1954 *Present :* **Gratiaen J. and Gunasekara J.**

COMMISSIONER OF INCOME TAX, Appellant, *and* CHETTINAD CORPORATION, LTD., Respondent

S. C. 458—Case Stated for the Opinion of the Supreme Court under the provisions of the Income Tax Ordinance (Cap. 188)

Excess profits duty—Partnership—Liability of each partner—Procedure for assessment—Excess Profits Duty Ordinance, No. 38 of 1941, ss. 12 (1) (2), 14 (1), 19—Income Tax Ordinance, ss. 29, 64–67, 68 (2) (b), 76 (1).

Under section 12 (2), read with section 19, of the Excess Profits Duty Ordinance excess profits duty may be assessed on any partnership. And under section 12 (1) the procedure for assessment and notice of assessment is analogous to that which is prescribed by sections 64 to 67 of the Income Tax Ordinance.

Section 76 (1) of the Income Tax Ordinance, which, by virtue of section 14 (1) of the Excess Profits Duty Ordinance, is applicable " as far as may be " to the payment and recovery of excess profits duty, imposes a liability on each partner to pay, in terms of the notice served upon him, the total amount of the duty due from the partnership.

CASE stated under section 74 (1) of the Income Tax Ordinance.

Walter Jayawardene, Crown Counsel, with *J. W. Subasinghe*, Crown Counsel, for the Commissioner of Income Tax, appellant.

S. Nadesan, with *S. Ambalavanar*, for the assessee respondent.

Cur. adv. vult.

March 22, 1954. GRATIAEN J.—

This is a case stated by the Board of Review for the opinion of the Supreme Court on the application of the Commissioner of Income Tax. Broadly stated, the dispute is as to whether the Chettinad Corporation, Ltd. (hereafter referred to as " the respondent ") is entitled to escape liability to pay the full amount of duty assessed under the Excess Profits Duty Ordinance, No. 38 of 1941 (as amended by Ordinances Nos. 6 of 1942, 39 of 1942 and 39 of 1944), on the " excess profits " of a rubber business carried on during four accounting periods between 15th April, 1943, and 31st December, 1946.

It is common ground that, under two agreements dated 15th April, 1943, and 14th November, 1945, the Lomond Rubber Mills Ltd. of Kelaniya carried on " the business of buying raw rubber, manufacturing rubber and selling the manufactured product " during the relevant

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accounting periods; and this business was "managed and financed" by the respondent upon certain terms which provided that the respondent should receive *inter alia* from the Lomond Rubber Mills Ltd. a share of the profits.

The Assessor took the view that these agreements constituted a partnership or joint venture between the respondent and the Lomond Rubber Mills Ltd., and four notices (A8 to A11) were served on the respondent requiring it, in respect of each accounting period, to pay the full amount of excess profits duty computed under the Ordinance. The respondent appealed to the Commissioner, and the only ground on which the assessments were challenged in those proceedings was that the respondent denied that it held a partnership interest in the business; the argument was that the contractual arrangement for a division of the profits should be construed as stipulating only for payments to the respondent of something equivalent to "interest" under a money-lending transaction. The Commissioner rejected this argument and upheld the assessments. He also recorded an admission made on behalf of the respondent that "*If it is held that there is a partnership, then the assessments on the figures as now agreed must stand*".

An appeal was preferred to the Board of Review against the Commissioner's determination, and once again the principal argument was that the agreements dated 15th April, 1943, and 14th November, 1945, did not constitute a partnership. On this issue the Board reversed the Commissioner's decision and held that no partnership had been established, so that the assessments would have had to be annulled on this ground alone. But the Board also proceeded to consider the respondent's further objection (which was inconsistent with its position taken up during the earlier appeal before the Commissioner) in the following terms:

> "Even if the agreements constituted a joint venture, the assessments could not have been made on us only as we were not the person solely owning or carrying on the business, and *the assessments are therefore invalid and of no force or avail in law.*"

The respondent admittedly placed no material before the Board (apart from the actual notices of assessment A 8 to A 11) to enable them to determine this issue. The decision of the Chairman, with whom the other members of the Board agreed, was as follows:

> "The second issue is whether, if a partnership has been proved, the claim is still bad *because the assessment notice is invalid.* I will not discuss this at length, but hold that *it is invalid* because it is not an assessment of a partnership of Lomond Company and the Chettinad Corporation. It is an assessment of the Chettinad Corporation.
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> It seems to me far from reasonable that the appellant (corporation) should be made liable to pay on the whole of the profits when he

receives only half the profits and when he has already deposited E. P. D. on that behalf. My colleagues agree to allow this appeal."

The assessments were accordingly annulled by the Board on both grounds. The Commissioner thereupon applied for a case stated under section 74 (1) of the Income Tax Ordinance (which also applies to the Excess Profits Duty Ordinance) on the following questions of law :

" (*a*) whether the determination of the Board that there was no partnership between the Chettinad Corporation, Ltd. and the Lomond Rubber Mills Ltd. is correct ;

(*b*) whether the determination of the Board that there has not been an assessment of the said partnership is correct ".

These two questions were duly submitted for the opinion of this Court, except that the second question has been amended by the Board by the insertion of the words " nor due notice of such assessment " between the words " partnership " and " is correct ".

With regard to the issue whether the agreements between the respondent and the Lomond Rubber Mills Ltd. constituted a partnership between them, Mr. Nadesan informed us at the outset that he was unable to support the decision of the Board. He agreed that the validity of the respondent's claim to exemption from duty on the excess profits of the business should be determined by us solely by reference to the second question of law submitted for our opinion, and on the assumption that the profits of the business during the relevant periods were in fact and in law the profits of a partnership. It is therefore necessary only to consider whether the Board correctly decided that " there has not been an assessment of the partnership ". In my opinion this question should be answered in favour of the Commissioner.

It is important to avoid confusion between the requirements contained in the relevant revenue enactments as to " an assessment " on the one hand and " a notice of assessment " on the other.

Section 12 (1) of the Excess Profits Duty Ordinance makes the provisions of Chapter 10 of the Income Tax Ordinance applicable " as far as may be " to the assessment of excess profits duty, and section 12 (2) declares that " the duty may be assessed on any person for the time being owning or carrying on a business ". Section 19 provides that in this context " any person " must be interpreted so as to include " any partnership ". For purposes of income tax, by way of contrast, partnerships are expressly excluded from the statutory definition of the terms " person " and " body of persons " in the Income Tax Ordinance : the principle of the scheme of taxation under that Ordinance in respect of income derived from a partnership business is that each individual partner is liable to be assessed only in respect of his own share of the profits (section 29).

Section 64 of the Income Tax Ordinance empowers an Assessor to assess every "person" (as defined in that Ordinance) who is in his opinion chargeable with income tax. The *assessment* so prepared by the Assessor is then scrutinised and either approved or amended by an Assistant Commissioner, who in due course signs *the assessment* if he is satisfied that, in its final form, it charges the person to whom it relates with the full tax with which he ought to be charged (section 66). Eventually, section 67 empowers the Assistant Commissioner to issue *a notice of assessment* "to each person who has been assessed stating the amount of income assessed and the amount of tax charged". The distinction between an "assessment" and a "notice of assessment" is thus made clear: the former is the departmental computation of the amount of tax with which a particular assessee is considered to be chargeable, and the latter is the formal intimation to him of the fact that such an assessment has been made. Section 68 (2) (*b*), for instance, declares that "an assessment shall not be impeached or affected *by reason of any variation between the assessment and the notice thereof*".

The analogous procedure which ought to be followed by the taxing authorities in a case where excess profits duty is chargeable on the profits of a business carried on by two or more persons in partnership must now be examined. The Assessor should prepare an assessment of duty *on the partnership* under section 12 (2) of the Excess Profits Duty Ordinance; this assessment must then be scrutinised and signed (after amendment, if necessary) by an Assistant Commissioner under section 66 of the Income Tax Ordinance; and thereafter, the Assistant Commissioner must issue *to each partner* a notice of assessment under section 67. Once this has been done, section 14 (1) of the Excess Profits Duty Ordinance makes the provisions of section 76 (1) of the Income Tax Ordinance applicable "as far as may be" to the payment and recovery of excess profits duty. In consequence, each partner is liable to pay the total amount of duty claimed in terms of the notice served upon him, and, in the event of non-payment, he becomes a defaulter to the full extent (and not merely of a proportionate share). It will be observed that, whereas section 76 (1) operates only in exceptional cases in the context of liability to income tax, it enjoys a very much wider scope when excess profits duty is levied on partnership profits. (In the latter case, an individual partner may lawfully be called upon to discharge the whole of the partnership liability, and, if he has done so, he would generally have an independent claim for contribution from the other partners.)

In this case, the respondent had not raised any objection to the form of the notices of assessment served on it in respect of the relevant accounting periods. The Board of Review had therefore no jurisdiction to quash the assessments merely because, in their opinion, the notices thereof were lacking in validity. That matter was not in issue before the Board at all. Indeed, Mr. Nadesan concedes that the objection which was intended to be taken was confined to an attack on the assessments themselves; the notices, he explained, were relied on only as evidence to establish that the assessments were bad in law. In my opinion, therefore, the decision of the Board is vitiated by misdirection, and must be

set aside unless we are satisfied that, if the respondent's real objection had been properly appreciated, the same conclusion should necessarily have been reached by a different process of reasoning.

Mr. Nadesan's argument is that the language of the notices of assessment A8 to A11 which were served on the respondent contains *prima facie* evidence that the assessments themselves had been made on the respondent alone, and not (as they should have been) on the partnership, i.e., on the respondent as well as Lomond Rubber Mills Ltd., who jointly owned the business. I cannot agree. Each notice specifically states that the business on whose excess profits the department was claiming duty was the respondent's joint venture with Lomond Rubber Mills Ltd.", and the form of each notice sufficiently complies (as far as the respondent was concerned) with the requirements of section 67 (1) of the Income Tax Ordinance. Similarly, the fact that in each case payment was demanded from the appellant to the total amount of duty chargeable on the excess profits of the " joint venture " is justified and explained by the circumstance that section 76 (1) imposed an obligation on each partner to pay the full amount.

A claim that an individual partner should (as required by law) discharge the entirety of a partnership liability in respect of excess profits duty does not carry the implication that the departmental assessments had been made on him alone. Indeed, the admission made on behalf of the respondent at the proceedings before the Commissioner " that the assessments must stand " if a partnership was established militates against the inference which Mr. Nadesan now invites us to draw from the language of the notices of assessment.

In my opinion, the respondent has not discharged the onus of proving that the assessments were invalid or of no force or avail in law, and there was no evidence on which the Board could reasonably have decided that the assessments made under section 12 (2) of the Excess Profits Duty Ordinance were made only on the respondent and not on the partnership. I would therefore decide, as a matter of law, that the second question submitted for the opinion of this Court should be answered in favour of the Commissioner. The determination of the Commissioner dated 28th February, 1951, confirming the assessments (on the basis of the figures agreed to) must accordingly be restored. The respondent must pay the Commissioner's costs of appeal, and also a sum of Rs. 50 representing the fee delivered to the Clerk of the Board of Review under section 74 (1) of the Ordinance.

GUNASEKARA J.—I agree.

Appeal allowed.