INCOME TAX APPEAL

Jamaica

Nos. 12 & 13 of 1972

In the Revenue Court - On 30th January to 2nd February, 1973
5th February to 9th February, 1973
12th February to 16th February, 1973
19th February to 23rd February, 1973
5th March to 9th March, 1973
12th March to 16th March, 1973 and
19th March, 1973 and on the
12th April, 1973.

BETWEEN

Liner Diner (1968) Limited)
) - Appellants
&)
E. S. Campbell & Company (1968) Limited)

AND

The Commissioner of Income Tax - Respondent

For the Appellants - Mr. Enos Grant, instructed by Messrs. Clinton Hart & Company.

For the Respondent - Mrs. A. Hudson-Phillips and Mr. Bryan Kieran, instructed by the Crown Solicitor.

These two appeals, although listed separately, were consolidated and heard together pursuant to an application to that effect, by Counsel for the Respondent, under Rule 22(b) of the Revenue Court Rules, 1972.

Both appeals are in respect of additional assessments raised on the Appellants for the Years of Assessment 1966 and 1967, under Section 47 (4) of the Income Tax Law, 1954.

As regards the first named Appellant (hereinafter referred to as "Liner Diner") the respective amounts are as follows:-

(a) for the Year of Assessment 1966 - $61,895, and

(b) for the Year of Assessment 1967 - $76,156.

As regards the second named Appellant (hereinafter referred to as "Campbell and Company") the amounts are as follows:-

(a) for the Year of Assessment 1966 - $55,272, and

(b) for the Year of Assessment 1967 - $70,190.

Decisions ...../

Decisions were in due course made by the Respondent confirming these additional assessments in the sums just stated, and it is in respect of those decisions that the Appellants have now appealed to this Court.

The Assessments arise out of a refusal by the Respondent to accept that certain payments made by the Appellants to a third company, known as Airport Services Limited, allegedly by way of management fees, constituted expenditure wholly and exclusively incurred by the Appellants in acquiring their incomes for the relevant years of assessment.

The issue reaches this Court by way of additional assessments because the amounts claimed had originally been allowed by the Respondent in the tax computations of the Appellants for the two years in question, and then subsequently reversed, upon a further review of the matter.

Most of the relevant facts are contained in the Pleadings. Evidence was also given by Mr. C. L. Campbell a Director and Shareholder in both of the Appellant companies, as well as, in Airport Services Limited. A number of exhibits were also tendered in evidence, as an agreed bundle of documents.

The Respondent's case in justification of the assessments, stated briefly is as follows:-

(i) that the amounts claimed are to be disallowed as they do not represent expenditure wholly and exclusively incurred by the Appellants in acquiring their incomes for the years in question, or

(ii) in the alternative, that they are artificial or fictitious transactions, the result of which is to reduce the amount of tax payable by the Appellants, and as such are to be disregarded pursuant to the provisions of Section 10(1) of the Income Tax Law 1954.

Four Grounds of Appeal were relied on by the Appellants.

They ...4

They are as follows:-

"(1) That the said additional assessments are excessive, arbitrary and unreasonable.

(2) Further and in the alternative, that they are unlawful in that the Respondent had no jurisdiction to make them.

(3) Further and in the alternative, that the said expenditure was at all material times wholly and exclusively incurred by the Appellants in acquiring their incomes, within the intendment of Section 8 of the Income Tax Law, and as such ought to be deducted therefrom in arriving at their chargeable incomes for the Years of Assessment 1966 and 1967, respectively, and

(4) Further and in the alternative that the employment of the Management Services of Airport Services Limited, by the Appellants in the operation of their businesses, was a bona fide commercial transaction, and as such does not fall within the intendment of Section 10 of the Income Tax Law 1954."

The Statement of Case filed by the Respondent in respect of Campbell and Company sets out the following material facts -

"(a) The Appellant, a company limited by shares, and formerly known as E. S. Campbell and Company Limited, was incorporated on the 27th April, 1956.

(b) On the 17th May, 1968, the said Appellant Company changed its name to E. S. Campbell and Company (1968) Limited.

(c) The Appellant Company was established to carry on the business of, inter alia, restaurant keepers, refreshment room proprietors and licenced victuallers, and at all material times was providing catering services for the airlines which used Montego Bay Airport, and held a concession to operate all catering services at that airport.

(d) By agreement dated third day of October, 1961, between the Appellant Company and Airport Services Limited, a company incorporated in Jamaica and having its registered office at Palisadoes Airport, the Appellant Company having roquested Airport Services to arrange and supervise the operations of its catering services at Montego Bay Airport, it was agreed, inter alia, as follows:-

"(i) Airport Services would manage and supervise the operation of the concession in a good efficient and prudent manner and would use its best endeavours to see that the concession referred to in sub-paragraph (c) hereof was operated to the complete satisfaction of all

parties ..../

parties in particular the Airlines.

(ii) The Appellant Company would pay Airport Services by way of remuneration, an amount of £100 for the first year and an amount equivalent to 95% of the net profits of Campbells for the second and each subsequent year until the termination of the Agreement, such amount to be paid annually ... in no case later than the 31st December of each year ..."

(e) At all material times the same persons were directors of both the Appellant Company and Airport Services Limited.

(f) By letter dated the 17th August, 1966, the Respondent agreed with Messrs. Price Waterhouse and Company, then auditors of the Appellant Company, that the latter's statutory and chargeable income for the Year of Assessment 1966 was nil, subject to, inter alia, information as to whom management fees of Thirty Six Thousand, Eight Hundred and Forty Nine Pounds (£36,849) and concession fees of Fifteen Thousand One Hundred and Twenty Seven Pounds (£15,127) were paid.

(g) By letter dated 1st September, 1967, Messrs. Peat, Marwick, Mitchell and Company presently auditors of the Appellant Company, wrote to the Respondent indicating that there had been an error in the Appellant Company's tax computations for the Year of Assessment 1966, and making a claim for tax deducted at source from dividends.

(h) By letter dated the 13th October, 1967, the Respondent replied to Messrs. Peat, Marwick, Mitchell and Company enclosing for agreement, an amended computation showing a chargeable income for the Year of Assessment 1966 of Five Hundred and Sixty Three Pounds (£563), the tax due on this chargeable income being Two Hundred and Eleven Pounds Two Shillings and Six Pence (£211.2.6), the tax deducted at source from the dividends being Nine Hundred Pounds (£900). The net refund of Six Hundred and Eighty Eight Pounds Seventeen Shillings and Six Pence (£688.17.6) was carried forward by the Respondent to be set off against the tax payable by the Appellant Company for the Year of Assessment 1968.

(i) In or about 1969, the Respondent discovered that the sum of Fifty Five Thousand, Two Hundred and Seventy Two Dollars ($55,272) which it had allowed the Appellant Company to deduct for tax purposes from its gross income as being fees paid for management services and an expense wholly and exclusively incurred in acquiring its income for the Year of Assessment 1966, had in fact been paid to Airport Services Limited, a company which was, at all material times, under the control of the same group of persons who controlled the Apellant Company, and which had gone into voluntary liquidation in or about 1967.

(j) Accordingly, the Respondent taking the view that the said alleged manegement fee had been paid for the purpose of reducing the amount of tax which ought to have been paid by the Appellant Company, and being of the opinion that the said Appellant Company had been assessed to a less amount than that with which it ought to have been charged, wrote to the Appellant on 3rd December, 1969 and subsequently assessed it for the Year of Assessment 1966, by Notice dated the 31st December, 1969, to an additional chargeable income of Fifty Five Thousand, Two Hundred and Seventy Two Dollars ($55,272).

(k) To...

(k) To this Notice of Additional Assessment, Messrs. Peat, Marwick, Mitchell and Company, by letter dated the 20th January, 1970, received by the Respondent on the 2nd February, 1970, gave formal Notice of Objection on behalf of the Appellant Company.

(l) In or about 1967, the Respondent assessed the Appellant Company for the Year of Assessment 1967 to a statutory income after allowances and a chargeable income of Three Thousand, Two Hundred and Fifty Eight Pounds (£3,258).

(m) By letter dated 26th September, 1967, received by the Respondent on the 29th September, 1967, Messrs. Peat, Marwick, Mitchell and Company gave formal Notice of Objection to the assessment referred to in sub-paragraph (1) hereof, on the ground that the Appellant Company had not been credited with tax deducted at source from its dividends, and claimed a tax refund of Nine Hundred and Twenty Six Pounds Twelve Shillings and Six Pence (£926.12.6).

(n) The Respondent subsequently amended the Appellant Company's computation for the Year of Assessment 1967 to show a statutory income after capital allowances, and a chargeable income of Three Thousand, Nine Hundred and Seventy Pounds(£3,970), and a net tax refund of Nine Hundred and Eleven Pounds and Five Shillings (£911.5.0), which he carried forward to be set off against the tax due by the Appellant Company for the Year of Assessment 1968.

(o) In or about 1969, the Respondent discovered that the sum of Seventy Thousand, One Hundred and Ninety Dollars ($70,190) which it allowed the Appellant Company to deduct for tax purposes from its gross income as being a management fee and an expense wholly and exclusively incurred in acquiring its income for the Year of Assessment 1967, had in fact been paid to Airport Services Limited, a company which was, at all material times, under the control of the same group of persons who controlled the Appellant Company, and which had gone into voluntary liquidation in or about 1967.

(p) Accordingly, the Respondent taking the view that the said alleged management fee had been paid for the purpose of reducing the amount of tax which ought to have been paid by the Appellant Company, and being of the opinion that the said Appellant Company had been assessed to a less amount than that/which it ought to have been charged, assessed the Appellant Company for the Year of Assessment 1967 by Notice dated the 12th December, 1969, to an additional chargeable income of Seventy Thousand, One Hundred and Ninety Dollars($70,190).

/with

(q) To this Notice of Additional Assessment, Messrs. Peat, Marwick, Mitchell and Company gave, by letter dated the 20th January, 1970, received by the Respondent on the 2nd February, 1970, formal

Notice .../

Notice of Objection on behalf of the Appellant Company.

(r) The Notices of Objection referred to in sub-paragraphs (k) and (q) having been received, the Respondent, by letter dated the 19th February, 1970 addressed to Messrs. Peat, Marwick, Mitchell and Company, invited them and the directors of the Appellant Company to attend on him on the 17th March, 1970, to discuss the relationship between the said Appellant Company, Airport Services Limited and Liner Diner (1968) Limited, a company which was, at all material times, under the control of the same group of persons who controlled the Appellant Company and Airport Services Limited.

(s) At a meeting with the Respondent on the 17th March, 1970, Mr. Hugh Hart, a director of the Appellant Company, explained the circumstances which gave rise to the relationship between the Appellant Company, Airport Services Limited and Liner Diner (1968) Limited. He stated, inter alia, that prior to 1961, the Appellant Company was providing catering services for the airlines using Montego Bay Airport, and at that time, a Mr. DeLisser who had the catering concession for the Bay Roc Hotel, was supplying Pan American Airways with catering facilities at Montego Bay Airport. It was agreed with Mr. DeLisser, he continued, that they could operate more economically by combining their efforts, and, subject to his obtaining renewal of his agreement with Pan American Airways, it was arranged that he would be allocated 25% of the issued capital of the Appellant Company if he were able to persuade Pan American Airways and Bay Rock Hotel to transfer their catering agreements to the Appellant Company This was subsequently effected, Mr. Hart said, and the agreement between the Appellant Company and Mr. DeLisser consequent upon that transaction, would be made available to the Respondent for inspection. In 1961, he continued, the catering concession at Palisadoes Airport was due for renewal. At that time the concession was operated by Mr. McNaught through his company Liner Diner Limited. It was agreed between Mr. Campbell of the Appellant Company and Mr. McNaught, that the Appellant Company would not apply for this concession in opposition to Liner Diner Limited, provided that if the latter were sucessful in its application, the total operations of the two companies would be combined, and that Mr. McNaught would receive 20% of the equity in the combined business. He further stated that, in view of the fact that the Authority granting the catering concession would require details of the shareholdings in any company to which the concession was granted, and would require to be notified of any changes therein within 12 months of the granting of the concession, it was decided that no shares in either Liner Diner Limited or the Appellant Company would be transferred to give effect to the agreement between Mr. Campbell and Mr. McNaught. It was agreed that a third company to be known as Airport Services Limited would be formed, and that the shareholdings in this company would be arranged so that Mr. McNaught would have a 20% equity and Mr. Campbell and Mr. DeLisser, the balance. It was further agreed that the profits of the Appellant Company and Liner Diner Limited would be transferred to the new company, in order that the total profits might be divided between the parties concerned in the manner agreed. The parties concerned, he continued, entered into written agreements with each other in order to implement this arrangements, and those agreements would be produced to the Respondent for inspection.

(t) By letter dated 7th May, 1970, received by the Respondent

on ..../

on the 8th May, 1970, Messrs. Clinton Hart and Company forwarded to the said Respondent, the following documents:

(i) The original Articles and Memorandum of Association of Airport Services Limited.

(ii) The original Articles and Memorandum of Association of E. S. Campbell and Company Limited.

(iii) The original Articles and Memorandum of Association of Liner Diner Limited.

Messrs. Clinton Hart and Company also stated in the same letter, that the books of account of Airport Services Limited could not be located, and were being reconstructed.

(u) By letter dated 8th May, 1970, Messrs. Peat, Marwick, Mitchell and Company informed the Respondent that, further to the interview of the 17th March, 1970,

> "the amounts debited for directors' salaries and travelling and entertaining represented the proportionate amount borne by Airport Services Limited of the total amounts paid under the respective headings to the directors, by E. S. Campbell and Company Limited."

(v) By letter dated the 14th May, 1970, Messrs. Peat, Marwick, Mitchell and Company forwarded to the Respondent a photocopy of the reconstructed general ledger of Airport Services Limited up to the 15th January, 1967, the date of its cessation of trading.

(w) By letter dated the 23rd December, 1970, received by the Respondent on the 30th December, 1970, Messrs. Peat, Marwick, Mitchell and Company forwarded to the Respondent, photocopies of the management service agreements dated the 3rd October, 1961, between Liner Diner (1968) Limited and Airport Services Limited, and between the Appellant Company and Airport Services Limited.

(x) At a subsequent meeting on the 9th July, 1971, between the Respondent, the directors of Liner Diner (1968) Limited, the Appellant Company and Messrs. Peat, Marwick, Mitchell and Company, the notes of the meeting of the 17th March, 1970, and in particular the statement referred to in sub-paragraph (s) hereof, were read, and the directors present were asked whether the information relating to the situation obtaining between the companies concerned as recorded in the statement referred to in sub-paragraph (s) hereof, was correct. Mr. E. S. Campbell agreed that it was substantially correct, and there were no dissentions from this except that Mr. Hugh Hart pointed out that at a later stage in the meeting he had specifically denied the suggestion that the payments to Airport Services Limited were distributions of profits, and had maintained that

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the payments were payments for management services.

(y) By letter dated the 15th July, 1971, addressed to Messrs. Peat, Marwick, Mitchell and Company, the Respondent asked to be provided with a list of the shareholders and the amounts of their shareholdings, in Liner Diner (1968) Limited, the Appellant Company and Airport Services Limited. The Respondent also enclosed with that letter and for their comments, a copy of the notes of the meeting of the 9th July, 1971.

(z) By letter dated the 22nd October, 1971, addressed to Messrs. Peat, Marwick, Mitchell and Company, the Respondent asked for a reply to his letter of the 15th July, 1971. The Respondent received no reply to this letter.

(aa) The Respondent, having examined, inter alia, the Memorandum and Articles of Association of the Appellant Company, Liner Diner (1968) Limited, and Airport Services Limited, as well as the photocopy of the reconstructed general ledger of Airport Services Limited and the Management Services agreements referred to in sub-paragraph (w) hereof, and having taken into account the fact that Airport Services Limited had ceased trading on the 15th January, 1967 and gone into voluntary liquidation, formed the view that the said agreements were not normal commercial agreements, and that the said reconstructed general ledger showed that Airport Services Limited was a vehicle set up by those who controlled the Appellant Company and Liner Diner (1968) Limited, to apportion the profits of these companies as they saw fit. The Respondent will therefore rely, at the hearing of this Appeal to this Honourable Court, on all the matters set out in the documents referred to in this sub-paragraph.

(bb) In the light of the matters set out in sub-paragraph (aa) hereof, the Respondent concluded that the alleged management fees referred to in sub-paragraphs (i) and (o) hereof, were not expenses wholly and exclusively incurred in acquiring the Appellant Company's income.

(cc) Accordingly, by Notices of Decision dated the first day of June, 1972, the Respondent confirmed the Appellant's Additional Assessment for the Year of Assessment 1966 at a chargeable income of Fifty Five Thousand, Two Hundred and Seventy Two Dollars ($55,272), and the Additional Assessment for the Year of Assessment 1967 at a chargeable income of Seventy Thousand, One Hundred and Ninety Dollars ($70,190).

(dd) Against these Notices of Decision, the Appellant Company has now appealed to this Honourable Court."

The Statement of Case in respect of Liner Diner was in substantially similar terms, except that it related to a catering concession at the Palisadoes Airport.

In due course Replies to the foregoing were filed and served by the Appellants. They are also in substantially similar terms, and that of

Campbell .../

Campbell & Company reads as follows:-

"1. TAKE NOTICE that the Appellant herein Admits the material facts set out in paragraph 2 of the Respondent's Statement of Case, but the Appellant will say that the Respondent has no justification whatsoever in forming the view and/or concluding as set out in the sub-paragraphs (aa) and (bb) thereof, in particular that the said agreements were not normal commercial agreements and that the Airport Services Limited was a vehicle set up by those who controlled the Appellant's Company and Liner Diner (1968) Limited to apportion the profits of those companies as they saw fit and that the alleged management fees referred to in sub-paragraph (i) and (o) thereof were not expenses wholly and exclusively incurred in acquiring the Appellant Company's income."

As will be seen from these Pleadings the basic facts relevant to these two Appeals are not really in dispute. What however, is in dispute are the proper inferences to be drawn from those facts, and their application to the tax computations of the Appellants for the relevant years of assessment.

Although this has been a very difficult and complicated case, lasting nearly seven weeks and in the course of which I was referred to some eighty or more different authorities, I am happy to say (thanks largely to the industry and enterprise of Counsel on both sides) that the issues are, at the end of this rather long day, fairly clear in my mind. I therefore propose, so as not to prolong this Judgment unduly, to deal with the matter as briefly as is consistent with the mass of evidence and the various contentions of the parties.

Mr. Grant for the Appellants, in a wide ranging argument, of which I think it can truly be said that every point that could reasonably be urged in support of the Appellants' case, was put forward, made a series of submissions in respect of Grounds 1 and 2, which were argued together.

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The main burden of those contentions was that the Respondent, when acting under Section 47 of the Law, and in particular under Section 47(4) thereof, was carrying out a judicial function; or in the alternative, was exercising a discretion of a judicial nature; and was therefore required to act in a judicial manner, and in accordance with settled principles of law and the rules of natural justice, including specifically, the audi alteram partem rule, and including also, certain implied legal requirements namely, that there should not be an excess or abuse of the discretionary power by exercising it for an inadmissible purpose, or on irrelevant grounds or without regard to relevant considera tions, or with gross unreasonableness.

Having stated these principles, Mr. Grant then went on to submit that on the evidence, the Respondent, in making these additional assessments had acted unlawfully and without jurisdiction by failing to offer the Appellants an opportunity first to be heard, and by taking into account irrelevant factors and excluding others which were relevant.

Among the irrelevant factors allegedly taken into consideration by the Respondent were the following:-

(1) that the Appellants were controlled by the same set of shareholders who controlled another company, namely Airport Services Limited;

(2) that there was a common set of directors between the Appellants and that third company;

(3) the reconstructed general ledger of a company other than the Appellants, as well as the fact that that other company had gone into liquidation.

Among the relevant factors allegedly not taken into consideration were the following:-

(1) that under the Comapnies Act a company is a separate entity from its shareholders;

(2) that an individual, under the Constitution of Jamaica, has a right to be a member of any number of companies, and to hold as many directorships, as he wishes.

(3) that a Board of Directors owes a fiduciary duty to the company it manages, and that common Boards of Directors owe separate duties to their various companies.

(4) that the management of a company is vested in its directorate and as such, they are entitled to take ..../

take any decisions which they subjectively feel to be bona fide in the interest of the company;

(5) that between the Appellants and Airport Services Limited there existed a legally binding contract which governed the relationship between them at all times;

(6) that Airport Services Limited did function as a company, performed the services in question, made its tax returns to the Respondent and paid tax thereon.

Several authorities were cited by Counsel on this particular aspect of the case, but I need not refer to them in any detail here. Suffice it to say, that after due examination of those authorities and upon a consideration of the wording of Section 3 and 47 of the Law, I am satisfied that the function of raising assessments or additional assessments imposed upon the Respondent by the statute is administrative rather than judicial in nature, and while it may be true to say that in hearing objections to such assessments, after they have been made, he may be required to act in a quasi-judicial capacity, in that he may at that stage be called upon to hear evidence, weigh it and come to some conclusion thereon, the function is none the less administrative in nature, and I can find nothing in the authorities cited or in the wording of the statute, which supports the view canvassed by the Appellants as to his being required, as a condition precedent to the raising of these assessments, to first offer them an opportunity to be heard.

Section 47 amply provides for the taxpayer to be heard by way of an objection to the assessment once raised, and to construe it as also requiring him to be heard prior thereto would be placing upon the language of the section a strained construction and would in fact create the very multiplicity of hearings which some of the authorities cited, indicate are best avoided. See for example Lord Pearson in Wiseman v. Borneman (1971 A.C. 297 at p. 547; and see also C.I.R. v. Pearlbergh (1953) 1 W.L.R. 331 and the observations of Lord Denning therein as to the appropriate remedy in tax cases.

Counsel for the Appellants argued, quite strongly, that the initial act of raising the assessment was of the utmost importance, since it fixed finally the amount of the property of the citizen which was being claimed by the State, and which if not objected to within the specified period, becomes absolutely binding upon him as a debt due to the Crown; and he urged that it was therefore crucial for the taxpayer to be heard prior to the issue of an assessment so as to avoid the dire

consequence./

consequence of having to surrender property to the state in circumstances which, if explored in time, could have resulted in no liability attaching. I cannot accept this argument, which ignores the clear right conferred upon the taxpayer to object to an assessment if dissatisfied therewith, and other provisions in the Law which empower the Respondent to accept late objections due to illness, absence from the Island or other reasonable cause, and which provide for the collection of tax to be suspended while such objections are outstanding; all of which, apart from providing ample protection for the citizen against any such dire circumstances as suggested by Counsel, seems to me to recognise explicity the very frailty and uncertainty in human affairs upon which he relied.

Section 47 so far as is relevant reads as follows:-

> "(4) Where it appears to the Commissioner that any person liable to tax in respect of the year of assessment 1951 or any subsequent year has not been assessed or has been assessed to a less amount than that which ought to have been charged the Commissioner may, within the year of assessment or within six years after the expiration thereof, assess such person at such amount or surcharge, as according to his judgment ought to have been charged:
>
> Provided that where any form of fraud or wilful default has been committed by or on behalf of any person in connection with or in relation to income tax assessments, additional assessments and surcharges on that person to income tax for that year may, for the purpose of making good to the Crown any loss of tax attributable to the fraud or wilful default, be made as aforesaid at any time:
>
> Provided further that any person who disputes such assessments, additional assessment or surcharge, may appeal to the Revenue Court in the same manner as an appeal may be made against an assessment."

On the wording of this subsection, I understand the following to be the position:-

(1) Section 47(4) confers upon the Respondent a power to assess any person where it appears to him that such person is liable to tax, but has either, not been assessed at all, or, has been assessed to a less amount than that at which he ought to have been charged;

(2) that when under the subsection, the Respondent is raising additional assessments, he need not be in possession of any new facts, and it will be sufficient to ground such an assessment, if he merely changes his mind about the legal effect of facts already disclosed and agreed;

See Celon Finance Company Limited v. Ellwood 40 T.C. 176, and Parkin v. Cattell. Tax Leaflet 2405.

(3) that .../

(3) that the Respondent when exercising these powers must act fairly and reasonably, by which I mean that he must not act capriciously but upon the basis of material or information before him which is capable, at least, of establishing a prima facie case of liability; See Wiseman v. Borneman (1971) A.C. 297.

(4) that a taxpayer who is dissatisfied with any assessment raised under the subsection had a positive right to challenge the same, and to seek to have it quashed or varied by filing a Notice of Objection thereto, and to be heard in support of same;

(5) that since one of the ordinary English meanings of the word "assess" is "to estimate", the right conferred by the subsection to challenge or object to the assessment once it has been made, suggests that the word "assess" has been used in that context in the subsection, and is to be understood as implying that the assessment is simply the Respondent's estimate of the quantum of the taxpayer's liability under the Law, which estimate the taxpayer may either accept, or challenge in the manner laid down by the statute, as being erroneous either in fact or law, or in both;

(6) that when read in conjunction with Section 50 (7), the subsection indicates that immunity from further variations in such estimate is only achieved when the matter in question has been determined on appeal to this or some higher court, or, except in cases of fraud, after the expiration of six years from the end of the year of assessment to which the same relates; and finally

(7) that the subsection imposes no obligation upon the Respondent to offer the taxpayer an opportunity to be heard before raising an assessment, since the latter has been given a clear and unequivocal right to object thereto once it has been made, and to be heard in support of that objection; and it could hardly have been intended to confer such a right upon a taxpayer twice over as that would simply lead to a plurality of hearings and arguments, which,

apart .../

apart from being administratively burdensome, are, on the authorities, best avoided. See for example

Pearlberg v. Varty (1972) 1 W.L.R. 534

Ranaweera v. Weekramsinghe (1970) 2 W.L.R 491

Ranaweera v. Ramchandran (1970) 2 W.L.R. 520

Exparte Donald Hocks Morey O.B.D 11th May, 1971. (Not yet available in the Law Reports)

Where the subject (i.e. of the application of the Rules of Natural Justice to tax assessments and the nature of the functions of Income Tax Commissioners) is fully discussed. See also Wiseman v. Borneman (1971) A.C. 297 where Lord Reid, at page 408, states the following:-

> " Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a prima facie case, but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him."

So far as the present appeals are concerned, therefore, my duty under the law, as just stated, is to determine whether the Respondent, in raising these additional assessments, acted fairly and reasonably, and upon the basis of material properly before him. In that connection, Exhibit "A" 12, which is a letter from the Respondent to Messrs. Peat, Marwick, Mitchell and Company, Auditors and Accountants of the Appellants, contains the following statement:-

> "In connection with management fees charged in the accounts for the year ending 30th November, 1966 and the 16 months ended 30th November, 1965 I have now discovered that the recipient of these fees was in fact a company whose control appears to be vested in the same person having control of E. S. Campbell and Company Limited. In these circumstances, I cannot accept that any services could be rendered by the recipient company other than those services which would have to be provided by the Directors of E. S. Campbell and Company Limited by virtue of their office. I am now of the opinion that the management fees are not expenses or disbursements wholly and exclusively laid out or expended for the purpose of acquiring the income of that company."

A similar letter was written in respect of Liner Diner.

That extract from Exhibit "A" 12, when read against the background of the material facts set out in the Respondent's Statement of Case, indicates that the Respondent took the view on the

information ..../

information before him, that the Appellants appeared to be paying another company for services which their Directors were already under a duty to provide, and therefore that the expenditure thus incurred did not represent a disbursement or expense wholly and exclusively incurred in acquiring their income. I see nothing objectionable or unlawful in such an approach. Even if, as the Appellants contend, Airport Services Limited was an independent company performing real services under a real contract with the Appellants, it has been established since the William Flood case, that the Revenue may, in such circumstances, nevertheless question whether the payments sought to be deducted, are permitted by the Income Tax Acts. See Copeman v. William Flood Limited 24 T.C. 53 per Lawrence J., at page 56, where the following is stated:-

> "Mr. Donovan had argued, first, that it is not a question on this appeal as to the right amount which should have been paid; secondly, that the question is, did the Company pay those sums of money as directors' remuneration; thirdly, that if it did pay as directors' remuneration, then it follows that they were wholly and exclusively laid out for the purpose of the Company's trade. Therein, in my opinion, lies the fallacy of Mr. Donovan's argument. It does not follow that because the sums of money were paid to the directors as remuneration that they were necessarily wholly and exclusively laid out for the purposes of trade.
>
> Turning again to the Commissioners' decision I think it is perfectly true that the Commissioners cannot interfere with the prerogative of the Company to pay to its directors whatever it thinks fit, but they can find in a proper case that sums so paid are not wholly and exclusively laid out for the purposes of the trade, and it is their duty to direct their minds to that question and to that question alone. The only tribunal that can interfere with a company's prerogative to pay such sums as it chooses to the directors is the High Court in an appropriate case, but that has nothing to do with the Commissioners - the Commissioners have nothing to do with the internal economy of the company as a Company; they have solely got to see whether in making up proper Income Tax accounts the sums which are to be deducted are sums which are permitted by the Income Tax Acts. It may very well be that there are sums which are paid to the directors as remuneration for their services in accordance with the articles of association and in accordance with a resolution of the company, but it does not necessarily follow in the least that they are sums which are wholly and exclusively laid out for the purposes of the trade."

There is yet a further aspect of the matter to which I would like to refer before concluding my views on Grounds 1 and 2, and it is this.

Bearing in mind that these are additional assessments raised after previous discussions between the Respondent and the Appellants or their representatives, as indicated in paragraph (f) of the Respondent's Case, it is I think fair to point out that even if the submissions of Counsel for the Appellant as to the proper law to be applied had been acceptable, there would still have remained a reasonable area of doubt

as .../

as to whether the underlying facts upon which they were based, could in the circumstances, be said to have been satisfactorily established. Paragraph (f) supra, suggests that there was some discussion on the management fee when the original assessments were being settled, a circumstance which tends to negative the allegation of the Appellants that they were denied all opportunity of being heard on the subject matter of the additional assessments. Nevertheless since this point was not pressed during arguments, I do not propose to say anything further on it other than point out that the area of doubt exists.

On any view of the matter therefore, the arguments of the Appellants on Grounds 1 and 2 of their Appeal, must fail. There is no question here of the Respondent refusing to consider the constitutional right of taxpayers to be members of as many companies as they wish, or ignoring the fact that in law a company is a separate entity from its shareholders; what he did was to look at the claim submitted and the circumstances in which the payments were made, and having thus examined the matter reached the conclusion that the Appellants appeared to be claiming an allowance which did not, prima facie, meet the test laid down by the statute. I see nothing unlawful in that approach. It is my view therefore, and I so hold, that the Respondent, in raising the additional assessments herein, acted fairly and reasonably and on the basis of information properly before him, and otherwise consistently with the duty conferred upon him by the statute, and that the said assessments were therefore lawfully made.

I turn now to consider the Appellants case as set out in Grounds 3 and 4 of their Notice and Grounds of Appeal. These two grounds were also argued together on the basis that, in a certain sense, they overlapped. I propose however, to treat them separately for reasons which will presently appear.

Mr. Grant's arguments on Ground 3, specifically, may be summarised thus:-

(1) The Management Agreements herein under which the management fees were paid, had been entered into pursuant to the Memorandum of Association of each of the Appellants and, therefore, constituted transactions within the scope of their business as set out therein.

(2) So far as the Appellants were concerned, the payments clearly represented revenue expenditure since they were made so as to be able to earn profits under the catering concessions at both airports in question; - so far as Airport Services Limited was concerned, the payments represented receipts of its trade or .../

or business upon which tax had duly been paid.

(3) The Respondent in his original treatment of the matter had taken the correct approach; the Appellants, and Airport Services Limited, had been acting under the Agreement over a number of years and paying tax on that basis; and there was no justification whatever for his change of mind, since the deductions did not cease to be allowable merely because the parties were connected, or merely because the amounts were large, or because Airport Services Limited had gone into liquidation, or had made up its accounts in a particular way, or because a particular formula had been used to calculate the amount of the consideration.

(4) The Agreements were valid and legally binding upon the parties, all of whom had so treated them over the years. Management expenses are legitimate business expenses. The interest payments were in that category and were clearly made for the purpose of earning profits, they were ordinary commercial transactions between the Appellants and Airport Services Limited.

(5) The Respondent had been led into error by regarding the connection between the Appellants and Airport Services Limited as being of particular significance, when clearly, on the authorities, that was not a particularly relevant factor; The transactions were bona fide commercial transactions, intra vires the Appellants, entered into by them in good faith and for the purpose of better earning profits from the two catering concessions, by placing them under a common management so as to avoid wasteful duplication and overlapping. The Directors of the Appellants, as prudent businessmen mindful of their duties to the two companies, were entitled to effect such transactions if they thought them to be in

the .../

the best interests of the companies.

(6) Accordingly, the sole question for this Court on this point, was whether the arrangement for the payment of the management fees was an ordinary commercial transaction, entered into by the Appellants in good faith, and for the purpose of earning pfofits from their trades; and since, on the facts, that was clearly so, then the amounts claimed should have been allowed, and the Respondent was therefore wrong in refusing to so treat them.

Before dealing with these submissions, it may be necessary to state briefly my understanding of the relevant law on this aspect of the case.

8 The question whether or not a certain payment is to be regarded as expenditure wholly and exclusively incurred in acquiring income, and if so, to what extent, is one which frequently arises in tax cases. This is perhaps inevitable, since the tax is imposed on the net profits, and in the nature of things, disputes will frequently arise between the Revenue and taxpayers as to whether or not a certain payment falls within such a category. Under the Jamaican Law, the relevant statutory provision is at Section 8(1) of the Income Tax Law 1954, the opening words of which read as follows:-

"8. (1) For the purpose of ascertaining the chargeable income of any person, there shall be deducted all disbursements and expenses wholly and exclusively incurred by such person in acquiring the income -

(i) where the income arises from emoluments specified in paragraph (c) of subsection (1) of section 5 of this Law, during the year of assessment; and

(ii) where the income arises from any other source, during such time as is provided for in section 6 of this Law,

and such disbursements and expenses may include -"

The section then proceeds to list under separate paragraphs, examples of such expenditure, some of which do not, I confess, readily fall within any accepted concept of revenue expenditure;

however, .../

However, that need not detain us here, since the list is not, on the wording of the subsection, exhaustive, and expenditure not so listed will still be allowable if it falls within the opening words of the section as constituting - "disbursements and expenses wholly and exclusively incurred in acquiring the income". It follows of course, that such expenditure will only be allowable where it satisfies both of the conditions laid down, i.e. it must be both wholly as well as exclusively incurred, in acquiring the income.

The expression "wholly and exclusively" has not been without judicial criticism in the past, nevertheless, its meaning must now be regarded as settled by the considerable body of case law, which exists on the point, and a large portion of which was cited in the instant case. Having examined those cases, I find that I can do no better than adopt, for purposes of this judgment, the statement of the relevant principles to be gleaned therefrom, as submitted by Counsel for the Respondent, who put the matter very accurately and very fairly, and in respect of which I hope nothing will be lost from my attempt to repeat them here in a more truncated form. They are as follows:-

(i) The onus of proving that the payment was wholly and exclusively incurred in acquiring the income, lies on the taxpayer.

(ii) The word "wholly" relates to the quantum of payment; therefore, unless it can be shown that the whole of the payment had been exclusively incurred in acquiring the income, it will not be allowable

Alternatively, only so much of the payment as the evidence shows had been exclusively incurred in acquiring the income, may be deemed allowable under the section.

(iii) The word "exclusively", relates to the purpose for which the payments were made. If the sole purpose was for acquiring the income, then it will be treated as allowable even though it necessarily invloves other consequences beneficial to the taxpayer.

(iv) On the other hand, if two or more purposes for the payment exist, and one of them is not the purpose of acquiring the income, then no part of the payment can be treated as allowable, even though the business purpose predominates.

(v) The fact that the payment was made pursuant to a

legal ..../

legal document, does not, ipso facto, qualify it as expenditure wholly and exclusively incurred in acquiring the income.

(vi) In deciding whether or not expenditure has been wholly and exclusively incurred in acquiring income, the Court is entitled to have regard, not merely to the fact of payment, but to all the circumstances surrounding the same with a view to discovering, on an objective basis, what was the real reason for the payment.
See Bentleys, Stokes and Lowless v. Beeson 33 T.C. 491. and Ransom & Higgs (1972) 2 All E.R. 817; where the foregoing is fully discussed.

Before attempting to apply those principles to the facts of the instant case, it is necessary to say a word or two about the evidence, and certain inferences which the Court was invited to draw from that evidence. Most of these relates principally to Ground 4 and to the arguments on that ground dealing with artificial or fictitious transactions, and therefore need not be dealt with at this stage; there is however, one aspect of the evidence which is in my view directly relevant to Ground 3, and I propose to deal with it here because, if it represents an accurate statement of the motives of the Appellants for making these payments, it will have a fundamental effect upon the outcome of this appeal.

That evidence, or at any rate most of it, is to be found in Exhibit "A" 4, which is a note of a meeting which took place in the Income Tax Department between the Respondent and some of the Directors of the Appellants and Airport Services Limited, on the 17th March, 1970. At that meeting explanations were put forward by Mr. Hugh Hart, a Solicitor, and a Director of all three companies, of the circumstances which led to the incorporation of Airport Services Limited, and of the reasons for the payments to that Company of the sums in question; and I set out below the relevant portions thereof, as recorded in the exhibit:-

"It was agreed that a third company known as Airport Services Ltd. be formed and that the shareholdings in this company be arranged so that Mr. McNaught would have a 20% equity and Mr. Campbell and Mr. DeLisser (and a few others) the balance. It was further agreed that the profit of E. S. Campbell..../

E. S. Campbell and Co. Ltd and Liner Diner Ltd. be transferred to this company in order that the total profits might be divided between the parties concerned in the manner agreed. The parties concerned entered into written agreements with each other in order to implement this arrangement and these agreements would be made available to the Department for inspection.

Dunning: Are you saying then Mr. Hart that the sums charged by Airport Services Ltd for management expenses were really a device to ensure that the profits of E. S. Campbell and Co. Ltd and Liner Diner Ltd were transferred to Airport Services Ltd for the purposes of distribution in accordance with these agreements.

Mr. Hart I am not saying that at all. Airport Services Ltd provided management services and was paid for them".

Further exchanges then took place between Mr. Hart, and the two officers who were conducting the interview on behalf of the Respondent, about certain variations in the amounts actually paid under the agreement over a period. And then, near the foot of page 2 of the exhibit, the following exchange is recorded:-

"Mr. Howson: From what has been said at this meeting I am of the opinion that Airport Services Ltd has been set up as a vehicle for the receipt of profits of E. S. Campbell & co. Ltd and Liner Diner Ltd and for no other purpose

Mr. Hart: The company was set up for that purpose but also to manage the operations of those companies."

That last statement by Mr. Hart is of crucial importance to this case. I say that because if one puts aside for the time being any suggestion of artificial transactions, and accepts that Airport Services Limited had been set up as a vehicle for the receipt of the profits of the Appellants, as well as, to manage their operations, then that would mean that the payments in question contained two distinctly separate elements, one element being the payment of management fees, and the other, a transfer of profits for ultimate division in the manner agreed; a situation which in turn would mean that there would in fact be more than one motive for the payments, and that one of those motives(namely the need to transfer profits) excluded any concept of a disbursement incurred in acquiring income, since clearly, a payment consisting of a transfer of profits is a payment made after income has been acquired, rather than for the purpose of acquiring the same. The result therefore would be that all the payments would have to be disallowed, since they would not then represent expenditure exclusively incurred in acquiring income. See for example, Bentleys. Stokes and Lowless v. Beeson 33 T.C. 491;

in .../

in which the claim before the Court related to expenses incurred by a firm of solicitors in entertaining clients, and in which Romer L.J. at page 503 stated the following:-

> "The relevant words of paragraph 3 (a) of the Rules applicable to Cases I and II - "wholly and exclusively laid out or expended for the purposes of the profession" - appear straightforward enough. It is conceded that the first advert - "wholly" - is in reference to the quantum of the money expended and has no relevance to the present case. The sole question is whether the expenditure in question was "exclusively" laid out for business purposes, that is: What was the motive or object in the mind of the two individuals responsible for the activities in question? It is well established that the question is one of fact: and again, therefore, the problem seems simple enough. The difficulty however a ises, as we think, from the nature of the activity in question. But the question in all such cases is: Was the entertaining, the charitable subscription, the guarantee, undertaken solely for the purposes of business, that is, solely with the object of promoting the business or its profit earning capacity?
>
> It is as we have said, a question of fact. And it is quite clear that the purpose must be sole purpose. The paragraph says so in clear terms. If the activity be undertaken with the object both of promoting business and also with some other purpose, for example, with the object of indulging an independent wish of entertaining a friend or stranger or of supporting a charitable or benevolent object, then the paragraph is not satisfied though in the mind of the actor the business motive may predominate. For the statute so prescribes. Per contra, if in truth the sole object is business promotion, the expenditure is not disqualified because the nature of the activity necessarily involves some other result, or the attainment or furtherance of some other objective, since the latter result of objective is necessarily inherent in the act."

In passing, I may point out, that although Romer L.J. was their dealing with a statutory provision which, was not identical to that of Section 8(1) of the Jamaican Law. in which the words used are - "in acquiring the income", rather than - "for the purposes of the profession"' I attach no significance to that fact in so far as the instant case is concerned, since he was clearly dealing specifically with the word "exclusively" which is the same in both statutes and was used in the same context. I point this out because certain submissions were made by Counsel on a possible distinction to be drawn from the difference in the wording. However, having regard to the observations of Lord Davey in Strong & Company (Romsey) Limited v. Woodfield 5 T.C. 215 such difference or distinction as exists must clearly be marginal, and therefore of no particular significance in relation to the point with which I am now dealing.

The .../

The case of Bentley, Stokes and Lowless v. Beeson was considered and followed as recently as 1972, in Ransom v. Higgs (1972) 2 All E.R. 817, where in a passage beginning at page 843, Megarry J. dealt with the matter thus:-

> "The commissioners accordingly held that the outlay, having regard to s. 137 (a) of the Income Tax Act 1952, was not allowable as a deduction in computing the profits of Kilmorie's trade. The commissioners accordingly dismissed the appeal and confirmed the assessment. The basis of the decision was thus the duality of purpose of the outlay, so that the statutory words 'wholly and exclusively' were not satisfied.
>
> Counsel for the taxpayers' attack on this decision was based on the proposition that if a trader enters into what from his point of view is a trading agreement, and this provides for the trader to make certain payments, those payments must of necessity be laid out wholly and exclusively for the purposes of trade. He said that a contract was a trading contract if it was entered into in the ordinary course of the taxpayers' trade for the purposes of earning a profit under that contract; and if there was such a contract, everything that the taxpayer was obliged to pay under the compulsion of that contract was deductible. It will be observed that no word such as 'solely' or 'exclusively' entered into that definition of a trading contract. In answer to questions from the Bench, counsel for the taxpayers asserted that it mattered not that the payments were of a bizarre nature, having little or nothing to do with trade, or that it was the trader himself who procured the insertion into the contract of the obligation to make the payments. If a trader inserts into a trading agreement made with a friendly supplier of his a provision that once a month the trader is to take the supplier out to a dinner and theatre in London at the expense of the trader, then the cost of each evening's entertainment is a deductible expense. Counsel for the taxpayers did not demur to the mild comment that his contention at least had interesting possibilities in it; but he stuck to his guns.
>
> Counsel for the Crown developed those possibilities . On counsel for the taxpayers' theory, a trader who is voluntarily paying £1,000 a year to a friend or relative has only to have an obligation for him to make this payment inserted into a trading contract of his for the £1,000 a year to be translated from non-deductibility to deductibility. Counsel for the Crown also took a more fundamental point; for he rejected altogether any concept of a trading contract as having any special efficacy, and above all as being conclusive. He did not assert that such a contract was irrelevant, but said that it should merely be given due weight as one of the factors that might have some bearing on the matter. The true basis was factual, not contractual; if in fact the money was wholly and exclusively laid out or expended for the purposes of trade it was deductible, but otherwise it was not, whatever any contract might say. In support of his contention, counsel for the Crown cited

/Littlewoods ...

Littlewoods Mail Order Stores Ltd v. McGregor (Inspector of Taxes), and said that as one of the circumstances of the expenditure, a contractual obligation might help the taxpayer; but, he added (if I may put it in my own way), it could not per se make for the taxpayer a silk purse out of a sow's ear.

In addition to the Littlewoods' case, a number of authorities were cited, but none carried the point in either direction. From Strong Co. of Romsey Ltd v. Woodifield (Surveyor of Taxes) emerged the phrase of Lord Loreburn L.C, that the only losses that could be deducted were those connected with the trade 'in the sense that they are really incidental to the trade itself', and the words of Lord Davey that the disbursement 'must be made for the purpose of earning the profits'. From Smith's Potato Estates Ltd v. Bolland (Inspector of Taxes) one may take Lord Porter's statement that what has to be determined is 'whether the expense is incurred in order to earn gain', as opposed (on the facts of that case) to the application or distribution of that gain when earned. From that case also comes what in effect is a warning that in the end one must always return to the words of the statute itself, for it is those words which must be construed , and not any curial exegese of those words, however distinguished. The two cases on solicitors, Bentleys, Stokes & Lowless v. Beeson (Inspector of Taxes) and Bowden (Inspector of Taxes) v. Russell & Russell, deal respectively with the expenses of entertaining clients and the cost of a visit to law conferences in North America. The first of these cases shows that in the phrase 'wholly and exclusively', the word 'wholly' relates to the quantum of the expenditure, whereas 'exclusively' is directed to the purpose, or the motive or object, of the expenditure; and this is a question of fact. If the sole purpose of the expenditure was the promotion of business, the expenditure is deductible, even though it necessarily invloves other consequences, perhaps beneficial to the taxpayer. If, on the other hand, there are two or more purposes in making the expenditure, and one of them is not the promotion of business, then none of the expenditure is deductible, even if the business purpose is dominant.

. . . . . .

I return to the statute. Was the £19, 240 'exclusively laid out or expended for the purpose of the trade'? The Commissioners have in effect answered 'No'; and I do not think that there has been any successful challenge to that decision. Even if one assumes that the agreement under which the payments were made is correctly and significantly described as a 'trading contract', there seem to me to be two answers to counsel for the taxpayers' contentions. First, I think that he ascribes an unwarranted paramountcy to the trading contract. Let me assume (contrary to the findings of the Commissioners) that the 'trading contract' was entered into solely for trading purposes. Payments were due under that contract, and no doubt one purpose of a contracting party, in making payments under a contract is to perform his contractual obligations. But I cannot see why the existence of those obligations should necessarily exclude any other purpose in making the payments. There may be one purpose, or two or more purposes; and I do not see why a trading contract should be so powerful and predominant as necessarily to exclude any other purpose in making the payments. The trading contract must be considered with all the other surrounding circumstances, and may well be a highly important factor; but the payment is deductible only if at the end of the day it is found as a matter of fact that the payment was exclusively made for the purposes of the trade. I cannot see why any contract, even if it is a trading contract, should have the power to impress conclusively on any payment made under it the quality of being exclusively expended for the purposes of the trade. I bear in mind, too, that although contracts are enforceable, they are not always enforced, and they may be rescinded or varied.

Second ..../

> Second, the finding of the Commissioners in this case is that the agreement was entered into with dual purposes, one of which was for the development of the land and the other of which was to facilitate the scheme for avoiding liability to income tax. Even if one ascribes to a contract the power to impress its own character on payments made under it, to the exclusive of all else, that character will in this case be a dual character, and not the character of being made exclusively for the purposes of the trade as required by the statute. I should add that I have considerable hesitation about accepting the assumption on which I have considered these two points, namely, that the contract under which the payments were made is correctly and significantly described as a 'trading contract'. No doubt it may be convenient to describe certain contracts as 'trading contracts', and for other purposes there may (or may not) be some importance in the description. But in relation to s. 137 (a), it seems questionable whether a contract entered into with duality of purpose of this contract is correctly described as a 'trading contract'; and even if it is, I very much doubt whether, for the reasons that I have given, that description is of any real significance."

I have quoted from this Judgment somewhat extensively, because it deals incidentally with two of the other principles which I ennunciated earlier, namely, that the mere fact that the payment is made pursuant to an ordinary trading or commercial contract, does not ipso facto, conclude the issue, and secondly, that one is entitled to look at all the circumstances, and not merely at the fact of payment itself, in order to decide what was the reason or reasons for the same.

To return however, to Exhibit 'A' 4, and to the explanations by Mr. Hart contained therein; it is clear from the case to which I have just referred that where the expenditure, to which a claim under Section 8(1) relates, has been incurred for more than one purpose and one of those purposes was not that of acquiring the income, that expenditure is not to be treated as having been 'exclusively' incurred for the purposes of the section. Unless therefore, there is some evidence elsewhere in the instant case capable of amounting to a refutation or denial of the explanation given by Mr. Hart, or which places it in some different context as indicating that he could never have meant what he appears to have said, then his statement that Airpost Services Limited had been created as a vehicle for the receipt of profits from the combined business of the Appellants, as well as for providing a management service to that combined business, will amount to an admission that the disputed payments had not been made exclusively for the purposes of acquiring their incomes; an admission, moreover, which in my view would as I indicated earlier, be fatal to any chance of this Appeal succeeding. Because of this, one of the main questions with which I have been concerned in this case, is the extent to which that statement by Mr. Hart, is to be taken as representing an accurate explanation of the reasons for the creation of Airport Services Limited, and ultimately, for the disputed payments.

The meeting recorded in Exhibit 'A' 4, was followed by another on the 9th July, 1971, and a note of the latter is set out in Exhibit 'A' 10, where the matter is dealt with thus:-

> "Dunning said that he had had a discussion with Mr. Hart on the 17th March 1970 and that after due consideration

of .../

> of the Notes of that discussion this Department had formed the opinion that Airport Services Ltd. was formed as a vehicle for the receipt of the profits of Liner Diner Ltd. and E. S. Campbell & Co. Ltd. order that these profits might be distributed between the shareholders in the manner agreed.
>
> Dunning then read part of the Notes of interview of the meeting on the 17th March 1970 beginning on page one at "In 1961 the catering concession at Palisadoes Airport was due for renewal" and ending on page one at "these agreements would be made available to the Department for inspection."
>
> Dunning asked the Directors present if the information relating to the situation obtaining between the companies concerned as recorded in the passage he had just read out was correct. Mr. E. S. Campbell agreed that it was substantially correct and there were no dissentions from this except that Mr. Hugh Hart pointed out that at a later stage in the meeting he had specifically refuted the suggestion that the payments to Airport Services Ltd., were distributions of profits and had maintained that the payments were payments for management services. Dunning said that he was not trying to suggest that Mr. Hart had ever agreed to the Department's contentions on this point. The Department was aware that Mr. Hart disputed the Department's conclusions and this was recorded in the Notes of Interview of the 17th March 1970."

The passage in that excerpt which reads - "except that Mr. Hart pointed out that at a later stage in the meeting he had specifically refuted etc. etc." requires examination. The question is - was Mr. Hart in that passage refuting entirely the statement attributed to him in Exhibit 'A' 4, as to the dual motive for the payments, or was he merely pointing out that he had never accepted that the sole motive was to transfer profits, and was reminding those present, that at a later stage in the first meeting he had specifically said so, in relation to discussions on the management expenses?

The only witness who gave evidence before me was Mr. C. L. Campbell, who was a Director of all three companies and Secretary of Liner Diner. In that evidence Mr. Campbell, having been referred by Counsel to Exhibits 'A' 4 and 'A' 10, during cross examination, stated that he was present at the second meeting when the passage from Exhibit 'A' 4 was read, and in answer to a further question, he agreed that the passage contained a correct summary of the intention of the parties, that the said intention had in fact been carried out and that Mr. McNaught did in fact receive 20 percent of the equity in Airport Services Limited. During re-examination he stated that he expressed no dissent because Mr. Hart had already done so by

reference ../

reference to the reality of the management services. To the testimony of this witness must be added the statement in Exhibit 'A' 10 that Mr. E. S. Campbell, another Director, had agreed that the passage read to the meeting from Exhibit 'A' 4, was substantially correct and that there were no dissentions therefrom, excepting of course, that attributable to Mr. Hart and to which I have already referred. All together therefore, it appears from this evidence that all of the principals involved in this matter were agreed, that at least one of the reasons for the creation of Airport Services Limited, was to facilitate distribution of the profits of what was going to be a combined business. On that basis it seems to me that Mr. Hart's dissent as set out in Exhibit 'A' 10, could not have been intended as a denial of his earlier statement, but rather as a confirmation of it, in that he was attempting to emphasize that apart from any question of a distribution of profits, the payments also related to the provision of management services, and he was therefore not prepared to accept the view taken by the Respondent that Airport Services Limited had been created for the sole purpose of dividing the profits, so as to give effect to the agreement between the parties. This view of the matter is, to some extent, supported by the stipulation in the agreements that the consideration for the management services was to be 95 percent of the total profits of both Appellants. In this connection a reference to some of the actual payments made in the two relevant years is illuminating. To take the figures of Campbell & Co. as an example, one finds that for the first year of assessment they were as follows:-

> Out of a total net profit of approximately £38,784, the amount transferred or paid to Airport Services Limited was £36, 845, leaving a sum of £1,939 available for distribution to shareholders.
> In the following year out of a total net profit of £36,942, the amount paid was £35,095, leaving a sum of £1,847 for distribution among shareholders.

The figures for Liner Diner, were of similar proportions, and their magnitude tends to corroborate some of the evidence to which I have just been referring, and suggests that even if the payments did include a fee for management, they must also have included, as the evidence indicates they were intended to, an element of profit distributions, since I can find no other compelling reason for paying out practically the entire profits of the two Appellant companies

As I understand the matter, Airport Services Limited had only one salaried employee, in the person of Mr. E. S. Campbell, who incidentally was also Managing Director of Campbell & Co. and it is difficult to see what sort of management could have been provided by Airport Services Limited, with such a small staff, that could warrant a mamagement fee of such extraordinarily large proportions. The weight of the evidence therefore seems to suggest that in the two relevant

years.../

years, at any rate, the payments contained substantial elements of profit distribution.

Having therefore considered this aspect of the case, against the background of the foregoing, I have come to the conclusion, and I so find, that the payments made by the Appellants to Airport Services Limited during the relevant years of assessment were, on the evidence, made for more than one purpose, and that one of those purposes was not for acquiring income, but for dividing income already acquired from the combined business carried on by the Appellants. I also hold that there is no basis, on the evidence, whereby the payments could be apportioned.

The result therefore is that even if one takes the case put for the Appellants at its highest, and accepts the payments as genuine commercial transactions arising out of ordinary commercial dealings, the fact remains that they were made partly, at any rate, for the purpose of distributing profits, and for the reasons already mentioned, cannot therefore be accepted as disbursements or expenses wholly and exclusively incurred in acquiring income. The Appeal on this ground therefore, also fails, in that the Appellants have failed to satisfy me, on a balance of probabilities, that the expenditure to which their claims relate, comes within the provisions of the statute.

I now turn to Ground 4, under which in my opinion, two basic points arise for decision. They are -

(1) What is an "artificial or fictitious" transaction, within the meaning of Section 10(1) of the Income Tax Law 1954? and

(2) Do the transactions in the instant case or any of them, having regard to the evidence and the inferences to be drawn therefrom, come within that meaning?

Section 10(1) reads as follows:-

> "where the Commissioner is of opinion that any transaction which reduces or would reduce the amount of tax payable by any person is artificial or fictitious, or that full effect has not in fact been given to any disposition, the Commissioner may disregard any such transaction or disposition, and the persons concerned shall be assessable accordingly."

It is to be observed that the words "artificial" and "fictitious" are .../

are joined by the disjunctive preposition "or", a circumstance which, prima facie, suggests that they were not intended to be construed synonymously, but as having separate meanings.

I have been unable to find any provision in the United Kingdom tax legislation which is precisely equivalent to section 10(1), although versions of it apparently exist in the tax legislation of other former colonial territories. There was some suggestion during argument that the subsection might have been inserted in the Jamaican Law in 1939, to overcome the effect of the decision in the Duke of /490 Westmin-ster's case 19 T.C./, however, it is uncertain whether or not this is so, although it is clearly an anti-avoidance provision and must have been intended to provide the revenue with a weapon for dealing with tax avoidance schemes. As the case progressed it struck me that there might have been some similarity between this provision in the Jamaican Law, and Section 260 of the Australian Income Tax and Social Services Contribution Assessment Act 1936-60, as the latter has been construed by Lord Denning M.R. in Newton's case (1958)A. C. 450 at page 465; however, Counsel on both sides took a contrary view, and having considered the matter, I am not prepared to say that they are wromg.

So far as can be gathered, section 10(1) has never before been considered in any detail by a Jamaican Court, and I therefore find myself in the perhaps unenviable position of having to pursue the matter without benefit of precedent.

A number of authorities were, however, cited by Counsel for the Appellant with a view to showing that the words "artificial" and "fictitious", were known to the common law long before the introduction of the subsection into the Jamaican statute, and that Courts in the United Kingdom, and elsewhere, have more or less consistently construed them as being synonymous, and as meaning primarily, something that is feigned, or not real. It was therefore urged upon me that in the absence of any decision by a Jamaican Court directly on the point, the better course would be to follow the example in the cases cited and construe the subsection as applying only to transactions which were not real; I agree that some of the cases cited, suggest that the words have frequently been construed as having that meaning. However, in none of them was the Court in question dealing with a statutory provision similar to Section 10(1), although most of the examples cited were tax avoidance cases. While therefore, they may be useful as indicating some general frame of reference within which to approach the problem, one must in the end come back to the actual words used in the Jamaican Statute.

In the Shorter Oxford English Dictionary, one of the meanings

given .../

given to the word - "artificial" is -

> "made by, or resulting from, art or artifice - not natural"; and

one of the meanings given to the word - "artifice" is -

> "an ingenious expedient, a manoeuvre, device or trick".

In the same Dictionary, among several meanings given to the word - "fictitious", are two which, in my opinion, may be relevant. The first of these is as follows:-

> "artificial, counterfeit, sham, not genuine".

The other is -

> "feigned, assumed, not real".

Having regard, however, to what I have just stated about the use of the disjunctive preposition, I am inclined to view that the word "fictitious" has been used in the subsection in the sense of the second of these two meanings - i.e. as meaning a transaction which is "feigned, assumed or not real"; and "artificial" in the sense of something resulting from artifice, i.e. a device or trick.

There is, in my view, some justification for taking that approach. For example, no one would venture, I think, to suggest that an artificial flower is not real, in the sense of having an actual existence. It does exist, it has form, shape and size, and is therefore a real object or thing - it is real but pretending, within the context of its own reality, to be that which it is not, namely a natural flower; and its reality lies in the fact that it consists of paper rather than petals. In that sense therefore it is artificial without at the same time being fictitious. A distinction which some critics may regard as being too subtle, but which to my mind proves at any rate that a distinction exists.

While therefore it may be true to say that in a general manner of speaking these words can and are frequently construed as having the same or a similar meaning, it is I think equally true to say that they are also capable of having different meanings, even though that difference may be slight. On that basis therefore, I have come to the conclusion, and I so hold, that the use of the disjunctive preposition in the subsection indicates that in the present context they were not intended to be construed synonymously.

If therefore, I may express the matter in my own words, I would say that within the context of Section 10(1), a fictitious transaction is - one that has form but no substance, in the sense that none of the parties involved intend to createany real or legal

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relationship thereby, in short a feigned transaction. On the other hand, an artificial transaction is - one that has both form and substance, except that the form is used merely to disguise the substance; for example, a transaction in which commodities bought by a trade are sold at a loss, under the guise or pretence that it is an ordinary trading transaction, when in fact they were bought in the first place with the deliberate aim of selling at a loss, for the purpose of making a claim on the revenue. Here there is no question but that the transaction would be real, in that the commodity would in fact have been bought and in fact sold, and money would have passed, but when viewed as a whole, that is, by looking at its inception and the arrangements made initially, as well as the manner of its implementation, it is revealed as an artificial device remote from trade, even though superficially bearing some of the normal characteristics of such an operation. To suggest however, that it was not a real transaction in the sense of one that actually took place would seem to me to be putting the matter too high.

If I am correct in the view just stated, then it would follow that an artificial transaction must contain some element of deception, some concept of pretence, or of a device, some transaction for example, which is intrinsically outside the scope of ordinary commercial dealings, but which nevertheless is put forward as being within the same because, in form at any rate, it bears that complexion. I think it also follows from the use of the word "transaction" that some sort of arrangement between two or more persons must be involved. See for example Lord Morris in Lupton's case at page 679 of (1971) 1 W.L.R. 670. All of which therefore suggests that in deciding whether or not a transaction is caught by the subsection regard must be had not only to the transaction itself, but to all the surrounding circumstances, including the relationship between the parties, which in the case of a company would include its directors and shareholders. On this reasoning it would follow that an enquiry into the relationship that existed between the three companies involved in this Appeal, is essential to any determination of the question now before me.

Counsel for the Appellant, however, argued quite strenuously that this was not so, and that this Court was not concerned with any such relationship; as he put it, the search for artificiality ended once it was found that the management agreements were legally binding documents, which took effect, and were carried out by the performance of services and payment therefor. The veil of corporate personality could not be thrust aside, it was submitted, merely because the Respondent was suspicious, and when there was clear evidence that the transactions were real and formed part of genuine commercial activities entered into with a view to earning profits. Several authorities were cited in support of these submissions, including the well known case of Salmon v. Salmon & Company (1897) A. C. 22 and Bombay Trust Corporation

v. Income..../

v. Income Tax Commissioners (1936) 2 All E. R. 1697. Of these the last mentioned, that is the Bombay Trust case, is in my opinion the most relevant and important. In the report of that case an editorial note appears in the headnote, in the following terms:-

> "The Hong Kong Trust Corporation Ltd. lent money to the Bombay Trust Corporation Ltd. and the latter paid interest thereon. In respect of this interest the Hong Kong company was assessed to income tax in the name of the Bombay company as its agent under the Indian Income Tax Act 1922, ss. 42 (1) and 43, and such assessment was held good on appeal to the Privy Council. The loan was paid off through a common banker and a new loan from Arnold and Co. in China was substituted for it. All these companies, including the bankers, were closely associated companies and their share capitals were held almost exclusively by one family. The income tax authorities at Bombay disbelieving the reality of the transactions continued to assess the Hong Kong company in the name of the Bombay company as its agent:-
>
> HELD: all the evidence went to show that the transaction by which the lender was charged was a real one and as the tax authorities were unable to prove the contrary by evidence the assessment was invalid and must be discharged.
>
> EDITORIAL NOTE. The point here is of general interest, although only Indian income tax is dealt with. It is much to the advantage of wealthy companies which are closely associated by reason of their share capital being largely held by one family or set of directors to arrange their transaction so as to avoid payment of tax. There has long been authority for the statement that such avoidance of tax is a perfectly legal procedure and the present case carries the doctrine perhaps a stage further. Transactions are to be presumed to be legal unless they can be shown by evidence to be illegal and in income tax matters transactions are to be treated as real and not fake transactions unless there is evidence to prove their unreality. The authorities are not entitled to assume from the close relationship between companies that book entries misrepresent the transaction. They must show by evidence that there is such misrepresentation, and unless that evidence is produced they must accept the book entries and their legal result."

Counsel for the Respondent, perhaps not suprisingly, did not accept the approach put by Counsel for the Appellant, and cited sevral other authorities with a view to showing that this court was entitled to look through the corporate veil at the persons who controlled the companies, and their relationship one with the other, in order to get at the realities underlying the transactions. In at least one of these cases, the sanctity of the corporate veil has been challenged in its application to revenue law. That case is Littlewoods Mail Order Stores Ltd. v. MacGregor 45 T.C. 519 in which it would seem that the sacred cow of Salmon v. Salmon & Co. (1897) A. C. 22, avoided

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avoided being slaughtered by the narrowest of margins, at any rate in its application to tax cases. See for example p. 536 of the report, where Lord Denning M. R., after referring to the Land Securities case, 45 T. C. 495, deals with the matter thus:-

> "That case would be virtually indistinguishable from the present case but for the interposition in this case of the wholly-owned subsidiary, Fork Manufacturing Co. Ltd. If that subsidiary were indentified with Littlewoods, so as to be one with Littlewoods, the net result of the transaction would be that Littlewoods, could give up the 88 years outstanding at £23,444, a year and would get instead the freehold of Jubilee House, paying therefor a rent of £42,450 a year for 22 years. The case would then be on a par with the Land Securities case. Littlewoods would acquire the freehold of Jubilee House (a capital asset) by means of paying an extra £19,006 a year £42,450 less £23,444) for 22 years and nothing thereafter. The extra £19,006 would be paid for the capital asset and not be deductible. Mr. Heyworth Talbot was inclined to agree. But he said that the interposition of the Fork Manufacturing Co. Ltd. made all the difference, albeit it was a wholly-owned subsidiary of Littlewoods. He said that the Fork Manufacturing Co. Ltd. was to be regarded as a separate and independent entity, just as if its shares were owned by someone quite unconnected with Littlewoods. In that case the freehold of Jubilee House would be acquired by the Fork Manufacturing Co. Ltd. Littlewoods would have acquired no capital asset at all. They would be able to deduct the whole £42,450 a year. I cannot accept this argument. I decline to treat the Fork Manufacturing Co. Ltd. as a separate and independent entity.
> The doctrine laid down in Salamon v. Salamon & Co. (1897) A.C. 22 has to be watched very carefully. It has often been supposed to cast a veil over the personality of a Limited company through which the Courts cannot see. But that is not true. The Courts can, and often do, draw aside the veil. They can, and often do pull off the mask. They look to see what really lies behind. The Legislature has shown the way with group accounts and the rest. And the Courts should follow suit.
> I think that we should look at the Fork Manufacturing Co. Ltd. and see it as it really is - the wholly-owned subsidiary of Littlwoods. It is the creation, the puppet, of Littlewoods, in point of fact: and it should be so regarded in point of law. The basic fact here is that Littlewoods, through their wholly-owned subsidiary, have acquired a capital asset, the freehold of Jubilee House: and they have acquired it by paying an extra £19,006 a year. So regarded, the case is indistinguishable from the Land Securities case. Littlewoods are not entitled to deduct this extra £19,006 in computing their profits."

The Judgment of Karminski L. J. contains a somewhat similar approach,

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as is indicated by his comments at page 538, where he states the following: -

> "I agree that this appeal must be allowed, and desire to say only a very few words of my own on the question of the subsidiary company, Fork Manufacturing Company Limited. Mr. Heyworth Talbot, in what I hope I may be allowed to describe as a rear guard action conducted with enormous skill and equal good humour, had to rely on the confusion created by the subsidiary company in order to distinguish this case from the decision of the House of Lords in the Land Securities case; and his contention, as I understood it, was, rightly, that the Fork Company and the Respondents to this Appeal, Littlewoods, are two separate entities in Law, There is no doubt as to the correctness of that submission, based as it is on the rule in Salomon v. Salomon and Company, of many years standing. <u>But it is necessary here, as I think, to look at what I believe to be the realities of this situation.</u>"

The case of Littlewoods was decided some 30 or more years after the Bombay Trust case, and if there is any conflict between the two, Littlewoods case, must in my view, be accepted as representing the more modern judicial approach in tax cases, to questions involving closely connected companies; which approach I understand to be that the doctrine of the inviolability of the corporate personality must be approached with caution, and that there are circumstances in which a Court will remove "the mask", as Lord Denning puts it, in order to get at the underlying realities and the true relationship existing between parties. One of the most obvious examples of such a circumstances in my opinion is of course that presented in the instant case, where the question is whether or not a transaction is artificial of fictitious, and in which the need to ascertain that really lies behind the mask becomes a crucial factor. It is my opinion however, and I so hold, that there is no conflict between these two cases. The <u>Bombay Trust</u> case in my view is simply saying that if one is going to rely on the close relationship between companies in order to establish that a transaction is a fake, there must be some evidence pointing to the fact that what has been presented as genuine is not in fact so - book entries, for example, cannot be assumed to misrepresent the transaction merely because the companies are closely connected; in short, as the case states, mere suspicion is not enough.

If therefore one may summarise the principle to be extracted from these two cases and others which were cited in argument, I would put the matter thus:-

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> In deciding whether or not a transaction is artificial or fictitious within the context of Section 10(1), a court has a duty to examine all the circumstances surrounding the same with a view to seeing it as it really is, and to discovering what is the true relationship between the parties, and, where these happen to be closely connected companies, to enquire into their structure and their relationship with each other; but in doing so, the mere fact that companies share common directors and shareholders will not, by itself, render a transaction artificial or fictitious; there must be some evidence in the case from which it can be deduced that the transaction was part of some scheme or device in which an attempt has been made, perhaps clandestinely, to pass off as a genuine trading transaction something which is essentially an artificial device remote therefrom, or which is in some other way, properly to be regarded as feigned or unreal, and the result of which is to reduce the amount of tax which is payable, or would be payable. In short, a comprenhensive view of the matter must be taken, but, if after doing so it is then discovered that the transaction is palpably a trading transaction, the mere fact that a fiscal advantage was thereby obtained will not be fatal; if however, it is not palpably trading, then the opposite will be the case.

With that concept of the approach to be taken, to guide me, I turn now to an examination of the circumstances surrounding the transaction in the instant case, and I start with the evidence of Mr. C. L. Campbell, who, I am afraid, did not make a good impression as a witness, and was inclined to be evasive in some of his answers. For example, when asked why Airport Services Limited had been put into liquidation in 1967, his initial response was that he could not remember exactly, later, he said it had been done because the Appellants no longer needed a management service due to an improvement in their staff position, but when pressed, he admitted that

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the tax advantage to be gained from a liquidation was also another reason.

As I indicated earlier most of the evidence in this case consists of agreed facts, and the issue has turned chiefly on the inferences to be drawn therefrom; some of those facts, however, were not disclosed in the exhibits tendered, but arose during the evidence of Mr. Campbell. Having heard that evidence, and having examined the exhibits, I set out below my findings thereon. These are as follows:-

(1) That in 1961 when the "management agreements" were being negotiated, it was the view of the parties that there would be a considerable increase in the flow of air traffic towards the middle and late sixties, and consequently, that the profit potential of the two catering concessions involved would be extremely good during that period, and that this projection proved in fact to be correct.

(2) That Airport Services Limited did not keep a regular bank account.

(3) That on the alleged date (3rd October, 1961) of the execution of the two agreements with Airport Services Limited, the latter had not yet been incorporated, and therefore did not then exist as a legal entity, and so had no contractual capacity.

(4) That Airport Services Limited had only one salaried employee in the person of Mr. E. S. Campbell who was also Managing Director of Campbell and Company.

(5) That during the period from the incorporation of Airport Services Limited up to the date when it was put into liquidation, services were performed for the Appellants at a fee, by persons other than Airport Services Limited, and that some of those services were in the field of management.

(6) That there is no evidence that Airport Services Limited had any cash Transactions, despite the fact that some of the accounts tendered show that quite large sums were due to it by the Appellants.

(7) That ../

(7) That there is no clear evidence that the issued share capital of Airport Services Limited had actually been received by it.

(8) That the shareholders of the Appellants expected, having regard to the nature of the concession business, a return of some 20 percent on their investment in the two companies.

(9) That there was no indication in any of the original "management agreements" that any sum other than the agreed sums, could be paid thereunder; nevertheless, in the first year of agreement between Campbell and Company and Airport Services Limited, and in which the prescribed management fee was to be £100, the amount actually paid was £1,000, although Campbell and Comapny had made a loss of £5,843 in that year.

(10) That in the following year although Campbell & Company incurred losses amounting to £6,295, and was therefore ostensibly under no legal obligation to pay anything under the agreement, it nevertheless paid once more a fee of £1,000; and in the third year, although it made a profit of £5,180, and should therefore have paid as a management fee 95 percent of that figure, it again paid a fee of £1,000.

(11) That in the first year of the agreement between Liner Diner and Airport Services Limited, the former sustained losses and therefore had no obligation to pay anything, but nevertheless paid a fee of £1,000.

(12) That in the year ending July 1964 Liner Diner had a profit of £10,188 and should therefore have paid a fee amounting to 95 percent of that figure, but in fact only paid a fee of £1,000.

(13) That although further agreements were executed by the Appellants in 1964 purporting to vary the original agreements of 1961, in order to regularise the payments made

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contravention thereof and to which I have just referred in some of the years to which the new agreements were supposed to apply, the Appellants made no profits and could not therefore have been under a legal obligation to pay anything to Airport Services Limited, for those years.

(14) That in the accounts of Campbell and Company for 1968, that is the year subsequent to the liquidation of Airport Services Limited, and in which on the evidence of the witness Campbell, there was no longer supposed to be any further need for a management service, a management fee was nonetheless paid by Campbell and Company to another company.

(15) That although the management service to be supplied by Airport Services Limited related solely to management of the concessions, which in the case of Campbell and Company was only part of its total business, the agreement nevertheless prescribed a fee of 95 percent of the <u>total</u> profits of that company.

(16) That the Directors of the two appellant companies and of Airport Services Limited were aware of the fiscal advantages to be derived from a liquidation of the latter company; and, that the prospect of achieving that tax advantage was one of the reasons for liquidating the same.

(17) that no legally recognised step was taken by the Appellants, or Airport Services Limited, to cure the defect in the 1961 Agreements that arose from the lack of contractual capacity in the latter.

(18) That apart from its dealings with the Appellants, Airport Services Ltd. had no dealings or transactions with any other person.

(19) That there is an insufficiency of evidence as to what management services were specifically performed by Airport Services Ltd. in return for the fee it received.

(20) That the reconstructed General Ledger and Journal of Airport Services Ltd. (Exhibit 'A' 9) shows that various amounts allegedly paid

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by it, were in fact paid, either by Liner Diner or Campbell and Company, on its behalf.

(21) That the principal shareholders and directors of the Appellants held similar positions in Airport Services Ltd. and, in particular, that three of those Directors, i.e. Messrs. McNaught, DeLisser and E. S. Campbell, had considerable experience in the catering business.

(22) That for reasons which to them appeared sufficient, the parties to the decision made in 1961 to combine the operations of the two concessions, did not wish the Civil Aviation Department to know of the change in the shareholdings of the two Appellant Companies that would have been a consequence of that decision.

Looking therefore at all the surrounding circumstances evidenced by the foregoing, and in particular at the fact that:-

(i) the two Appellants and Airport Services Ltd. shared a common set of directors and shareholders;

(ii) the lack of any management skills in Airport Services Ltd. , other than Messrs. McNaught, DeLisser and E. S. Campbell, who were already under a duty, as Directors of the Appellants, to provide them with whatever management advice might have been necessary for the efficient operation of the catering concession;

(iii) the inconsistency with the other evidence, of one of the reasons given by the witness Mr. C. L. Campbell, for the liquidation of Airport Services Ltd. in 1967;

(iv) the explanations given by another Director, Mr. Hart, for the setting up of Airport Services Ltd;

(v) the absence of any cash transactions between the Appellants and Airport Services Ltd., and the failure of the latter to operate a bank account;

(vi) the transfer of funds from the Appellants to Airport Services Ltd. during periods in which, even if the management agreements had been validly executed, there would have been no legal obligation to transfer the same;

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(vii) the relative enormity of the consideration agreed to be paid for the performance of management services in a business from which, on the evidence of the witness Campbell, the shareholders expected a return of some 20 percent on their investment;

(viii) the wide difference between the fee and the amount paid to the one salaried employee of Airport Services Ltd;

(ix) the awareness of the Directors of all three companies of the fiscal advantages to be obtained from a liquidation of Airport Services Ltd;

(x) the expectation, in 1961 when the new operations began, that there would be a significant increase in air traffic towards the middle and late 1960s, and the fact that the same was fully realised;

I have come to the conclusion , and I so find, that the management agreements purported to have been executed in 1961, the alleged variation thereof in 1964, the transfer of 95 percent of the total profits of the Appellants to Airport Services Limited during the relevant years of assessment, together with the liquidation of the same in 1967 for the purpose of obtaining a tax advantage - were not genuine commercial transactions consisting simply of payments to a third party for management services, but were in reality part of an elaborate scheme embarked upon by the Appellants for the purpose of obtaining a fiscal advantage and for distributing the profits of their combined business.

I therefore hold that on the facts, these transactions are both fictitious and artificial, within the meaning of Section 10(1) of the Income Tax Law 1954. They are fictitious in so far as they consisted of payments made to Airport Services Ltd. under agreements which were purportedly valid, but which in fact bound no one, since on the date of their alleged execution that company had neither legal existence nor contractual capacity; and there is no evidence to show that this defect in their validity was ever cured by the Appellants, as could, as a matter of law, have been done. They are artificial in that, on the totality of the evidence and a proper appreciation of the underlying realities, they do not constitute genuine commercial transactions, but are in fact links in a chain or artificial device remote therefrom, the result of which was to reduce ultimately the amount of tax payable by the Appellants.

Nor do I consider the fact that Airport Services Ltd. submitted income tax returns and paid income tax on the amounts it received, as affecting or qualifying in any way, the conclusions

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which I have come. That Airport Services Limited should have done so was, in my judgment, an essential link in the chain of devices, the object of which was to transfer the bulk of the profits of the Appellants to Airport Services Ltd. and then at some appropriate time liquidate the latter, so as to save tax on one complete year of those profits, by having the 'cessation provisions" of section 6 of the law, applied thereto; and the only way that this could have been accomplished was for Airport Services Limited to hold itself out as a company in receipt of taxable trading profits. It must be remembered that in cases of this sort, a Court should not confine itself to a mere examination of the ingredients of the transactions, but should also recognise, or at any rate bear in mind, that its totality may be different from the mere sum of its parts. Viewing the matter comprehensively therefore and with due regard to the underlying realities, these transactions considered as a whole, may be described, if I may respectfully echo the words of Lord Donovan in Lupton's case, as - the planning and execution of a raid on the Treasury using the technicalities of revenue law and company law as the necessary weapons.

For these reasons, as well as for those already stated in respect of the third ground of appeal, it follows that this appeal must be dismissed; and it is hereby ordered that the decisions of the Respondent herein in respect of both Appellants for the years of assessment 1966 and 1967 are to be confirmed, and the Appeal dismissed with costs to be taxed or agreed.

Sgd.

(D. W. Marsh)
Puisne Judge - Revenue Court
12th April 1973.