1935 *Present :* **Akbar S.P.J. and Koch J.**

ANGLO-PERSIAN OIL CO., LTD. *v.* COMMISSIONER OF INCOME TAX.

162—(Inty.) Income Tax Special

Income tax—Contract for sale of fuel oil made in London by company registered in U. K.—Delivery to shops at Colombo by company's agent—Payment in London—Profits not arising in or derived from Ceylon—Agent not instrumental in selling or disposing of property in Ceylon—Ordinance No. 2 of 1932, ss. 5 and 34.

A contract was entered into in London by the appellant company, which was registered in the United Kingdom, for the sale of fuel oil (which was not a product of Ceylon) to shipowners, whose ships call at Colombo. Delivery of the oil was to be made at Colombo by the agent of the company who stored his own oil as well as the oil of the company, payment being made in London on receipt of telegraphic advice of the quantity delivered each time. The shipowners were bound to purchase all their requirements from the company, the latter undertaking to have ready at Colombo sufficient oil to satisfy all their requirements.

Held, **that the profits of the company from the contract were not liable to income tax under either section 5 or section 34 of the Income Tax Ordinance.**

The profits of the company arise from contracts made in London and it cannot be said from the mere act of delivery of the oil in Ceylon that the profits "arise in or are derived from Ceylon" within the meaning of section 5 of the Ordinance.

Section 34 is intended to include contracts which have been entered into as a result of efforts of agents in Ceylon of a foreign principal even when such contracts have been finally concluded outside Ceylon.

THIS was a case stated for the opinion of the Supreme Court under section 74 of the Income Tax Ordinance. The facts are stated by Akbar J. as follows :—

The appellant is the Anglo-Persian Oil Company, Ltd., registered in the United Kingdom, and its agent in Ceylon is the Anglo-Persian Oil Company (Ceylon), Ltd., also registered in the United Kingdom. The appellant company enter into contracts in London with shipowners whose ships call at various ports including Colombo. In Colombo the appellant company, although it has no place of business, stores its fuel oil with its agent, the Ceylon company, which has its place of business in Colombo where it trades in fuel oil as part of its business. A specimen form of the contract is attached and under it the appellant company undertakes to supply fuel oil for the requirements of the shipping company's vessels at certain named ports including Colombo and at a stated price per ton. The shipping company on its part binds itself to buy from the appellant company all the oil requirements of its vessels at the named ports and the total estimated tons of oil for all the ports are also stated. The minimum quantity which the shipping company undertakes to buy and the maximum quantity which it may require the appellant to deliver during the period (which is also fixed) are also stated. Clause 3 provides that the prices include delivery f.o.b. where there are direct pipe lines, but where delivery is by barge (as in Colombo) the shipping company pays an extra sum also paid per ton. The appellant company's weights and measurements are to be accepted as conclusive but the shipping company may also be represented at the measuring to verify the correctness of the measurements. By clause 5 payment is to be made in London by cash nett on receipt of the appellant's agent's telegraphic advice of the quantity delivered. By clause 7 the shipping company had to give the appellant's agents at the named ports forty-eight hours notice of each delivery required. Clause 9 states that each delivery shall constitute a separate contract. The appellant has the right to suspend or cancel the contract in the event of the shipping company failing to make the payments provided in the contract and in certain other contingencies not material to this case.

According to the fact stated the agents of the appellant, *i.e.*, the Ceylon company store the appellant's oil and its own oil in tanks built on premises leased out from the Crown by the Ceylon company for the latter's own business. When a ship belonging to a company which has entered into a contract with the appellant arrives in Colombo a representative of the Ceylon company visits the ship and ascertains the requirements of oil and the required quantity is brought in lighters belonging to the Ceylon

company and delivered to the ship. A document of delivery and acceptance is signed by representatives of the ship and the Ceylon company and a copy of this document is sent by the Ceylon company to the appellant in London.

H. V. Perera (with him *F. C. W. Vangeyzel* and *G. E. Chitty*), for assessee, appellant.—The question in this case is whether the Ceylon company "sells or disposes of or is instrumental in selling or disposing" of oil stored in bulk in Ceylon so as to give rise to taxable profits. The contract of sale is made in London between the London company and the shipowner and the latter has an option of taking oil or not, according to his requirements in Colombo. The oil is the property of the London company, and if the shipowner wants oil in Colombo the Ceylon company merely delivers the oil, acting under a contract of service between it and the London company.

"Disposes" must be construed in this context as equivalent to "sells", and it is clear on the facts of the case stated that the Ceylon company is certainly not a seller. Is it, then, instrumental in selling? The function it performs is only ministerial and if that was within the section then the labourer who pumps the oil or the boatman who takes the lighter out to the ship are equally 'instrumental'. Mere delivery of goods which are covered by a contract made abroad cannot come within the ambit of the section: compare the function of the Post Office when it delivers goods sent V.P.P. by foreign sellers. It even collects the purchase price, whereas in the present case the Ceylon company has nothing to do with payments for the oil it delivers.

Counsel cited *Erichson v. Last*[1], *Crookston v. Furtado*[2], and *Lovell & Christmas v. Commissioner of Taxes*[3].

M. W. H. de Silva, Acting S.-G (with him *H. H. Basnayake*, C.C.), for respondent.—The matter for decision is whether the assessee is liable to be assessed for income tax, not whether he is liable under a particular section only.

There is a difference between our law and the English law on the point arising for decision. The English law speaks of "trade exercised" while our Ordinance speaks of "business transacted". (*2 T. C. 607*). Of the two expressions business and trade the former has a wider meaning. In a taxing statute words should be given their ordinary meaning, not a technical one (*12 T. C. 567*).

The place of agreement is not always the place where the business is transacted. The test is where is the most important step in the business taken. There the business is transacted and the profit arises.

The contract before the Court is an agreement to sell and an agreement to purchase—one party undertakes to sell and the other undertakes to buy. It does not specify that any particular quantity should be sold at any port to which the agreement extends. In considering the contract section 1 of the Sale of Goods Ordinance should be looked at. The quantity of oil to be delivered is discussed and agreed to at Colombo. Clause 9 of the contract provides that each delivery shall constitute a separate sale. A contract of sale includes sale and agreement of sale. They are two separate matters—the agreement and the sale.

[1] *8 Q. B. D. 414.* [2] *(1911) S. C. 217.* [3] *(1908) A. C. 46.*

The profit bearing transaction is completed in Ceylon. Delivery is the most important step in the whole transaction. Without delivery no profit can arise. Though the agreement is made outside Ceylon the sale takes place here.

The Solicitor-General next addressed the Court on the expression "dispose of" and "instrumental in selling or disposing of" in section 34 of the Income Tax Ordinance and thereafter dealt with section 5 (2) of the Ordinance.

The following cases were cited—*Smith v. Greenwood*[1], *Turner v. Rickman*[2], *Belford v. Mace*[3], and *Grainger & Son v. Gough*[4].

Cur adv. vult.

July 30, 1935. AKBAR S.P.J.—[After stating the facts:—]

The assessment was in respect of profits which it is claimed the appellant company must have made from the supply of oil to the shipping company's ships calling at Colombo. The question to be decided is whether on these facts the appellant company is liable to be taxed under the Ordinance. The case for taxation was solely put before the Board on the ground that the liability to be taxed arose under section 34 of the Ordinance, and it was urged for the appellant that the sole question to be decided by us was whether section 34 applied. The Deputy Solicitor-General, however, contended that it was open to us to decide this case upon an interpretation not only of section 34 but also of the general section 5 of the Ordinance. As the case sent up to us for our opinion is (as it is expressed in paragraph 12) "whether the appellant company is liable to pay income tax upon the facts set forth above" we were of opinion that it was necessary for us to interpret both sections. There was another reason for this course. Section 34 is supplementary to section 5 and, as I shall indicate later, was presumably drafted to catch up cases which were likely to escape the net cast by section 5 according to certain English decisions. It would be necessary therefore to consider both sections and if, in the result, we came to the conclusion that section 34 did not apply but that section 5 did, our decision will lead to no practical benefit to the appellant company. Apart from this, as I have said, paragraph 12 of the case stated is wide enough to allow us to consider both sections. (See *per* Atkin L.J. in *Armayo & Co. v. Ogston*[5].)

On the case stated and the contract, it is quite clear that the contract was signed in he United Kingdom for delivery of oil in Ceylon (which is not a product of Ceylon) by the appellant's agents in Ceylon and that the price was paid in the United Kingdom. The oil belonging to the appellant company is mixed up with the oil of the local company and stored in the Ceylon company's stores. The Ceylon company would be paid for this storage and also for their services to the appellant company by the appellant which payment would be liable to taxation under section 5. The Ceylon company appears to be nothing more than an agent for delivery of oil; the quantity, the price, the conditions and method of delivery having been already fixed by a contract entered into in England.

[1] *8 T. C. 193.*
[2] *4 T. C. 25.*
[3] *13 T. C. 539.*
[4] *3 T. C. 471.*
[5] *(1925) 1 K. B. 109.*

By section 5, income tax is payable in respect of profits and income, in the case of a person not resident in Ceylon (as in this case) if they arise in or are derived from Ceylon. I do not think the profits of the appellant company arise in Ceylon or are derived from Ceylon. In my opinion the profits of the appellant company arise from the contracts made in England and not from the mere act of delivery in Ceylon made in pursuance of the contract. If the oil delivered is the product of Ceylon one may contend that the profits arose in or are derived from Ceylon, just as the income from a tea estate in Ceylon may be said to arise in Ceylon even though the non-resident owner sold the tea on contracts made in the country of his domicile. But the oil is not the product of Ceylon, and it is oil that has been shipped to Ceylon. Nor do I think that the profits have been derived from Ceylon; the word "derive" implies that the source of the profits or income must be Ceylon. If the local Government can reach the income derived by an agent in England who is paid for his services in England on behalf of a person resident in Ceylon by the latter, such income may possibly be said to be derived from Ceylon. In my opinion these two words "arise" and "derive" were meant to include the case of the Ceylon company when it makes any profits or gets any income for anything done in Ceylon and the case of a non-resident owner deriving his income from an estate in Ceylon.

On the facts stated in this case, although the generality of the words has not been restricted, I think the words mean nothing more than its definition in sub-section (2) of section 5. Otherwise, a foreign merchant sending goods sold on a contract made outside the Island and when the price is also paid outside Ceylon to a purchaser in Ceylon would be liable to be taxed when the goods are sent to an agent in Ceylon for delivery or even when they are sent by post. It is the same distinction between trading *with* a country and trading *within* a country pointed out by Lord Herschell in *Grainger & Son v. Gough* [1].

In section 3 (2) the words used are "business transacted in Ceylon whether directly or through an agent", whereas the words in Schedule D of the English Act are "trade exercised within the United Kingdom". In my opinion the words mean the same thing. In *Lovell & Christmas, Ltd. v. Commissioner of Taxes* [2], the Privy Council interpreted the words "income derived from business" in the New Zealand Act as more or less equivalent to the words in the English Act. Sir Arthur Wilson said as follows in his judgment:—"The language of the English Income Tax Acts and that of the New Zealand Act are not identical, but there is sufficient similarity in substance to make the English decisions authoritative as to the principles to be applied to the interpretation of the Colonial Act". The Privy Council applied the principles of the English decisions even though the sales were of produce shipped by growers in New Zealand in and under arrangements and contracts made in New Zealand for sale by the appellant company in England. "The rule seems to be that where such contracts, forming as they do the essence of the business or trade, are habitually made, there a trade or business is carried on within the meaning of the Income Tax Acts, so as to render the profits liable to income tax". There is a series of English decisions

[1] (*1896*) *A. C. 325.*

(*1908*) *A. C. 46*

beginning with *Erichsen v. Last* [1], down to quite recent times in which the deciding factor was held to be the place where the contracts were made. In some of those decisions, the three essential points, the place where the contract was made, the place where delivery was to be made, and the place where the price was to be paid—were considered but the crucial test was laid down as the place where the contract was made. In *Maclaine Co. v. Eccott* [2], the Lord Chancellor said as follows :—" The question whether a trade is exercised in the United Kingdom is a question of fact, and it is undesirable to attempt to lay down any exhaustive test of what constitutes such an exercise of trade ; but I think it must now be taken as established that in the case of a merchant's business, the primary object of which is to sell goods at a profit, the trade is (speaking generally) exercised or carried on (I do not myself see much difference between the two expressions) at the place where the contracts are made. No doubt reference has sometimes been made to the place where payment is made for the goods sold or to the place where the goods are delivered, and it may be that in certain circumstances these are material considerations ; but the most important, and indeed the crucial, question is, where are the contracts of sale made ? Statements to this effect by Lords Justices Brett and Cotton in *Erichson v. Last* (*supra*) were quoted with approval in this House in the case of *Grainger v. Gough* (*supra*) ; and the same principle was the basis of the decisions in *Werle v. Colquhoun* [3] ; *Lovell & Christmas v. Commissioner of Taxes* [4] ; *Greenwood v. Smith* [5] ; and *Wilcock v. Pinto* [6]. The decision in *Crookston v. Furtado* [7] may probably be supported for the second reason given by the Court, namely, that the profits there in question had not been received by the agents ; but on the question first discussed, namely, as to the place where the trade was carried on, I think that the reasoning of Lord Dundas is to be preferred to that of the other members of the Court ".

This case was followed by the House of Lords in *Muller & Co. (London), Ltd. v. Commissioner of Inland Revenue* [8], and Viscount Dunedin referred to the remarks of Lord Shaw in the former case.

In the case before us the contract is made in England and the price is to be paid in England, and only the delivery is to be made in Ceylon. The Deputy Solicitor-General argued that the delivery was to be regarded as decisive in this case, for he said it regulated the price and he quoted the cases of *Turner v. Rickman* [9], and *Crookston Bros. v. Furtado* [10]. In the former case it is true that Wills J., while holding that the contracts were concluded and the deliveries made in the United Kingdom, was of opinion that even if the contracts had been made in New York, the delivery of the goods here would by itself have constituted an exercise of trade in this country. But Wills J.'s remarks were *obiter* and although it is referred to in the dissenting judgment of Lord Dundas in *Crookston Bros. v. Furtado* (*ubi supra*) he preferred to follow the other decisions of the English Courts. In *Maclaine v. Eccott* (*supra*) Viscount Cave preferred the reasoning of Lord Dundas.

[1] *8 Q. B. D. 417.*
[2] *42 Times L. R. 416.*
[3] *4 Times L. R. 396 ; 20 Q. B. D. 753.*
[4] *24 Times L. R. 32 ; (1908) A. C. 46.*
[5] *38 Times L. R. 421 ; (1922) 1 A. C. 417.*
[6] *(1925) 1 K. B. 30.*
[7] *(1911) Scot. C. 217 ; 5 Tax Cases 602.*
[8] *(1928) A. C. 48.*
[9] *4 Tax Cases 25.*
[10] *5 Tax Cases 602.*

Lord Shaw's remarks are as follows :—" But I may be allowed before doing so to add but a few words to those of the Lord Chancellor in regard to the case of *Crookston v. Furtado* (*supra*). It humbly appears to me that the judgment of the majority of the learned Lords of the Second Division was erroneous. I think the weight of authority upon the subject in England was much too lightly treated. As illustrated of this I may cite the following passage from Lord Salvesen's judgment :—" I am fully aware ", says he (it was a clear case of a contract completed in England), " that my opinion runs counter to some dicta of the English Judges, and especially to the dictum of Lord Justice Brett in the case of *Erichsen* (*8 Q. B. D. 414*), which was quoted without disapproval in the subsequent case of *Grainger* (*12 Times L. R. 364 ; (1896) A.C. 325*), and from which it might be inferred that the fact that a foreign company makes its contracts in England for the sale of its goods there, even when it does so through an agent, is of itself sufficient to constitute an exercise of trade by a foreign company so as to render it amenable to assessment under our fiscal law ".

" My Lords, in the case of *Grainger* (*supra*), Lord Herschell said :—

" In all previous cases contracts have been habitually made in this country. Indeed, this seems to have been regarded as the principal test whether trade was being carried on in this country. Thus in *Erichsen v. Last* (*supra*) the present Master of the Rolls said :—" The only thing we have to decide is whether, upon the facts of this case, this company carry on a profit-earning trade in this country. I should say that whenever profitable contracts are habitually made in England, by or for foreigners, with persons in England, because they are in England to do something for or supply something to those persons such foreigners are exercising a profitable trade in England even though everything to be done by them in order to fulfill the contracts is done abroad ".

" It appears to me that it gives insufficient weight to the important judgment in *Grainger's case* (*supra*) to treat it as having quoted the observations of Lord Esher in *Erichsen v. Last* (*supra*) ' without disapproval ', and I agree with Lord Dundas that Lord Herschell agreed with and approved of Lord Esher's expressions.

" I go so far as respectfully to adopt as my own the judgment of Lord Dundas, who dissented from the majority of the Second Division Judges, and in particular to accept his statement to this effect :—" I now come to the last and, as I think, the most important question of fact, namely, whether or not the contracts of sale by the company were made within the United Kingdom. In my opinion, they were so made. It is admitted that ' the appellants have authority to sell the company's phosphates at or over minimum prices fixed by the company. The appellants make the sales without reference to the company. It is left to the appellant's discretion to whom to sell '. Crookston Brothers, therefore, are not mere canvassers for orders, to be approved or rejected by their principals, but have full authority to make contracts of sale, so long as the price they contract for is not below the prescribed minimum ".

" Lord Dundas gives a careful citation of the authorities and considers that if he is right in holding that the sales were made in this country it

follows from the decisions and particularly from the opinion in *Grainger v. Gough (supra)* that the company exercised a trade here.

"I humbly think that both Mr. Justice Rowlatt and the Court of Appeal were right in disregarding *Crookston v. Furtado* (*supra*) and in holding that it did not correctly interpret the Income Tax Acts in the particular mentioned".

So that according to the English decisions the business of the appellant company, must be held so far as liquid fuel was concerned to be transacted not in Ceylon but in England. The Deputy Solicitor-General, however, argued (and this part of his argument also affected the position that he took up with regard to section 34 to which I shall refer later) that the contract which was signed in the United Kingdom was nothing more than an agreement to sell and that the sale proper took place in Ceylon as each delivery was made. (See section 1 of the Sale of Goods Ordinance, No. 11 of 1896.) I do not think that this is so on the statement of facts set out for the opinion of this Court. Paragraph 5 states as follows:—"The Ceylon company store the oil of the appellant company and other oil in which the Ceylon company deals, in tanks belonging to them . . . . Considerable stocks of oil are stored in these tanks to meet the obligations of the appellant company in respect of contracts entered into in London by the appellant company with various shipowners whose ships are likely to call at Colombo".

Paragraph 6 states that under the contracts the shipping company undertakes to purchase their whole requirements of fuel oil from the appellant company at the port of Colombo . . . . and that, therefore, the appellant company has to have ready and available various quantities of oil at the various ports to meet the various contracts. The contract provides for a fixed price per ton of oil, and the minimum quantity which the shipping company undertakes to buy during the period of the contract and the maximum quantity which the shipping company may require the appellant company to supply during the contract period are both fixed by the contract.

Paragraph 11, sub-paragraph (3), also makes it clear that the appellant company store their oil in the Ceylon company's tanks in Colombo. At the time the contract was entered into there was an agreement to sell as well as an agreement to buy all the oil required by the shipping company's ships calling at Colombo; the oil was stored by appellant in Colombo and the minimum and maximum quantities were fixed in the contract. The oil was to be delivered in Colombo according to the requirements of each ship as it came to Colombo. These contracts are entered into by business men, who will have no difficulty in calculating the exact oil requirements at each port during each month.

It seems to me that in these circumstances the intention was that the property in the oil stored in Colombo passed to the shipping company at the time the contract was signed, the exact quantity being limited by the requirements of all the ships of the shipping company calling at Colombo and only the delivery was to be made in instalments in Colombo to suit the convenience of the buyer.

Section 18 of Ordinance No. 11 of 1896 begins by stating that "unless a different intention appears", the rules enumerated in it are to be

applied. The intention in this contract, it appears to me, was to transfer the property in the oil at the time the contract was entered into in England and that only the delivery was to be made later at intervals according to the requirements of the buyer from time to time. It is to be noted in this connection that it is the buyer who has to notify in the first instance his requirements for each ship as it arrives in Colombo. (See *Turley v. bates*[1]). The Ceylon company's duty was merely to measure out the quantity required and give delivery to the ship. I cannot, therefore, subscribe to the contention that the contract signed in London was an agreement to sell and that each delivery in Colombo by the Ceylon company was an actual sale by the latter on behalf of the appellant company.

The Deputy Solicitor-General referred to clause 9 of the contract as supporting his view, but far from supporting him, there is a reason for its insertion. The whole contract is a contract for sale of oil to be delivered by stated instalments. Under section 30 (2) of the Sale of Goods Ordinance, No. 11 of 1896, where there is a breach by the seller in the delivery of any one or more instalments or by the buyer to take delivery it is a question in each case, depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated It was to emphasize this aspect of the contract that the parties inserted clause 9. It puts into relief that the main contract was the one entered into in England, and unless the facts were so strong as to justify a Court in setting aside the whole contract, a breach or any number of breaches of the delivery or acceptance of delivery were only to be compensated by damages. It seems to me that the appellant company is not liable to be taxed under section 5 on the kind of contract before us. Thus there remains the further question whether the Crown can tax the appellant under section 34 which was the only contention of the Commissioner before the Board of Review. In *Grainger & Son v. Gouhg* (*supra*) the House of Lords held as follows :—" A foreign merchant who canvasses through agents in the United Kingdom, for orders for the sale of his merchandise to customers in the United Kingdom, does not exercise a trade in the United Kingdom within the meaning of the Income Tax Acts, so long as all contracts for the sale and all deliveries of the merchandise to customers are made in a foreign country ". This is the headnote of the case, but as I have already said the reference to the delivery was made because there was such delivery outside the United Kingdom in that particular case. What Lord Herschell said was as follows :—" In all previous cases contracts have been habitually made in this country. Indeed this seems to have been regarded as the principal test whether trade was being carried on in this country ".

In my opinion section 34 was inserted in the Ceylon Ordinance to include contracts which have been entered into as a result of the efforts of agents in Ceylon of a foreign principal, even when such contracts have been finally concluded outside Ceylon. This seems to be the intention of the draftsman when one considers the words " is instrumental in selling

[1] *2 H. & C. 200.*

or disposing". It is difficult to construe section 34, but the words in lines 5 to 8 "and whether the insurance, sale or disposal is effected by such person or by or on behalf of the non-resident person outside Ceylon" must be read *singuli in singulos* as follows: to give the section a meaning "and whether the insurance, sale, or disposal is effected by such person or when such person is instrumental in effecting any insurance sale or disposal, the insurance, sale or disposal is effected by or on behalf of the non-resident person outside Ceylon". Otherwise there will be an insurance, sale or disposal effected simultaneously by the separate acts of both the person in Ceylon and his principal outside Ceylon.

I cannot accede to the Deputy Solicitor-General's argument that each delivery in Ceylon was a sale or disposal by the agent, for reasons which I have stated previously. Nor can I accede to his argument that the words "sells or disposes" will include a mere delivery in Ceylon of goods already sold by a contract made outside Ceylon by a non-resident person through a mere agent for delivery in Ceylon of the non-resident person. The word "disposal" was used, I suppose to include contracts other than sales proper disposing of property, *e.g.*, barters or exchanges. The sale or disposal when it refers to the person in Ceylon means in my opinion a sale or disposal by the person in Ceylon on behalf of his foreign principal as a definite legal act and does not include a mere delivery by an agent in Ceylon of goods sold in pursuance of a contract made outside Ceylon.

My opinion that the sale or disposal in reference to the agent in Ceylon can only mean a sale or disposal by the agent is confirmed by the words in lines 4 and 5 "whether such property is in Ceylon or is to be brought into Ceylon". Therefore the sale or disposal must be a complete legal act of the agent transferring title. The section is meant, as I have said, to catch up acts of canvassing which result in contracts of selling or disposing outside Ceylon if the Crown can prove that the agent was instrumental in getting the sale or disposal fixed. In my opinion, the appellant is not liable to pay income tax upon the facts stated and he is entitled to his costs at the hearing of this case which will be taxed by the Registrar and the fee of Rs. 50 paid by the appellant under section 74 (1) will be refunded to him.

KOCH J.—

The appellant, the Anglo-Persian Oil Company, Ltd., being dissatisfied with the decision of the Board of Review, has requested the latter to state a case for the opinion of this Court on a question of law. That question is whether the appellant company is liable to pay income tax upon the facts set forth.

It would appear that the decision of the Board that the appellant was liable was solely confined to his liability under section 34 of the Income Tax Ordinance, and when the learned Deputy Solicitor-General sought to reason that on the facts stated the appellant was also liable to be taxed under the provisions of section 5 of this Ordinance, appellant's Counsel objected. I do not think there is any force in the objection in view of the terms of reference to us. We are asked generally for our opinion on the law on the facts as stated. The objection therefore must be overruled.

There is also the utility point of view which is worth considering, and that is that nothing will be gained by the appellant if he succeeds under section 34 but continues to be liable under section 5. The authorities will proceed to tax him duly under section 5. It is as well therefore that his liability be tested under section 34 and section 5 respectively.

The facts stated by the Board have been fully recapitulated by my brother and there is no purpose to be served by my repeating them.

I shall first deal with the question of the liability of the assessee under section 34 of the Ordinance. The contention of the Commissioner of Income tax before the Board of Review that the assessee was liable was confined to this section. This section presents some difficulty, but I am of opinion that after careful consideration it is clear that on the facts stated liability to pay does not attach to the assessee. This section makes provision for the liability of non-resident persons by reason of facts done by a person in Ceylon on behalf of a person resident abroad. These acts are specifically set out in the section. Firstly, the acts must refer to the effecting of a contract of insurance in Ceylon, or if the insurance is effected out of Ceylon by the non-resident person, the latter would nevertheless be liable if his agent in Ceylon was instrumental in bringing about the contract. I advisedly use the words " in bringing about " because I wish to emphasize the implication contained in the words " effects or is instrumental in effecting ", which precede the words " any insurance " and which to my mind must be confined to acts that precede the making of the contract and do not extend to acts that succeed such contract and may be necessary to implement it.

The same vein of intention on the part of the draughtsman, in my opinion, runs through the other contracts that follow, and that brings me to the second type of contracts set out, viz., sales. Here again the non-resident person would be liable if his agent in Ceylon sells any property on his behalf in Ceylon, whether such property is at the time in Ceylon or is to be brought into Ceylon ; the non-resident person will also be liable although the sale was actually effected by him, if in point of fact his agent in Ceylon acting on his behalf was " instrumental in selling " that property. Carrying out the idea already enunciated, I am of opinion that the words " instrumental in selling " means aiding or assisting in " bringing about " the contract of such sale, which but for such aid and assistance may never have come off. A very apt illustration of this may be negotiations on the part of the agent in Ceylon carried out in Ceylon that have led to the making of the contract of sale of property in Ceylon, or to be brought into Ceylon, between the principals, both of whom may be resident outside.

It has been strongly argued by the Deputy Solicitor-General that delivery is an integral part of a contract of sale ; in fact he pressed on us that is was the essence of such a contract, and this being so, he maintained that delivery having actually taken place in Ceylon, the non-resident seller was liable to pay tax on the profits he derived from the sale.

I regret that I cannot agree with this submission. Delivery is not, in my opinion, an essential requisite of a contract of sale to give it validity in every case, when entered into, although it may be a necessary consequence that follows in order to implement it.

Our Sale of Goods Ordinance, No. 11 of 1896, in section 4 (1) sets forth: "A contract for the sale of any goods shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or pay the price or a part thereof, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf". For a contract to be said to be "enforceable by action" there must be a contract of binding effect already entered into.

The second clause to this section says, that "the provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery".

If then a contract which provides for a future delivery of the "res" is nevertheless an enforceable contract, I cannot see that delivery is an essential of the contract such as the "res", "pretium" or "consensus" would be.

I do not agree with the learned Deputy Solicitor-General's argument that the contract in question was a mere agreement to sell and not a contract of sale, and that it only became a contract of sale when the Ceylon company "ascertained the requirements of oil" after the ship requiring oil entered the port of Colombo.

A contract of sale has been defined to be a contract when under its terms express or implied the seller transfers or agrees to transfer the property in the goods to the buyer. A sale takes place when the property in the goods transferred from the seller to the buyer, but where the transfer of the property in the goods is to take place at a future date, then when such time elapses, what until then was only an agreement to sell becomes a sale.

Reading the contract as a whole and taking into consideration the intention of the parties, regard being had to the terms thereof and also to the conduct of the parties and the circumstances of the case as has been required to do under section 17 (2) of our Sales Ordinance, I have little difficulty in coming to the conclusion that the understanding was that the property in the goods passed at the date the contract was entered into but the delivery was postponed for future dates. I am supported in this view by the circumstances that on the facts stated to us considerable stocks of oil are stored by the assessee in tanks in Ceylon belonging to the Ceylon company to meet the obligation of the appellant company in respect of contracts entered into in London by the appellant company with the shipowners, the shipowners undertake to purchase their whole requirements of fuel oil from the appellant company, and the appellant company must have ready and available at Colombo sufficient oil to meet those requirements. The maximum and minimum quantities have also been fixed, and the sellers by the terms of the contract not only bound themselves to sell but the buyers had bound themselves to buy.

Section 18, rule 1, of the Sale of Goods Ordinance says that where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or delivery or

both be postponed. The contract in question is unconditional, the goods are specified and they are in a deliverable state, so far as oil stored in tanks for sale can always be said to be in a deliverable state.

Rule 5 (1) further provides for the sale of unascertained or future goods by description and lays down that such goods in a deliverable state can be unconditionally appropriated to the contract by assent when the property in the goods would pass to the buyer. The assent may be express or implied. I think it is clear therefore that the intention was that the property in the goods should pass at the time of the contract, the sellers and buyers had bound themselves to sell and buy maximum and minimum quantities respectively which were fixed and so was the price, but delivery was postponed to suit the convenience of the buyer.

The " ascertainment of the requirements of the buyer " on the part of the seller's agent here was nothing more than to receive a demand for delivery from the buyer after the ship arrived in port.

Clause 7 of the contract provides for the buyers giving the seller's agent (the Ceylon company), 48 hours' notice of *each delivery they require under this contract.*

Clause 9 reads, " each delivery shall constitute a separate contract ". Respondent's Counsel depended on this condition for his argument that the contract was only an agreement to sell until the delivery took place. I do not agree that this clause was inserted for that purpose or that its appearance in the contract substantiates the position taken up by the respondent. In my opinion, this provision was included for no other reason than to make clear that a breach on the part of the seller's agent to deliver in Colombo according to the instalments contemplated when called upon, should not be considered a repudiation of the whole contract but a severable breach giving rise to a claim for compensation—*vide* section 31 of the English Sale of Goods Act, 1893. If this is once made clear, the reference in this clause of the contract to the delivery would, on the other hand, tend to support my view that the property had already passed and delivery was merely postponed.

It has been held in *Higgins v. Pumpherston Oil Co.*[1], that the insertion of a clause, such as No. 9 above referred to, made each delivery stand by itself, and the buyer cannot enforce delivery of arrears, it being his duty to buy in against the seller on the occasion of each separate breach.

I therefore hold that although the agent in Ceylon may actually deliver the *res* or may be instrumental in such delivery, if he did not actually effect the contract, or if he was not instrumental in effecting it, the non-resident would not be liable on the profits arising from that contract.

The next argument of the learned Deputy Solicitor-General is that if the act of delivery by the agent in Ceylon cannot rightly be brought in under the words " sells or is instrumental in selling ", it is clearly caught up by the words that immediately follow, namely, " disposes or is instrumental in disposing ".

Now, if it was intended to introduce the words " disposes " to include the mere physical act of delivery of the property sold, the submission would have been right, but is this word so intended or has it been inserted to provide for contracts other than sales out of which profits may accure ?

[1] *(1893) 20 Ret. 532.*

The real difficulty in the interpretation of this section now arises. I have very carefully considered the arguments for and against and feel that the legislature intended to tax profits derived by a non-resident person from every type of contract entered into in the circumstances set forth in the section. It first referred to a common type of business contracts in Ceylon, viz., insurances, next a commoner type of business transactions, viz., sales, next and finally, it used a very comprehensive word to include all other contracts which involved the disposal of "property in Ceylon or to be brought into Ceylon". These latter words are helpful in arriving at what really the words "disposes of" mean. If "disposes" was meant to include a mere delivery, how is it possible to effect such an act in connection with property not in Ceylon at the time but expected to arrive later? It might be asked if "disposes" does not include an act of delivery that accompanies or follows a sale but was intended to include generally contracts other than sales under which profits passed, what could be the contracts so contemplated? The answer for one can be contracts of barter or exchange. Such contracts were the backbone of trade and business in times past and even to-day resuscitated in some parts of the world. The difficulty of estimating the actual profits arising from such transactions is another matter and cannot affect the appropriateness of the illustration. Profits did—very large profits they were—arise from barter or else no trade by way of barter could obtain. Voet refers freely to such contracts. Why should profits arising on such contracts not be taxed under our Income Tax Law? This is, however, only one type, there are others.

My view is that the word "disposes" connotes clear and intelligible contractual relations between the agent in Ceylon and the disposee and was not intended to refer to such a detail as a mere delivery that may to the imaginative mind be performed even by a non-human agency.

If the draughtsman really intended to provide for cases of mere deliveries under sale contracts, nothing could have been easier than to insert words appropriate to such an idea, *e.g.*, "sales or deliveries thereunder". It would not be extravagant to expect this as the term "goods sold and delivered" is well known in legal circles and is a familiar expression in drafting. To give one instance, *vide* section 9 of Ordinance No. 22 of 1871 (Prescription Ordinance) :—"No action shall be maintainable for or in respect of any *goods sold and delivered* or for any shop bill . . . ." The draughtsman does not stop at the words "goods sold" but tacks on the words "and delivered".

For these reasons I am of opinion that in the circumstances the pro-visions as contained in section 34 do not impose any liability on the appellant to pay tax.

I now come to the second point, and that is, the assessee's liability under section 5. This section provides for income tax being chargeable on "profits and income arising in or derived from Ceylon" in the case of a person non-resident in Ceylon. In sub-section (2) "profits and income arising in or derived from Ceylon" are for the purposes of the Ordinance considered to include all profits and income derived from services rendered in Ceylon or from property in Ceylon or from business transacted in Ceylon whether directly or through an agent. It is only reasonable to

suppose that the Ceylon (agent) company have been and are being paid for the storage of oil supplied by the assessee company and also for their services to the assessee company. Under this sub-section the Ceylon company can be taxed and has presumably been taxed for the profits derived by it on this head.

We next come to profits and income derived from property in Ceylon. I consider this to mean that profits are taxable if they arise out of some immovable property situate in Ceylon such as a tea or rubber estate, or as the result of trade connected with commodities or products manufactured or grown in Ceylon. The oil in question is not the product of this Island but has been transported from abroad to be merely stored here and delivered by the Ceylon company to the steamship company, when their vessels call and their requirements are notified, the Ceylon company being merely an agent for storage and delivery for the assessee non-resident company. This point did give some trouble while the learned Deputy Solicitor-General was outlining his argument, because I felt that there was reason in his insisting that were it not for Ceylon and the property (oil) being available to the steamship company in Ceylon, there would be no purpose in the entering into of the contract. At the close of the arguments, however, on this point, I felt that the words "property in Ceylon" could not be said to be any property whatsoever that happened to be in Ceylon irrespective of the fact of its being sent here for the sole purpose of delivery to a party who was to accept it under an agreement entered into abroad, under which agreement the quantity, price and method of delivery, &c., were all previously arranged and provided for.

What remains to be considered is whether the profits that have been taxed have arisen from "*a business transacted in Ceylon*", whether directly or through an agent.

The precise words in the English Income Tax Act of 1918 are "profits or gains arising or accruing from any trade exercised within the United Kingdom". Now, if the words in our Ordinance have the same meaning as that intended by the words in the English Act, there is a series of authoritative decisions showing what actually was meant. It is therefore necessary to learn whether the difference in phraseology between our Ordinance and the English Statute on this point materially matters.

The case of *Commissioner of Taxes v. Lovell & Christmas, Ltd.*, that came up before the Privy Council, reported in (*1908*) *Appeal Cases, p. 46*, is very helpful. This was an appeal from the decision of the Supreme Court of New Zealand. Four of the learned Judges of that Court held in favour of the Commissioner but Stout C.J. dissented. The words in the New Zealand Act were "income derived from business", which are words very closely allied to the words in our Ordinance. The facts, as stated, and on which the Privy Council based their decision, can be summarized thus: Lovell was a salaried officer of Lovell & Christmas, Ltd. He resided in and had no other business in New Zealand. His company carried on in London the business of provision agents. That business consisted of selling in London dairy produce sent from New Zealand and other parts of the world. The company had established credit at all the

New Zealand banks. Every year a servant of the company, Mr. Kowin, arrived in New Zealand, met Lovell, and attended together meetings of the different butter and cheese factories and endeavoured to persuade the directors of these factories to consign their season's output to the defendant company to be sold in London on commission. The defendant company from London instructed Mr. Kowin and Lovell of the amount to which it was prepared to make advances. Mr. Kowin and Lovell then entered into negotiations with the dairy companies and interviewed their directors and offered verbally to make advances within the limit so fixed. The defendant company thereupon made the necessary advances through a Bank in New Zealand against shipping documents. The produce shipped was sold in London by the defendant company on commission.

On these facts the majority of the Supreme Court of New Zealand considered that the case fell within the principle of the English case *Erichson v. Last* [1], which when applied made the profits on the commission sales profits derived from contracts made in New Zealand and therefore derived from business in New Zealand and so liable to payment of income tax in New Zealand. Stout C.J. on the other hand was of opinion that the principle laid down in *Grainger v. Gough* [2], was the one to be followed. The Privy Council agreed with the view of the dissenting Judge, Stout C. J. and was of opinion that the business which yielded the profit was the business of selling goods on commission in London. The commission was the consideration for effecting such sales, and the monies received by the defendant company out of which they deducted their commission and from which therefore their profits came, were paid to them under the sales effected in London. The earlier arrangements entered into in New Zealand were merely tranactions, the object and effect of which was to bring goods from New Zealand within the net of the business in London which was to yield the profit. The Privy Council was further of opinion that although the language of the English Income Tax Act and that of the New Zealand Act were not identical, there was sufficient similarity in substance to make the English decisions authoritative as to the principles to be applied to the interpretation of the Colonial Act.

Now, if in spite of the canvassing by the defendant company's officials in New Zealand and the arrangements made by them in New Zealand with the dairy companies to ship to London on advances received in New Zealand through banks in New Zealand the opinion of the Privy Council was that the profits arising from the commission sales in London cannot rightly be said to be "income derived from business" carried on in New Zealand, how much stronger would be the case of the resisting taxpayer on the facts of the case before us, when all that was done in the taxing country was ascertaining the requirements and making a delivery?

The language of our Ordinance is much more similar in substance to that of the New Zealand Act, and therefore while the opinion of the Privy Council in the New Zealand case on the law would apply in its full intensity to Ceylon, the authoritative English decisions as to the principles to be applied to the interpretation of the words "from any trade exercised within the United Kingdom" will also apply to the interpretation of the words of our Ordinance, namely, "from a business transacted in Ceylon".

[1] *(1881) 8 Q. B. D. 414.*

[2] *(1896) A. C. 325.*

These decisions have been clearly and fully considered by my brother, and agreeing as I do with him in his comments regarding them, I think it unnecessary for me to say anything more than that they (the decisions) positively disclose that the crucial test is the place where the business contract has been made.

On the facts stated by the Board to us, and applying the law to them, I have therefore no hesitation in holding that the profits of the appellant company do not arise in Ceylon or are derived from Ceylon. It is my opinion therefore that the appellant upon the facts stated to us is not liable to pay income tax either under section 34 or section 5 of our Income Tax Ordinance.

I agree with the order made by my brother as to costs.

Appeal allowed.