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IN THE PRIVY COUNCIL

No. 35 of 1959

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG

(APPELLATE JURISDICTION)

B E T W E E N:-

THE COMMISSIONER OF INLAND REVENUE — Appellant

- and -

THE FOUR SEAS COMPANY LIMITED — Respondent

RECORD OF PROCEEDINGS

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IN THE PRIVY COUNCIL No. 35 of 1959

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG

(APPELLATE JURISDICTION)

B E T W E E N:

THE COMMISSIONER OF INLAND REVENUE Appellant

- and -

THE FOUR SEAS COMPANY LIMITED Respondent

RECORD OF PROCEEDINGS

No. 1. No.1.

COMMISSIONER'S DETERMINATION CONFIRMING ASSESSMENT Commissioner's determination confirming Assessment.

ORD/38(145). 5/779.

6th June, 1957.

Commissioner's determination under Section 66(2) on an appeal by the Four Seas Co., Ltd., against profits tax assessments for the years of assessment 1955/56 and 1956/57 in respect of the profits of Joint Ventures between the Appellants and Nam Sing Co., Ltd.

1. THE AGREED FACTS ARE :-

(1) The Four Seas Co., Ltd., is a company incorporated in Hong Kong carrying on business in the Colony as importers and exporters.

(2) During the two years ended 31st December, 1954 and 31st December, 1955 the Company conducted joint ventures in Hong Kong with Nam Sing Co., Ltd., of Djakarta, resulting in profits arising in or derived from the Colony amounting to $49,888 and $73,618 respectively. These profits were shared equally by the two partners.

(3) Apart from its joint venture profits the Company's trading for the above two years resulted in a loss. The Company had also made similar losses during the two previous years, which are available for set-off against future profits.

2. PARTICULARS OF THE ASSESSMENTS IN DISPUTE.

(1) The assessments in dispute are for Corporation Profits Tax for 1955/56 and 1956/57, being joint assessments raised in accordance with Section 22 of the Inland Revenue Ordinance on the Hong Kong

No.1.

Commissioner's determination confirming Assessment.

6th June, 1957 - continued.

profits of the joint ventures, and cover both parties' shares of these profits.

(2) By virtue of Section 26(b) of the Ordinance the Assessor excluded the Company's share of these profits from its own Corporation Profits Tax assessments. The practical effect of this exclusion and the separate joint assessments is that the Company is prevented from applying its losses against its share of the joint venture profits.

(3) The tax in dispute amounts to $3,118 and $4,601 for the two years of assessment 1955/56 and 1956/57 respectively, and represents the tax charged on the Company's half-share of the profits of the joint ventures. The tax charged in respect of the other partner's share of the profits is not in dispute.

(4) The notices of assessment contained the tax in dispute were dated 10th November, 1956 under Charge Nos. 1I/1039 and 1J/623. Both Demand Notes have been paid in full.

3. GROUNDS OF APPEAL

On 9th November, 1956 the Company's authorised representatives, Messrs. Thomas Le C. Kuen & Co., Public Accountants, gave notice of objection against these two assessments on the grounds that the joint venture profits are assessable under Section 14 and form part of the assessable profits of the Corporation concerned, thus reducing the assessable profits of the joint ventures to NIL. A copy of the letter of appeal is attached at Enclosure 1.

4. COMMISSIONER'S DETERMINATION

(1) I heard the above appeals on 22nd May, 1957 and at the conclusion of the hearing announced my decision in accordance with Section 64(6) of the Ordinance to the effect that I confirmed the assessments, being of the opinion that they were properly made in accordance with the law.

(2) The Appellants were the Four Seas Co., Ltd., being the resident partner of the joint ventures with Nam Sing Co., Ltd., of Djakarta, and were represented by Mr. King of Messrs. Thomas Le C. Kuen & Co. Mr. W. J. Darby, Chief Assessor, assisted by Mr. LEUNG Tung Chun, Assessor, represented the Assessor.

(3) After listening to the arguments put forward by both parties, and the various cases quoted, I came to the conclusion that, without any doubt at all, the joint ventures with Nam Sing Co., Ltd., were a trade or business "carried on by two or

more persons jointly", so that Section 22 of the Inland Revenue Ordinance must apply in this case, and the profits must be computed in one sum and the tax charged jointly.

(4) It seemed to me that the only question on which there could be any argument was on the correct application of Section 26(b). This section was introduced into the Inland Revenue Ordinance in 1951 and was designed to prevent double taxation in just such a case as this. The relevant portions of the present version of this section read :-

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

(a) .....

(b) ..... no part of the assessable profits or losses of a trade, profession or business carried on by a person who is chargeable to tax under this Part shall be included in the assessable profits of any other person".

The intention of the Section is clear but it is open to argument as to which "person" should be charged first and so which "person" should have the benefit of the exclusion.

(5) The Appellants argued that by virtue of Section 14(2), the Four Seas Co's share of the joint ventures is deemed to arise from the trade or business carried on by that Company and so falls for inclusion in the Company's assessment. They also argued that it is a normal part of the Company's business to enter into these joint ventures and that in view of Section 14(2) the Company's share of the profits must first be included in the Company's own assessment and then, by virtue of Section 26(b), must be excluded from the joint assessment under Section 22.

(6) The Assessor argued in reverse and contended that it is not possible to assess the Company's share of the profits until the joint profits have first been assessed separately, and that having made the joint assessment, the Company's share must be excluded from its own assessment by virtue of Section 26(b). Further, the joint profits were made first by the partnership, and only after they had been divided between the two partners could the Company's share be brought into its profits and loss account. He claimed that the assessments should follow in the same order.

(7) The Appellants also argued that if there is any ambiguity in the language of a taxing statute,

No.1.

Commissioner's determination confirming Assessment.

6th June, 1957 - continued.

the taxpayer must be given the benefit of the doubt and claimed that ambiguity existed here. The Assessor contended that if Section 26(b) is read in conjunction with Section 22, which requires a joint assessment, there can be no ambiguity.

(8) It would seem that on a literal construction of Section 26(b), which section was incorporated into the Ordinance to avoid double taxation, either interpretation would be possible. To ascertain the Company's share of the assessable profits of the joint ventures it would obviously first be necessary to calculate those profits as a whole, but having made the calculation it would still be possible to make the first assessment on the Company, whereupon its share of the joint venture profits would require to be excluded from the joint assessment by virtue of Section 26(b).

(9) Nevertheless, I am of the opinion that the Assessor's "order of priority" is the correct one; if the Appellants' suggested method of application is used, all that would be left in the joint assessment would be the other partner's share of the profits, and the assessment under Section 22 would no longer be a joint assessment, as envisaged by that Section. Further, although, but for Section 26(b), the joint venture profits would require to be doubly taxed, the requirement to assess these particular profits under Section 22 is specific, whereas under Section 14(2) it is general. I consider that the specific requirement has priority over the general requirement so that Section 26(b) would exclude the general.

(10) Thus, although there might seem to be ambiguity in Section 26(b) if read by itself, when it is read in conjunction with Sections 22, 14 and 15, I consider there is only one interpretation which is consistent with those sections, and that is the Assessor's interpretation.

(11) It seemed to me that, strictly speaking, the tax charged on the joint ventures should have been Business Profits Tax and not Corporation Profits Tax since the partnership is a "person other than a Corporation". The Assessor claimed protection under Section 63 and as the Appellants accepted this and as the resultant tax was identical I made no order to substitute the correct tax.

(12) For the reasons stated above I confirmed the assessments and announced my decision orally in accordance with Section 64(6) of the Ordinance.

(13) Within one week after the announcement of my decision the Appellants declared their dissatisfaction therewith in accordance with Section 66(1) of the

Ordinance and requested me to transmit to them in writing my determination and reasons therefor, which determination and reasons I have duly set out above and signed and do transmit accordingly.

(Sgd.) P.D.A. CHIDELL,
Ag. Commissioner of Inland Revenue.

HONGKONG
6th June, 1957.

No.1.

Commissioner's determination confirming Assessment.

6th June, 1957 - continued.

COPY
ENCL. 1.

THOMAS LE C. KUEN & CO.

9th November, 1956.

The Commissioner,
Inland Revenue Department,
HONGKONG.

Enclosure referred to in Commissioner's determination confirming Assessment.

Dear Sir,

Re: Four Seas Co., Ltd., and
Nam Sing Co., Ltd. (Joint Venture)
Your File No. 5/779.

We acknowledge receipt of I.R. Form No.88 advising us that you have assessed the assessable profits on Joint Venture between the above companies for the years of assessment 1955/56 and 1956/57 in the amount of $49,888 and $73,618 respectively.

We hereby appeal against the raising of these assessments and the grounds upon which we rely is that the Section 26 of the Inland Revenue Ordinance should be applied in so much that these profits are assessable under Section 14 and form part of the assessable profits of the corporation concerned, thus reducing the assessable profits of the Joint Venture to nil.

Under the circumstances we shall be pleased if you will exercise your authority under Section 71(2) and instruct that the payment of tax be held over pending the result of this appeal.

Yours faithfully,
(Sd.) for Thomas Le C. Kuen & Co.
.....
Public Accountants.

No. 2.

In the Board of Review.

DECISION OF BOARD OF REVIEW

No. 2.

Decision of Board of Review.

16th September, 1957.

1. For the purpose of this Decision the following is taken from the Commissioner's Determination of 6th June, 1957 :-

"AGREED FACTS

(1) The Four Seas Co., Ltd., is a company incorporated in Hong Kong carrying on business in the Colony as importers and exporters.

In the Board of Review.

No.2.

Decision of Board of Review.

16th September, 1957
- continued.

(2) During the two years ended 31st December, 1954 and 31st December, 1955 the Company conducted joint ventures in Hong Kong with Nam Sing Co., Ltd., of Djakarta, resulting in profits arising in or derived from the Colony amounting to $49,888 and $73,618 respectively. These profits were shared equally by the two partners.

(3) Apart from its joint venture profits the Company's trading for the above two years resulted in a loss. The Company had also made similar losses during the two previous years, which are available for set-off against future profits.

PARTICULARS OF THE ASSESSMENTS IN DISPUTE

(1) The assessments in dispute are for Corporation Profits Tax for 1955/56 and 1956/57, being joint assessments raised in accordance with Section 22 of the Inland Revenue Ordinance on the Hong Kong profits of the joint ventures, and cover both parties' shares of these profits.

(2) By virtue of Section 26(b) of the Ordinance the Assessor excluded the Company's share of these profits from its own Corporation Profits Tax assessments. The practical effect of this exclusion and the separate joint assessments is that the Company is prevented from applying its losses against its share of the joint venture profits.

(3) The tax in dispute amounts to $3,118 and $4,601 for the two years of assessment 1955/56 and 1956/57 respectively, and represents the tax charged on the Company's half-share of the profits of the joint ventures. The tax charged in respect of the other partner's share of the profits is not in dispute".

2. At the hearing before the Commissioner the Appellants objected to the two assessments on the ground that joint venture profits are assessable under Section 14 of Cap. 112 and form part of the assessable profits of the Appellants thus, on the facts and accounts, reducing the assessable profits of the joint venture to nil.

3. Having heard the arguments the Commissioner decided that the Appellants' joint ventures with Nam Sing Co., Ltd., were a trade or business "carried

on by two or more persons jointly", so that Section 22 of the Inland Revenue Ordinance must apply in this case, and the profits must be computed in one sum and the tax charged jointly.

4. Having so decided the Commissioner went on to consider the correct application to the case of Section 26(b) of the Ordinance which, he says, was introduced into the Ordinance in 1951 to prevent double taxation in such a case as the present one; and came to the conclusion that the "order of priority" contended for by the Assessor, which may be said to be the reverse of that for which the Appellants argued, was the correct one. In the result, he confirmed the assessments, observing towards the end of his Determination that the tax charged on the joint venture should have been Business Profits Tax and not Corporation Profits Tax, since the partnership was a "person other than a Corporation".

5. At the hearing before this Board, the Appellants contended (albeit without much enthusiasm) that being a Corporation, they were liable to tax only under Section 14(1); and that Section 22 had no application to them. It was further and strenuously argued that, if Section 22 were applicable, then, by virtue of certain principles of construction adverted to later herein, Section 26(b) should be so interpreted as to give the tax-payer the right to elect as to what the Commissioner has termed the "order of priority". As the Appellants appeared to attach much greater weight to this argument, we deal with it first.

6. The principles of construction relied on for this argument are to be found in the following quotations, embodied in the Grounds of Appeal included in a letter of 5th July, 1957 from the Appellants to the Clerk to the Board of Review :-

I. "I agree that it (a taxing section) must be strictly construed but nevertheless if its meaning is plain, its plain words must be followed. If on the other hand two constructions are possible, the consequences following the one or the other may rightly be taken into consideration and if the balance between the two constructions is equal that in favour of the subject is to be preferred" - per Lord Porter in IRC v. Bladnoch Distillery 48/1 AER at p.634.

In the Board of Review.

No.2.

Decision of Board of Review.

16th September, 1957 - continued.

II. "If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be".

"I quite agree we ought not to put a strained construction upon that Section in order to make liable to taxation that which would not otherwise be liable, but I think it is now settled that in construing these Revenue Acts, as well as other Acts, we ought to give a fair and reasonable construction, and not to learn in favour of one side or the other, on the ground that it is a tax imposed upon the subject, and therefore ought not to be enforced unless it comes clearly within the words". (Citations by Lord Hanworth M.R. in Ormonde Investment Co. v. Betts 1927 2 KB at p.338).

7. This Board does not agree that these principles are applicable in the manner suggested, or indeed have any bearing on the point as argued. The wording of Section 26(b) is plain; and in the opinion of the Board the argument of the Appellants is not in effect that a fair and reasonable construction should be given to the words of the subsection but that where its applicability is concerned the tax-payer should be allowed to opt for that which is more favourable to him. No authority was cited for this proposition, and we have failed to find any; whereas there is authority for the statement that in certain U.K. cases the Crown can elect while the tax-payer cannot - see 17 Hails p. 193 para. 395; and Liverpool London Globe Insurance Co. v. Bennett 1911 2 KB 577, per Hamilton J. at p. 591, and (the same case on appeal) 1912 2 KB per Cozens - Hardy MR at p. 51. The Appellants argued that the case cited was distinguishable and drew the Board's attention to a passage in the judgment of Lord Dunedin in Fry v. Salisbury House Estate Ltd. 1930 AC at pp. 446-7, submitting that this was a better parallel. It seems to us, however, that even if the English authorities are to be disregarded, the argument of the Appellants must be rejected.

8. To turn to the other point upon which the Appellants relied: Section 14(1) defines the person liable to be charged in respect of Corporation Profits Tax. Similarly, Section 15(1) defines the person liable to be charged in respect of Business Profits Tax. This is "every person other than a Corporation .....". It will be seen, too, that "person" has more than one meaning in Section 15, thus in sub-paragraph (c) of the Proviso to sub-section (2) the "person" there is obviously an individual.

9. Now, in the absence of any provision such as Section 22, there could be no question of a corporation being chargeable with Business Profits Tax if it were engaged in a joint venture, be it with another Corporation or a firm or an individual. The question therefore is whether, by virtue of Section 22, a corporation so engaged, would be liable to Business Profits Tax or remains chargeable under Section 14(1) for Corporation Profits Tax.

10. In the course of the hearing, Mr. Hastie, who argued in support of the Commissioner's Determination, was asked what would be the position of a Corporation which had done no business save in the nature of joint ventures. What would be its position under Section 22, he was asked, if in the course of a fiscal year, such a Corporation had made a profit on three joint ventures and had had the misfortune to lose a considerably larger sum on another two such ventures? Mr. Hastie was constrained to state that in such circumstances the Corporation must pay Business Profits Tax in respect of its profits on the three ventures and could not offset the losses on the other two against such profit. He offered, as a sop to a Corporation so unhappily placed, the small consolation that if in each of its joint ventures the Corporation made a profit of less than $7,000 it would be scot free of tax, thanks to Section 18B(2)(a). The manifest absurdity of either result is such that leads us to the conclusion that, while "person" as defined in Section 2 (the interpretation section) is wide enough to cover the position contended for against the Appellants, some limitation must be placed upon it when it comes to construing Section 22. That there is authority for so doing, even where the word is included in a

In the Board of Review.

No. 2.

Decision of Board of Review.

16th September, 1957 - continued.

definition section, is clear : see 31 Hails p.476 paragraph 591. Furthermore, a word may be used in different senses in different sections of the same statute - ibid., p. 482 paragraph 599. It seems to us, also, that this is eminently a case for the selection of an interpretation which obviates such an absurdity - 10th Maxwell p. 229. In our view, then, Section 22 does not cover a Corporation or Corporations which, if they are engaged in a joint venture, are in our view, still to be taxed in respect thereof under Section 14. By the enacting provision to be found in Section 14(1) the position of a Corporation vis-a-vis tax is clear-cut, and its liability to tax under Section 14 in the hypothetical case put to Mr. Hastie such as leaves room for neither absurdity nor hardship.

We therefore annul the assessments as determined by the Commissioner.

DATED this 16th day of September, 1957.

..... Chairman
(Leo d'Almada)

..... Member
(H. Sidbury)

..... Member
(U Tat Chee)

..... Member
(L.J. D'Almada Remedios)

No. 3.

Reasons of Mr.L.J.D'Almada Remedios.

No. 3.

REASONS OF MR. L. J. D'ALMADA REMEDIOS

Note by Mr. L.J. D'Almada Remedios

Having arrived at the same conclusion by a slightly different process of reasoning I deem it right that I should give below my own reasons for so deciding :-

Mr. L.J. D'Almada Remedios' Opinion

I think the real point that arises in this Appeal may be formulated as follows - The Appellants, as a Corporation, trading in Hong Kong, conducted a joint venture with another Corporation resulting in profits arising in or derived from the

Colony. It is suggested on behalf of the Revenue Authorities that this circumstance makes it right for - and indeed the duty of - the appropriate officer to set in motion the machinery detailed in Section 22 of the Inland Revenue Ordinance by the imposition of business profits tax on the joint venture, with the result that the Appellants, by virtue of Section 26(b) of that same Ordinance, would not be entitled to bring into account the losses of the Corporation to offset any such tax.

Section 22(1) reads as follows :-

> "Where a trade, profession or business is carried on by two or more persons jointly the assessable profits therefrom shall be computed in one sum and the tax in respect thereof shall be charged in the partnership name".

Mr. Hastie (for the Inland Revenue), in supporting the decision arrived at by the Commissioner, has laid great emphasis on the mandatory language of Section 22, and argues that the word "shall" appearing therein imposes an obligation to carry out the requirements of that Section to its letter. However, it must also be remembered that Section 14(1) and (2) are similarly mandatory in nature. These sections read as follows :-

> "(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".

Having regard to the fact that the Appellants are a Corporation, these Sections are not without relevance, for by virtue of 14(1) the word "shall" subjects a Corporation to Corporation tax. 14(2) is the sub-section in clarification which removes whatever doubts that may arise in its absence by providing (in effect) that any sum received by or

In the Board of Review.

No. 3.

Reasons of Mr.L.J.D'Almada Remedios - continued.

credited to a Corporation shall be deemed to arise from its trade or business and therefore is liable to corporation tax. It would appear therefore that upon profits being credited to or received by a Corporation in the carrying on of its trade - whether as a result of a joint venture or otherwise - such profits are by virtue of the sub-section deemed the profits of the Corporation and upon which Corporation tax could be charged.

While the context of these sections would lead to such a view when read by itself, one must bear in mind that Section 22, read literally, and by the unqualified use of the word "persons", is apparently aimed at all partnerships (including joint ventures) whether they consist of individuals or Corporations or both as a result of the definition of the word "persons" in Section 2 of the same Ordinance. That being the case, the Commissioner bases his justification for the imposition of business profits tax on the ground that the joint venture is a partnership - albeit between two Corporations - and is therefore chargeable to tax under Section 22, and that as it is not possible to assess the Corporation's profits without first determining the profits of the joint venture the same order should follow in the assessments with the resultant tax on the profits of the joint venture being first made: It would further appear that if a statute authorises taxation under alternative methods, the selection of the alternative lies with the taxing authority and not, as contended by Mr. King for the Appellants, on the taxpayer. (Liverpool Globe Insurance Co., v. Bennett (1911) 2 K.B. at 591; Revell v. Edinburgh Life Insurance Co. (1906) 5 Tax Cases at 221). If the right of election rests with the Crown, and I think it does, then it only remains to determine whether the Ordinance, read as a whole, allows alternative methods of taxation, for if the answer is in the affirmative then the Crown, having elected, the provisions of Section 26(b) would apply, and the assessable profits of the joint venture could not be included in the assessable profits of the Corporation.

At first blush I was tempted to the view that under Section 22(1) it is the partnership upon whom the levy of tax is made having regard to the words "charged in the partnership name", wherefore it is immaterial whether the partnership is constituted of individuals or Corporations as partners. Whether

this parity of reasoning is sound I have some doubts, for as a strict proposition of English law there is no doubt at all that a partnership is not, as such, a single juristic person. As Farwell, L.J., said in Sadler v. Whiteman (1910) 1 K.B. 68 at p. 889:

> "In English law a firm as such has no existence; partners carry on business both as principals and as agents for each other within the scope of the partnership business; the firm name is a mere expression, not a legal entity, although for convenience, under R.S.C. Ord. 48A, it may be used for the sake of suing and being sued ..... It is not correct to say that a firm carries on business; the members of the firm carry on business in partnership under the name or style of the firm".

And per Viscount Simon, L.C., in the Income Tax Commissioners v. Gibbs, 1 A.E.R. (1942) at p. 422:-

> "If language is accurately used a partnership firm does not carry on a trade at all. It is the individuals in the firm who carry on the trade in partnership. It is not the firm which is liable to income tax. The individuals composing the firm are so liable ... "

I am cognizant that there is, however, some authority for the argument that for the purposes of taxation a partnership is treated as a special entity though Lord Wright, L.J., makes it clear in Gibbs' case (supra) at p. 430 that it is

> "the partners, and not the firm as an entity, that are taxed".

If we were therefore to push this proposition of law to its logical conclusion, it would be seen that in the event of default of payment by either of the partners - both being Corporations - in this joint venture, recourse by the Crown to exact payment for business profits tax would have to be pursued against either or both of the Corporations, and this, of course, postulates liability of a Corporation to business profits tax.

But Section 15(1) provides as follows :-

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No. 3.

Reasons of Mr.L.J.D'Almada Remedios - continued.

"Business profits tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every person other than a Corporation carrying on a trade, profession or business in the Colony in respect of the profits of that person arising in or derived from the Colony from such trade, profession or business".

This section, read by itself, clearly excludes Corporation from liability to business profits tax by the use of the words "on every person other than a Corporation carrying on a trade, profession or business in the Colony", and I would be constrained by the clear wording of that section to the view that Corporations are exempt from business profits tax but for Section 22 which, whatever may be the correct view, is, upon probative reasoning, apparently in conflict with Section 15, in that the ultimate liability of payment of business profits tax under Section 22 would fall on one or both of the Corporations, and Section 15 excludes Corporations from such tax. The important question that therefore arises is whether, in the fact of this apparent inconsistency between the two sections, one can be satisfied that the Ordinance has clearly and unequivocally authorised the imposition of business profits tax on Corporations, as this must necessarily be a 'sine qua non' if the Inland Revenue Department claims that they are entitled, or in duty bound, to impose such tax.

In Attorney General v. Milne (1914) App. Cas. 765, Lord Parker of Waddington said :-

"The Finance Act is a taxing statute, and if the Crown claims a duty thereunder it must show that such a duty is imposed by clear and unambiguous words".

I confess to finding some difficulty in arriving at a conclusion that the Ordinance has clearly and unambiguously allowed the imposition of the duty by way of business profits tax in the manner now under review, wherefore I feel that one must, to my mind, approach this question on the broad principle that :-

"A taxing statute must be strictly construed and that any ambiguity of such a statute must therefore be resolved in favour of the taxpayer".

(Simon's Income Tax, Vol.1, p.41 para.55)

But it would be unnecessary to approach the problem in the manner suggested if the two sections could be made to read consistently with each other, and the only difficulty one encounters is that the Ordinance in its definition of the word "persons", has given that word a more extended meaning than would normally be conveyed if taken in its strict grammatical sense, with the consequence that one is inclined to interpret the word "persons" in Section 22 as inclusive of Corporations. However, no repugnancy between these sections would arise if legislature had intended to use the word in its ordinary grammatical significance, and this possibility ought not to be overlooked if the general purview of the Ordinance justifies ascribing the plain and natural meaning to that word; for there is no strict rule that the parliamentary or enlarged meaning must necessarily apply in all the possible context in which a word may be found in a statute.

> "If a defined expression is used in a context which the definition will not fit, it may be interpreted according to its ordinary meaning".
>
> (31 Hailsham at 477).

And again in Craies Statute Law at p.200 :-

> "Interpretation clause not necessarily applicable on every occasion when word interpreted is used in Act. Another important rule with regard to the effect of an interpretation clause is, that an interpretation clause is not to be taken as substituting one set of words for another, or as strictly defining what the meaning of a term must be under all circumstances, but rather as declaring what may be comprehended within the term where the circumstances require that it should be so comprehended. If, therefore, an interpretation clause gives an extended meaning to a word, it does not follow as a matter of course that, if that word is used more than once in the Act, it is on each occasion used in the extended meaning, and it may be always a matter for argument whether or not the interpretation clause is to apply to the word as used in the particular clause of the Act, which is under consideration".

Section 22 deals essentially with business profits tax and must therefore be read in para

In the Board of Review.

No. 3.

Reasons of Mr.L.J.D'Almada Remedios - continued.

materia with other sections dealing with the imposition of that form of tax in order not only to ascertain its true scope and extent but also, if possible, to reconcile its apparent inconsistency with Section 15. Having read the relevant Sections together, one comes to the view that there is some indication that the legislature did not intend the extended meaning of the word "persons" to include Corporations insofar as business profits tax are concerned. This is first apparent in Section 15 which is the primary section in Part IV dealing with and authorising the imposition of business profits tax, and one may say that not only is there express exclusion of Corporations but the proviso in the section from the use of the words "such sum ..... which derives from his own personal property" is a further indication that it was intended to subject individuals rather than Corporations to business profits tax and that by the use of the word "persons" in sections dealing with that form of taxation the legislature must have intended its ordinary and plain meaning to apply rather than a meaning that would be at variance with the clear intention of the legislature as collected from a reading of the Ordinance as a whole. When there can be two meanings to a word, one of which offends but the other satisfies the general scheme and purview of the Ordinance, no violence is done by adopting the construction which is reasonable and sensible instead of adhering to an interpretation that produces a repugnancy.

In the Caledonian Railway Co. v. North British Railway Co. (1881) 6 App. Cas. 114, Lord Selbourne, L.C., said at p. 122:

> "The more literal construction ought not to prevail if ..... it is opposed to the intentions of the legislature as apparent by the statute and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated".

I think therefore that in the circumstances of the case under consideration the literal construction of Section 22 ought not to prevail and that the words in Sections 14, 15 and 22, read together, are sufficiently flexible to admit of the construction that the intention of Legislature, as apparent from Sections 14(1) and (2) and 15(1) and (2), will be

better effectuated by the imposition of corporation tax on any profits arising from the trade or business of the Corporation notwithstanding that such profits are derived from a joint venture. As Lord Herschell said in Colquhoun v. Brooks (1889) 14 App. Case 493 at p. 506:

> "It is beyond dispute that we are entitled, and indeed bound, when construing the terms of any provisions found in a statute, to consider any other parts of the act which throw light upon the intention of Legislature and which may serve to show that the particular provision ought not to be construed, as it would be, if considered alone and apart from the rest of the act".

Although considering Section 22 alone one might be tempted to arrive at the same view adopted by the Commissioner, I feel that the other sections referred to, do, in my opinion, throw some light and have a bearing on the scope of Section 22 and the general intention of Legislature insofar as it concerns Corporations and the incidence of taxation that attaches. In my opinion, Section 15(2) is yet another section which does not militate against but indirectly lends support to the view that the joint venture profits earned by the Corporation and which it is sought to tax, are deemed by Section 14(2) to arise from the trade of the Corporation and taxable as such, and by Section 15(2) not deemed to arise from the joint venture by the use of the words "other than a corporation ..... "

To hold a contrary view would be to beset oneself with yet another difficulty when the test of Chargeability to tax is applied :-

> "The primary test is the nature of the receipt in the hands of the recipient without regard to the fund from which it comes or the way in which the recipient chooses to use the sum received".

(Simon's Income Tax, Vol.1, p.7, para.6)

As a partnership or firm is not a legal entity, the "recipients" are therefore the partners of the firm (and in this case, the Corporations), and it follows that if the quality of that receipt is one which arises in the ordinary course of the business of the

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Corporation, then the chargeability to tax necessarily falls under 14(1) and (2) of the Ordinance, and a fortiori in the present case where it is common ground that one of the objects of the corporation is the carrying on of joint ventures.

In my judgment, for the reasons above stated, the profits earned by the Appellants in this joint venture are necessarily part of the profits and gains of the Appellants arising in the ordinary course and business of the Corporation and so fall directly within the charging words of Section 14(1) as amplified by Section 14(2). I am glad to arrive at this conclusion for, if the Commissioner were right, it would follow that in a case where the main business of a Corporation is the carrying on of joint ventures whereby, for instance, profits on contracts are to be shared, the result would be that the Revenue Authorities would treat each joint venture as a separate entity with consequential taxation on profits of each joint venture without allowing for deductions on losses on other joint ventures or of the Corporation generally, so that, for example, if $1,000,000.00 is made on contract A and $2,000,000.00 lost on contracts B and C, the unfair result would be, if the Commissioner were right, that the Corporation would have to pay $125,000.00, or thereabouts, for business profits tax although in point of fact the Corporation made no profits but suffered a loss of $1,000,000.00. To my mind, such cannot conceivably be the intention of Legislature. The Ordinance insofar as Part IV is concerned envisages taxation on "profits", and the system adopted by the Commissioner serves to create a means whereby, when a realistic view is taken, one is not taxed on "profits" at all but on "receipts" as the above example clarifies; wherefore I cannot bring myself to endorse an approbation of such a system which is manifestly unequitable and contrary to the purview of the Ordinance.

Mr. Hastie suggests that if the ruling of the Commissioner is upset it would mean that if a Corporation conducts several joint ventures and a profit of $6,999.00 is made on each venture, the effect would be to carve a path by which tax could be avoided intoto. I do not see how that could come about. The profits of each joint venture is deemed the profits of the Corporation and must therefore be aggregated and taxed under Section 14(1).

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No. 3.

Reasons of Mr.L.J.D'Almada Remedios - continued.

I cannot, however, take leave of the case without expressing my regret that so much time had to be involved by the Board in unravelling a tangle which could so easily have been straightened out by the Revenue Authorities in one of their applications to the Legislature, and my hope that an early opportunity will be taken of doing so. I would also commend to their attention Section 44(2) of the Finance Act, 1947, which I think has been enacted to deal with the same problem.

(Sgd.) L.J.D'Almada Remedios.

No. 4.

Supplementary Decision of Board of Review.

27th September, 1957.

No. 4.

SUPPLEMENTARY DECISION OF BOARD OF REVIEW.

RE: APPEAL NO. 4 of 1957

FOUR SEAS CO., LTD.

DECISION OF BOARD OF REVIEW

On the above decision being communicated to the parties, it was pointed out that the Board having annulled the assessments, this would necessarily affect the case of the Nam Sing Co., Ltd., the other partner in the joint venture. In principle, there is nothing to distinguish the case of this other partner from that of the Appellants. But the Nam Sing Co., Ltd., not having appealed against the original assessment, nor, of course, to this Board, we hold that we are not seised of the matter insofar as they are concerned. The intention of the Board was clearly to deal only with the appeal before it, and, this being so, we take the view that we should amend our order so as to make that intention clear. Accordingly, in lieu of annulling the assessments, as the Board purported to do by its decision of 16th September, 1957, we substitute the following: that the assessments as determined by the Commissioner are hereby reduced by the sums of $3,118.00 and $4,601.00 being the amounts of tax in dispute.

Dated this 27th day of September, 1957.

..... Chairman
Sgd. (Leo d'Almada)

..... Member
Sgd. (H. Sidbury)

..... Member
Sgd. (U Tat Chee)

..... Member
Sgd. (L.J.D'Almada Remedios)

In the Board of Review.

No. 5.

Case stated to Supreme Court.

7th November, 1957.

No. 5.

CASE STATED TO SUPREME COURT.

Appeal to the Board of Review by the Four Seas Co. Ltd.

Case Stated Pursuant to Section 69 of Cap. 112.

1. At the Appeal to the Board the following were the agreed facts:-

(a) The Four Seas Co., Ltd., a Company incorporated in Hong Kong carries on business in the Colony as importers and exporters.

(b) The business of the Company and one of its objects included the carrying on of joint ventures. During the two years ended 31st December, 1954 and 31st December, 1955 the Company conducted joint ventures in Hong Kong with Nam Sing Co., Ltd., of Djakarta, resulting in profits arising in or derived from the Colony amounting to $49,888 and $73,618 respectively. These profits were shared equally by the two partners.

(c) Apart from its joint venture profits the Company's trading for the above two years resulted in a loss. The Company also made similar losses during the two previous years, which were available for set off against future profits.

2. Particulars of the Assessments in dispute are as follows :-

(a) The Commissioner sought to make chargeable to tax the profits of the joint venture raised in accordance with Section 22 of the Inland Revenue Ordinance, and claimed by virtue of Section 26(b) to disallow the Company from applying its losses suffered in its business generally against the profits made by it in the joint venture.

(b) The tax in dispute amounts to $3,118 and $4,601 for the two years of assessment 1955/56 and 1956/57 respectively, and represents the tax charged on the Company's half-share of the profits of the joint ventures.

(c) The tax charged in respect of the other partner's share of the profits is not in dispute.

3. On behalf of the Company it was contended :-

(a) That being a Corporation they were liable to tax only under Section 14(1) of Cap.112, and that Section 22 had no application to them as the joint venture activities formed part of the trade of the Company; and

(b) that, if in fact Section 22 were applicable Section 26(b) should be so construed as to give the taxpayer the right to elect whether the Company's share of the profits arising out of the joint ventures should be included in the Company's own assessment so that, if they were so to elect, then by virtue of Section 26(b) it would be excluded from the assessment under Section 22.

4. For the Commissioner it was contended :-

(a) in respect of the Company's first argument -

that the joint ventures constituted a trade or business carried on by two or more persons jointly; that a Corporation was a "person"; and that therefore the Company, in respect of the joint ventures, was properly taxable under Section 22 for its share of the profits; and

(b) against the Company's second argument -

that on the wording of Section 22(b) the principle of "election" contended for had no basis.

5. The Board rejected the second argument advanced on behalf of the Company. ~~The Company has not applied for a case to be stated.~~ The Company has not applied for a case to be stated, but the parties have, since the case was stated, agreed that this should also be propounded as a question of law for the opinion of the Court.

6. With regard to the Company's first argument, the Board being of the opinion that a Corporation is not chargeable to tax under Section 22 and that it is chargeable only under Section 14(1) accordingly allowed the Company's appeal and reduced the

In the Board of Review.

No. 5.

Case stated to Supreme Court.

7th November, 1957 - continued.

assessments as determined by the Commissioner by the sum of $3,118 and $4,601 being the amounts of tax in dispute. The conclusions arrived at by the Board are contained in the written decision and supplemental note of 16th and 27th September respectively, annexed hereto.

7. ~~The question of law for the opinion of the Court on this Stated Case is whether the Board was right in its decision as set out in paragraph 6 hereof~~. The questions of law for the opinion of the Court on this matter are whether the Board was right in its decisions as set out in paragraphs 5 and 6 hereof.

Dated this 7th day of Nobember, 1957.

(Sgd.)..... Chairman
(Leo d'Almada)

(Sgd.)..... Member
(H. Sidbury)

(Sgd.)..... Member
(U. Tat Chee)

(Sgd.)..... Member
(L.J.D'Almada Remedios)

The amendments in red ink were made in the following circumstances. Both parties being agreeable that the point dealt with in paragraphs 3(b), 4(b) and 5 hereof should be one of the questions of law for the opinion of the Court, the Chairman applied to the Honourable Mr. Justice Reece for leave to amend the Case Stated, which application having been granted, the said amendments were made.

In the Supreme Court of Hong Kong.

No. 6.

Judgment.

13th June, 1958.

No. 6.

JUDGMENT

This is an appeal by way of a case stated dated the 7th day of November, 1957, by the Board of Review pursuant to Section 69 of the Inland Revenue Ordinance, Chapter 112, (hereinafter referred to as the Ordinance) on the application of the Appellant, the Commissioner of Inland Revenue,

against the decision of the Board of Review, dated the 16th day of September, 1957, as amended by its decision dated the 27th day of September, 1957. The Respondent is the Four Seas Company, Limited.

The case stated for the opinion of the Court is as follows :-

"1. At the Appeal to the Board the following were the agreed facts:-

(a) The Four Seas Co., Ltd., a Company incorporated in Hong Kong carries on business in the Colony as importers and exporters.

(b) The business of the Company and one of its objects included the carrying on of joint ventures. During the two years ended 31st December, 1954 and 31st December, 1955 the Company conducted joint ventures in Hong Kong with Nam Sing Co., Ltd., of Djakarta, resulting in profits arising in or derived from the Colony amounting to $49,888 and $73,618 respectively. These profits were shared equally by the two partners.

(c) Apart from its joint venture profits the Company's trading for the above two years resulted in a loss. The Company also made similar losses during the two previous years, which were available for setoff against future profits.

2. Particulars of the Assessments in dispute are as follows :-

(a) The Commissioner sought to make chargeable to tax the profits of the joint venture raised in accordance with Section 22 of the Inland Revenue Ordinance, and claimed by virtue of Section 26(b) to disallow the Company from applying its losses suffered in its business generally against the profits made by it in the joint venture.

(b) The tax in dispute amounts to $3,118 and $4,601 for the two years of assessment 1955/56 and 1956/57 respectively, and represents the tax charged on the Company's half-share of the profits of the joint ventures.

In the Supreme Court of Hong Kong.

No. 6.

Judgment.

13th June, 1958 - continued.

(c) The tax charged in respect of the other partner's share of the profits is not in dispute.

"3. On behalf of the Company it was contended:-

(a) That being a Corporation they were liable to tax only under Section 14(1) of Cap. 112, and that Section 22 had no application to them as the joint venture activities formed part of the trade of the Company; and

(b) That, if in fact Section 22 were applicable Section 26(b) should be so construed as to give the taxpayer the right to elect whether the Company's share of the profits arising out of the joint ventures should be included in the Company's own assessment so that, if they were so to elect, then by virtue of Section 26(b) it would be excluded from the assessment under Section 22.

4. For the Commissioner it was contended :-

(a) In respect of the Company's first argument -

that the joint ventures constituted a trade or business carried on by two or more persons jointly; that a Corporation was a "person"; and that therefore the Company, in respect of the joint ventures, was properly taxable under Section 22 for its share of the profits; and

(b) against the Company's second argument -

that on the wording of Section 22(b) the principle of "election" contended for had no basis.

5. The Board rejected the second argument advanced on behalf of the Company. The Company has not applied for a case to be stated, but the parties have, since the Case was stated, agreed that this should also be propounded as a question of law for the opinion of the Court.

6. With regard to the Company's first argument, the Board being of the opinion that a Corporation is not chargeable to tax under Section 22

and that it is chargeable only under Section 14(1) accordingly allowed the Company's appeal and reduced the assessments as determined by the Commissioner by the sum of $3,118 and $4,601 being the amounts of tax in dispute. The conclusions arrived at by the Board are contained in the written decision and supplemental note of 16th and 27th September respectively, annexed hereto.

7. The questions of law for opinion of the Court on this matter are whether the Board was right in its decisions as set out in paragraphs 5 and 6".

It was agreed between the parties that in paragraph 4(b) of the case stated the Section "22(b)" was a typographical error and should be section "26(b)".

In respect of Section 26(b) of the Ordinance, the Board of Review came to the conclusion that there was no legal authority for the proposition that the taxpayer may elect under which section he is to be taxed and that legal authorities in England were to the contrary, and came to the conclusion that the wording of Section 26(b) is plain and does not give the taxpayer power to elect under which Section he will be taxed.

The Board of Review also came to the conclusion that a Corporation was clearly taxable under Section 14 of the Ordinance, and that although a Corporation fell within the definition of "person" in Section 2 of the Ordinance, it did not fall within the meaning of "person" in Section 22 of the Ordinance, and to hold otherwise would lead to the absurdity that a Corporation which only did business in the nature of joint ventures and in the course of a fiscal year made profits on three joint ventures and a loss on a fourth joint venture would not be at liberty to offset the loss against the profits.

Under Section 2 of the Ordinance the definition of "person" is said to include "a company, partnership or body of persons"; and under the same section the definition of "body of persons" is said to mean "any body politic, corporate or collegiate and any company, fraternity, fellowship and society of persons whether corporate or not corporate".

In the Supreme Court of Hong Kong.

No. 6.

Judgment.

13th June, 1958 - continued.

Section 14 of the Ordinance deals with corporation profits tax chargeable on Corporations, and is 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".

Section 15 of the Ordinance deals with business profits tax chargeable on persons other than Corporations, and is as follows:-

"15. (1) Business profits tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every person other than a Corporation carrying on a trade, profession or business in the Colony in respect of the profits of that person arising in or derived from the Colony from such trade, profession or business.

(2) Any sum arising in or derived from the Colony, received by or credited to a person other than a Corporation carrying on a trade, profession or business in the Colony shall be deemed to arise from such trade, profession or business:

Provided that any such sum which -

(a) is liable to interest tax under Part V; or

(b) arises from the sale of a capital asset; or

(c) is received by or credited to a person carrying on a trade, profession or business but which derives from his own personal property,

shall not be deemed as to arise".

Section 22 of the Ordinance deals with the computation of assessable profits from a trade, profession or business carried on by 2 or more

persons jointly, and is here set out :-

"22. (1) Where a trade, profession or business is carried on by two or more persons jointly the assessable profits therefrom shall be computed in one sum and the tax in respect thereof shall be charged in the partnership name.

(2) The precedent partner shall make and deliver a statement of the profits or losses of such trade, profession or business, on behalf of the partnership, ascertained in accordance with the provisions of this Part relating to the ascertainment of profits. Where no active partner is resident in the Colony the return shall be furnished by the manager or agent of the partnership in the Colony.

(3) If a change occurs in a partnership of persons carrying on any trade, profession or business, by reason of retirement or death, or the dissolution of the partnership as to one or more of the partners, or the admission of a new partner, in such circumstances that one or more of the persons who until that time were engaged in the trade. profession or business continue to be engaged therein, or if a person previously engaged in any trade, profession or business on his own account continues to be engaged in it, but as a partner in a partnership, the tax payable by the person or persons who carry on the trade, profession or business after that time shall, notwithstanding the change be computed on what would otherwise have been the assessable profits of such person or persons or the aggregation of such assessable profits in accordance with Section 18 as if no such change had occurred:

Provided that on application made in writing by all the persons engaged in the trade, profession or business both immediately before and immediately after the change, and signed by all of them or, in the case of a deceased person, by his legal representative, and received by the assessor within two years after the change took place, the assessor shall compute the profits for any year of assessment as if the trade, profession or business had been discontinued at the date of the change and a new trade, profession or business had been then set up and commenced.

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Judgment.

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(4) Tax upon the partnership shall be recoverable by all means provided in this Ordinance out of the assets of the partnership, or from any partner.

(5) Tax may be assessed on the profits of a partnership notwithstanding the cessation or dissolution of such partnership and shall be recoverable from the former partners and from the assets of the partnership at the time of its cessation". 10

The relevant part of Section 26 of the Ordinance is as follows :-

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

xxx xxx xxx

(b) subject to the provisions of Section 15A no part of the assessable profits or losses of a trade, profession or business carried on by a person who is chargeable to tax under this Part shall be included in the assessable profits of any other person". 20

Section 15A of the Ordinance in this context is irrelevant for the purposes of this appeal, and Sections 14, 15, 22 and 26 all fall within Part IV of the Ordinance.

The main issue between the parties was whether the Respondent's share of the profits arising from the joint ventures should be taxable under Section 14 of the Ordinance, or computed under Section 22 of the Ordinance, resulting in business profits 30 tax being charged under Section 15 of the Ordinance. The parties agreed that the purpose of Section 26(b) was to prevent double taxation, but disagreed on how the section should be applied. It was agreed by the parties that the legal position was that if there was an ambiguity in a section of the Ordinance it should as far as possible be resolved in favour of the taxpayer.

Before the Court it was argued on behalf of the Appellant that the Respondent was a person 40 within the meaning of "persons" in Section 22 of the Ordinance and also by virtue of the definition of "person" in Section 2 of the Ordinance, that a joint venture such as that illustrated by the facts of this case fell within Section 22 of the Ordinance,

and that by virtue of Section 26(b) of the Ordinance the Respondent was not liable to be taxed again under Section 14 of the Ordinance in respect of the profits the Respondent received from the joint ventures after taxation of those profits under Section 22 of the Ordinance. It was contended on behalf of the Appellant that, although a Corporation is taxable on its profits under Section 14 of the Ordinance, that where a Corporation is carrying on a joint venture or trade or business with another Corporation, that then the profits which result therefrom are not those that result from the Corporation as such, but are the joint profits of the two persons concerned in the joint venture, and arise from the joint venture of those 2 persons, and such profits are assessable under Section 22 and not under Section 14 of the Ordinance; and that by virtue of Section 22 of the Ordinance, that where there is a joint venture, even though one or all of the partners is a corporation, the profits from the joint venture must be computed under Section 22 of the Ordinance in one sum and are chargeable to business profits tax under Section 15 of the Ordinance. It was contended that the word "profits of the Corporation" in Section 14(1) of the Ordinance do not include profits from a Corporation and another person. It was submitted that if Section 22 did not apply to a Corporation it would be impossible to assess the profits of a joint enterprise where one of the partners was a Corporation. It was urged that applying Section 26(b) in this case, the position was that the two Corporations paid tax under Section 22 on their joint profits, and that they were then not liable to include sums that they received from those joint profits in their returns for the purpose of Section 14.

Counsel for the Respondent did not support the proposition of "election", and submitted that it did not arise, and that the Respondent would be entitled to have all its profits including those from joint ventures assessed for tax under Section 14 of the Ordinance. It was contended on behalf of the Respondent that a joint venture between two Corporations was not within Section 22 at all, and that therefore Section 26(b) did not arise. Secondly it was submitted on behalf of the Respondent, that if Section 22 could be applied, nevertheless Section 14 still operated on all moneys received by the Corporation including their share of profits

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Judgment.

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from the joint venture, and that therefore Section 26(b) would operate to prevent those moneys assessed under Section 14 from being re-assessed under Section 22.

It was urged on behalf of the Respondent that Sub-section 14(2) of the Ordinance was vital to this case, and in view of its provisions it could not be said that a profit derived by the Corporation from a partnership enterprise was not a profit of the Corporation, and emphasis was placed on the words "shall be deemed to arise" in the sub-section, and that it was clear that under Section 14 profits which might not necessarily be regarded as profits of the Corporation are to be deemed to be profits of the Corporation if received by or credited to the Corporation.

It was further submitted on behalf of the Respondent that a Corporation was not a person within the meaning of Section 22 of the Ordinance, and illustrated this by saying that a Corporation should be charged Corporation profit tax, that is under Section 14, and not business profits tax under Section 15, as it was a Corporation, which would be the result if Section 22 applied. It was contended that Sections 14 and 15 were enabling sections, and that Section 22 was not an enabling Section but a machinery section and was limited to business profits of individuals under Section 15, and that this was also illustrated by the proviso to sub-section (3) of Section 22 which enacted that a certain application was to be "signed" by all the persons engaged in the trade, profession or business, and that obviously a Corporation could not "sign" an application; and that if a Corporation were held to be within Section 22 of the Ordinance it would cause hardship to the Corporation which could not avail itself of the provisions of Sections 15A and 41 of the Ordinance whereas an individual could do so. Section 15A deals with aggregation for the purpose of business profits tax of assessable profits from more than one trade, profession or business. Section 41 deals with election for personal assessment and personal assessment. On behalf of the Respondent it was submitted that if there were 2 partners, such as a Corporation and an individual in partnership, the Corporation not being a person within Section 22 of the Ordinance, and there would not then be 2 or more persons carrying on a business jointly so that Section 22 would not arise, and the

Corporation would be assessed under Section 14 and the individual under Section 15; if a Corporation and 2 individuals were in partnership, the Corporation would be dealt with under Section 14, and there was no hardship to the individuals in view of the provisions of Section 26(b).

It was contended on behalf of the Respondent that should it be held that a Corporation fell within the meaning of "persons" in Section 22 of the Ordinance, that the provisions of Section 14(2) of the Ordinance still applied, and moneys credited to a Corporation on the partnership account were within sub-section 14(2) and therefore subject to Corporation profits tax; and therefore by virtue of Section 26(b) in assessing the profit for the purpose of taxation under Section 22, the assessor must exclude that share of the profits which is credited to the Corporation.

In reply, in answer to the Court, Counsel for the Appellant in respect of sub-section (2) of Section 14 of the Ordinance, submitted that the sub-section had been inserted as a dragnet that would bring in items of trade not carried on by the Corporation, and that it was possible for the Corporation to show that they did not arise from trade or business. It was further submitted that the sub-section did not arise in this case, because the profits from the joint venture where taxable under Section 22, and then would also become taxable under Section 14 but for the provisions of Section 26(b), and that one could not find out what the sum was under Section 14 until Section 22 had been applied. In respect of the word "signed" in the proviso to sub-section (3) of Section 22 of the Ordinance, it was submitted that "signed" implied being signed by an agent of the Corporation. In respect of hardship it was alleged that there must be a hardship on anybody assessed under Section 22, whether Corporation or individual, and that if a Corporation is a partner, Section 15A would apply to a partnership of which the Corporation was a partner, and that that section could apply both to an individual and a Corporation. In respect of Section 41, that would not apply to a Corporation, but Counsel for the Appellant was unable to see how Section 41 would benefit an individual assessed under Section 22.

In respect of the first question asked in the

In the Supreme Court of Hong Kong.

No. 6.

Judgment.

13th June, 1958 - continued.

case stated, namely, whether or not the Board of Review was right in its decision in rejecting the argument of the Respondent Company that in the event of Section 22 being applicable the Company should have the right to elect under Section 26(b) whether the Respondent's share of the profits arising out of the joint venture should be assessed under Section 14 or under Section 22, it was not contended by either of the parties before this Court that there was such a right to elect, and the matter was not argued before this Court, and I see no reason to differ from the decision of the Board of Review on this question, and the answer to the first question in my opinion is therefore in the affirmative.

The next matter to be considered is the answer to the other question asked in the case stated, namely whether or not the Board of Review was right in its decision that a Corporation is not chargeable to tax under Section 22 of the Ordinance and is only chargeable to tax under Section 14(1) of the Ordinance.

This matter in my opinion is not without difficulty. Interpreting the relevant sections by giving them their ordinary plain meaning, would appear to cause no ambiguity inconsistency or repugnance in the Ordinance, but such interpretation would appear to cause hardship in certain cases, such as the illustration given by the Board of Review which I have already set out and in cases such as the present one.

Section 2 of the Ordinance gives the meaning of certain words used in the Ordinance the word "person" being one of them, and states that "person" includes a company; by applying that meaning to Section 22, the word "persons" used in Section 22 is meant to include companies, and therefore Section 22 is also applicable to companies. The words of Section 22 sub-section (1) "trade, profession or business ..... carried on by 2 or more persons jointly" obviously include joint ventures such as those in the present case, because each joint venture consisted of business being carried on jointly by the 2 companies in question. The profits in question were produced from the joint ventures in question and therefore are obviously assessable profits referred to in sub-section (1) of Section 22 of the Ordinance. It follows that

by using the clear plain meaning of the relevant words in Sections 2 and 22 of the Ordinance that the profits in question in this case are assessable under Section 22 of the Ordinance. It is equally clear that, but for the provisions of Section 26(b) of the Ordinance, the Respondent Company's profits derived from the joint ventures would also be taxable under Section 14 of the Ordinance, especially in view of the provisions of sub-section (2) of Section 14. The sequence is that on production of the profits by the joint venture they become assessable under Section 22 of the Ordinance, the Respondent's share of the profits is received by or credited to the Respondent after the production of the profits, and when the Respondent's share is received by or credited to the Respondent then, but for the provisions of Section 26(b), the Respondent's share of the profits becomes again taxable under Section 14 of the Ordinance. It is common ground between the parties that the purpose of Section 26(b) is to prevent double taxation and I am of the same opinion and if Section 26(b) applies, it thus operates to prevent the Respondent being taxed a second time under Section 14 of the Ordinance. The parties are in agreement that 26(b) does apply to the present case if Section 22 applies, the dispute being as to how it should be applied, and I think that it clearly does apply and that a joint venture by 2 companies as in the present case is within the definition of "person" and "body of persons" as defined in Section 2 of the Ordinance.

The question that remains is whether or not, by giving the plain ordinary meaning to the relevant words in the relevant sections, the resulting hardship that would thereby arise in this case and which might arise in other cases amounts to an absurdity, and an absurdity so great as to convince the Court that the intention could not have been to use words in their ordinary meaning. In this respect it is to be noted that Lord Wensleydale stated in the case of Grey and Other v. Pearson and Others, 6 H.L. C.61 at p.106;

> "I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills and indeed statutes, and all written instruments, the

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grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther".

It is also to be noted that Lord Blackburn in the case of the River Wear Commissioners v. Adamson and Others, 2 A.C. 743 at pages 764 and 765 said:

"But it is to be borne in mind that the office of the Judges is not to legislate, but to declare the expressed intention of the Legislature, even if that intention appears to the Court injudicious; and I believe that it is not disputed that what Lord Wensleydale used to call the golden rule is right, viz., that we are to take the whole statute together, and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification, and to justify the Court in putting on them some other signification, which, though less proper, is one which the Court thinks the words will bear".

In my opinion, construing the relevant sections together, and giving the relevant words their ordinary signification, does not produce such an absurdity; and I consider that what has been termed "The Golden Rule" should be followed.

I should add that the words "signed by all of them" in the proviso to sub-section (3) of Section 22 of the Ordinance, when applied to a Corporation, must in my opinion imply being signed by an agent of the Corporation.

For these reasons in my opinion the answer to the second question asked in the case stated is in the negative.

13th June, 1958.

No. 7.

In the Supreme Court of Hong Kong (Appellate Jurisdiction)

No. 7.

Notice of Appeal.

16th July, 1958.

NOTICE OF APPEAL

TAKE NOTICE that the Full Court will be moved at 10 o'clock on the 24th day of October, 1958 or so soon thereafter as Counsel can be heard by Mr. Brook Bernacchi, Counsel for the above-named Appellant, pursuant to Section 69(7) of the Inland Revenue Ordinance, Cap.112 for an Order that the Judgment of the Honourable Mr.Justice Alwyn Denton Scholes, delivered in original Jurisdiction Inland Revenue Appeal No.1 of 1957 on the 13th day of June 1958, be set aside and that the Decision of the Board of Review contained in a written Decision and supplemental notes of the 16th and 27th of September 1957 respectively, be restored and that it be adjudged that the taxes the subject matter of the proceedings herein be reduced by the sums of $3,118.00 and $4,601.00 respectively being the amounts thereof in dispute AND FURTHER TAKE NOTICE that without prejudice to the generality of the appeal herein the particular Grounds of Appeal are:-

i. That the Learned Judge wrongly held that Section 22 of the Inland Revenue Ordinance was applicable at all to a Limited Company, and

ii. That the Learned Judge failed to deal with or otherwise wrongly rejected the argument on behalf of the present Appellants that by virtue of Section 14, particularly 14(2), of the Inland Revenue Ordinance a Corporation is taxable with Corporation Tax in respect of the total profits arising from its trade or business carried on in the Colony including profits creditable to the Corporation from a joint venture, and that the right of the Respondent to tax has been fully exhausted by the application of that Section, or alternatively, that Section 26B operates to prevent such profits creditable to the Corporation from being included in the assessable profits of a joint venture under Section 22 of the Ordinance.

Dated the 16th day of July, 1958.

Sgd. BROOK BERNACCHI.

Counsel for the Appellants.

In the Supreme Court of Hong Kong (Appellate Jurisdiction)

No. 8.

Judgment.

24th December, 1958.

No. 8.

JUDGMENT

This is an appeal from a decision by Mr. Justice Scholes given on a case stated by the Board of Review under Section 69(1) of the Inland Revenue Ordinance (hereinafter called the Ordinance).

The questions put to the Court in the case stated were :-

(a) Whether Section 22(1) of the Ordinance applies to a Corporation, and

(b) Whether, if it does apply, Section 26(1) gives to a Corporation the right to elect that its profits should be assessable and taxable under Section 14 and not under Section 22(1).

The Board dealt first with the question mentioned at (b) and the Court below has, consequently, referred to it as the "first question"; but we think it preferable to return to the order in which these questions were put to the Board as it seems to us the more logical order.

The Board has answered each question in the negative. The Judge in the Court below agreed that the answer to the question at (b) should be in the negative but gave an affirmative answer to the question at (a), thus reversing the Board's decision on it.

According to the case stated for the opinion of the Court, the agreed facts were as follows :-

"(1) The Four Seas Co. Ltd., is a company incorporated in Hong Kong carrying on business in the Colony as importers and exporters.

(2) During the two years ended 31st December, 1954 and 31st December, 1955 the company conducted joint ventures in Hong Kong with Nam Sing Co. Ltd., of Djakarta, resulting in profits arising in or derived from the Colony amounting to $49,888 and $73,618 respectively. These profits were shared equally by the two partners.

(3) Apart from its joint venture profits the Company's trading for the above two years resulted in a loss. The Company had also made similar losses during the two previous years, which are available for set-off against future profits".

It seems to us that this statement of facts raises the question whether the joint ventures conducted with the Nam Sing Co. Ltd. of Djakarta amounted to the carrying on of a trade, profession or business in the sense in which those terms are used in Section 22 of the Ordinance. It might presumably have been argued that carrying on a trade or business implies a measure of repetition or continuity, greater than that which appears on the face of this statement of the facts, and that the later reference in the section to a partnership name would strengthen this inference. The Board was not, however, asked to state a case on this point and it was apparently not raised before the Board or in the Court below; consequently, it does not seem to us that we have before us the material on which a proper decision about it could be reached nor, indeed, that it would be open to us - in the absence of any amendment to the case stated and none has been requested - to decide this question. Consequently we content ourselves with saying that nothing in this decision should be taken as implying that on this statement of facts we are of the opinion that a trade, profession or business was being carried on by the Respondents and the Nam Sing Co. Ltd. jointly.

We turn therefore to the first of the two questions specifically put to the Court for decision.

The assessments in dispute are those on the joint ventures for the two years 1955/56 and 1956/57 which amounted to HK$3,118 and $4,601 respectively. In making these assessments no deduction was allowed for the losses of the Corporation outside the joint ventures in question, because, in the opinion of the taxing authorities, any such deduction was precluded by Section 22(1) of the Ordinance, which reads as follows:-

"22(1) Where a trade, profession or business is carried on by two or more persons jointly

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the assessable profits therefrom shall be computed in one sum and the tax in respect thereof shall be charged in the partnership name".

The word "person" is defined in Section 2 of the Ordinance as including "a company, partnership or body of persons" and "body of persons" is defined as meaning "any body politic, corporate or collegiate and any company, fraternity, fellowship and society of persons whether corporate or not corporate".

Despite these definitions, the Board held that the word "person" in Section 22 did not include a Corporation and reached this conclusion mainly because of the view expressed by Mr. Hastie who, arguing on behalf of the Crown, answered an enquiry from the Board by the statement that, if a Corporation had made a profit on three joint ventures and had the misfortune to lose on another two, it would have to pay on the profits made by the three ventures and could not set off the losses on the other two. He went on to add that if in each of these joint ventures the Corporation made a profit of less than $7,000, such profit would not be taxable.

Although the Board regarded these results as so absurd as to feel impelled, because of them, to find that the word "person" in Section 22 could not include a Corporation, the Board did not directly express an opinion on the validity of Mr. Hastie's conclusions. It seems to us, however, that both for the purpose of weighing the reasons given for the Board's decision and the arguments addressed to us by Counsel on the questions contained in the case stated, it is necessary to examine that conclusion somewhat more closely. Counsel on both sides have dealt with it very fully in the course of the hearing before us.

Section 19(1) which appears in Part IV of the Ordinance, the same part as Section 22, is in the following terms:-

"19(1) Subject to the provisions of sub-section (3) where a loss is incurred in any year of assessment by a person chargeable to tax under this part the amount of such loss attributable to activities in the

Colony shall notwithstanding the provisions of Section 70 be set off against what would otherwise have been the assessable profits of such person for that year of assessment".

It would seem therefore that if a Corporation which is liable to tax under Section 22 for profits made in a joint venture, wishes to reduce those profits by losses incurred either in another joint venture or in activities carried on solely on its own account, it must show that the person making the profit is the same person that suffered the loss. Indeed Crown Counsel stressed before us that the whole substance of his argument on this point lay in his contention that sub-section 22(1) creates a new taxable entity, separate and distinct from the Corporation itself, and, consequently, separate and distinct from the taxable entity which had incurred the losses.

He seemed to us, however, to put this contention in some jeopardy when he suggested early in his argument that sub-section 22(1) was merely machinery inserted into the Ordinance for the purpose of working out the application of the principal operative sections by indicating how the tax should be computed.

The only words in this sub-section which appear capable of being construed as creating a separate taxable entity are those which say that the assessable profits of the joint undertaking "shall be computed in one sum and the tax in respect thereof shall be charged in the partnership name". Are these words in themselves sufficient to make the "partnership name" a new taxable entity and to set up between it and the component partners a barrier like a water shed across which losses and profits may not flow and intermingle?

In determining this question it seems desirable first to look at the chargeable entities already established by this part of the Ordinance and to see how the liability for tax has been imposed on them.

Sections 14 and 15 of the Ordinance, which may be regarded as the principal charging sections in Part IV of the Ordinance, impose a liability for

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tax on Corporations and individuals respectively, by using the following terms:-

Section 14: "Corporation profits tax shall .... be charged... on every Corporation ..... in respect of the profits of the Corporation ....."

Section 15: "Business profits tax shall .... be charged .... on every person other than a Corporation .... in respect of the profits of that person ..."

The sections say that the tax will be charged on every Corporation and every person other than a Corporation respectively, whilst Section 22(1) says that the tax shall be charged in the partnership name.

Is there consequently any operative difference in the effect of Sections 14 and 15 on the one hand and Section 22(1) on the other? Does this change in language indicate that Section 22(1) is to be regarded merely as "machinery" in the sense in which that term was used by Finlay J. when he said in Longmans Green & Co. Ltd. XVII Tax Cases p.282 "You have got to get the charge imposed and you have got to get the necessary machinery for levying the tax .... What one has to do is to find out whether the charge is imposed and whether the machinery is adequate to support the charge and to enable the Crown to get its money".

Thus understood, one would not expect a "machinery" section to expand the area or limits of chargeability or to enhance the amount of the charge imposed by the charging section; and the language of Section 22(1) certainly appears to carry some indication that the tax to which it refers has already been imposed and that all the section is seeking to do is to indicate the channel through which that tax should be extracted. The reference to "the tax" and to charging it not on the partnership but merely in the partnership name lend colour to this view. Whilst it would be fallacious to tie the label "machinery" to this section and then deduce from that label some limitation on the language of the section, nevertheless, this language could be said to imply that the tax contemplated by Section 22(1) remains charged on and payable by the person on whom it has already been imposed by an earlier section of the Ordinance and

that Section 22(1) merely indicates the capacity or guise in which it will be paid.

Some guidance may be obtained from the manner in which the words "chargeable in" and "charged in" have been used elsewhere in the Ordinance. Section 10 says that the income of a wife shall in certain circumstances "be deemed to be the income of her husband and shall be chargeable accordingly in his name". This seems to indicate that the charging in his name is a consequence of the provision that the whole income "shall be deemed to be" that of her husband and not by itself to bring about that situation.

Again Section 20(2) provides that in certain circumstances the profits of a non-resident person carrying on business with a resident person "shall be assessable and chargeable with tax .... in the name of the resident person as if the resident person were his agent". Then Section 20A(1) provides that a non-resident person "shall be chargeable to tax either directly or in the name of his agent ..." in respect of certain profits.

It would appear that in these two latter sections, at any rate, the word "in" is used not to transfer the liability for tax from the principle taxpayer but to leave liability for the tax where it was whilst providing an indirect channel through which it may be extracted.

The change in language, from imposing a charge on a person to making a charge in a name may not seem great but why make it unless some difference is intended? If the language of Sections 22 should be regarded as equivalent to saying that the tax shall be charged on the partners in the name of the partnership, the suggestion that it creates a taxable entity separate from the component partners seems less tenable than if it had said that the tax shall be charged on the partnership.

Examination of the legislation now embodied in Section 144(1) of the English Income Tax Act 1952, from which Section 22(1) appears to be derived, strengthens this impression. It reads as follows:-

"144(1) Where a trade or profession is carried on by two or more persons jointly, the tax in respect thereof shall be computed

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and stated jointly and in one sum, and shall be separate and distinct from any other tax chargeable on those persons or any of them, and a joint assessment shall be made in the partnership name".

The Hong Kong section has omitted the words "shall be separate and distinct from any other tax chargeable on those persons or any of them" and to that extent may have weakened the argument in favour of a separate and distinct taxable entity but their presence in the English section, more particularly the reference to "other tax chargeable on those persons", clearly implies that tax levied under Section 144 is itself a tax on those persons and not a tax on something distinct and separate from them. In other words, the English section, whilst separating this particular tax from other taxes on the component partners was apparently not thought to have set up a taxable entity separate and distinct from these partners.

In Hong Kong, the liability of the individual partners is clearly established or preserved by Section 22(4) which makes the partnership tax a joint and several liability of the partnership and the individual partners, in contrast with the English legislation which imposes only a joint liability. It may, however, be noted that this sub-section (4), prior to its amendment in 1955, made provision for the recovery of the tax not only from the partners who were members of the firm but also from those who had been members previously, a provision which would seem to imply that the Legislature did not look on the firm itself as a continuing entity separate and distinct from the partners, but as something dependent on and identified with the particular partners forming it at the moment when the liability fell on the partnership. In any event, a several liability for the partnership tax having been thus imposed on the partners, one can well understand the feeling of the taxpayer that consideration of his several losses should not be excluded.

The question whether Section 22 has set up a new taxable entity would, I think, have found a ready answer if the decision in the English Court of Appeal in R. v. Income Tax Commissioners ex parte Gibbs (1940) 3 A.E.R. 613, and the reasoning

of Scott L.J. and Clauson L.J. had been upheld in the House of Lords; but it was not.

The question at issue in that case is not indeed identical with the question before us. It turned on whether a "succession" had occurred in the sense in which that word was used in Rule 9 of cases 1 and 2 of Schedule D, a rule which has now been replaced by Section 146(1) of the English Income Tax Act 1952, but in language very different from the former rule - possibly as a result of further reflection on this very case. It did however involve a very close examination, both in the Court of Appeal and in the House of Lords, of the extent to which the Income Tax Acts treat a partnership as something separate and distinct from its component partners and as a separate entity of assessment, or of taxation, under the Act. Consequently the observations of the judges throw considerable light on the problem before us, particularly when they refer, as they frequently did, to the Rule 10 which is now S.144(1) of the 1952 Act.

During the course of the fiscal year, a partnership consisting of four persons had taken in a fifth and the Crown contended that as a result there had been on that date a succession of one person by another, within the meaning of Rule 9, while the taxpayers contended that there was no succession merely because a business which had previously been carried on by A.B.C. and D., in partnership was subsequently carried on by A.B.C. D. and E. They contended that the presence of the first four partners throughout preserved the continuity. The difference in the view points of the opposing parties is brought out vividly by the opening statements of Counsel in the Court of Appeal. King K.C. for the taxpayers said:-

> "The Income Tax Acts do not treat a partner as a separate entity. A firm is no more an entity for the purposes of the Income Tax Acts than it is in the general Law".

Hills who, with the Attorney General, argued the case for the Crown said:-

> "A partnership is a separate taxable group of persons. It is distinct from its partners. It is composed of its partners".

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and the Attotney General spoke of the "succession of one taxable entity to another taxable entity whose identity had been destroyed .... where the identity of the old firm is destroyed and a completely new taxable entity takes its place ....."

The Court of Appeal found in favour of the taxpayers but that decision was reversed (1942 A.C. 402) by a majority in the House of Lords, Lord Russell of Killowen alone dissenting.

The principal speech was made by Viscount Simon L.C. Having said (p.411) that,

> "reading r.9, r.10 and the amended Rule 11 together, a puzzle is disclosed to which, as it seems to me, no entirely satisfactory solution can be found.",

he continued (p.413)

> "I concede without any doubt or qualification the proposition relating to the English law of partnership on which the judgment of the Court of Appeal is largely based. Strictly speaking, it is certainly true that an old partnership cannot be regarded as "ceasing" to carry on the trade, and the new partnership cannot be regarded as "succeeding" to it when some members of the old partnership are also members of the new, and thus do not individually cease to carry on the trade at all. A.B.C. and D. are carrying on the trade throughout the year. How, then can it be said that they or any of them, have in the course of the year ceased to carry it on? If language is accurately used, a partnership firm does not carry on a trade at all. It is the individuals in the firm who carry on the trade in partnership. It is not the firm which is liable to income tax. The individuals composing the firm are so liable, though by r.10 when a trade is carried on by two or more persons jointly the tax is computed and stated jointly and in one sum and is separate and distinct from any other tax chargeable to those persons or any of them, and a joint assessment is made in the partnership name. If therefore (it is argued) r.9 is applied to a partnership, it applies not because a partnership is "a person charged under this Schedule" but because the singular includes the plural, and instead of a single person the case

is one of a number of persons who are jointly so charged.

So far as English law is concerned, it is indisputable that a partnership firm is not a single persona, though a different view obtains in Scotland, and in construing a taxing statute which applies to England and Scotland alike, it is desirable to adopt a construction of statutory words which avoids differences of interpretation of a technical character such as are calculated to produce inequalities in taxation as between citizens of the two countries .....

..... As a strict proposition of English law, there is no doubt at all that a partnership is not, as such, a single juristic person. As Farwell, L.J., said in Sadler v. Whiteman (6) at p.889:-

'In English law a firm, as such has no existence; partners carry on business both as principals and as agents for each other within the scope of the partnership business; the firm name is a mere expression, not a legal entity, although for convenience under R.S.C. Ord. 49A, it may be used for the sake of suing and being sued .. It is not correct to say that a firm carry on business in partnership under the name or style of the firm.'

In the end, the House has to choose between two views, neither of which is entirely satisfactory. For the reasons I have given, I think that we must in this case be prepared to construe the rule under discussion in a popular rather than in a technical sense, and I am not greatly shocked to find that when dealing with a joint assessment of trade carried on by a partnership, the legislature has proceeded on the view that, when the trade was first carried on by A, B, C and D in partnership and was subsequently carried on by A, X, Y and Z, in partnership, this is to be regarded as though the first partnership ceased and the second partnership succeeded to the first. At the same time, this result, though in my opinion preferable to treating r.9 as obsolete lumber, is only reached by giving to the rule an application which is difficult to reconcile with the aptest use of legal terminology, and it is to be hoped that Parliament, in a future Finance

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Act, may, by the use of amending language, think fit to illuminate the obscurity in which the judiciary for the time being has to grope."

Lord Russell of Killowen spoke strongly in favour of supporting the judgment of the Court of Appeal, regarding, as he said, the judgment of Clauson L.J. as unanswerable. He was however in a minority of one.

Lord Macmillan said (p.418):-

"In considering whether a partnership or a group of persons associated in partnership constitutes 'a person charged' within the meaning of the rule, I think it right to lay aside any preconceptions derived either from the law of England or from the law of Scotland as to the technical legal nature of a partnership. In Scotland a firm is 'a legal person distinct from the partners of whom it is composed' (Partnership Act, 1890, s.4(2) but this is not so under English law. For the present purpose this distinction should, in my opinion, be disregarded ...

The important thing to ascertain is the meaning of the word 'person' in the vocabulary of the Income Tax Acts. The word constantly occurs throughout the Acts, and I think that it is most generally used to denote what may be termed an entity of assessment, i.e., the possessor or recipient of an income which the Acts require to be separately assessed for tax purposes. Now r.10(1) provides that:-

'Where a trade or profession is carried on by two or more persons jointly, the tax in respect thereof shall be computed and stated jointly and in one sum, and shall be separate and distinct from any other tax chargeable on those persons or any of them, and a joint assessment shall be made in the partnership name.'

The profits of a business carried on by a partnership are thus treated as a separate subject of assessment, and the assessment is made in the partnership name. The personification of partnership is even more manifest in r.12, by which in certain circumstances, a 'partnership

shall be deemed to reside outside the United Kingdom, notwithstanding that some of the members of the said partnership are resident in the United Kingdom'. That rule uses the expressions 'the trade or business of a partnership firm', 'the said firm shall be chargeable', an assessment may be made on the said firm in respect of the said profit in the name of any partner resident in the United Kingdom'. Justification is thus not wanting for the view expressed by Romer, L.J. in Watson & Everitt v. Blunden (7), at p.409 that for taxing purposes:

> 'A partnership firm is treated as an entity distinct from the persons who constitute the firm.'

Having regard to the special vocabulary of the income tax legislation, I find no difficulty in interpreting the words 'a person charged' in r.9 to include the case of several persons associated together in partnership for the purpose of carrying on a trade in common, whose profits are, by the Acts, made the subject of separate assessment and separate charge"

He then proceeded, however, on a basis which seems to indicate that the person charged is not really the partnership name or even the partnership firm, as a separate and distinct entity from the partners, but is in fact those partners themselves, for he said later:-

> "There has undoubtedly been a change in the person charged, as I construe this expression. The trade has ceased to be carried on by four persons in partnership and has become a trade carried on by five persons in partnership. Whereas four persons were jointly chargeable, there are now five persons jointly chargeable by reason of the change in the 'person charged'. It does not seem forced to say of this change that four persons jointly have ceased to carry on the trade and that five persons jointly have succeeded to it."

Lord Wright concurred with the views of the majority but found the language of Rule 9 "vague and obscure" and in the end voted for what he thought to be a meaning which achieved a practical

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and reasonable result in the particular case before them.

Lord Porter said (p.432) with reference to Rule 9 that

> "the phraseology may be loose inasmuch as strict accuracy compels one to acknowledge that in England, though not in Scotland, the business is carried on by the individual partners jointly and not by the partnership. Nevertheless it is not unimportant to recall that one partner alone does not carry it on. The totality of members form a joint body of management and responsibility".

and went on to vote with the majority.

Earlier when indicating his reasons for coming to the conclusion that Rule 9 was at least capable of bearing the interpretation which the Crown put upon it, he had said (p.432) "rule 10 treats the entity of assessment as being the partnership and not the individuals composing it".

Subject to the significance to be attached to Section 22(4) in Hong Kong and to the absence from the Hong Kong sub-section (1) of the words "separate and distinct" which appear in the English subsection, that statement would seem to support the contention of the Crown in the case now before us, and undoubtedly the majority of the House of Lords, albeit with some misgiving, found that the Income Tax Legislation in England had conferred on the partnership a personality sufficiently distinct and separate, as an entity of assessment, from the partners composing it, to enable the House to regard the addition of a new partner as "a succession" to the business previously carried on by the old partnership.

Nevertheless the speeches in the House clearly recognised that generally in England - and the position in Hong Kong is no different - the firm name is merely a compendious description for the partners composing it and, whatever personality may have been conferred on the partnership or the partnership name, it is inescapable that it was a change amongst the partners themselves and not in the firm name or anything of that kind that brought about the "succession" with which the House was

concerned. This seems to emphasize the continuing identity of the partners with the firm and that whatever distinct and separate capacity may be conferred on the firm or the partnership name by the English Income Tax Legislation, it is not so great as to make the firm or partnership name so independent of the partners as to leave it directly unaffected by a change amongst the individual partners. Whatever the language used, the essence of the decision was merely that the continuation of one or more partners in the business did not prevent a succession arising under Rule 9 when a new partner was introduced.

The limitations to be placed on the scope of the decision are emphasized by the later case of Worth v. Inland Revenue Commissioners (1953) 1 A.E.R. 930, when the point in issue was very much closer to that now before us.

The question was whether certain income qualified for exemption under Section 49(2) of the Finance Act 1948. The income, measured by the net Schedule A assessment, was that derived from land owned by the taxpayer, a farmer, but occupied and farmed by him in partnership with his son and for which he received rent from the partnership. Under the Act the income for which exemption could be claimed was "income arising to persons carrying on a trade, profession or vocation from property occupied and used by them for the purpose thereof."

The following appears in the judgment of Singleton L.J. (p.933):

> "It is said, on the one side, that this was investment income arising to the taxpayer in carrying on the trade of farming on the farm, the property being 'occupied and used' by him 'for the purposes thereof'. As against that it is submitted by Counsel for the Crown that it could not be said that the taxpayer was entitled to exemption under Section 49(2)(b) for he was not occupying and using the farm. The farm was occupied and used by him and his son who were farming in partnership. The submission of the Crown was that, unless the income from the property belongs to the identical individual who is carrying on the trade, there cannot be any exemption under the terms of that sub-

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section. It was common ground between learned Counsel that, in order to read Section 49(2)(b) in its sense plainly intended, one ought to put in the place of the word 'persons', the words 'an individual', and it was agreed that, if this income arose to the taxpayer in carrying on the trade, profession or vocation on property occupied and used by him alone he would be entitled to exemption, but it was said that the exemption did not apply if user and occupation were shared by two partners of whom the owner of the property was one. Our attention was called to Income Tax Commissioners v. Gibbs."

He then went on to quote passages from the speech of Viscount Simon L.J. which we have already quoted, and, having done so, said (p.934):-

"I have referred to Lord Simon's words in that case because of the reliance placed in the course of the argument on the wording of r.10 of the Rules Applicable to Cases 1 and 2 of Schedule D as to partnership assessments. That rule, which is of very long standing was, no doubt, made for the convenience of those who had to make assessments, on the one hand, and of those who had to suffer under assessments, on the other. It was a great convenience if a trading partnership could be assessed as such though the liability of the individual members remained, but, as was said by Lord Simon, the fact is that strictly the firm does not carry on business. The members of the firm carry on the business in partnership. On behalf of the Crown it is said boldly that, if a man has been farming a farm for thirty or forty years and thereafter gives the bailiff a small interest or a share in the profits, or makes him a partner to a small extent, the farmer himself, the owner of the farm, ceases to be in occupation for the purpose of this section. I do not think that that is right.

The Special Commissioners state their finding in this way:

'In our opinion, (the taxpayer) does occupy and use the property for the purposes of the trade of farming carried on by him, and we do not consider that the fact that his

son also occupied and uses the same land for the same purpose and that a joint assessment under sched. D in respect of the profits falls to be made in the partnership name debars him from the relief claimed. We, therefore, hold that he is entitled to exclude the net annual value of the land owned and farmed by him in computing his aggregate investment income for the purposes of the special contribution.'

On appeal Harman, J., took a different view. The ground for his decision can, I think, be stated from the words in his judgment as follows:

> 'Nevertheless, it seems to me that it is not true to say that (the taxpayer) occupies this land or that (the taxpayer) carries on this trade. He and another person carry it on; he and another person occupy the land. The person who pays the money is not identical with the person who receives it. In my judgment, para. (b) does postulate an identity of payer and payee before the exemption comes into operation.'

I do not agree. The taxpayer owned the farm. He had been farming it for many years. If the question had been asked, after his son had become a partner: 'Is the taxpayer occupying and using the land for the purposes of farming?', the answer, I think, would be: 'Yes, he is'. It is true that someone else was there too. It is impossible to find an answer covering every side of every problem which might arise under this sub-section, but the view which I hold on this part of the case is that the income arose to the taxpayer as to a person carrying on the trade of farming from property occupied and used by him for the purposes thereof, and that, consequently, the sum of £1,489.10s. is not to be treated as investment income."

The distinction between the partnership which farmed the land and paid the rent and the partner who received that rent as his own separate property, a distinction which led Harman, J. to hold that the partner and the partnership could not be identified

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or treated as one, was not in the eyes of the Court of Appeal, sufficient to preclude him from being so identified with the farming and occupation of the land as to enable his income from it, measured by the net Schedule A assessment, to qualify for exemption under S.49(2)(b). Would it be right then, in the present case, to hold that there was such a distinction between the partnership which made profits in the joint venture and the component partner who made losses elsewhere, that there was not a sufficient common identity to permit those losses to be set off under Section 19?

Before answering that question, however, it seems appropriate to consider two other points.

If there is no such distinction in England why should it have been thought necessary there to introduce Section 142, with its express provision for setting off losses incurred by a "person who carries on, either solely or in partnership, two or more distinct trades".

The answer to this would appear simply to be that S142 is put in for the purpose of ensuring that where there are distinct trades, there will be a set-off between them, and that the reference to "solely or in partnership" is only incidental to the main purpose. But its presence does indicate that in the same trade, the fact that some of the trade was carried on solely and some in partnership would not prevent a set-off. In the same way, S341, which also refers to sole and joint trading, appears to deal with the allowance of the loss against other income and to assume that where there had been a loss in the same trade, this would simply have reduced the assessable profits.

In the absence of express statutory provision, however, does the rule exemplified in re Pennington and Owen Ltd. (1925) Ch.825, that joint liabilities cannot be set off against claims that are not joint present an obstacle to allowing the losses incurred in one partnership or in sole trading to be set off against the profit made in another partnership?

So far as Hong Kong is concerned the answer to this query seems to lie in the terms of Sections 22(4) and 19(1).

Section 22(4) which has no counterpart in the English legislation, makes each of the Hong Kong partners severally liable for the whole of the tax on the partnership profits. Thus it is not the partnership profits that are to be deemed the separate property of each partner, but it is the tax on them that is made the subject of the separate obligation imposed on each partner. Section 19(1) says that when a loss is incurred in any year of assessment by a person chargeable to tax under this part, the amount of such loss shall be set off against what would otherwise have been the assessable profits. So it is the chargeability to tax that attracts the set off and the partners' chargeability having thus been equated with that of the partnership, a clear channel for set off seems to have been established, for it is no less reasonable to treat as profits, for the purpose of this subsection, the profits of the partnership in which a Corporation shares and for the tax on which the Corporation is liable, than it was in the Worth case, to treat the use and occupation of the farm by a partnership as use and occupation by one of the partners for the purpose of claiming the exemption then in question.

That a similar result would obtain in England, even without the existence of Section 22(4) of the Hong Kong Ordinance, seems to be indicated by the passages in Steven v. Britten (1954) 3 A.E.R. 386, where the Court of Appeal had to consider the relationship of the individual partners to the "partnership liability" created by Section 144 of the English Act, and Sir Raymond Evershed, M.R. had this to say (p.386):-

> "I have used the word 'partnership' because that is the word which is to be found in S144, but it is axiomatic that generally speaking a partnership in English law is merely a compendious description of the individual persons who compose the firm.

In Income Tax Commissioners v Gibbs (1) there was some discussion of the significance of the use of the word 'partnership' in the Income Tax Acts. As Lord Macmillan observed, for example (1942) 1 All E.R. at p.425):

> 'Justification is thus not wanting for the view expressed by Romer, L.J., in Watson & Everitt v. Blunden (2) (18 Tax Cas. at p.

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409) that for taxing purposes 'A partnership firm is treated as an entity distinct from the persons who constitute the firm'."

When, however, the question is one of liability, in the sense of liability at law for payment of the tax and for the penalties in the case of non-payment, it seems clear that the individuals are themselves liable for the "partnership" tax. It seems equally clear that their liability is joint, though not, be it observed, joint and several. I think the legal position which I have tried to state by reference to the sections of the Act of 1952 is correctly set out in Simon's Income Tax (2nd Edn.), Vol. 1, p.337, where I find the following :-

> "The tax assessed in the firm name is a partnership debt for which all who were partners at the time when the debt was incurred, or who have held themselves out to the Revenue to be such, are jointly liable. This means that any or all of those persons may be sued for the whole of the tax due (when the assessment becomes final) without reference to their respective shares under the partnership agreement."

This would seem to indicate that, even in England, although, as the Law Lords had said in ex parte Gibbs, the entity of assessment is the partnership and not the individuals composing it, when chargeability or liability for the tax is in question the partners are themselves chargeable and liable and this liability, which in England remained merely a joint liability, has in Hong Kong, by virtue of Section 22(4), become also a several liability of the partners. A separate entity of assessment is not necessarily the same thing as a separate entity of taxation and the Hong Kong sub-section does not seek, as the English section does, to make the tax liability in respect of the partnership separate and distinct from any other tax liability of the taxpayer.

It would seem therefore that neither in England nor in Hong Kong does Section 144(1) or Section 22(1) respectively impose a liability on something separate and distinct from the component partners and indeed both sections contain features that would be inconsistent with any such intention.

We have already mentioned the significance of the word "other" in that portion of the English section which says this tax shall be "separate and distinct from any other tax" chargeable on the persons carrying on the joint trade or profession; this seems clearly to imply that the tax under the sub-section is chargeable on those persons themselves rather than merely on the firm name in which it is charged. Had it been different the word "other" would not have appeared at this point.

In Hong Kong, the opening words of Section 22(3), which is similar to the English Section 145 imply that a partnership does not form an entity entirely distinct and separate from its partners, otherwise the retirement or admission of a partner would not cause a change in the partnership and it would not be necessary to provide, as this sub-section does provide, that the tax should be computed as if such change had not occurred.

The use of the expression "charged in" rather than "changed on" to which we have also drawn attention earlier, points in the same direction. It tends to confirm the conclusion that whilst section 22 may not be limited merely to the role of machinery, since it makes each partner liable for the whole tax on the partnership, it was not intended to go to the length of depriving a partner of the right to take other losses into account.

For all these reasons we are of the opinion that, whilst Section 22 makes each partner liable for the whole of the tax on the partnership, it was not intended to, and it does not, prevent the partners, whether individuals or corporations, from setting off against their taxable profits the losses mentioned in Section 19.

It follows, therefore, in our opinion, that the Commissioner was wrong when, in reliance on S26(b) which says that "no part of the .... losses of a .... business carried on by a person who is chargeable to tax .... shall be included in the assessable profits of any other person", he disallowed the taxpayer's losses in the present instance. If the joint enterprise amounted to "carrying on" a business then it was carried on, not by the "partnership name", but by the Corporation jointly with the Nam Sing Co. Ltd. and consequently there was no such distinction between the

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person that incurred the trading losses and the person taxed or taxable in respect of the joint trading profit as would justify a refusal to set off the losses against the profit.

This is the real point at issue between the parties and it has been very fully argued by Counsel before us. They have done so, however, only as a matter incidental to the decision of the first question formally put to us in the case stated when the reverse would probably have more truly reflected the position. The question whether a Corporation was or was not a person within the meaning of Section 22(1) was, in reality, only one step in determining whether the losses which the taxpayer had suffered elsewhere could be set off against the profits included in his assessment. Nevertheless, although our conclusion on this matter, which we have examined in the course of reaching a conclusion on the first question put to the Court below, may make that question somewhat academic, so far as the present taxpayer is concerned, it seems desirable that we should answer it.

We have already indicated that, in our opinion, the reason advanced by the Board for reaching its conclusion that the word "person" in Section 22(1) did not include a Corporation was ill-founded but, even if we had not come to that conclusion, we could not support the interpretation placed on the word "person" in Section 22 by the Board. We think that the Judge in the Court below properly applied the canons of interpretation to Section 22 and, having regard to the definition of "persons" and "body of persons" given in Section 2 of the Ordinance and to the context in which the word "person" is used in Section 22(1), that he was right in holding that the word "person" in this subsection includes a Corporation.

As regards the second question we see no reason to differ from the opinion in the Court below, which was also held by the Board, that there is no right of election open to the taxpayer under Section 26(b), which would enable the Corporation to prevent its share of the profits arising out of the joint ventures from being included in an assessment under Section 22.

(Michael Hogan)
President
24 Dec.1958

(C.W. Reece)
Appeal Judge.

(J.R.Gregg)
Appeal Judge.

No. 9.

ORDER GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

In the Supreme Court of Hong Kong (Appellate Jurisdiction)

No. 9

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

3rd March, 1959.

IN THE SUPREME COURT OF HONG KONG

APPELLATE JURISDICTION

CIVIL APPEAL NO. 10 of 1958

(On Appeal from Inland Revenue Appeal No.1 of 1957)

BETWEEN:- THE FOUR SEAS COMPANY LIMITED — Appellant (Inland Revenue Appeal No.1/57 Respondent)

- and -

THE COMMISSIONER OF INLAND REVENUE — Respondent (Inland Revenue Appeal No.1/57 Appellant)

The Hon. Sir Michael Hogan, Kt., C.M.G., The Hon. Mr. Justice Reece and the Hon. Mr. Justice Gregg in Chambers.

ORDER Granting Final Leave to Appeal to Privy Council

Upon the motion by the Respondent, and upon hearing Counsel for the Respondent, and upon reading the Affidavit of Graham Rupert Sneath filed the 26th day of February, 1959, IT IS ORDERED that the Respondent do have final leave to appeal to Her Majesty in Her Privy Council.

DATED the Third day of March, 1959.

(L.S.) Sgd. C.P.D'ALMADA & CASTRO
Registrar.