

UNIVERSITY OF LONDON
 INSTITUTE OF ADVANCED
 LEGAL STUDIES
 6 - DEC 1971
 25 RUSSELL SQUARE
 LONDON W.C.1

Judgment 24. 970

No. 17 of 1970

IN THE PRIVY COUNCIL
ON APPEAL FROM THE COURT OF APPEAL
OF NEW ZEALAND

B E T W E E N:

THE COMMISSIONER OF INLAND REVENUE

Appellant

- and -

ASSOCIATED MOTORISTS PETROL COMPANY
 LIMITED

Respondent

10

CASE FOR THE APPELLANT

RECORD

1. This is an appeal from the judgment of the Court of Appeal of New Zealand dated 21st November 1969 dismissing an appeal by the above Appellant from a judgment of the Supreme Court of New Zealand dated 8th May 1969 in respect of a Case Stated by the Appellant under s.32 of the Land and Income Tax Act 1954, following objections by the Respondent to various amended assessments of income tax for the years ended 31st March 1960 to 31st March 1965 inclusive.

158
 159
 122

20

2. The questions for determination in this appeal are whether the Commissioner acted incorrectly in making the assessments in respect of income for the years in question, and if so, in what respects should the assessments be amended.

13/20

3. The income tax in issue for the years in question is as follows :

30

<u>Year Ending:</u>	<u>Proprietary Income</u>
31 March 1960	£425,239
31 March 1961	£410,944
31 March 1962	£516,239
31 March 1963	£480,594
31 March 1964	£511,315
31 March 1965	£553,695
	<hr/>
	£2,898,026
	<hr/>

Income tax thereon at 8/6d. in the £:
 £1,231,661.

40

4. The assessments in dispute were made under s.138 of the Land and Income Tax Act 1954. This section deems the income of a "proprietary company" (as defined) to be, in certain

RECORD

circumstances, the income of its shareholders and taxable in their hands. The "proprietary" provisions were first enacted as s.23 of the Land and Income Tax Amendment Act 1939, the principal Act then being the Land and Income Tax Act 1923. Section 23 read as follows :

23 (1) The following provisions shall apply for the purposes of this section, namely :-

- (a) The term "proprietary company" means in respect of any income year a company which at the end of that year is under the control of not more than four persons. For the purposes of this paragraph all the members of any partnership shall be deemed to be one person and all the persons interested in the estate of any deceased person (whether as trustees or as beneficiaries) shall be deemed to be one person: 10
- (b) The term "shareholder", in respect of any income year, means a person by whom or on whose behalf shares in a proprietary company are held at the end of that year; and includes a debenture-holder: 20
- (c) The term "debenture-holder", in respect of any income year, means a person who at the end of that year holds debentures (being debentures of the kind referred to in section one hundred and seventeen of the principal Act) issued by a proprietary company; and includes any person on whose behalf any such debentures are held at the end of the income year: 30
- (d) The term "non-assessable income" means non-assessable income to which section six of the Land and Income Tax Amendment Act, 1931, applies:
- (e) The term "ordinary proprietary company" means a proprietary company the issued capital of which consists wholly of ordinary shares each of which has the same nominal value and is paid up to the same extent as and ranks in all respects equally with every other share, and which is not a company that has issued debentures of the kind referred to in section one hundred and seventeen of the principal Act: 40
- (f) The term "total income" means taxable income and non-assessable income:
- (g) The total income derived in any income year by a proprietary company shall be deemed to be income derived in that year from the company by the shareholders of the 50

company. In the case of an ordinary proprietary company the total income shall be deemed to be derived by the shareholders in the proportions which the numbers of shares held by or on behalf of the shareholders respectively bear to the total number of shares issued by the company. In the case of a proprietary company other
10 an ordinary proprietary company the total income shall be deemed to be derived by the shareholders in proportions determined in such manner as may be prescribed by regulations made under the principal Act, or, in default of any such regulations or so far as they do not extend, in such proportions as the Commissioner thinks just and reasonable, having regard to the nature and relative importance of the interests of the shareholders in the company:

20 (h) All shares or debentures held by or on behalf of a married woman living with her husband within the meaning of section thirteen of this Act shall be deemed to be held by her husband:

30 (i) The term "proprietary income" means the income deemed under paragraph (g) of this subsection to have been derived by a shareholder from a proprietary company in any income year in every case where that income is not less than one-fifth of the total income of the company for that year. The proprietary income derived by a shareholder from any proprietary company in any income year shall be deemed to consist of assessable and non-assessable income in the proportions in which the total income of the company for that year consists of taxable and non-assessable income; and
40 that portion of any proprietary income that is deemed to be assessable income shall, if derived from an investment company, be deemed to be unearned income of the shareholder, and in all other cases shall be deemed to be earned income of the shareholder:

50 (j) The term "investment company" means a proprietary company the taxable income of which is derived exclusively or principally from sources of such a nature that, if income were derived therefrom by a person other than a company or a public or local authority, that income would be unearned income.

(2) The proprietary income derived by any shareholder in any income year shall be included in his assessable or (as the case may require) his non-assessable income for that year, and he

RECORD

shall be assessable and liable for income-tax accordingly.

(3) The following provisions shall apply with respect to every assessment made under this section in respect of income derived by any shareholder during any income year:-

- (a) Notwithstanding anything to the contrary in section six of the Land and Income Tax Amendment Act, 1931, the Commissioner shall have no regard to the dividends or interest (being interest of the kind referred to in section one hundred and seventeen of the principal Act) derived by the shareholder from any proprietary company from which he derived proprietary income during the income year: 10
- (b) Notwithstanding anything to the contrary in section seventy-three of the principal Act, all deductions from the assessable income by way of special exemption shall, to the extent of the portion of the assessable income that is not proprietary income, be made from that portion, and the balance (if any) shall be deducted from the assessable proprietary income: 20
- (c) Where the proprietary income of the shareholder or any portion thereof is taxable under this section and that income is also taxable in the same year of assessment as being income derived by a proprietary company, there shall be deducted from the tax payable by the shareholder in respect of that income a sum equal to the tax payable by the company in respect of that income. 30

(4) Nothing in the foregoing provisions of this section shall be construed to affect the assessment or liability for income-tax of any proprietary company.

Land and Income Tax Act 1923 40

Relevant definitions in the principal Act of 1923 were :

s.2: In this Act except where a contrary intention appears

"Assessable income" means income of any kind which is not exempted from income tax otherwise than by way of a "special exemption" expressly authorised as such by this Act.

"Company" means any body corporate, whether incorporated in New Zealand or elsewhere 50

"Taxable income" means the residue of assessable income after deducting the amount of all special exemptions to which the taxpayer is entitled.

Section 84 of the 1923 Act was the predecessor of s.165 of the Land and Income Tax Act 1954. It read:

84. Income derived from New Zealand or abroad: how far assessable.

10 (1) Subject to the provisions of this Act, all income derived by any person who is resident in New Zealand at the time when he derives that income shall be assessable for income-tax, whether it is derived from New Zealand or from elsewhere.

(2) Subject to the provisions of this Act, all income derived from New Zealand shall be assessable for income-tax, whether the person deriving that income is resident in New Zealand or elsewhere.

20 (3) Subject to the provisions of this Act, no income which is neither derived from New Zealand nor derived by a person then resident in New Zealand shall be assessable for income-tax.

1931: Section 6 (1) of the Land and Income Tax Amendment Act 1931 (referred to in s.23 (1) (d) of the 1939 Amendment) provided that non-assessable income was to be treated as assessable income in certain cases and subs. (2) read:

30 (2) The non-assessable income referred to in the last preceding subsection includes the following :-

- 40 (a) Income derived from securities issued by the Government of New Zealand subject to the condition that the income derived therefrom shall be exempt from income-tax:
- (b) Income derived from debentures issued by companies on terms providing for the payment of income-tax by such companies, as provided by section one hundred and seventy-one of the principal Act:
- (c) Dividends or other profits derived from shares or other rights of membership in companies.

The 1939 provisions were amended in various ways both before and after re-enactment in the present 1954 Act.

The definitions of "assessable income", "company" and "taxable income" were brought forward in s.2 of the 1954 Act without change;

RECORD

"non-assessable income" was defined in s.2 on similar lines to the description of that term in the Land and Income Tax Amendment Act 1931. Section 84 of the 1923 Act was reproduced as s.165 in the 1954 Act in identical terms.

The following sets out s. 138 as it stood at all material times relevant to the income years referred to in this appeal:

138. Income of proprietary company in certain cases assessable as income of shareholders - 10

(1) The following provisions shall apply for the purposes of this section, namely:

(a) The term "proprietary company", in relation to any income year, means a company which at the end of that year is under the control of not more than four persons, or a company which at the end of that year is being or has been wound up and was at the commencement of the winding up under the control of not more than four persons. 20

For the purposes of this paragraph all the members of any partnership shall be deemed to be one person and all the persons interested in the estate of any deceased person (whether as trustees or as beneficiaries) shall be deemed to be one person:

(b) The Term "shareholder", in relation to any company and any income year, means a person by whom or on whose behalf shares in the company are held at the end of that year or, as the case may be, at the date of the final distribution of the assets of the company during that year; and includes a debenture holder: 30

(c) The term "debenture holder", in relation to any company and any income year, means a person by whom or on whose behalf debentures issued by the company (being debentures of the kind referred to in section 142 of this Act) are held at the end of that year or, as the case may be, at the date of the final distribution of the assets of the company during that year: 40

(d) The term "ordinary proprietary company" means a proprietary company the issued capital of which consists wholly of ordinary shares each of which has the same nominal value and is paid up to the same extent as and ranks in all respects equally with every other share, and which is not a company that has issued debentures of the kind referred to in section 142 of this Act: 50

- (e) The term "non-assessable income" means non-assessable income as defined in section 2 of this Act; and includes non-assessable proprietary income:
- (f) The term "residual taxable income", in relation to any proprietary company and any income year, means the amount by which the taxable income of the company for that year (including taxable proprietary income) exceeds the total amount of the income tax ... payable by the company in respect of income derived by it during that year:
10 / Provided that, for the purposes of this paragraph, the social security income tax payable by the company shall be calculated as if social security income tax were payable by the company not only on income of the company which is otherwise chargeable under this Act with social security income tax, but also on the taxable proprietary income derived by the company from any other company during that year: /
20 Provided also that in the application of this section to any shareholder that is a company the residual taxable income of the proprietary company for any income year shall be deemed to be the amount of the taxable income of the proprietary company for that year:
- 30 (g) The term "total income", in relation to any proprietary company and any income year, means the total amount of the residual taxable income and non-assessable income of the company for that year:
- (h) The total income derived in any income year by a proprietary company shall be deemed to be income derived in that year from the company by the shareholders of the company. In the case of an ordinary proprietary company the total income shall be deemed to be derived by the shareholders in the proportions which the numbers of shares held by or on behalf of the shareholders respectively bear to the total number of shares issued by the company. In the case of a proprietary company other than an ordinary proprietary company the total income shall be deemed to be derived by the shareholders in proportions determined in such manner as may be prescribed by regulations made under this Act, or in default of any such regulations or so far as they do not extend, in such proportions as the Commissioner thinks just and reasonable, having regard to the nature and relative importance of the interests of the shareholders in the company:
40
50
- (i) The term "proprietary income", in relation

RECORD

to any shareholder in any proprietary company and any income year, means the income deemed under this subsection to have been derived by the shareholder from the company in that year in every case where that income (together with any other income deemed under this section to have been derived by that shareholder in that year) is not less than one-fourth of the total income of the company for that year. The proprietary income derived by a shareholder from any proprietary company in any income year shall be deemed to consist of assessable and non-assessable income in the proportions in which the total income of the company for that year consists of residual taxable income and non-assessable income. 10

(j) The term "proprietary assessment", in relation to any taxpayer and any income year, means an assessment which includes, in addition to any other income, the whole of the proprietary income derived by the taxpayer in that year: 20

(k) The term "non-proprietary assessment", in relation to any taxpayer and any income year, means an assessment which does not include any of the proprietary income which the taxpayer has derived in that year:

(l) Where pursuant to section 141 of this Act the Commissioner treats as a single company two or more companies any one or more of which holds shares in another company, the companies so treated as a single company shall be deemed to be one shareholder of that other company and for the purpose of paragraph (a) of this subsection, to be one person: 30

(m) Where two or more companies (in this paragraph referred to as the holding companies) which are under the control of the same persons hold such shares or debentures in any other company that if the holding companies were a single company the other company would be a proprietary company from which that single company would derive proprietary income, the other company shall be deemed to be a proprietary company and the income derived therefrom by the holding companies shall be deemed to be proprietary income of the holding companies: 40 50

(n) Where a proprietary company derives proprietary income, either directly or through any intermediate proprietary company or companies, from another proprietary company, and that other proprietary company also derives proprietary income from the

10 proprietary company first mentioned, whether directly or through any intermediate proprietary company or companies, the Commissioner may, notwithstanding anything in paragraph (g) of this subsection, exclude from the total income of any of the proprietary companies concerned such portion of the proprietary income derived by that company as he determines and may allocate to the shareholders of that company such portion of the total income derived by that company as he thinks just and reasonable, having regard to the nature and relative importance of the interests of the shareholders in that company.

20 (2) The proprietary income derived by any shareholder in any income year shall be deemed to be assessable income or (as the case may require) non-assessable income for that year, and, where a proprietary assessment is made, shall be included in that assessment accordingly. The ordinary income tax payable for any year by any shareholder shall be either -

(a) The ordinary income tax assessed for that year in a proprietary assessment made on the shareholder, after -

(i) Making the deduction provided for by paragraph (c) of subsection (3) of this section: and

30 (ii) Where the shareholder is a company that is not resident in New Zealand, allowing a rebate of a sum equal to five percent of the amount of any taxable proprietary income included in that assessment; or

(b) The ordinary income tax assessed for that year in a non-proprietary assessment made on the shareholder -

40 whichever amount of ordinary income tax is the greater and the shareholder shall be assessable and liable for ordinary income tax accordingly.

(3) The following provisions shall apply with respect to every proprietary assessment made under this section in respect of income derived by any shareholder during any income year:

50 (a) No portion of any loss incurred by any taxpayer (being a loss of the kind referred to in section 137 of this Act) shall be deducted from or set off against his proprietary income:

(b) All deductions from the assessable income by way of special exemption shall, to the extent

RECORD

of the portion of the assessable income that is not proprietary income, be made from that portion, and the balance (if any) shall be deducted from the assessable proprietary income:

(c) Where the proprietary income of the shareholder or any portion thereof is taxable under this section and that income is also taxable in the same year of assessment as being income derived by a proprietary company, there shall be deducted from the ordinary income tax payable by the shareholder a sum equal to the ordinary income tax payable by the company in respect of that income. 10

(4) The assessment of any shareholder of a proprietary company in accordance with the provisions of this section shall not affect the assessment or liability for tax of that proprietary company. 20

(5) Nothing in the provisions of this section shall be construed to affect the assessment or liability of any shareholder for social security income tax

(6) No dividends or interest derived by a shareholder from a proprietary company in any income year (the interest being interest of the kind referred to in section 142 of this Act) shall be included in a proprietary assessment that includes proprietary income derived by the shareholder from that company. 30

(7) Where an assessment made in respect of the income derived by any taxpayer in any income year includes a dividend from a company from which the taxpayer has derived proprietary income during one or more of the four income years immediately preceding that income year, there shall be deducted by way of rebate in calculating the ordinary income tax payable the additional tax payable under a proprietary assessment made in respect of income derived by the taxpayer in any one or more of those four immediately preceding income years, to the extent that it does not exceed the additional tax payable by reason of the inclusion of that dividend. 40

(8) Where any additional tax payable under a proprietary assessment has been allowed to any taxpayer as a rebate under subsection (7) of this section, the amount so allowed shall not be again allowable as a rebate under that subsection to that taxpayer or to the wife or husband of that taxpayer. 50

(9) For the purposes of subsections (7) and (8) of this section -

(a) "Additional tax payable by reason of the inclusion of that dividend" means the amount by which the ordinary income tax payable in any year under a proprietary or non-proprietary assessment which includes that dividend exceeds the ordinary income tax that would be payable if that dividend had not been derived in that year:

10 (b) "Additional tax payable under a proprietary assessment" -

(i) In relation to the income year that ended with the thirty first day of March, nineteen hundred and fifty-three, or any subsequent year, means the amount by which the ordinary income tax payable under the proprietary assessment in respect of any such income year exceeds the ordinary income tax that would be payable by the taxpayer under a non-proprietary assessment in
20 respect of that income year:

(ii) In relation to any income year before the year that ended with the thirty first day of March, nineteen hundred and fifty-three, means the amount by which the ordinary income tax payable under an assessment made in accordance with section 23 of the Land and Income Tax Amendment Act 1939 in respect of any such income year exceeds the ordinary income tax that
30 would be payable by the taxpayer under an assessment made in respect of that income year as if that section had not been passed.

(10) With respect to the proprietary income derived by a trustee from a proprietary company during any income year, the following provisions shall apply:

40 (a) The whole or any part of the proprietary income may for the purposes of this section be allocated by the Commissioner to such one or more of the beneficiaries under the trust, and if more than one in such proportions as the Commissioner determines. The Commissioner shall make the allocation in such manner as he deems just and equitable, having regard to the respective interests of the beneficiaries under the trust:

50 (b) If and so far as the proprietary income of the trustee is so allocated to any beneficiary it shall be deemed for the purposes of this section and of section 155 of this Act to be also proprietary income derived by the beneficiary as a beneficiary entitled in possession to the

RECORD

receipt thereof under the trust during the same income year, and for the purposes of this section the beneficiary shall be deemed to be a shareholder of the proprietary company accordingly:

- (c) If and so far as the proprietary income of the trustee is not allocated by the Commissioner to any beneficiary, it shall for the purposes of this section and of section 155 of this Act be deemed not to be also proprietary income derived by any beneficiary as aforesaid 10

[(11) This section shall not apply so as to affect the assessment or liability for tax of any taxpayer who is not a company.]

1968 Amendment.

By s.26 (5) of the Land and Income Tax Amendment Act (No. 2) 1968 subsection (12) was added. It declared (inter alia) that s.138 shall not apply so as to impose upon any shareholder liability for tax in respect of proprietary income derived from a proprietary company not resident in New Zealand except where the Commissioner is satisfied as to various specified matters. 20

Section 26 (9) provides:

(9) Where any objection has been made, whether before or after the passing of this Act, to an assessment of income tax in respect of income derived in any income year which ended not later than the thirty-first day of March, nineteen hundred and sixty-eight, then, notwithstanding anything in any other enactment or in any rule of law relating to the interpretation of legislative enactments, nothing in subsections (1) to (7) of this section shall in determining that objection and every appeal against the determination thereof be construed as altering the law in force before the passing of this Act, and the objection and every appeal against the determination thereof shall be heard and determined as if subsections (1) to (7) of this section had not been enacted. 30 40

2/24

5. At all material times the Respondent held one-half of the shares in a company called Pan Eastern Refining Company Limited (hereinafter called "Pan Eastern") which was incorporated in the Bahama Islands. The Respondent is a wholly owned subsidiary of Europa Oil (N.Z.) Limited. In 1956 Europa entered into a contract with the Gulf Oil Corporation for the supply by Gulf to Europa of its gasoline requirements and pursuant to the arrangements between them Gulf and Europa set up Pan Eastern the profits of 50

which were to be equally divided between subsidiaries of Gulf and Europa. Europa arranged for the shares to which it was entitled in Pan Eastern to be taken up by the Respondent. In effect, the question at issue in this appeal is whether the income derived by the Respondent from Pan Eastern is assessable as "proprietary income" under s.138.

10	6. In the Supreme Court McGregor J. (who dealt with the Cases Stated in respect of Europa Oil (N.Z.) Limited, and of the Respondent in one judgment), decided that the assessments in issue could not be upheld. McGregor J. referred to the presumption that Parliament deals only with persons within the jurisdiction and discussed <u>Colquhoun v. Heddon</u> 25 Q.B.D. 129 and <u>In re Adams</u> (1903) 25 N.Z.L.R. 302. He then referred to s.165 of the Act whereunder income derived by a person resident in New Zealand is assessable for income tax in New Zealand	51 110 112/47 113/45
20	whether the income is derived from New Zealand or from elsewhere. He found (i) that the Respondent was both incorporated in and had its head office in New Zealand and was therefore assessable for income tax on all income derived by it. (ii) that Pan Eastern was incorporated in the Bahamas, had its head office there, and derived no income from New Zealand. (iii) that Pan Eastern was not within the New Zealand jurisdiction. McGregor J. then referred to the definition of "company" in s.2. as meaning unless the context otherwise requires, any body corporate whether incorporated in New Zealand or elsewhere, and to the submission for the Respondent that the context of s.138 required limitation of the expression to a company resident in New Zealand. He noted that Pan Eastern was a company controlled by not more than four persons and was a proprietary company but said this did not decide the issue. He considered the expressions "assessable income" and "non-assessable income" and referred to the decision of this Board in <u>Australian Mutual Provident Society Ltd. v. Commissioner of Inland Revenue</u> [1962] N.Z.L.R. 449 (P.C.) to the effect that before a company can be exempt from income tax it must first be subject to income tax. He considered other terms used in s.138 such as "residual taxable income" "taxable income" and "income tax" and considered they could apply only to a New Zealand company. While some of these provisions were, he said, in a sense machinery sections, he considered that they referred to matters which the Commissioner lacked jurisdiction to determine, if applied to Pan Eastern's income. Section 138 applied therefore only to persons and matters within the jurisdiction notwithstanding the generality of some of the expressions used.	113/51 114/3 114/8 114/15 115/14 116/1 116/30 117/9
30		
40		
50		
60		

income tax on overseas companies which carried on business in New Zealand. The definition of "company" therefore needed to embrace such companies.

10 North P. next referred to Colquhoun v. Heddon (1890) 25 Q.B.D. 129 and to the submissions for the Appellant (i) that the principle of the case had no application as no attempt was made to extract income tax from overseas companies which derive their income outside New Zealand; (ii) that s.138 was aimed at the shareholders of the proprietary company, and not the company itself; (iii) that the Respondent was a New Zealand shareholder and was liable to pay proprietary income tax. He considered that these submissions overlooked the fact that "shareholder" is also a defined term and could apply to both shareholders in Pan Eastern namely Propet (the Gulf subsidiary) and the Respondent.

20

133/12

134/7

134/20

30 North P. thought that the only safe approach was to consider whether the whole tenor of s.138 in the light of its history indicated that the section was aimed exclusively at companies within the jurisdiction of New Zealand revenue authorities. In his opinion the whole scheme of the section pre-supposed that the proprietary company was itself subject to New Zealand income tax. He referred to ss.114 to 120, s. 137, and also to s.139 and s.140, neither of which two latter sections, he said, could have application to a proprietary company not resident in New Zealand. He accordingly held that s.138 did not apply to Pan Eastern and the whole basis for the assessments issued by the Commissioner fell down.

135/2

135/26

136/1

40 Turner and McCarthy JJ. delivered a joint judgment, also dismissing the appeal. They referred to Pan Eastern having been specially incorporated in the Bahama Islands for the purposes described in the judgments in the earlier case of Europa Oil (N.Z.) Limited and stated that by processes referred to in those judgments Pan Eastern rapidly acquired very substantial profits of something like £1 million per year from the notional operations which (on paper) it conducted.

137

137/17

137/27

138/4

50 They observed that the matter appeared to be one of construction of the statute. In their view the crucial question was "Is this legislation applicable to the case where, the shareholder company being resident in New Zealand, the company which it is sought to deem a 'proprietary' company is incorporated outside New Zealand, resident outside New Zealand, and has never derived income from New Zealand."

138/22

143/28

RECORD
145/11

- 145/29 The statutory provisions passed in 1939 had, they observed, been amended but the amendments were not significant. The best test of the intention of the Legislature was to examine the provisions as originally enacted.
- 146/4 They stated that the argument for the Appellant was that the section and its 1939 predecessor were not expressly limited to New Zealand companies; that no duties were imposed on proprietary companies; liabilities are imposed not upon the proprietary companies but merely on those shareholders who derive proprietary income and are assessable for tax in New Zealand. They then passed to the submissions for the Respondent that the provisions of the section though not in terms excluding foreign companies led inevitably by implication to the same result. They preferred this view. 10
- 147/18
- 148/9
- 149/29 They considered that paragraphs (1) (h) and (1) (i) of s.138 appeared to be the crucial operative subsections. It was the assessable part of the shareholders' share of the total income which was taxable. If these words were not specifically defined and could be read as whole income such a provision might not be decisive. But the words were specifically defined; to ascertain total income of a company it was necessary to ascertain taxable income and non-assessable income. A company which is neither resident in New Zealand nor derives income from New Zealand could not, they considered, have taxable income in view of s.165 (3). Such a company derives no income assessable for tax; this, they said, is merely another way of saying it derives no assessable income. They said that counsel for the Appellant in attempting to answer this had replied that it depended on considerations of machinery, not substance. In their view the provisions were not mere machinery 20
- 150/24
- 150/32
- 151/16 30
- 152/22
- 153/6
- 153/21
- 154/7 40
- 154/20 They then considered whether, because the shareholders of Pan Eastern would have been liable for income tax if they had been partners instead of shareholders in a company, they ought to be held liable as such shareholders, but dismissed comparison with partnership as untenable
- 154/30
- 155/8 They then considered McGregor J's view that the Commissioner was put to election and concluded that the doctrine did not apply to the Commissioner as he was acting under statutory duty and, further, Europa and the Respondent were different legal entities. 50
- 156/13
- 157/7 In conclusion they noted that they had held that the section was not apt to deal with the

income of companies not resident in New Zealand if such companies did not derive income from New Zealand. They did not decide what the position might be, in the intermediate case, as to the income of companies which, though not resident in New Zealand, yet derived some of their income from New Zealand. It might be, they thought, that such income was caught by the section.

157/16

10 10. The basic contentions for the Appellant are :

(1) The word "company" used in the expression "proprietary company" in s.138 (1) (a) includes by definition of that word in s.2 a company incorporated outside New Zealand; the context does not require limitation to a company incorporated in New Zealand.

20 (2) Section 138 (1) (g) defines "total income" (which is by paragraph (h) attributed to the shareholders) as the total amount of the residual taxable income and non-assessable income of the proprietary company. "Residual taxable income" becomes "taxable income" by the second proviso to s.138 (1) (f).

"Taxable income" is defined by s.2 as the residue of assessable income after deducting all special exemptions; a company taxpayer has no special exemptions; what it has is therefore "assessable income".

30 Section 138 (1) (g) may therefore be reconstructed to read:

"The term 'total income' in relation to any proprietary company and any income year means the total amount of the (assessable income) and non-assessable income of the company for that year."

40 (3) "Assessable income" is defined in s.2 as income of any kind which is not exempted from income tax otherwise than by way of special exemption. This definition is not concerned with the place where income is earned. Further, income which is not derived from New Zealand by a person not resident in New Zealand is not exempt from tax unless, but for exemption, it would have been liable (Australian Mutual Provident Society v. Commissioner of Inland Revenue (1962) N.Z.L.R. 449 P.C.)

50 It is submitted too, that the term "assessable income" must include income derived from outside New Zealand. By s.165 (1), subject to the Act, all income derived by any person who is resident in New Zealand is assessable for income tax whether the income is derived from

RECORD

New Zealand or elsewhere. Section 170 provided in its original form in 1954 that income derived by a New Zealand resident but not derived from New Zealand should be exempt from income tax if derived from some other country within the Commonwealth and taxed there. In 1962 the exemption was dropped and a credit was directed to be allowed for foreign tax against income tax payable in New Zealand on that income.

The other component of "total income", namely, "non-assessable income" is defined in s.2 and arms (b) and (c) of the definition may clearly include income derived from overseas. 10

Thus the "total income" of a proprietary company includes all overseas income it might earn. This income is in turn by s.138 (1) (h) attributed proportionately to its shareholders. The income thus attributed therefore includes income derived from overseas, and for the Respondent its income from Pan-Eastern is so derived. 20

(4) The proprietary company is not necessarily liable for tax in New Zealand.

The proprietary company may be incorporated overseas, may be a non-resident in New Zealand, and its income may be derived from outside New Zealand. It is submitted that these factors involve the conclusion that it need not be liable for tax in New Zealand.

In further support of this submission the Appellant contends, as he did both in the Supreme Court and the Court of Appeal (although this contention is not referred to in any of the judgments), that there is a clear distinction between assessable income as defined in the Act, and income which is assessable for income tax. 30

(i) Before income is assessable for tax under s.78 (1) it must be "taxable income" of a taxpayer.

"Taxpayer" is defined by s.2. as a person chargeable with ... income tax. 40

It was necessary to use the word "taxpayer" in s.78 instead of "person" (also defined in s.2) as without limitation persons beyond the jurisdiction would be included.

(ii) By s.165 (3) no income which is neither derived from New Zealand nor derived by a person then resident in New Zealand "shall be assessable for income tax". This puts the territorial limit of liability on the widely defined term "assessable income". 50

- 10 (iii) That assessable income is not always assessable is shown not only by the general provisions of the Act but also by various special provisions of the Act, for example the special exemptions, all of which are included in assessable income but are not taxable (ss.78A - 85B:) and s.137 relating to the carrying forward of losses as a deduction from or set off against future assessable income.

It is contended therefore that in terms of the Act itself not all "assessable income" is "assessable for income tax".

- 20 (5) The section itself and in particular s.138 (3) (c) assumes that the proportion of the proprietary income attributed to the shareholder need not be "also taxable" in New Zealand in the hands of the proprietary company. It is submitted that the only situation in which this happens is where, as here, the proprietary company is not resident in New Zealand and does not derive income from New Zealand

Hence it is submitted that the income of Pan-Eastern is "assessable income" but

- 30 (i) it is not as such income of a "taxpayer" (s.78 (1)) and
(ii) under s.165 (3) it is not assessable for income tax.

Such income being "assessable income" is part of "total income" which is by (h) attributed to shareholders of the proprietary company

The Appellant humbly submits that the judgment of the Court of Appeal of New Zealand is erroneous and ought to be reversed and that this Appeal ought to be allowed with costs here and below for the following among other

R E A S O N S

- 40 1. BECAUSE Pan-Eastern was a proprietary company for the purposes of s.138; and no question of New Zealand's asserting jurisdiction over it arises.
2. BECAUSE the income of Pan-Eastern was within the term "total income" in s.138 (1) (g)
3. BECAUSE the income of Pan-Eastern was assessable income but was not income of a taxpayer; and was not assessable for income tax in the hands of Pan-Eastern.

RECORD

4. BECAUSE the income the Respondent derived from Pan-Eastern was proprietary income under s.138.
5. BECAUSE the doctrine of election did not preclude the Appellant from making any of the amended assessments.

J. C. WHITE

I. L. M. RICHARDSON.

No. 17 of 1970

IN THE PRIVY COUNCIL

ON APPEAL FROM THE COURT OF

APPEAL OF NEW ZEALAND

B E T W E E N :

THE COMMISSIONER OF INLAND REVENUE
Appellant

- and -

ASSOCIATED MOTORISTS PETROL
COMPANY LIMITED Respondent

CASE FOR THE APPELLANT

MACKRELL & CO.
Inigo Place,
31 Bedford Street,
Strand,
London, W.C.2.