Privy Council Appeal No. 12 of 1974

The Trustees of Seramco Limited Superannuation Fund – *Appellants*

v.

The Commissioner of Income Tax – – – – *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 8TH MARCH 1976

Present at the Hearing:

LORD DIPLOCK

LORD MORRIS OF BORTH-Y-GEST

LORD KILBRANDON

LORD SALMON

LORD RUSSELL OF KILLOWEN

[*Delivered by* LORD DIPLOCK]

In 1964 a company, Seaforth Sugar and Rum Ltd. ("Seaforth"), of which substantially all the shares were held by members of the Elder family, had accumulated undistributed profits of the order of £200,000 up to the end of its financial year which ended on 30th September 1963. It was thus ripe for a dividend stripping operation by which this sum, or the major part of it, could be received by the shareholders in a form which would not attract liability to surtax, but without imperilling their resumption of ownership of the shares once the stripping operation had been completed.

A classic method of doing this, which had been widely used in the United Kingdom before the passing of s. 28 of the United Kingdom Finance Act 1960, was for the shareholders to enter into a transaction with a person who would be exempt from paying income tax on any dividends he received. The transaction would (*a*) provide for him to purchase the shares from the shareholders; (*b*) enable him to receive the accumulated undistributed profits in the form of dividends exempt from tax in his hands; and (*c*) require him to sell the shares back to the shareholders at a price which would be lower than that at which he had purchased them, by a sum equal to the gross amount of the dividends he had received, less such commission (if any) as he had bargained for when entering into the transaction. Where the period between purchase and sale back extended into subsequent financial years of the company the transaction might involve an element of forward dividend stripping too.

It was this classic method that the Elder family decided to adopt for dealing with the accumulated undistributed profits of Seaforth. The appellants (" the Trustees ") who were trustees of a superannuation fund that was exempt from income tax under s. 7 (1) of the Jamaican Income Tax Law, 1954, were the other parties to the transaction.

At the material time the tax law of Jamaica contained no provisions specifically directed against dividend stripping comparable to those introduced in the United Kingdom by the Finance Act 1960. The relevant provision of the Income Tax Law, 1954, upon which the present appeal turns is to be found in s. 10 (1), *viz* :—

> " 10 (1). 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."

In their Lordships' view the crucial questions arising under this sub-section that are determinative of the appeal are : —

(1) was the transaction one which the Commissioner was entitled to treat as " artificial " within the meaning of the sub-section : and, if so,

(2) what is the effect of his so treating it upon the right of the Trustees to repayment of income tax deducted by Seaforth from the gross amount of a dividend which it had paid to the Trustees?

To answer these two questions it is necessary to set out with some particularity the way in which the impugned transaction was carried out.

The history starts with the incorporation of a company called Seramco Limited (" Seramco ") which commenced business on 1st October 1963. Its authorised capital was £100 of which £22 was issued. The nature of the business which it was to carry on does not appear from the record in this appeal. One of the first things that it did was to decide to set up a superannuation fund for its male employees. On the instructions of Seramco a draft Trust Deed and Schedule of Rules for the Superannuation Fund was prepared by professional consultants. The draft was approved by the Directors of Seramco on 21st December 1963, and on that date the appellants were appointed as the first trustees of the Fund, although the Deed itself was not engrossed and executed until 16th January 1964.

The Rules provided for equal contributions to the Fund by Seramco and its employees. For the most part the Rules followed a form commonly adopted in superannuation funds of this kind : but they included, in Rule 12, an unusual provision entitling Seramco, on giving three months' notice at any time, to cause the Fund to be wound-up. The effect of this provision was that upon a winding-up under this Rule, each employee who had not yet become entitled to a superannuation annuity would receive the aggregate amount of his own contribution to the Fund together with such share of any interest derived from capital investments of the Fund as had been credited to his account (*i.e.* calculated upon the sum of his own contributions and those made by Seramco in respect of him). Seramco would receive the aggregate amount of its contributions to the Fund in respect of all such employees together with any surplus resulting from whatever capital appreciation of those investments might be realised upon the winding-up.

Rule 18 conferred upon the Trustees wide powers of investment in the following terms: —

"18. (1) The trustees shall invest and/or reinvest any or all the moneys for the time being standing to the credit of the fund, not immediately required for making any payment pursuant to these rules, in such securities and investments as they may in their absolute discretion deem safe and advisable without being confined or limited to those investments to which trustees are limited by Law and with liberty from time to time to call in, convert, vary or transpose any such investment.

. . . .

(3) The trustees may from time to time and are hereby empowered to borrow or raise money with or without security if it is deemed by them in their sole discretion to be in the best interests of the fund to do so and the trustees shall be entitled to full indemnity from the fund for any debts so incurred."

Approval of the Fund as an approved superannuation fund was granted by the Commissioner on 8th January 1964, under s. 25 of the Income Tax Law, 1954. Until withdrawn by the Commissioner this approval operated under s. 7 (1) of the Law to exempt the income of the fund from income tax. So the Trustees were then in a position to play a part in a dividend stripping transaction.

In March 1964 the Trustees were approached by the Elder family to act in this capacity in stripping Seaforth of the undistributed profits which it had accumulated by that date. On 22nd June 1964 the Trustees (as "Purchasers") entered into an agreement ("the Shares Agreement") with the members of the Elder Family (who contracted jointly only, and not severally, as "Vendors") to buy from them all the issued shares of the company at the price of £407,934. This price was payable by eight instalments of the following amounts:

On or before 1st July 1964	£54,500
On or before 31st January 1965	£62,500
On or before 30th June 1965	£62,500
On or before 31st July 1965	£12,500
Sub-total	£192,000
On or before 30th September 1965	£62,500
On or before 31st October 1965	£62,500
On or before 30th November 1965	£62,500
On or before 31st December 1965	£28,434
Sub-total	£215,934
Total	£407,934

The Elder family were granted an option exercisable upon notice being given at any time before 31st December 1965 to re-purchase the shares at a price of £215,904, *i.e.* £30 less than the total amount which the Trustees had agreed to pay for them, after deduction of the instalments payable up to 31st July 1965.

Clause 8 of the agreement deserves to be set out in full:

"8. The Purchasers covenant and agree with the Vendors that until the purchase money hereby provided shall have been paid in full to the Vendors the Purchasers will forthwith upon the issue of Share Certificates in the names of the Purchasers and/or their nominees deliver to the Vendors the said Share Certificates and that the

Vendors shall be at liberty to hold and retain the said share Certificates as security for the payment of the said purchase money in full. In the event that the Purchasers shall make default in the payment of any instalment of the purchase money on or before the date hereinbefore provided for the payment of such instalment the Vendors shall forthwith be entitled to cancel this Agreement and demand re-transfer of the said shares to them or as they shall direct in which event all payments previously made by the Purchasers hereunder shall be forfeited and retained by the Vendors and this remedy shall be the only remedy available to the Vendors for default hereunder and shall be in substitution for and not in addition to all other remedies at Law or in Equity which may otherwise have been available to them."

This ingenious clause has certain practical consequences which call for comment.

(1) The requirement that the certificates for all the shares should be deposited as security with the Elder family until the last instalment had been paid (if this were ever to happen) would effectively prevent the Trustees from using the shares as security to raise money upon bank overdraft or from some other outside source to meet the instalments of the purchase price as they fell due. The first instalment of £54,500 was due in nine days time; the only money standing to the credit of the Fund and available for investment by the Trustees under Rule 12 was £400. The only way in which they could raise money to pay even the first instalment was out of dividends to be declared by Seaforth on the shares.

(2) In the event of the Trustees making default in the payment of any instalment the only remedy to the Elder family was to have the shares re-transferred to them. If the Trustees had chosen, as they might, to exercise their voting power to compel Seaforth to distribute by way of dividend the whole of its accumulated undistributed profits before instalments of the purchase price equal to the amount so distributed had fallen due and had then defaulted in the payment of any further instalments, they could have secured for the Fund of which they were trustees a capital profit at the expense of the Elder family which could have amounted to as much as £200,000 if they had acted promptly enough. As will be seen the transaction was carried out in such a way that if the Trustees had chosen to default in payment of the second instalment due on 31st January 1965 they could have made a profit of some £146,000.

(3) On the other side of the same coin are the provisions for the payment of the last four instalments falling due after 31st July 1965. They are equally unrealistic from a business point of view. The amount of the instalments of the purchase price outstanding after that date was the same (within £30) as the price at which the Elder family had an option to re-purchase the shares. If the option were exercised on 1st August 1965, the one could be set off against the other; only £30 in money would change hands. If there were any prospects of there being further profits available in Seaforth for distribution by way of dividend before 31st December 1965, the Elder family would have been most imprudent to leave it within the power of the Trustees to procure the payment of any further dividend before the option was exercised and so reduce the value of the shares without any corresponding reduction in the re-purchase price. While if there were no such prospects, it would be in the interest of the Fund to default in the payment of the next instalment of £62,500 due on 30th September 1965, rather than to be out of pocket by this amount until the option was exercised thereafter. It cannot really have been contemplated by either party that the provisions for the payment of the last four instalments of the purchase price would ever be carried out.

On 23rd June 1964, the day after the agreement was executed, there was a board meeting of Seaforth. The transfers of the shares from the Elder family to the Trustees was approved; and the Board of the company was reconstituted so as to consist of three members of the Elder family and three of the Trustees of whom one, Mr. F. L. Myers, was appointed Permanent Director and Chairman. It was resolved to recommend to the annual general meeting of the company to be held on 1st July 1964 that a dividend of 48½% gross (*viz.* £100,686) be paid out of the undistributed profits of the company up to 30th September 1963. This resolution was carried by the votes of the Trustee directors aided by the Chairman's casting vote. A touch of the bizarre was added by the three directors who were members of the Elder family casting their votes against the resolution—but it may be that they had in mind the risk they ran under Clause 8 of the Agreement if the Trustees received a dividend of more than £54,500 when only the first instalment of the purchase price of the shares had fallen due.

On the same day as the board meeting a letter was written on behalf of Seaforth to the Commissioner of Income Tax seeking his authority under s. 21 of the Income Tax Law to pay dividends to the Trustees of Seramco Limited Superannuation Fund without deduction of tax. This was granted by the Commissioner by letter dated 25th June 1964.

The annual general meeting of Seaforth was held on 1st July 1964 and the dividend of £106,686 recommended by the board was declared. On 2nd July Seaforth informed the Commissioner by letter that this sum had been paid to the Trustees and claimed to be credited with the amount of £37,757.5.–. against its 1964 assessment as the amount which would have been deductible from the gross dividend paid to the Trustees.

This claim appears to have aroused the suspicions of the Commissioner and on 28th July 1964 he wrote to Seaforth revoking the authority he had given to it on 25th June to pay dividends to the Trustees without deduction of tax.

On 11th December 1964 a board meeting of Seaforth recommended, by the same majority as at the meeting on 23rd June, that a dividend of £62,280, representing a gross dividend of 48% (*viz.* £99,648) less tax, be paid out of the accumulated profits of the company up to 30th September 1964. This recommendation was duly approved at the annual general meeting of the company held on 28th December, and the dividend declared payable not later than 29th December 1964. The net amount of £62,280 was paid to the Trustees on that date, although the only instalment of the purchase price of the shares that had been paid by them was the first, *viz.* £54,500.

On 5th January 1965 the Trustees by their solicitors wrote to the Commissioner claiming repayment of £37,368 being the tax deducted by Seaforth from the gross amount of the dividend declared on 28th December 1964. This was refused by the Commissioner by letter of 9th February 1965. In his letter the Commissioner told the solicitors to the Trustees:

> " As you are aware, if you are dissatisfied with my refusal you have a right of appeal to the Income Tax Appeal Board in the matter ".

Responding to this invitation the Trustees duly appealed to the Income Tax Appeal Board against the Commissioner's refusal to make any repayment. At the hearing of the appeal a preliminary objection was taken on behalf of the Commissioner that the relevant provision of the Income Tax Law, *viz.* s. 63 (3), confined the right of appeal to cases where the

Commissioner had made some repayment, however small, which the appellant claimed was insufficient; but gave no right of appeal if the Commissioner refused to make any repayment at all.

Logically their Lordships must deal with this preliminary objection first. It was rejected by the Income Tax Appeal Board and by Grannum J. in the Supreme Court of Jamaica. They dealt with the appeal upon the merits and would have allowed it. On the appeal by the Commissioner from the judgment of Grannum J. all three members of the Court of Appeal also dealt with the case upon the merits. Luckhoo Ag.P. and Edun J.A. would have been in favour of allowing it on the merits; Smith J.A. would have been for dismissing it. All three, however, were united in upholding the preliminary objection. They were of opinion that the Commissioner's refusal to make any repayment of tax at all was final and conclusive and that s. 63 did not confer any right of appeal against it.

The question of construction involved in the preliminary objection does not permit of much elaboration. The relevant provisions of s. 63 read as follows:—

> "(1) If it be proved to the satisfaction of the Commissioner that any person for any year of assessment has paid tax, by deduction or otherwise, in excess of the amount with which he is properly chargeable, such person shall be entitled to have the amount so paid in excess refunded and the Commissioner shall make the refund accordingly. Every claim for repayment under this section shall be made within six years from the end of the year of assessment to which the claim relates.
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> . . . . .
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> (3) Any person who objects to the amount of any repayment made by the Commissioner may appeal to the Appeal Board in the same manner as an appeal may be made against an assessment."

Read in their literal meaning the words of subsection (3) are more apt to apply to cases in which the Commissioner has made *some* repayment of tax and the taxpayer objects to the amount of this as being insufficient.

This subsection, however, deals with the remedy of the subject for the failure by the Commissioner to perform a duty which is mandatory on him under subsection (1). It is clear enough that in the phrase "the amount with which he is properly chargeable", where it appears in subsection (1), the expression "the amount" must be understood to include what in the vernacular used in relation to income tax assessments is often called a *nil* amount, and to mean "the amount (if any)". Where a person who is not chargeable to income tax at all has paid tax by deduction he is entitled to have the whole of the amount of tax that he has paid "refunded" by the Commissioner. In their Lordships' view subsection (3) must have been intended to provide, for failure by the Commissioner to perform his statutory duty, a remedy co-extensive with that duty. In this subsection as in subsection (1) the word "amount" is to be understood as including a *nil* amount and as meaning "the amount (if any)" of any repayment made by the Commissioner. A literal construction which would exclude a *nil* amount would have consequences so arbitrary and unjust to the subject that Parliament cannot possibly have intended them. A claim for repayment relates to a year of assessment. A taxpayer whose claim to a refund was unsuccessful as to 99% would have a right of appeal as to the whole claim, whereas if he were unsuccessful as to 100% he would have no right of appeal. He might have two claims based on different grounds relating to the same year of assessment, one claim for £10 overpaid as a result of an alleged arithmetical mistake in his assessment, the other for £100,000 paid by deduction.

If the claim for £100,000 were refused by the Commissioner the tax-payer's right to appeal against this refusal would depend upon whether or not any part of his claim for the £10 overpayment had been allowed by the Commissioner.

It is true, as was pointed out by Luckhoo Ag.P., that before s. 63 of the Income Tax Law 1954 was enacted there was no right of appeal from a refusal of the Assessment Committee (the predecessors of the Commissioner) to refund income tax overpaid; but in their Lordships' view this affords no ground for an inference that Parliament, when it decided in 1954 to grant a right of appeal, intended to do so in such a way as to give rise to consequences so arbitrary and unjust as those which could result from giving to the words of s. 63 (3) the narrow literal construction for which the Commissioner now contends.

In their Lordships' opinion the preliminary objection fails. They must accordingly deal with the appeal upon the merits.

Section 10 (1) strikes at transactions which are "artificial or fictitious", where the effect of the transaction would reduce the amount of tax payable by any person. The transaction for which the Shares Agreement provided would reduce the amount of tax payable by the Elder family upon dividends declared by Seaforth in the period during which the shares in Seaforth were vested in the Trustees. The Shares Agreement thus falls within the subsection if, but only if, the transaction for which it purports to provide was artificial or fictitious. The fact that the Shares Agreement provides for dividend stripping is not of itself sufficient to bring it within the subsection, which was first enacted in 1939 before this method of tax avoidance had achieved its subsequent notoriety. It is only when the method used for dividend stripping involves a transaction which can properly be described as "artificial" or "fictitious" that it comes within the ambit of s. 10 (1). Whether it can properly be so described depends upon the terms of the particular transaction that is impugned and the circumstances in which it was made and carried out.

"Artificial" is an adjective which is in general use in the English language. It is not a term of legal art; it is capable of bearing a variety of meanings according to the context in which it is used. In common with all three members of the Court of Appeal their Lordships reject the appellants' first contention that its use by the draftsman of the subsection is pleonastic—that is, a mere synonym for "fictitious". A fictitious transaction is one which those who are ostensibly the parties to it never intended should be carried out. "Artificial" as descriptive of a transaction is, in their Lordships' view, a word of wider import.

Where in a provision of a statute an ordinary English word is used, it is neither necessary nor wise for a court of construction to attempt to lay down in substitution for it, some paraphrase which would be of general application to all cases arising under the provision to be construed. Judicial exegesis should be confined to what is necessary for the decision of the particular case. Their Lordships will accordingly limit themselves to an examination of the Shares Agreement and the circumstances in which it was made and carried out, in order to see whether that particular transaction is properly described as "artificial" within the ordinary meaning of that word.

The relevant circumstances begin with the creation of a superannuation fund by a company, Seramco, with an issued capital of £16. Under the Rules of the Fund, to which attention has already been drawn, it could be wound up by Seramco's giving three months' notice at any time, even before any superannuation benefits were due. It was in purported exercise of their powers of investment of "the moneys for the time being

standing to the credit of the Fund" that the Trustees entered into the Shares Agreement. The beneficiaries of the Fund were the present and future employees of Seramco. The right of each to participate in the Fund upon death or retirement was limited to the amount of his own contributions and the corresponding contributions made by Seramco in respect of him, together with a share of the interest upon the investment of the moneys in the Fund proportionate to the amount of those contributions. Seramco was not itself a beneficiary during the lifetime of the Fund. It could, however, become a beneficiary if it gave notice to wind up the Fund. In that event it would become entitled to the return of its own contributions in respect of all members who had not yet qualified for superannuation annuities, and also to any surplus realised upon sale of the capital investments of the Fund.

In the absence of any evidence that the Fund was not intended to serve the purpose of a genuine superannuation fund for the present and future employees of Seramco, their Lordships must proceed on the assumption that it was not intended by the parties to the Trust Deed (*viz.* Seramco and the Trustees) to wind it up prematurely for the benefit of Seramco. On this assumption the proper course for the Trustees would have been to invest the monies of the Fund in income-earning assets. As already mentioned, at the time the Shares Agreement was entered into the Fund had no investments and the only monies standing to its credit were some £400 representing contributions made by Seramco and its employees.

Their Lordships have already analysed the practical consequences to which the provisions of the Shares Agreement could give rise. For their part the Trustees, although purporting to exercise the powers of investment conferred upon them by Rule 12, did not invest a single penny of the monies standing to the credit of the Fund in the purchase of the shares of Seaforth under the Shares Agreement. They had no funds with which to make this purchase and Clause 8 deprived them of any opportunity of using the shares of Seaforth as security for raising funds from outside sources to meet the instalments of the purchase. Clause 8, however, also safeguarded them against the risk of making any loss on the transaction in the event of default, apart from the costs of entering into it and obtaining transfers of the Seaforth shares.

On the other hand from the point of view of the Elder family it was a most improvident agreement for them to enter into unless they had a tacit understanding with the Trustees that after the accumulated profits of Seaforth had been distributed by way of dividend the Trustees would not default on any of the first four instalments of the purchase price so as to bring Clause 8 into operation. They risked losing as much as £200,000 on the transaction and, as has been pointed out, in the way the transaction was in fact carried out they would have lost £146,000 if the Trustees had defaulted in payment of the second instalment of £62,500 due on or before 31st January 1965.

It is also, in their Lordships' view, an irresistible inference that although the provision for the repurchase of the Seaforth Shares by the Elder family was expressed as an option only, it was never contemplated by the parties that the title to the shares would not be retransferred to the Elder family as soon as the first four instalments payable by 31st July 1965 and totalling £192,000 had been paid by the Trustees.

In their Lordships' view it is impossible to regard the transaction for which the Shares Agreement on its face provided either as a genuine exercise by the Trustees of the powers of investment of monies standing to the credit of the Superannuation Fund under which they purported to act; or as a genuine sale by the Elder family of their shares in Seaforth for a price payable by instalments accompanied by what was no more

than an " option " to repurchase them. Their Lordships agree with the Court of Appeal that the cumulative effect of all those features of the transaction to which they have drawn attention, is that the transaction is properly described as an " artificial " transaction within the meaning of s. 10 (1). It would be difficult to find a more apt description for it.

There remains the final question whether a finding that the Shares Agreement was an artificial transaction entitles the Commissioner to refuse to pay to the Trustees the sum of £37,368 income tax deducted by Seaforth in paying to them the net dividend of £62,280 on 29th December 1964. Luckhoo Ag.P. and Edun J.A. were of opinion that it did. Smith J.A. thought that it did not.

The point is a short one on the construction of the second part of s. 10 (1). The subject-matter of the subsection is " any "—*sc.* artificial or fictitious—" transaction which reduces or would reduce the amount of tax payable by any person ". A " transaction " necessarily involves more than one party; but in order to bring it within the subsection it is sufficient that the amount of tax payable by one of the persons concerned in it would be reduced if effect were given to the transaction. It is not necessary that the tax liability of any other of those persons should also be reduced; it may be unaffected or, as often is the case, it may be increased, though to a lesser extent than the reduction which would be obtained by the party for whose benefit the transaction was entered into.

The second part of the subsection deals with the consequences which follow when a transaction falls within this category. Those consequences are that " the Commissioner may disregard any such transaction, and the persons concerned shall be assessable accordingly ". To disregard a transaction means to treat it as if it had never been entered into, *i.e.* by any of the parties to it. So if the words which precede the comma are to be given their natural meaning, they entitle the Commissioner when exercising any of his powers under the Income Tax Law to treat the transaction as if it had never been entered into. As between the parties themselves, the subsection does not purport to alter whatever legal rights or liabilities the transaction is capable of giving rise to notwithstanding its artificial character. These remain governed by the general law; so do the legal consequences as between the parties of any action taken by the Commissioner in the exercise of his right to disregard the transaction for tax purposes.

In the instant case the Trustees seek to compel the Commissioner to perform the duty imposed upon him by s. 63 (1) to refund an amount of tax which they claim to have paid by deduction upon income of an approved superannuation fund which is exempt from tax by s. 7 (1). The basis of their claim is that the sum of £62,280 paid to them by Seaforth on 29th December 1964 was received by them by way of dividend of a gross amount from which tax in the amount of £37,368 had already been deducted by Seaforth. The Trustees' right to receive from Seaforth any monies by way of dividend depended upon their being the legal owners of the shares in that company that had been transferred to them by the Elder family under the Sale Agreement. The sum of £62,280 was undoubtedly received by the Trustees and, in the absence of any claim by the Commissioner to treat the Trust Deed itself as an artificial or fictitious transaction, it was income of an approved superannuation fund. But if the Commissioner is entitled to treat the Sales Agreement and the transfer of shares made thereunder as of no effect, it follows that he may treat (1) the shares as having remained throughout in the legal and beneficial ownership of the Elder family; (2) the monies in fact received by the Trustees from Seaforth as not having been received by them by way of dividend on shares of which they were the legal owners, and (3) the tax

which Seaforth had deducted as having been deducted in respect of the tax liability of the Elder family and not of the Trustees. The Commissioner is therefore entitled to treat the Trustees as if they were not persons who have paid any tax by deduction and to reject any claim by them to any refund under s. 63 (1).

On behalf of the Trustees it was sought to answer this by a submission that the purposes for which the Commissioner is entitled to disregard a transaction are restricted to those specifically referred to in the last eight words of the subsection: "and the persons concerned shall be assessable accordingly". The contention is that the only purpose for which the Commissioner may disregard the transaction is in order to assess the taxable income of the person or persons who would pay a reduced amount of tax if the transaction were treated as effective for tax purposes.

Their Lordships find themselves unable to accept this submission. The argument in support of it is that these last eight words would be otiose if the immediately preceding words, "the Commissioner may disregard any such transaction", were given what their Lordships hold to be their natural meaning. A general power to make additional assessments is conferred upon the Commissioner by s. 47 (4) and there would have been no need to confer upon him any express power to do so in s. 10 (1) if the words "the Commissioner may disregard any such transaction" were intended to mean that he could exercise *all* the powers conferred upon him under the Income Tax Law on the footing that the transaction had never been entered into.

In their Lordships' view there is another explanation for the addition of the words "and the persons concerned shall be assessable accordingly" which is consistent with the natural meaning of the preceding words and is to be preferred. Their Lordships have already drawn attention to the fact that a transaction which reduces or would reduce the amount of tax payable by one party to it may have the result of increasing the amount of tax payable by another party to the transaction. The subsection confers on the Commissioner a general discretion whether or not to disregard the transaction, and, if this was all it had done, it would have been arguable that he was entitled to elect to disregard the transaction for the purpose of assessing the party whose liability to tax it would have reduced, without being compelled to disregard it also for the purpose of assessing any other party whose liability to tax would have been increased by it. "The persons concerned" means all parties to the transaction; those whose liability to tax it would have increased as well as those whose liability to tax it would have reduced. The words "shall be assessable accordingly" are mandatory. They make clear what otherwise might have been left in doubt: that if the Commissioner does elect to disregard a transaction he must do so as respects all the parties to it; and they confer upon those parties to the transaction whose liability to tax it would have increased a right to be reassessed at the lesser amount, so that the net amount of tax recoverable by the Crown will be the same as it would have been if none of the parties to the transaction had entered into it.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed with costs to be paid by the appellants to the respondent.

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In the Privy Council

THE TRUSTEES OF SERAMCO LIMITED SUPERANNUATION FUND

v.

THE COMMISSIONER OF INCOME TAX

DELIVERED BY
LORD DIPLOCK

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