (2)(a) which at the material times provided as follows :

"(1) Subject to the provisions of this Act, there shall be levied and paid for the use of Her Majesty ... for the year commencing on the first day of April in each year, a tax herein referred to as income tax, which shall consist of two parts, namely, ordinary income tax and social security income tax.

(2) Subject to the provisions of this Act, -

(a) Income tax shall be payable by every person other than a subsisting company or a public authority or a Maori authority on all income derived by him during the year ... for which the tax is payable:"

(e) Section 78 which is as follows :

"(1) Income tax shall be assessed and levied on the taxable income of every taxpayer at such rate or rates as may be fixed from time to time by Acts to be passed for that purpose.

(2) The Act by which the rate of income tax is so fixed for any year is in this Act referred to as the annual taxing Act."

(f) Section 92 which at the material times was as follows :

"For the purposes of this Act every person shall be deemed to have derived income although it has not been actually paid to or received by him, or

already become due or receivable, but has been credited in account, or reinvested, or accumulated, or capitalised, or carried to any reserve, sinking, or insurance fund, or otherwise dealt with in his interest or on his behalf".

14. The Land and Income Tax (Annual) Act 1966 fixed the rates of ordinary income tax and social security income tax on taxable income derived during the year ended 31 March 1967. Social security income tax was at a flat rate of 1 1/5 d. for every sum of 1/6 d. or part thereof of taxable income but ordinary income tax was imposed at a progressively increasing rate on taxable income derived by taxpayers and each individual taxpayer had a special exemption from social security income tax of £104 and from ordinary income tax of £468. Income derived by a trustee was assessable to the trustee but where it was also derived by a beneficiary entitled in possession to the receipt thereof during the same income year, the trustee was deemed to be agent of the beneficiary and in the case of each such beneficiary the income tax was calculated on the basis of the taxable income of the beneficiary.

15. In the Supreme Court of New Zealand Wilson J. held that no part of the income of the Trusts was properly assessable as part of the income of the First Appellant and Second Appellant respectively and that the Respondent had acted incorrectly in making the amended assessments.

16. Wilson J. reviewed the facts and held that,
p.91,L.29-36 because the Appellants agreed to Mr Hegan's stipulation that he was not prepared to pay by way of his entrance premium into the partnership a sum which included an estimation of the office charges, there
p.91,L.42-45 was a necessity to make some arrangement so that the office charges would be kept separate. He considered that the simplest way to have done this would have been to credit the office charges to a special fund
p.91,L.45-50 or special account in the partnership which would be divided amongst the old partners only and not include the new partner. But having reviewed the family considerations and the various transactions entered into he concluded that the answer given by the Second
p.93,L.2-5 Appellant was perfectly reasonable and justified what was done without any thought to the tax consequences.

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The answer, said the Judge, was that whilst the Appellants received these payments as partners their enjoyment of them depended on their continued existence in that the partnership would be terminated by the death of either of them and presumably the survivor would succeed to the full payment of the charges, whereas by creating trusts and having those payments paid to the trusts they were insured against that risk and, so long as either of them survived to ensure by his goodwill the continuity of those payments, both families would continue to enjoy the profits equally instead of one succeeding on the death of the other to the full amount. In Wilson J.'s view that was a very prudent and reasonable arrangement and thoroughly justified the setting up of the Trusts and the arrangement by which the payments were received by the Trusts rather than by the Appellants. p.93,L.5-20 p.93,L.20-26

17. Wilson J. said that what was done was as he saw it "ordinary family dealing" as those words were used by Lord Denning in Newton v. Commissioner of Taxation [1958] A.C. 450. He reasoned that ordinary family dealing means no more than dealing in such a way as the ordinary person faced with these circumstances as faced the tax payer would have acted had he not been seeking to evade liability for tax. For that reason, although he did not agree that the transactions were ordinary business transactions, he was satisfied that he could predicate with confidence that what was done in the way of ensuring that this income became the income of the family trusts rather than the Appellants' was ordinary family dealing and was not referable in any significant degree to any desire to avoid tax. Accordingly he concluded that, having seen and having heard the Appellants, he was satisfied that the predominant purpose of the arrangement was to provide security for their families with regard to the office charges which had formerly been paid to them as partners. p.93,L.27-31 p.93,L.32-37 p.93,L.37-50 p.94,L.12-17

18. Although in view of his finding in favour of the Appellants it was not necessary for him to consider the taxation consequences if the transactions were void as a result of the application of s.108, Wilson J. went on to do so and concluded that the amended assessments would not have been justified. He referred to the Respondent's submission that the trusts were avoided, that the appointment by the finance companies of the p.94,L.27-39

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trustees as accountants carrying with it the remuneration of the office charges was avoided and that the instructions by the trustees to the new partnership of Ashton, Wheelans and Hegan to carry out the strictly accounting duties at the lesser remuneration were also avoided and reasoned that, if the trusts were annihilated, there was no basis upon which he could say that the three trustees held the moneys received by them as constructive trustees for the Appellants. If their trusts
p.95,L.2-17 were annihilated there was a resulting trust to return the money to the source from which it came, namely the finance companies and alternatively, if the trustees had given consideration for receiving it, it was paid to the three of them and would not become the income of the Appellants or either of them. He added that, if
p.95,L.27-32 one went further (as the Respondent claimed to do) and annihilated the appointment of the trustees as accountants by the finance company, that still did not leave the money in the hands of the Appellants or make it their
p.95,L.32-37 income. He said that would be an added reason for saying that such moneys as were in fact paid by the companies to the trustees were held by them on resulting trust for the company because they had no right to them whatsoever.

19. The Respondent appealed to the Court of Appeal of New Zealand from the judgment of the Supreme Court on the grounds that the judgment was erroneous in fact and law. Judgment of the Court of Appeal was delivered
p.115 on 29 May 1974 when the Court in a Judgment delivered by McCarthy P. unanimously allowed the Appeal.

20. Their Honours began their judgment by reviewing the facts in considerable detail. They considered it
p.109,L.8-17 emerged rather clearly from Wilson J.'s reasons for judgment that he would probably have thought that the facts were sufficiently indicative of a principal purpose of altering the incidence of tax or of relieving the objectors from liability to pay tax had it not been for the oral evidence given by the two objectors which seemed to have persuaded him that their dominant purpose was otherwise. The Court noted
p.109,L.23-30 that no objection was raised to this evidence but said it was plainly established by the authorities that the test to be applied in relation to s.108 was an objective one and that it excluded reliance on much of the evidence

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which seemed to have influenced Wilson J. Referring to Newton, Their Honours reasoned that the Court can have regard to surrounding circumstances to ascertain terms and, they thought, their meanings too, but that purposes had to be determined by what the transaction effected and motive was irrelevant. Their Honours said that observations in a recently decided case under s.108 (Martin v. Inland Revenue Commissioner (1973) 3 A.T.R. 707), on which the Appellants relied as departing from this and justifying weight being given to the Appellants' testimony, should not be taken outside the context of the particular case and were intended to relate to matters of background rather than of motive.

p.110,L.7-13

p.110,L.13-22

21. Their Honours were prepared, without deciding, to accept that it was permissible for the Court to recognise as the background to this scheme that the Appellants were taking a new partner into their business, that the incoming partner did not wish to share in certain of the partnership activities, that one of the Appellants had suffered a recent severe illness and that they both wished to make financial provision for their families. But in their opinion the question they had to decide was whether it could be predicated from the way the transaction was implemented that it was entered into for the purpose of avoiding tax. Their Honours said that there are very broadly three divisions of cases arising under s.108. The first is those where it cannot be predicated on the stated test that the sole purpose or at least the principal purpose was to avoid tax; here the Commissioner fails. The second is those where it can be said that the taxpayer merely exercised his right to choose within the range of ordinary family or business dealings a method of carrying out the arrangement which was the most favourable to him from a taxation point of view; here too the Commissioner fails. The third is those where the overt acts enable it to be predicated that, though the taxpayer may have had other concurrent objectives, the principal purpose for carrying out the transaction in the way it was carried out was to avoid tax; here the Commissioner succeeds.

p.110,L.37-48

p.111,L.2-6

p.111,L.7-27

22. Their Honours reviewed the factual considerations and concluded that, when the steps by which the transaction was implemented and what was effected

p.112,L.37 - p.113,L.4

by those steps were seen in their totality, it was not possible to describe what was done as an ordinary business or family dealing in the sense that those words were used in Newton and they could not escape the conclusion that the principal purpose of the highly artificial transaction was to alter the incidence of the tax which otherwise would have been payable by the Appellants on those office charges while allowing them to enjoy the use of benefits of them.

p.113,L.6-14 23. Turning to the question of annihilation, Their Honours said that the crucial documents in each case were the Deed of Trust, the revocation of the old appointment and the new appointment and that if those were eliminated then for the reasons which they had already given (referring back to their observation p.108,L.18-29 that in the letters of appointment the First Appellant, the Second Appellant and Geoffrey Charles Pitt Beadel were appointed as accountants to perform income earning services without any reservation as to their role with the moneys being received in their personal capacities in return presumably for their personal exertions) the income received by the Appellants and their solicitor or agent must be treated as having been derived by them and taxable accordingly.

p.113,L.14-25 24. They considered the argument advanced in relation to the Deed of Trust that the only arrangements, contracts or agreements which may be set aside under s.108 are those to which the objecting taxpayer is a party in the strict sense and as neither of the Appellants was a party to the Deed of Trust relating to his own family group those steps could not be annihilated. p.113,L.14-25 In their reasons for judgment they also related that argument to the revocation of the old appointment, whereas Counsel for the Appellants had p.5,L.21-27 related it to the new appointments noting that in the p.2,L.11 - Cases Stated the Commissioner had not sought to avoid p.3,L.20 the revocation by the finance companies of the appoint- p.61,L.38 - ments of Ashton and Wheelans as accountants to the p.62,L.2 p.58,L.29 - p.59,L.44

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finance companies. After referring to the conflicting views of Turner J. in Wisheart v. Commissioner of Inland Revenue [1972] N.Z.L.R. 319 and Wild C.J. in Udy v. Commissioner of Inland Revenue [1972] N.Z.L.R. 714 they agreed with the Chief Justice. They read s.108 as extending to documents to which the objector is not a party if it is shown that the document was procured by or with the connivance of the taxpayer and as a step in the whole scheme and they concluded that the reciprocal trust deeds here were within that test. p.113,L.25-42 p.113,L.42 - p.114,L.3

25. Their Honours then stated that the Appellants had argued that the revocations and new appointments were in the same class as the grant of the insurance agency in Wisheart where the grant was held not to be annihilated because it was quite plain that the insurance company there concerned could not be held implicated in any scheme to avoid tax and was manifestly free to grant its agencies where it wished. They distinguished Wisheart on the facts and held that it would be unreal to see the revocations and the new appointments as anything other than pieces in a scheme worked out and put into operation by the Appellants and in their view all those steps had to be treated as annihilated. p.114,L.4-27

26. The Court of Appeal of New Zealand on 19 November 1974 granted the Appellants final leave to appeal from the judgment of the Court of Appeal to Her Majesty in Council. p.116

27. The Appellants submit that for the provisions of s.108 of the Act to operate there must be found, first, arrangements made or entered into which directly or indirectly had or purported to have the purpose or effect of altering the incidence of income tax or relieving any person from his liability to pay income tax and second, a state of affairs such that if so much of the arrangements as gave effect to that purpose or effect are avoided the taxpayer would have derived assessable income. The Appellants further submit :

(1) That s.108 has no application in the circumstances of the case in that the transactions and their implementation do not constitute in whole or in part a contract, agreement or arrangement having or purporting to have the purpose or effect of

altering the incidence of income tax or relieving the Appellants from liability to pay income tax; and

(2) That, if s.108 has any application to the transactions in this case, the result is not to increase in any way the assessable incomes of the Appellants in that the annihilation of such contracts or legal transactions as are capable of annihilation and are annihilated would not leave exposed any income taxable in the hands of the Appellants and the Appellants did not derive respectively the additional assessable incomes on which they were assessed.

28. It is submitted that the test of the application of s.108 is, as laid down in Mangin, whether there was a scheme devised for the sole purpose or at least the principal purpose of bringing it about that the particular taxpayer should escape liability for tax on a substantial part of the income which without it he would have derived. The Appellants submit that on the applicable tests the transactions in question did not fall within s.108.

29. The Appellants contend that Wilson J. was entitled to attach the weight he did to the evidence of the Appellants and that the Court of Appeal was wrong in considering itself obliged to reject that evidence on which Wilson J. relied. Although s.108 applies in so far as the "arrangement ... has or purports to have the purpose or effect" of escape from tax it does not follow that oral evidence as to the circumstances giving rise to the arrangement and the reasons of those concerned for entering into the particular transactions and their explanation of how the arrangement operated are irrelevant and it is submitted that the Court of Appeal was wrong in rejecting relevant evidence in this respect.

30. It is contended that the arrangements are readily capable of explanation by reference to ordinary business and family dealing without raising the inference that escape from tax was the sole or principal purpose. In particular :

(i) The dissolution of the partnership of Ashton and Wheelans and the formation and financial structure of the new partnership of Ashton, Wheelans

and Hegan were bona fide business transactions standing completely on their own feet.

(ii) In the circumstances it was a realistic commercial arrangement for the new partnership of Ashton, Wheelans and Hegan to agree to do the accountancy work relating to the finance companies on the terms proposed by the trustees of the two trusts.

(iii) In the circumstances it was a realistic commercial arrangement from the viewpoint of the finance companies.

(iv) In the circumstances it was a realistic arrangement from the standpoint of the Appellants. So far as they were concerned there were mixed commercial and family considerations involved. First, the arrangement gave a measure of protection to each of them in that, with the finance companies having contracted with the trustees jointly, the untimely death of either Appellant or his sickness causing a withdrawal from the accountancy partnership would not necessarily mean a loss of all the income to the family of the partner concerned. In a sense that was a commercial consideration as between the Appellants. Second, the Appellants to some extent insulated their families from the full impact of the death or sickness of either of them by the arrangement for the trusts to provide for the administration of the finance companies' lending arrangements. In this respect the trusts were a much better vehicle than a personal joint venture on the part of the Appellants and the arrangement served the family purposes of the Appellants.

31. The second submission referred to in paragraph 27 is on the premise that following annihilation of arrangements having the purpose or effect of escape from tax, no additional basis for taxing the Appellants is then disclosed. It is submitted that s.108 has an annihilating effect. It does not enable the Commissioner to substitute a new arrangement for the one actually made. It assists him only if when the initial plan and also all the steps by which it was carried into effect are annihilated and ignored the remaining facts justify an assessment. Before Mangin the annihilation principle was not strictly applied (Marx v. Commissioner

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of Inland Revenue [1970] N.Z.L.R. 182 per McCarthy J. 220/15-221/10). It is submitted that following Mangin a stricter and more rigorous approach to annihilation is required and this rigorous approach was not adopted by the Court of Appeal in this case.

32. It is submitted that, if s.108 applied at all, all that is voided is the agreement between the trustees and the partners in Ashton, Wheelans and Hegan as to the accountancy work for the finance companies and that

(i) The formation of the trusts is not voided because in each case the Appellant was not a party to the trust deed constituting the trust for the benefit of his family and

(ii) The appointment of the trustees as accountants for the finance companies is not voided because the Appellants were not separately parties thereto and

(iii) The Respondent made his assessments considering and on the basis that the withdrawal by the finance companies of the appointment of Ashton and Wheelans as accountants to the finance companies was not void and the Court of Appeal was wrong to treat those withdrawals as void.

33. It is further submitted that a taxable situation is not disclosed following the voiding under s.108. The first reason is that to attribute income to the Appellants involves unauthorised reconstruction of the income earning arrangements. The approach adopted by the Respondent assumes

(i) That the partnership of Ashton, Wheelans and Hegan contracted with the finance companies and this involves substituting Ashton, Wheelans and Hegan for the trustees in the appointments referred to in paragraph 4(vi) and

(ii) That Ashton, Wheelans and Hegan agreed on the sharing of partnership income in the proportions assessed by the Respondent.

It is submitted that both assumptions are highly notional and contrary to fact and that the approach

of the Respondent and of the Court of Appeal was erroneous and was contrary to the reasoning in Cecil Bros. Pty Limited v. Commissioner of Taxation (1964) 111 C.L.R. 430 and also Wisheart. It is contended that, whatever annihilation approach is adopted, the attribution to the Appellants of income from the finance companies involves the setting up of a new business arrangement not permissible under s.108.

34. Furthermore, it is submitted that the income in question did not reach the Appellants and there was no basis for taxing them on it. The sums in question went direct from the finance companies to the trusts and there was no actual receipt by the Appellants of the amounts in dispute. It is submitted that Wilson J. was correct in holding that there was no basis for concluding that Ashton Wheelans and Beadel held the sums received by them on behalf of the First Appellant and the Second Appellant beneficially.

35. Accordingly it is respectfully submitted that the Appeal should be allowed and the Order of Wilson J. should be restored for the following among other reasons :

R E A S O N S

(1) Because s.108 of the Land and Income Tax Act 1954 has no application in the circumstances of the present Appeal.

(2) That, even if s.108 applied to the transactions in the present Appeal or any of them, the annihilation of such transactions as are capable of annihilation and are to be annihilated would not leave exposed any income taxable in the hands of the Appellants and the result is not to increase in any way the assessable incomes of the Appellants.

(3) That the decision of Wilson J. in the Supreme Court was right and ought to be upheld and the decision of the Court of Appeal of New Zealand was wrong and ought to be reversed.

I.L.M. RICHARDSON