CHARTER POWERS AND LIABILITY TO INCOME TAX

In dealing with liability to assessment for income tax it is essential to keep clearly in mind that the Income War Tax Act charges with tax income or profits.[1] For the purposes of this discussion, we are concerned more particularly with the taxability of earned profits, which are derived from the pursuit of an occupation, trade or business adventure. Preliminary to the conclusion that certain profits are, or are not, taxable there must be either a conscious or unconscious decision as to whether the taxpayer has been carrying on business. The question "what are taxable profits" involves the question "what is carrying on business" and the determination of the latter question automatically resolves the first.

Quite often this preliminary decision of whether the taxpayer has been carrying out a scheme of profit making is overlooked when dealing with assessments made against incorporated companies. Somehow the doctrine that incorporated companies carry on business in accordance with the powers set forth in the Memorandum of Association and Articles of Association of companies created by registration, and in the letters patent of companies created by charter has crept in to tax jurisprudence. Thus if a company takes power to buy and to sell land, and does acquire land and at some later period sells it again for a price higher than that paid, then *ipso facto* the sum representing the difference between the purchase price and the selling price becomes profit brought into charge and the company must pay income tax (and possibly excess profits tax) thereon. Put shortly a company carries on business whenever it exercises any of the powers set out in the objects clause of its charter.

So far as the writer has been able to find, this idea was first put into words by Sir George Jessel, then Master of the Rolls, in 1880. In delivering judgment in *Smith* v. *Anderson*[2] the learned judge said:[3]

> You cannot acquire gain by means of a company except by carrying on some business or another, and I have no doubt if any one formed a company or association for the purpose of acquiring gain, he must form it for the purpose of carrying on a business by which gain is to be obtained. But whether that be so or not, I am clearly of opinion that where investment is made a business, or where the dealing in securities is made a business, it is a business within the purview of

[1] "The term 'income' means, as applied to a commercial business the profits made in that business." *Yates* v. *Yates*, [1913] N.Z.L.R. 281, per Cooper J. at 285.

[2] (1880), 15 Ch. D. 247.

[3] *Ibid.*, at 260.

this Act. There are many things which in common colloquial English would not be called a business, even when carried on by a single person, which would be so called when carried on by a number of persons. This is a distinction not to be forgotten, even if we were trying the question by the ordinary use of the English language. For instance, a man who is the owner of offices, that is, of a house divided into several floors and used for commercial purposes, would not be said to carry on a business because he let the offices as such; but suppose a company was formed for the purpose of buying a building, or leasing a house, to be divided into offices, and to be let out, should not we say, if that was the object of the company, that the company was carrying on business for the purpose of letting offices, or was an office-letting company, trying it by the use of ordinary colloquial language? The same observation may be made as regards a single individual buying or selling land, with this addition, that he may make it a business, and then it is a question of continuity. A man occasionally buys and sells land, as many landowners do, and nobody would say that he was a land-jobber or dealer in land, but if a man made it his particular business to buy and sell land to obtain profit, he would be designated as a land-jobber or dealer in land.

When you come to an association or company formed for a particular purpose, you say at once that it is a business, because there you have that from which you would infer continuity; it is formed to do that and nothing else, and, therefore, at once you would say that the company carried on a business.

It should be noted that *Smith* v. *Anderson* was not a tax case. There the question before the Court was whether the Submarine Cables Trust (an unregistered company) was an association of more than twenty persons for gain contrary to section 4 of the Companies Act of 1862. The action was brought by an investor against a former trustee who raised the defence that the Submarines Cables Trust was an illegal association and therefore the contract with the investor was illegal and consequently the court could not enforce it.

In his judgment Sir George Jessel first of all assumed that an unregistered company did exist, and then proceeded to find that any company must do business. The judgment of the Master of the Rolls was unanimously reversed on appeal on the ground that the trustees were the persons carrying on business and not the investors. In view of the fact that the illustration used by the trial judge to show that a company must carry on business was completely divorced from the real point of the case it should not be quoted and referred to with that happy abandon which seems to be characteristic of tax practitioners. Much less should it be clothed with the mantle of authority it has often worn. A few words from the judgment of Lord Justice James, dealing with *Smith* v. *Anderson* in the Court of Appeal,

might be used appropriately to seal the tax coffin of that case: "now people cannot be said to carry on business when it is utterly inconsistent with what they have done and with what they have said."[4]

In *Scottish Investment Trust Company* v. *Forbes*[5] the Lord President gave expression to the thought for the second time in its career when he said (after referring shortly to the objects of the company)[6], "It is true that the doing of any of these might be incidentally necessary in the conduct of the business of any company. But from the structure of the memorandum it appears that the varying the investments and turning them to account are not contemplated merely as proceedings incidentally necessary, for they take their place among what are the essential features of the business. In my view such speculations are among the appointed means of the company's gains." This judgment, from the standpoint of a reasoned analysis of the problem, is unsatisfactory. In all probability the Lord President felt, on the facts before him, that the company should pay income tax, and then went searching for some ground to give colour to his judgment. That the company could have been found (and probably was shown) to be actually carrying on the business of buying and selling securities is borne out by the pleadings where the Surveyor of Taxes contended "that (as appears from the annual reports) the company made a practice of realising securities and such sales were obviously part of its business; and the balance of gain made fell to be reckoned among the profits." In drafting his pleadings, the solicitor to the Inland Revenue faced the question which apparently did not occur to the learned judge, *i.e.* was the company carrying on business.

One puzzling feature arises in the judgment. The Lord President professes to have been influenced by the decision in *Northern Assurance Company* v. *Russell.*[7] That case was concerned with the way in which the profits of an insurance company carrying on both life and fire branches of the business were to be assessed. Apparently the Revenue had included among the profits the gains made on the sale of securities, for the company contended that profits on investments realized were capital and not income and that their business was not that of buying and selling shares of other companies, but of

[4] *Ibid.*, at 275.
[5] (1893), 3 T.C. 231.
[6] *Ibid.*, at 234.
[7] (1889), 2 T.C. 571.

fire and life insurance. The Commissioners arrived at a mode of assessment which, *inter alia*, brought into charge the profits derived from the realization of investments. Both sides appealed; and the High Court, in answer to the stated case, formulated instructions for the guidance of the Commissioners. The judgment consisted solely of five directives, the fifth of which was "where the gain is made by the company by realizing an investment at a larger price than was paid for it, the difference is to be reckoned among the profits and gains of the company." Nowhere was mention made of the method of incorporation or of the powers possessed by the company. While certain inferences may validly be made from the result arrived at in the *Northern Assurance* case, it is difficult to see why the Lord President was so greatly influenced, and yet proceeded to stress in his own judgment the powers contained in the Memorandum of the Scottish Investment Trust Company as indicative of tax liability. It is interesting to note that twenty-two years after *Northern Assurance Company* v. *Russell*[8] was decided, Mr. Justice Hamilton, as he then was, came to the conclusion in *Brice* v. *Northern Assurance Company* that liability for income tax did not attach to profits realized by the sale of investments.

Following closely on the *Scottish Investment Trust* case *Assets Co. Limited* v. *Forbes*[9] came before the Court. This appeal was dismissed because there was insufficient material on which to found a judgment. However, both Lord Trayner and Lord Young went out of their way to express dissatisfaction with the trend of thought appearing in previous cases which had treated corporate powers and tax liability as synonymous.

The next two cases are probably the most quoted in all tax jurisprudence; one is always referred to in support of the proposition here under discussion and the other is always cited as being to the contrary. The facts in *Californian Copper Syndicate (Limited and Reduced)* v. *Harris*[10] were that a company formed to acquire mining properties, sold them at an enhanced value. The difference between the purchase price and the selling price was claimed to be a capital profit realized in the sale of the company's assets. The Court held otherwise, and thereafter this case has been quoted as deciding that a gain made in pursuance of an act within the appointed powers of the company is taxable as income. A close scrutiny of the judgments delivered reveals that references were made, and quite frequently, to the

[8] (1911), 6 T.C. 327.
[9] 3 T.C. 548.
[10] 5 T.C. 158.

objects set out in the Memorandum of Association. It also reveals that the Court felt and had before it the evidence on which it could so find, altogether apart from the Memorandum, that the company had been carrying on the business of trading in rights to mining properties and had not been engaged in developing mining properties. This is evident in the words of Lord Justice Clerk:[11] "(after saying the purposes of the company pointed to a highly speculative business) and the mode of their actual procedure was in the same direction. . . . I feel compelled to hold that this company was in its inception a company endeavouring to make a profit by a trade or business, and that the profitable sale of its property was not truly a substitution of one form of investment for another. It is manifest that it never did intend to work this mineral field with the capital at its disposal. Such a thing was quite impossible. Its purpose was to exploit the field, and obtain gain by inducing others to take it up on such terms as would bring substantial gain to themselves." Following the words just quoted comes this sentence: "This was that the turning of investment to account was not to be merely incidental, but was the essential feature of the business, speculation being among the appointed means of the company's gains." That sentence illustrates the way in which a principle of English company law has been applied to tax cases with little or no regard for the provisions of the taxing statutes. It is clear from the first quotation that Lord Justice Clerk had found the company to be carrying on business in selling its mining lands. What did the quoted sentence add that wasn't already in the judgment? Nothing. Actually the sentence lastly quoted is based on found facts necessarily extraneous of the Memorandum of Association. How did the learned Judge decide "the turning of investment to account was not to be merely incidental, but was the essential feature of the business"? Certainly not from reading the Memorandum itself. The provision "to turn to account" was among the so-called incidental and ancillary powers usually included in Memoranda of English companies. It was not one of the main provisions of the objects clause. The finding that the turning to account was the essential feature of the business was made from the capital structure, the way in which the business was operated, and the intent to make a profit from the sale which could be inferred from the other two items of evidence. Those three factors led the Judge to believe the company was

[11] *Ibid.*, at 166.

carrying on the business of dealing in mineral properties, and at the same time told him the profits therefrom were taxable.

The other oft referred to case is *Tebrau (Johore Rubber) Syndicate Ltd.* v. *Farmer*[12] decided in the same year as *Californian Copper Syndicate (Limited and Reduced)* v. *Harris*.[13] The Tebrau Rubber Syndicate was formed for the purpose of acquiring and developing rubber estates. Power was taken in the Memorandum to sell the undertaking. However, the Court held that the profit realized on the sale of the estates was not made in the course of business and was therefore not taxable.

> No doubt power was also taken to sell any part of the undertaking and property of the Co.; and I presume that the promoters of the syndicate had in view from the first that it might become expedient to do so; but I am unable to infer from this fact—that it was part of the trade of the syndicate to purchase and sell lands.[14]

Can these two cases be distinguished on any reasonable grounds? The relevant powers are for practical purposes the same in the Memorandum of each company. Therefore the distinguishing features which led the court to different conclusions in the two cases must be found elsewhere. In the *Californian Copper* case the capital was found to be insufficient under any circumstances to develop the property.

> I am satisfied that the appellant company was formed in order to acquire certain mineral fields or workings—not to work the same themselves for the benefit of the company, but solely with the view and purpose of reselling the same at a profit. The facts before us all point to this. The properties were bought for £24000, leaving a share capital of less than £6000—a capital quite inadequate (even if all subscribed which it was not) to enable the company to work their minerals and bring them to market.[15]

No work had been done on the property, and the whole scheme of operation did not indicate any intention to develop and work the ore bearing lands. On the other hand the capital of the Tebrau Rubber Syndicate was found to be sufficient originally to enable the company to plant and develop rubber farms, and considerable acreage actually had been planted when the property was sold. Thus the distinguishing features of these two cases lie in the facts wherein they do not differ from any other cases dealing with a common problem. Certainly they can not be distinguished by the application of a pseudo principle of law based on the contents of the objects clause of the Memorandum of the Association.

[12] 5 T.C. 658.
[13] 5 T.C. 158.
[14] Per Lord Salvesen at p. 665.
[15] Per Lord Trayner at p. 167.

The Liverpool and London and Globe Insurance Company v. *Bennett*,[16] *Brice* v. *The Ocean Accident and Guarantee Corporation Limited*,[17] and *Brice* v. *The Northern Assurance Company*[18] all were concerned with the question whether interest and dividends from sums invested abroad should be included in profits assessable to income tax. By consent Mr. Justice Hamilton treated the question as being open on both law and fact. An appeal was taken ultimately to the House of Lords, but all three courts adopted the reasoning that the investments were made to secure the credit of the company and to enable it to discharge its obligations in the United States and the Dominions, and were necessarily made for the purpose of better carrying on the insurance business and consequently the interest and dividends were part of the gains of the business. The provisions of the Memorandum of Association were referred to but formed no part of the analysis of the situation. Particularly pertinent is a remark made by Lord Loreburn in delivering his judgment in the House of Lords: "I know of no formula which can discriminate in all circumstances what are and what are not profits of a trade."[19]

Between 1911 and 1923 four cases arose which have been referred to now and again as bearing on the problem here under discussion. I intend to review them briefly although they are not especially well known. In *T. Beynon and Co. Limited* v. *Ogg*[20] the powers set out in the Memorandum were referred to by Mr. Justice Sankey in tracing the business history of the company. The judgment however was based on the character of the transaction in purchasing a large number of railway cars and disposing of them in one sale at considerable profit. His Lordship mentioned the large number of cars acquired and came to the conclusion that the company had entered upon the business of wagon dealers.

The Court properly proceeded on the basis of whether the company was doing business in *Thew* v. *South West Africa Co. Ltd.*[21] The Master of the Rolls (referring to documents presented to the Court) said:[22] "I agree that those are really indeterminate and do not yield a guiding line on the relevant points in the case."

[16] 6 T.C. 357.
[17] 6 T.C. 357.
[18] 6 T.C. 357.
[19] *Ibid.*, at 379.
[20] 7 T.C. 125.
[21] 9 T.C. 141.
[22] *Ibid.*, at 158.

Counsel for the taxpayer put the reverse proposition to Mr. Justice Rowlatt in *The Alabama Coal, Iron, Land and Colonization Co. Ltd.* v. *Mylam.*[23] It was contended that the objects of the company took it out of the category of a trading company, but his Lordship did not agree and decided that the bondholders had embarked on a new venture wider than a mere realization of assets. He pointed out that what the company had actually done was different from the objects set out in the Memorandum.

In *Collins* v. *The Firth-Brearley Stainless Steel Syndicate Ltd.*[24] Mr. Justice Rowlatt stated:[25]

> Now, the principle I think is very clear and has been established by many cases. The appreciation of an article, the subject of property, whether it is the property of an individual or whether it is the property of a company, is not taxed as such; but it is taxed if the realization of that appreciation forms part of a trade, because then the trade is taxed, and this is an item in the trade. That is all there is in the principle.

This statement was quoted with approval in the House of Lords several years later:[26]

> What Mr. Justice Rowlatt did was to reverse a finding of fact and the enunciation that he made of the law appears to me to be open to very little criticism.

Another well known case on this point is *Commissioners of Inland Revenue* v. *The Korean Syndicate Ltd.*[27] The company acquired a mining concession but entered into an agreement with others to work it in return for a percentage of the profits and certain other rights. On appeal from Mr. Justice Rowlatt who had held the syndicate not taxable the Court found that the Commissioners had misdirected themselves in construing the agreement as a mere lease. It was held that the company still retained such an interest in the property as to constitute carrying on business and that it was working the concession through others, the syndicate being in the position of a sleeping partner. The Court reached that conclusion solely on its construction of the agreement between the company and the mine operators.[28] Lord Justice Atkin remarked in the course of his judgment:[29]

[23] 11 T.C. 232.
[24] 9 T.C. 520.
[25] *Ibid.*, at 564.
[26] Per Lord Buckmaster in *The Rees Roturbo Development Syndicate Ltd.* v. *Ducker*, 13 T.C. 366 at 398.
[27] 12 T.C. 181.
[28] See *C.I.R.* v. *South Behar Railway Co. Ltd.*, 12 T.C. 662, per Sargant L.J. at 701–702.
[29] *Ibid.*, at 204.

> Now I quite agree that it does not necessarily follow that because a company is incorporated under the Companies Act, it is carrying on a business.

Mr. Justice Sankey was of the opinion that the judgment in the *Korean Syndicate* case covered the situation in *Commissioners of Inland Revenue* v. *The Budderpore Oil Co. Ltd.*[30] Actually the facts were even more favourable to a finding that the company was engaged in business since it remained responsible for certain sums payable to the government for the concession and in addition employed a resident representative to check the output of oil.

The idea that powers taken under the Memorandum of Association determine whether a receipt is taxable income or capital appreciation comes out strongly for the last time in the English cases in *Commissioners of Inland Revenue* v. *Westleigh Estates Co. Ltd.*[31] and *Commissioners of Inland Revenue* v. *South Behar Railway Co. Ltd.*[32] A close scrutiny of the judgments delivered reveals that, in these cases, too, the Court found weighty facts which influenced it more than the provisions of the Memoranda. Some members of the Court paid lip service to the established dogma, more particularly Lord Justice Warrington[33] about whose remarks more will be said later. There were, however, ample facts which made evident a scheme of profit making without the necessity of resorting to fictitious grounds. The *South Behar Railway* case was taken to the House of Lords where the company was found to be a financial company. In his judgment Viscount Cave, Lord Chancellor, devoted about three lines to a resumé of the objects of the company, but considered other facts relating to its operations in much greater detail. *Gloucester Railway Carriage and Wagon Company Limited* v. *Commissioners of Inland Revenue* is also referred to at times. The company originally had manufactured and sold railroad cars. Later a policy of renting the cars was adopted. After a while the company sold the cars it had been renting. Obviously the company had made the cars with the intention of selling them; and the Court held that the sale was in the course of trade, leasing the cars before sale not having changed the nature of the ultimate transaction.

The old order changeth and giveth way to the new. So it is with the law although the change comes more slowly and

[30] 12 T.C. 467.
[31] 12 T.C. 657.
[32] 12 T.C. 657.
[33] See 12 T.C., p. 692–693.

is less perceptible than in other spheres. Gradually the shibboleth that companies carry on business along whatever lines are set forth in their charter comes to be heard only seldom. The new theory that the nature of a company's operations is a better indicator of tax liability becomes stronger. Mr. Justice Rowlatt through whose judgments that thought had been running for many years began to receive substantial support. In *Balgownie Land Trust Ltd.* v. *Commissioners of Inland Revenue*[34] Lord President Clyde referred to the Memorandum, but laid great stress on what the company actually did.

> One is not however entitled to infer from the circumstances that a company is professedly formed with trading purposes in view and for trading objects that the transactions in which it engages necessarily constitute a trade or business; because it does not follow from the fact that it has objects and powers such as I have indicated that it actually uses them for the purpose of conducting the usual business of a company trading in real estate.[35]

Lord Warrington of Clyffe stated the new (and correct) attitude clearly and unequivocally in delivering judgment in the House of Lords on two causes[36] which were taken to the highest tribunal in the form of a stated case. The sole question was whether the rents were properly included in the assessments as trade receipts. The sole issue was whether the company was carrying on a trade.[37] The case for the Crown was that Salisbury House Estate Ltd. was an incorporated company and had taken power in its Memorandum to lease its property.

> But the Crown contends that the fact that the taxpayer is a limited company may distinguish its operations from those of an individual. Assuming the Memorandum of Association allows it, and in this case it unquestionably does, a company is just as capable as an individual of being a landowner, and as such deriving rents and profits from its land, without thereby becoming a trader, and in my opinion it is the nature of its operations, and not its own capacity which must determine whether it is carrying on a trade or not. Nor do I see any reason why, as in the present case, some of its operations under the wide powers conferred by the Memorandum should not be operations of trade, whereas others are not.[38]

Some one will no doubt remark that the above quotation is the antithesis of what his Lordship said in *Commissioners of*

[34] 14 T.C. 684.
[35] *Ibid.*, at p. 692.
[36] *Salisbury House Estate Ltd.* v. *Fry and City of London; Real Property Company Ltd.* v. *Jones*, 15 T.C. 266.
[37] "The first question to be determined is whether in its capacity as landowner deriving rents from land the Company is carrying on a trade", per Lord Warrington at p. 315.
[38] *Salisbury House Estate Ltd.* v. *Fry*, 15 T.C. 266, per Lord Warrington at p. 316.

Inland Revenue v. *Westleigh Estates Co. Ltd.*,[39] and that is quite true. It is not for me to try to reconcile the words of a highly regarded and capable judge, but briefly it will be well to observe that the relevant remarks of Lord Justice Warrington (as he then was) in the *Westleigh Estates* case were surplusage only. There were other, concrete facts relating to the company's operations which provided ample evidence for the finding of the Court in that case. In *Salisbury House Estate Ltd.* v. *Fry*[40] the question before the House for decision was whether the powers contained in the Memorandum or the nature of the company's operations were indicative of liability for assessment. The latter case is an authoritative decision, in fact the only decision, determining whether the powers outlined in the Memorandum indicate taxable income or capital receipt. The Court came to the conclusion that the company's powers outlined in the Memorandum did not make a good guide.

Before leaving the English cases a warning is in order. Care should be taken to see that the Court had jurisdiction to adjudicate on the point for which the case is referred to as an authority. Many English tax problems go to the Court as a stated case and the Court can only decide whether there was sufficient evidence for the Commissioners to find as they did. Such cases were *Balgownie Land Trust Ltd.* v. *Commissioners of Inland Revenue;*[41] *The Rees Roturbo Development Syndicate Ltd.* v. *Ducher;*[42] and *Commissioners of Inland Revenue* v. *The Scottish Automobile and General Insurance Co. Ltd.*[43]

> If this is a finding of fact, it is unappealable if there was evidence on which the finding could be made, even if the Court would not have made such a finding.[44]

Turning to other parts of the Commonwealth we find *Ruhamah Property Co. Ltd.* v. *Federal Commissioner of Taxation*[45] and *Commissioner of Taxes (Victoria)* v. *Melbourne Trust Co. Limited*[46] referred to in Australia on the problem of when a company carries on business. The facts of the former case were that a man named Morrow owned certain real property and in order to make provision for his family he incorporated a company to acquire the property from him. The company had power to

[39] 12 T.C. 657 at 693.
[40] 15 T.C. 266.
[41] 14 T.C. 684.
[42] 13 T.C. 366.
[43] 16 T.C. 381.
[44] *The Rees Ruturbo Development Syndicate Ltd.* v. *Ducher*, 13 T.C. 366, per Lord Justice Scrutton at p. 390.
[45] (1928), 41 C.L.R. 148.
[46] R. & McG. Aust. Income Tax Cases 246; [1914] A.C. 1001.

purchase and sell land. Ultimately the land was sold. The Board of Review held that the powers under the Memorandum of Association determined that the profit at issue was income and not an accretion of capital. Four judges of the High Court thought the members of the Board of Review had misdirected themselves.

> In our opinion the authorities show that the objects and powers of the company contained in its memorandum and articles of association are not decisive of the question whether the sale was an operation of business in carrying out a scheme of profit-making.[47]
>
> Much must depend upon whether the company has taken the property into its trade and traded in it: whether it conducted a trading concern as opposed to a mere realization. The nature of the company, the character of its assets, the nature of the business carried on by it and the particular sale or realization are all relevant to the issue.[48]

In *Commissioner of Taxes (Victoria)* v. *Melbourne Trust Co. Ltd.*[49] Lord Dunedin in giving judgment in the Privy Council referred shortly to the objects of the company in tracing its history. However he dwelt at length on its operations and found that the company had been trading in and not merely realizing the assets of the banks it had taken over. Sums were paid to shareholders who were not necessarily the original creditors of the banks. Shares in the Trust Company were bought and sold on the open market. It is submitted that the case is not an authority (as is often supposed) for the proposition that a company's objects and powers decide when it does business.

The New Zealand Court of Appeal has held that the capacity of an incorporated taxpayer determines whether it is carrying on a trade or not.[50] *Smith* v. *Anderson*[51] was referred to in the judgments quite frequently, but it has already been shown that that case is by no means authoritative. No other cases were cited, and no independent line of reasoning is apparent. The single judge who heard *Wellington Steam Ferries Co. Ltd.* v. *Commissioner of Taxes*[52] felt bound by the judgment in *Commissioners of Inland Revenue* v. *Miramar Land Co.*[53] and simply applied *Smith* v. *Anderson* to the case before him.

South Africa has contributed two cases to this topic. From the judgment in *Commissioner for Inland Revenue* v. *Lydenburg*

[47] *Ruhamah Property Co. Ltd.* v. *Federal Commissioner of Taxation*, (1928), 41 C.L.R. 148, at pp. 151–152.
[48] *Ibid.*, at p. 154.
[49] [1914] A.C. 1001.
[50] *Commissioner of Taxes* v. *Miramar Land Co. Ltd.* (1906), 26 N.Z.L.R. 723.
[51] (1880), 15 Ch. D. 247.
[52] (1910), 29 N.Z.L.R. 1025.
[53] (1906), 26 N.Z.L.R. 723.
[54] 4 S.A.T.C. 8.

Platinum Ltd.[54] it is clear that there were facts apart from the provisions of the Memorandum on which the company could be found to be carrying on business. In one respect it was similar to the *Californian Copper Syndicate* case. Lyndenburg Platinum exhausted its capital in the acquisition of properties before actual operations were under way. The learned judge found that the profits were derived from capital productively employed. Chief Justice Stratford delivered the judgment of the Court in *Lace Proprietary Mines Ltd.* v. *Commissioner for Inland Revenue*[55] which also was concerned with the sale of assets of a mining company. His Lordship said the objects included a scheme of profit making by buying and selling mining rights. What is more important he said:[56] "this scheme (of profit making) it actually attempted to carry out." The reasoning of the Courts in both the above cases proceeds along what may be called the Memorandum principle on the surface only. Beneath the surface reasoning lies, and it must always be there, concrete evidence that the companies were actively engaged in buying and selling mining rights.

On the Canadian scene only one case has become important and is quoted on the problem. *Anderson Logging Co. Ltd.* v. *The King*[57] arose under the British Columbia Income Tax Act. In the Supreme Court of Canada lip service was paid to the Memorandum principle as a matter of course. It is quite clear from the judgment of Mr. Justice Duff (as he then was) that the nature of the company's operations was the deciding factor. The firm had not carried on logging operations for some four years, and it evidently intended to make a profit from the sale of timber limits.

> It is difficult to discover any reason derived from the history of the operations of the Company for thinking that in buying these timber limits the Company did not envisage the course it actually pursued for turning these limits to account for its profit as at least a possible contingency.[58]
>
> In support of the suggestion that the principal business of the Company was in fact the business of logging there is, apart from the Memorandum of Association, no evidence entitled to appreciable weight, and hardly any which can properly be considered at all.[59]

On appeal to the Privy Council that tribunal indicated that the Supreme Court of Canada had proceeded on correct

[55] 9 S.A.T.C. 349.
[56] *Ibid.*, at p. 360.
[57] [1925] S.C.R. 45; 1926 A.C. 140.
[58] [1925] S.C.R. 45 at 49.
[59] *Ibid.*, at p. 50.

lines in finding the company liable to assessment, and added nothing materially to the Supreme Court's discussion of the case.

Having reviewed the authorities, both actual and so-called, we find that the balance lies with the nature of operations being more truly indicative of tax liability than the capacity of the taxpayer. *Salisbury House Estate Ltd.* v. *Fry*[60] is the only authority in point, and in that action the House of Lords rejected the Crown's case which was that the powers and objects set forth in the Memorandum determined when an incorporated company carried on a trade or business.

Apart from authority it is not reasonable to base tax liability on capacity. Today the memoranda of companies incorporated under the registry system are drawn so as to give the company powers comparable with those of an individual person; thus the differentiation in treatment of the two entities for similar acts should not be continued in tax jurisprudence. Even if the memorandum is narrow in scope and the powers of the company restricted, can there be any doubt that at times it derives profit from some transaction not authorized by the memorandum which should properly be brought in to charge? Is not the Revenue grossly neglectful of its duty in saying that such a sum is not a profit of business simply because the act was outside the company's authorized powers? The company does not lose its legal being by entering into some transaction not authorized in its memorandum; the Crown must take active steps to dissolve the corporate entity and in any event the profit earned still remains a properly chargeable gain for tax purposes. Taxation problems should be approached with a practical outlook. Carrying on business successfully is a practical operation of everyday life. If tax jurisprudence sanctifies any theory such as the Memorandum or Charter principle which indicates that capacity to act determines whether a gain is income or capital appreciation it will lose touch with those practical operations of everyday life and its usefulness to society will be negligible.

The Memorandum doctrine which originated in the old English cases has been adopted without qualification by many Canadian tax practitioners. In Canada some provinces have instituted the registry system of incorporation, while in other provinces the letters patent system is used. Dominion companies are also incorporated by letters patent. As I have already pointed out there is no reason why capacity to be taxed

[60] (1930), 15 T.C. 266.

should be governed by a theoretical capacity to act in so far as companies incorporated by registration are concerned. There is still less reason (if possible) why powers set forth in letters patent should define the tax liability of charter companies. It is a trite principle of company law that charter companies have all the powers and capacity to act that a natural person has.[61] Why then should the liability to assessment for income tax differ as between the two entities on gains or profits similarly made?

The writer regrets that he has not had access to sufficient report material to enable him to consider the position in India and in the United States. Presumably the way in which the problem has been handled by Indian Courts is comparable to the treatment given in other parts of the British Commonwealth. In the United States the result following on the determination of the question of whether a company is carrying on business is not that it is taxable or not taxable, but is what tax is applicable. At the present time the tax on capital profits (at a fixed percentage) is the cheaper tax. Up until about five years ago the income tax was the less onerous of the two.

The question of when a company is carrying out or on a business or trade or a scheme of profit-making, is a real, live problem, and burdening tax jurisprudence with psuedo principles makes the solution of that problem all the harder.

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[61] *Bonanza Creek Gold Mining Co.* v. *The King*, [1916] 1 A.C. 566; *Baroness Wenlock* v. *River Dee Co.*, 38 Ch. D. 675; see also WEGENAST ON CANADIAN COMPANIES at p. 36; and PALMER'S COMPANY LAW, 17th Ed. at p. 3.