IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal on Questions of Law in terms of the Inland Revenue Act No. 10 of 2006 read together with the Tax Appeals Commission Act No. 23 of 2011.

Phoenix O & M (Private) Limited., No. 16, Barnes Place, Colombo 07.

Appellant

CA Case No.: TAX/32/2014

Tax Appeals Commission Case No.: TAC/IT/009/2013

Commissioner General of Inland Revenue, Department of Inland Revenue, Sir Chittampalam A. Gardiner Mawatha, Colombo 02.

Respondent

Before: Hon. D.N. Samarakoon, J.

Hon. Pradeep Kirthisinghe J.

Counsel: Mr. Reid Ameen with Z. Ismail and Mrs. Nilanthi Pieris instructed by Paul Ratnayake Associates for the Appellant.

Mrs. Farzana Jameel P.C., Senior Additional Solicitor General with Suranga Wimalasena, Senior State Counsel for the Respondent.

Argued on: 29.03.2021

Written submission tendered on: 12.11.2018 and 17.11.2021 by the Appellant.

26.07.2017 and 15.11.2021 by the Respondent.

Decided on: 15.12.2022

D.N. Samarakoon, J

The relevant part of the determination of the Tax Appeals Commission is as reproduced below,

> "...In the appeal made by the appellant, the matter was canvassed only the non deductibility of "Lease Rentals" and "Repair Expenses". At the hearing of the appeal before the Respondent as repair expenses were allowed, the only issue to be decided relates to the deductibility of lease rentals in relation to vehicles used for travelling purposes which amounted as Rs. 9,653,695/-. The total tax liability of the appellant amounted to Rs. 6,850,024/-. The penalty referred in section 26(2) of the Inland Revenue Act which is clear that any rental or annual payment paid in respect of vehicles which are used for travelling not allowed to deductible as an expense.
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> We agree with the Commissioner General of Inland Revenue/Respondent and the submission made by the Commissioner General of Inland Revenue that section 25(k)(1) section 26(2) of the Act No. 10 of 2006 should be read together".

The appellant has requested to state a case to this Court on the questions reproduced below,

(1) Is the amount of Rs. 9,653,695/- paid by the appellant to the employees for the use of the vehicles of the employees for the purposes of the business of the appellant, deductible in terms of section 25(1)(k) of the Inland Revenue Act in the computation of the profits of the appellant for the year of assessment 2008/2009, notwithstanding any prohibition in section 26(2) of the same Act?

(2) Did the Tax Appeals Commission err in law in assuming that its conclusion that section 25(1)(k) and 26(2) should be read together provides a sufficient basis for the purpose of determining the issue raised in this appeal on behalf of the appellant, namely, that the expenditure especially provided for in section 25(1)(k) which is a special provision should be deducted notwithstanding any prohibition in Section 26(2)?

(3) Did the Tax Appeals Commission fail to properly examine and or apply and or appreciate the facts and the law relevant to this matter?

In respect of the Question No. (1), the appellant submits that the TAC never decided whether the expense was deductible under section 25(1)(k) because before the TAC, it was never disputed by the respondent that the expense was deductible under section 25(1)(k) and the only argument of the Respondent was that the expense was not deductible due to section 26(2).

In respect of Question No. (2) the appellant submits that the issue in the appeal before the TAC was whether an expenditure especially provided for under section 25(1)(k) which is a special provision should be deducted notwithstanding any prohibition under section 26(2).

Hence, if briefly stated, the Questions are,

(i) Whether the section 25(1)(k) provides for a Special Deduction?

(ii) Whether the limitation in section 26(2) does not prohibit the deduction of Special Deductions?

(iii) In the alternative, what is the result of the application of section 25(1)(k) with section 26(2)?

Section 25(1)(k) reads,

CHAPTER IV

ASCERTAINMENT OF PROFITS OR INCOME

Deductions allowed in ascertaining profits and income.

25. (1) Subject to the provisions of subsections (2) and (4), there shall be deducted for the purpose of ascertaining the profits or income of any person from any source, all outgoings and expenses incurred by such person in the production thereof, including –

"K- the actual expenses incurred by such person or any other person in his employment in travelling within Sri Lanka in connection with the trade, business, profession or vocation in the first mentioned person:

Provided that no deduction under the preceding provisions of this paragraph shall be allowed to any person-

(i) in respect of expenses incurred in relation to a vehicle used partly for the purposes of his trade, business, profession or vocation and partly for the domestic or private purposes of an executive officer being employed by him or a non-executive director of such organization, unless the value of the benefit as specified under the proviso to paragraph (b) of subsection (2) of section 4 of this Act, has been included in the remuneration of such officer, for the purposes of deduction of income tax under Chapter XIV of this Act, **where such benefit is not exempt under paragraph (s) of subsection (1) of section 8 of this Act;**

(ii) in respect of expenses incurred in relation to a vehicle, where more than one vehicle is provided to any employee of such person or to any non-executive director or to any other individual who is not an employee, but rendering services in the trade, business, profession or vocation, carried on by such person, if such vehicle is not the first vehicle provided to such employee or non-executive director or such other individual, as the case may be;

(iii) in respect of expenses incurred in relation to a vehicle where such vehicle is provided to any other person who is not an employee of such person and who does not render any services to the trade, business, profession or vocation carried on by such person;

(iv) in respect of expenses incurred in relation to the reimbursement of any expenditure on a vehicle belonging to an employee of such person who has been allowed by the employer to claim such expenses, unless the value of benefit of using such vehicle for non business purposes by such employee as determined by the Commissioner-General, has been included in the remuneration of such employee for the purposes of deduction of income tax under Chapter XIV, or in the opinion of the Commissioner-General such amount that is reimbursed represents only expenses on allowable travelling expenses in relation to the trade, business, profession or vocation carried on by such employer; and

For the purposes of sub paragraphs (i),(ii),(iii) and this sub paragraph, "expenses incurred" shall not include any lease rental or other rental payments in respect of such vehicle or the cost of acquisition or the cost of financing of the acquisition of such vehicle; and

(v) in respect of any expenses incurred by such person by reason of any travelling done by any other person in his employment between the

residence of such other person and his place of employment or vice versa.

The paragraph in "bold" letters after sub paragraph (iv) was amended in 2007 and 2008.

By Inland Revenue (Amendment) Act No. 10 of 2007 which came into existence with effect from 01.04.2007, the said paragraph in "bold" letters after sub paragraph (iv) was removed.

The said Amendment introduced the paragraph reproduced below, at the end of the Proviso to section 25(1)(k):

> "For the purpose of this proviso, "expenses incurred", shall include any lease rental or other payment in respect of such vehicle or the cost of acquisition of such vehicle".

The appellant submits that the purpose of this amendment was to include rental expenses in sub paragraphs (i) to (iv) in the Proviso to Section 25(1)(k).

Section 25(1)(k) was once again amended by (Amendment) Act No. 09 of 2008, with effect from 29.02.2008.

It removed the words reproduced below from the Proviso in section 25(1)(k),

> " "For the purpose of this proviso, "expenses incurred", shall include any lease rental or other payment in respect of such vehicle or the cost of acquisition of such vehicle".

Hence prior to 01.04.2007 lease rentals could not be deducted. From 01.04.2007 to 29.02.2008, lease rentals could be deducted. After 29.02.2008, lease rentals could not be deducted.

However, what the appellant intends to show by the introduction of these amendments is that deductions could be made under section 25(1)(k) even in the existence of section 26(2).

In **Ogilvy Action (Pvt) Ltd., vs. Commissioner General of Inland Revenue (C. A. Tax 16/2013, dated 12.11.2021)** another division of this Court, expressing its view on these amendments said,

> "[89] By the Inland Revenue (Amendment) Act No. 9 of 2008, which came into operation on 24.02.2008, the above-mentioned paragraph (v) of section 25 (1) (k) was repealed, containing the word "lease rental or other rental" in the said proviso. The effect of repealing rental or other rental payment from the said proviso was to obliterate rental from the proviso as if it had never existed. The legislature appears to have removed rental or other rental payment in respect of such vehicle or the cost of acquisition of such vehicle to avoid any conflict with Section 26 (2) so that rental or annual payment in respect of any vehicle referred to in paragraphs (a) and (b) of Section 26 (2) will only be governed by Section 26 (2)".

The appellant submits at paragraph 145 of its Written Submissions dated 17.11.2021 that, neither the Commissioner General of Inland Revenue nor the Tax Appeals Commission disputed that sums paid to employees were included in their remuneration and PAYE tax was paid.

It is further submitted, that, sums paid to employees were included in their remuneration for PAYE which tax was deducted and remitted by the appellant and the expense was a travelling expense incurred in the production of income. Hence, the expense was deductible under section 25(1)(k).

In **Ogilvy Action (Pvt) Ltd., vs. Commissioner General of Inland Revenue (C. A. Tax 16/2013, dated 12.11.2021)** the said division of this Court said with regard to section 25 and 26,

> "[51] Now, the question is, if all deductible outgoings and expenses in Section 25 (1) are subject to the limitations set out in Section 26 as claimed by the Respondent, why did the legislature include several catalogues of other deductions in several sub-sections (a) -(w) of Section 25 (1)? It is

inconceivable that the legislature would have included several other specific items of deductions in sub-sections (a) -(w) of Section 25(1), if all the outgoings and expenses are restricted by the general limitation provisions in Section 26 of the Act. In order to determine this question, it is necessary to consider the relationship between Section 25 (1) and Section 25 (1) (k), and the scheme of Section 25 (1) (k) and Section 26 (2) of the Act".

What does section 26(2) say,

Deductions not allowed in ascertaining profits and income.

26. (1) For the purpose of ascertaining the profits or income of any person from any source, no deduction shall be allowed in respect of –

(2) No person carrying on any trade, business, profession or vocation shall be entitled to any sum for depreciation by wear and tear, or for renewal, or to any allowance under paragraph (a) or paragraph (d) of subsection (l) of section 25:-

(a) for any year of assessment, in respect of any vehicle used for travelling for the purpose of his trade, business, profession or vocation, except in respect of –

(i) a motor cycle or bicycle used for such purpose by an officer, who is not an executive officer, in the employment of such person; and

(ii) a motor coach used for transporting employees of such person to or from their place of work; and

(b) in respect of any plant, machinery, fixtures, equipment or articles provided for the use of any officer or employee of such person, in the place of residence of such officer or employee,

or for any deduction for any rental or annual payment in respect of any such vehicle, plant, machinery, fixtures, equipment or articles as are referred to in paragraphs (a) and (b).

Hence, section 26(2) is applicable with regard to paragraphs (a) and (d) of section 25(1) which read,

"

Deductions allowed in ascertaining profits and income.

25. (1) Subject to the provisions of subsections (2) and (4), there shall be deducted for the purpose of ascertaining the profits or income of any person from any source, all outgoings and expenses incurred by such person in the production thereof, including –

(a) an allowance for depreciation by wear and tear of the following assets acquired, constructed or assembled and arising out of their use by such person in any trade, business, profession or vocation carried on by him –

.....

(d) any sum expended by such person for the repair (not renewal) of any plant, machinery, fixtures, building, implement, utensil or article employed for producing such profits and income:

Provided that, in the case of a company carrying on the business of letting premises, the sum deductible under this paragraph shall, in so far as such sum relates to the repairs of such premises, not

exceed twenty five per centum of the gross rent receivable by such company for such premises ;..."

It is submitted in paragraph 56 of the Written Submissions of the respondent that,

"As evidenced above, Section 26(2) refers to section 25(1)(a) and (c). Thus, these sections have to be read together..."

However, Section 26(2) refers to paragraphs (a) and (d) of section 25(1) but not paragraph (c).

The tax exemption is claimed not under those sections but under section 25(1)(k) and its Provisos.

It was said in **Ogilvy Action (Pvt) Ltd., vs. Commissioner General of Inland Revenue (C. A. Tax 16/2013, dated 12.11.2021),** that,

"[52] One of the issues that has been argued extensively before this Court is with regard to the true and correct interpretation to be given to the word "including" at the end of Section 25 (1) of the Act. The Tax Appeals Commission has taken the view that any deduction permitted under Section 25 (1) including deductions specified in sub-sections (a) to (s) are subject to the prohibitions on deductions set out in Section 26. Mr. Ameen referred to the Privy Council decision in Patrick Alfred Reynolds v. Commissioner for Income Tax, Trinidad & Tobago (supra) in support of his argument that the use of the word "including" in introducing the catalogue in Section 25 (1) enlarges the meaning of the words or phrases contained in the statute. He submitted that if the intention was to make the list exhaustive, the legislature would not have used the word "including"' only, but would not have used the word "means" or the expression "means and includes".

In **Patrick Alfred Reynolds vs. The Commissioner of Income Tax, [1965] 1967 A. C. 1,** Lord Hodson speaking for the Privy Council said,

"Section 10(1).

"For the purpose of ascertaining the chargeable income of any person, there shall be deducted all outgoings and expenses wholly and exclusively incurred during the year preceding the year of assessment by such person in the production of the income, including..."

"Then there followed sub paragraphs (a) to (k) which give examples of permissible deductions. It is unnecessary to set all these out in detail. Many of them are indeed unnecessary for it is clear that without considering the permissible deductions set out in the catalogue (a) to (k) the taxpayer can make all legitimate deductions from his gross receipts before arriving at the figure of his chargeable income. If he carries on a business for profit, for example, the wages of his employees etc., are deductible quite apart from the headings in the catalogue before the profit can be ascertained. The catalogue is not in any sense exhaustive and appears to be directed in the main to deductions of a business nature which would naturally be covered by the phrase "outgoings and expenses…incurred…in the production of the income". There are, however, certain sub paragraphs which the last observation does not fit, for example, sub paragraph (j) is one which reads – "such other deductions as may be prescribed by resolution of the Legislative Council".

"There remains sub paragraph (f), around which the controversy has centred. This reads:-

> "annuities or other annual payments whether payable within or out of the Colony, either as a charge or any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract; Provided that no voluntary allowances or payment of any description shall be deducted:"

Section 12(1),

> "For the purpose of ascertaining the chargeable income of any person, no deduction shall be allowed in respect of – (a) domestic or private expenses; (b) any disbursements or expenses not being money wholly and exclusively laid out or expended for the purpose of acquiring the income;…(f) rent of or cost of repairs to any premises or part of premises not paid or incurred for the purpose of acquiring the income;…"

……

> "Their Lordships will now answer the questions upon which the judgment in this case depends".
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> "First, what is the effect, upon its true construction, of section 10(1)(f), bearing in mind the introductory words "outgoings and expenses wholly and exclusively incurred…in the production of the income?" If these words, as the respondent argues, govern all of the following sub paragraphs (a) to (k), the appellant must fail for it is not and cannot be contended that the covenant in question, including incidentally those entered into by the appellant personally, were entered into any way that could be covered by the words "in the production of the income". Moreover these words are underlined in section 12(1)(b), where the words "for the purpose of acquiring the income" repeated in section 12(1)(f) reinforces the argument of the respondent".
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> "On the other hand the use of the words "including" in introducing the catalogues enables the appellant to submit, in the language of Lord Watson giving the judgment of the board in Dilworth vs. Commissioner of Stamps [1899] A. C. 99; 15 T. L. R. 61, P.C., that,
>
> > "the word "include" is very generally used in interpretation clauses to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be

construed as comprehending not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include".

In **Ogilvy Action (Pvt) Ltd., vs. Commissioner General of Inland Revenue (C. A. Tax 16/2013, dated 12.11.2021),** the Court of Appeal said regarding the decision in **Patrick Alfred Reynolds vs. The Commissioner of Income Tax,**

"[67] The Privy Council considered the issue whether the general limitation in Section 12 (1) (f), which prohibited the general deduction under Section 10 (1), intended to take away the specific deduction that has been expressly provided under Section 10 (1) (f) of the Income Tax Ordinance (Laws of Trinidad and Tobago). Section 10 (1) of the Income Tax Ordinance (Laws of Trinidad and Tobago) contains a similar structure to Section 25 (1) of the Act and at the end of the body of the said Section, refers to the word "including" as follows:

> "10 (1) -For the purpose of ascertaining the chargeable income of any person, there shall be deducted all outgoings and expenses wholly and exclusively incurred during the year preceding the year of assessment by such person in the production of the income, including....." [emphasis added]

[68] Then, there are sub-paragraphs (a) to (k) of Section 10 (1) which sets out examples of permissible deductions and sub-paragraph (f) of Section 10 (1) allowed annuities to be deducted. It reads: "10 (1) (F) - annuities or other annual payments, whether payable within or out of the Colony, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract: Provided that no voluntary allowances or payment of any description shall be deducted"

[71] Having analysed the decision in Dilworth v. Commissioner of Stamps, (supra), the Privy Council stated that:

> 1. Section 10 (1), on its true construction, and having regard to the word "including" which was a word of extension, was intended to embrace the deductions specified in sub-paragraphs (a) to (k) in addition to all legitimate deductions of expenses incurred in the production of income;
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> 2. Section 12 (1) (b) which was of limited application, did not negative or fetter the provisions of Section 10 (1) (f) of the Income Tax Ordinance (Laws of Trinidad and Tobago).

In **Hayley & Co., Ltd., vs. Commissioner of Inland Revenue [1961]** Basnayake C. J., said,

> "Whether a particular "outgoing" is deductible for the purpose of ascertaining the profits or income of a business would depend on the circumstances of each case subject to the provisions of section 10(c) which forbids the deduction of any expenditure of a capital nature or any loss of capitol. Where an outgoing is not of a capital nature or a loss of capital or where its deduction is not expressly forbidden by the statute, it is deductible under section 9(1) and it is not for the taxing authorities to say that the payment should not have been made".

In **Ogilvy Action (Pvt) Ltd., vs. Commissioner General of Inland Revenue (C. A. Tax 16/2013, dated 12.11.2021),** it was said regarding Hayley & Co., Ltd.,

> "[16] Income chargeable with income tax is, however, arrived at after taking into account the various exemptions and deductions allowed under the Act and thus, the profits and income or profit or income on which income tax is payable may be either exempted or deducted by the provisions of the Act. Income tax is calculated by deducting "general" and "specific" expenses from the taxpayer's total assessable income for the

assessment year. In Hayley and Company Ltd v. Commissioner of Inland Revenue (supra), Basnayake C.J., dealing with Section 9 (1) of the Income Tax Ordinance of Ceylon (Cap. 188), which is the corresponding provision of Section 25 (1) of the Inland Revenue Act, No. 10 of 2006, classified the types of deductions for the purpose of Section 9 (1) of the Income Tax Ordinance of Ceylon (Cap. 188)".

"[17] Basnayake C.J., stated that Section 9 (1) deals with three classes of deductions, (i) "outgoings"; (ii) "expenses" incurred by the assessee in the production of the profits or income" and (iii) the specific deductions allowed by paragraphs (a) -(i) thereof. The general deductions referred to by Basnayake C.J., in Section 9 (1) are "outgoings" and expenses incurred by the assessee in the production of profits and income while the deductions referred to in paragraphs (a) -(i) thereof are the specific deductions. A general deduction provision generally allows the taxpayer to deduct from his assessable income any outgoings or expenses incurred in the production of profits and income of any person".

The respondent has also submitted at paragraphs 103 to 105 of its Written Submissions, that,

"[103] Section 25(1)(k) does not recognize "lease rentals" or "hire charges" as a permissible deduction. Therefore, a restrictive reading of Section 26(2) as contended by the appellant would render the section nugatory and superfluous. Such an interpretation would be contrary to a harmonious interpretation of the Statute and would impede the clear legislative intent of prohibiting deductions in respect of rentals or annual payments in respect of vehicles used for travelling in connection with the business".

[104] This reading of the Statute is affirmed by a recent decision delivered on the 3rd of August 2021 by Your Lordship's Court in Distilleries Company of Sri Lanka P. L. C. vs. Commissioner General of Inland Revenue C. A. (TAX) dated 03.08.2021. In this case Your Lordship's Court demonstrated

how foreign cases can only have persuasive value, particularly so in relation to fiscal statutes which are to be interpreted strictly. In the case cited, the House of Lord decision in Usher's Wiltshire Brewery Ltd., vs. Bruce that was cited by the Counsel had the highest degree of relevance in that the same expenditure was considered in the same circumstances. However, the Court held that regardless of the high persuasive value of such case, the case could not be applied because the English statute differed structurally and semantically to the local statute under consideration.

[105] Furthermore, Distilleries Company of Sri Lanka P. L. C. vs. Commissioner General of Inland Revenue, also considered the applicability of the very same sections that are being considered by this Court in the instant case; Section 25(1) and Section 26(1) of the Inland Revenue Act No. 10 of 2006. In that case, Your Lordship's Court considers the combined effect of the two sections. Prior to considering the applicability of Section 25 which permits deductions, the Court first examined to see whether the deduction was prohibited under Section 26. The Court then moved on to consider the applicability of Section 25, only when it was established that Section 26 does not prohibit the said deduction. In other words, it is only what is not prohibited by Section 26, that can be deducted under Section 25".

If only what is not prohibited by Section 26 can be deducted under Section 25, Section 25 is superfluous.

Although this Court's attention was drawn by the appellant in that case to Usher's Wiltshire Brewery Ltd., vs. Bruce and several other English authorities, in that case the case of **Patrick Alfred Reynolds vs. The Commissioner of Income Tax,** in which the structure and semantics of section 10(1)(f) and 12 (1)(f) were similar to section 25(1)(k) and section 26(2) of the Inland Revenue Act No. 10 of 2006, was not considered.

In **Usher's Wiltshire Brewery Ltd., vs. Bruce, 1915 A. C. 433,**

> "Where money is paid by a landlord, being a brewer, or allowed by him to the tenant of a tied house, as a necessary incident of the profitable working of the brewery business, the landlord is not prevented from deducting that money, in his estimate of the balance of profits of his brewery business for the purposes of assessment to income tax, by reason of the fact that it enures also for the benefit of the tenant's separate trade in the tied house.
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> So held on the authority of Smith vs. Lion Brewery Co. [1911] A. C. 150
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> A brewery company, as a necessary incident of the profitable working of their brewery business, acquired and owned licensed houses which they let to tied tenants, who, in consideration of the tie, paid a rent less than the full annual value. The tenants were under an agreement to repair and to pay rates and taxes, but the company in fact did the repairs and paid rates and taxes in order to avoid loss of tenants. The company also in respect of these houses paid premiums on insurances against fire and loss of licenses and incurred legal expenses in connection with the renewal of the licenses and otherwise. All these sums were solely and exclusively expended or allowed by the brewery company for the purposes of their business:-
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> Held that, in estimating the balance of the profits of their business for the purpose of assessment to income tax, the brewery company were entitled to deduct all these sums as expenses necessarily incurred for the purpose of earning the profits.
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> Brickwood & Co. vs. Reynolds [1898] 1 Q. B. 95 overruled.
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> Decision of the Court of Appeal [1914] 2 K. B. 891 reversed".

Lord Sumner who allowed the appeal, said at page 469,

"Next as to the rent. A trader who utilizes, for the purposes of his trade, something belonging to him, be it chattel or real property, which he could otherwise let for money, seems to me to put himself to an expense for the purpose of his trade. Equally he does so if he hires or rents for that purpose property belonging to another. The amount of his expense is prima facie what he could have got for it by letting it in the one case and what he pays for it when hiring it in the other. Where he gets something back for it, while employing it in his trade, by receiving rent or hire for it in connection with that trade, the true amount of his expense can only be arrived at by giving credit for such receipt.

In principle, therefore, I think that in the present case rent foregone, either by letting houses, which the brewers own, to tied tenants at a low rent instead of to free tenants at a full rack rent in the open market, or by letting houses in the same way, which they hire and then re let at a loss, is money expended within the first rule applying to both of the first two cases of Schedule D and that upon the findings of the special case, which are conclusive, it is "**wholly and exclusively expended for the purposes of such trade**".

B. P. Australia Ltd., vs. Commissioner of Taxation of the Commonwealth of Australia 1965 3 All E. R. 209, was another case cited by the appellant in that case. It was said in B. P. Australia,

"The appellant ("B. P.") carried on business as a supplier of petrol in Australia. In and after 1951 a system of sale through tied garages was introduced by another supplier. B. P. were asked by many retailers to remove their pumps. In endeavours to obtain tied stations throughout Australia, by means of solo site agreements, whereby B. P. would make lump sum payments ("development allowances") to retailers for the improvement of service stations, B. P., spent in the tax year ending June, 1952, 270,569 Sterling Pounds either in payment direct to the retailers

under solo cite agreements or by way of adjustments with the other co operating companies in respect of such payments made by them. By a solo cite agreement the retailer agreed to resell from his premises only brands of petrol approved by B. P. The average duration of a solo site agreement was five years. The lump sum expenditure of B. P. involved in relation to these solo cite agreements for the year ending June, 1952 was disallowed as a deduction in assessing B. P.'s profits for tax, on the ground that it was capital expenditure.

Held: the lump sum payments by B. P. paid for the solo site agreements with retailers were expenditure of a revenue rather than a capital nature and therefore were deductible in computing B. P.'s profits for income tax purposes for the following reasons:-

(i) the answer to the question whether the expenditure was of a revenue nature must be reached by a commonsense appreciation of all the guiding features.

Dictum of Viscount Radcliff in Commissioner of Taxes vs. Nchanga Consolidated Copper Mines Ltd., ([1964] 1 All E. R. at page 212) applied.

(ii) Applying the tests stated by Dixon J., in Sun Newspapers Ltd., vs. Federal Commissioner of Taxation ((1938), 61 C. L. R. 337) and Hallstorms Proprietary Ltd., vs. Federal Commissioner of Taxation ((1946), 72 C. L. R. at page 647), (a) the character of the advantage sought by B. P. through the solo site agreements pointed to the expenditure being of a revenue nature, as B. P.'s purpose was to obtain orders for petrol by up to date marketing methods, as the lump sums were prima facie circulating capital for they must come back bit by bit in orders for retailers, as the expenditure was recurrent if regard were had to the whole picture and as, on ordinary principles of commercial accounting, allocation of the expenditure

to revenue would be preferable; (b) the manner in which the benefit obtained by B. P. was to be used pointed to the expenditure being allocatable against revenue, as the solo site agreements become part of the ordinary process of selling; (c) expenditure incurred in making a radical alteration in a company's marketing arrangements need not be capital expenditure and (d) though the duration of the solo site agreements did not point clearly to revenue or capitol, yet the fact that the payments were made on the average for five years was a neutral factor which gave no indication towards capital which outweighted (a) and (b) above.

Anglo Persian Oil Co., Ltd. vs. Dale ([1931] All E. R. 725) applied.

Bolam (Inspector of Taxes) vs. Regent Oil Co., Ltd. ((1956), 37 Tax Cases 56) considered.

Per Curiam: it cannot be accepted that a chose in action must be a capital benefit if its value outlives the year of accounting.

Hinton (Inspector of Taxes) vs. Maden and Ireland Ltd., ([1959] 3 All E. R. 356) distinguished".

Lord Pearce, said at page 219,

"It is argued that here there is nothing to show that the retailers would or could insist on fresh payments for a renewal at the end of the periods; but the reasonable inference is that they would and could do so. Unless the demand for petrol exceeds the supply (which on a balance of probabilities seems quite unlikely), the retailers would at the end of the period be in a position as good as or better than their original position. **The fact that B. P. did not regard the lump sum payments as a permanent solution, but considered that some other method should be found, does not prevent their being of a recurrent nature.** A temporary ad hoc solution is none the less of a recurrent nature because

it is recognized that when the problem recurs it may have to be met in some other or more permanent fashion. Nor does the fact that in some cases B. P. dealt with the problem by an admittedly capital solution (e. g. by buying the service station itself and letting it to a customer) affect the question whether the method here in issue was a capital or income solution. Moreover there were fresh sums being paid each year to fresh retailers, a fact which cannot be wholly disregarded in considering whether there is a recurrent demand".

In the backdrop of **Patrick Alfred Reynolds vs. The Commissioner of Income Tax [1965]** and **Hayley & Co., Ltd., vs. Commissioner of Inland Revenue [1961]** and the analysis adopted in Ogilvy Action (Pvt) Ltd., vs. Commissioner General of Inland Revenue (C. A. Tax 16/2013, dated 12.11.2021), the respondent has not shown any reason not to allow the deduction claimed.

Therefore, it is decided that the appellant is entitled to deduct the said sum of Rs. 9,653,695/- under and in terms of section 25(1)(k) of the Inland Revenue Act No. 10 of 2006.

Hence, the Questions of Law are answered as set out below,

(1) Is the amount of Rs. 9,653,695/- paid by the appellant to the employees for the use of the vehicles of the employees for the purposes of the business of the appellant, deductible in terms of section 25(1)(k) of the Inland Revenue Act in the computation of the profits of the appellant for the year of assessment 2008/2009, notwithstanding any prohibition in section 26(2) of the same Act?

Yes.

(2) Did the Tax Appeals Commission err in law in assuming that its conclusion that section 25(1)(k) and 26(2) should be read together provides a sufficient basis for the purpose of determining the issue raised in this appeal on

behalf of the appellant, namely, that the expenditure especially provided for in section 25(1)(k) which is a special provision should be deducted notwithstanding any prohibition in Section 26(2)?

Yes. While there is no objection to read the two sections together, the effect of such reading is not to disallow the special deduction permitted by the former.

(3) Did the Tax Appeals Commission fail to properly examine and or apply and or appreciate the facts and the law relevant to this matter?

Does not arise in view of answers given to Question Nos. (1) and (2)

Hence further, this Court annuls the assessment issued by the Assessor for the Year of Assessment 2008/2009 in respect of the sum of Rs. 9,653,695/- claimed by the appellant under and in terms of section 25(1)(k) of the Inland Revenue Act.

In the circumstances, the appeal in the form of a case stated is allowed. The respondent will pay the cost of this appeal to the appellant.

Judge of the Court of Appeal.

Hon. Pradeep Kirthisinghe J.,

I agree.

Judge of the Court of Appeal