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

In the matter of an appeal under section 170 of the Inland Revenue Act, No. 10 of 2006 (as amended) from a determination of the Tax Appeals Commission.

Lanka Walltiles PLC,
No. 215, Nawala Road,
Narahenpita
Colombo 05.

Appellant

Case No. CA/TAX/0017/2016
Tax Appeals Commission
No. TAC/IT/015/2015

Vs.

The Commissioner General of Inland Revenue,
14th Floor, Department of Inland Revenue,
Sir Chittampalam A.Gardiner Mawatha,
Colombo 02.

Respondent

Before	**:**	Dr. Ruwan Fernando J. &
		M. Sampath K.B. Wijeratne J.
	:	Avinda Rodrigo, P.C. with Shamalie Jayatunga and Akiel Deen for the Appellant
		Suranga Wimalasena, DSG with R. Gooneratne, S.C for the Respondent
Argued on		:03.04.2022 & 26.05.2022
Written Submissions filed on	:	17.06.2022&10.05.2018 (by the Appellant)
		11.05.2018 (by the Respondent)
Decided on	:	30.09. 2022

Dr. Ruwan Fernando, J.

Introduction

[1] This is an appeal by way of a case stated against the determination of theTax Appeals Commission dated 16.08.2016 confirming the determination made by the Commissioner General of Inland Revenue on 28.11.2014 and dismissing the Appeal of the Appellant. The period relates to the year of assessment 2009/2010.

Factual Background

[2] The Appellant is a company incorporated in Sri Lanka and is engaged in the business of manufacturing and sale of ceramic wall tiles for export and local markets. In addition to the normal business of manufacturing and selling wall tiles for export and local markets, the Appellant is engaged in selling tiles manufactured by its subsidiary company, Lanka Walltile Meepe (Pvt) Ltd, for which a commission of 5% on gross value of sales was paid to the Appellant by Lanka Walltile Meepe (Pvt) Ltd (hereinafter referred to as Lanka Walltile Meepe Ltd) with effect from July 2008, for the reasons stated in the decision of the Board of Directors of Lanka Walltile Meepe Ltd.

[3] The Appellant submitted its income tax returns for the assessment year 2009/2010 and declared its profits and income earned from business, including the commission income received from Lanka Walltile Meepe Ltd. The Appellant claimed that the qualified export profits and income earned from the export of tiles attracts the concessionary income tax rate specified in the Fifth Schedule to the Inland Revenue Act in terms of section 52 of the Inland Revenue Act and that no commission is reveal able or due for the goads purchased from Lanka Walltile Meepe Ltd.

[4] The Assessor by his letter dated 26.11.2012 rejected, the return of income *inters alia* for the following reasons:

1. Commission on local sales to Lanka Walltile Plc by Lanka Walltile Meepe Ltd for the purpose of export has not been considered as income of the company;
2. As all outgoings and expenses incurred in the production of income for the purpose of ascertaining the profit or income are allowed to be deducted, provision of Rs. 1,754,000 for obsolete and slow-moving items are disallowed under section 25 of the Inland Revenue Act (hereinafter referred to as the Inland Revenue Act)

[5] Accordingly, the Assessor refused to consider the commission income claimed under section 3(1)(a) of the Inland Revenue Act, No. 10 of 2006

andadded it to the assessment under section 3(1)(j) of the Inland Revenue Act. The Assessor made the tax computation in his assessment as follows:

Adjusted profit as per the Appellant's computation		
	-	66,569,089
Less: Commission income (70,686,000-11,768,288)		
	-	(82,456,288)
Rent Income	-	(1,032,000)
Add:		
Balance commission payable	-	11,768,288
Provision for obsolete stocks	-	1,754,000
Adjusted profit/loss from trade/statutory income from trade	-	3,394,911
Qualified export profit/loss		
Adjusted loss	-	(3,394,9111)
Less: Profit from disposal of PPE	-	(154,552)
Adjusted qualified export loss		3,549,463

Tax payable	Income Tax	SRI
On qualified export profit	0	0
On other export profit 87,446,288 x 35%	30,516,600	457,749
	30,516,600	457,749

Appeal to the Commissioner General of Inland Revenue

[6] The Appellant appealed to the Commissioner General of Inland Revenue against the said assessment, and the Commissioner General of Inland Revenue in his reasons for the determination dated 28.11.2014 held that the Appellant failed to establish that it did not receive commission from Lanka Walltile Meepe Ltd for purchases made for export purposes. Accordingly, the Commissioner General of Inland Revenue confirmed the assessment made by the Assessor (vide- reasons for the determination at pp.8-10 of the TAC brief).

Appeal to the Tax Appeals Commission & the Court of Appeal

[7] Being dissatisfied with the said determination of the Commissioner General of Inland Revenue, the Appellant appealed to the Tax Appeals Commission (hereinafter referred to as the "TAC"). The Appellant's main arguments before the TAC were as follows:

1. The qualified profits and income for exporting wall tiles purchased by the Appellant from Lanka Walltile Meepe Pvt Ltd in terms of section 52 read with section 60 (b) of the Inland Revenue Act, No. 10 of 2006 shall be chargeable with income tax at the rate specified in the Fifth Schedule to the Inland Revenue Act;

2. The phrase "notwithstanding anything to the contrary in this Act" in section 52 of the Inland Revenue Act overrides all other provisions of the Inland Revenue Act and therefore, only the provisions of section 52 of the Inland Revenue Act are relevant to this appeal;

3. Appellant purchased the goods from Lanka Walltile Meepe Pvt Ltd, for export purposes, and in terms of the board paper dated 24.10.2008, the commission of 5% has been recommended to be paid on its local sales and therefore, and therefore, no commission is receivable by the buyers from the seller for buying the goods manufactured by the seller;

4. The commission earned by the Appellant for selling wall tiles manufactured by Lanka Walltile Pvt Ltd is part and parcel of the Appellant's regular business income and therefore it falls within the ambit of section 3(1)(a) of the Inland Revenue Act;

5. The Assessor had not given reasons for considering the commission income as a separate source of income and not part of the business income

[8] The TAC confirmed the determination made by the Commissioner General of Inland Revenue and dismissed the appeal for the following reasons:

a) The commission of 5% was paid to the Appellant on its local sales gross value and the phrase "local sales" covers all the purchases made by the Appellant from Lanka Walltile Ltd, whether they were purchased for selling locally or for the purpose of export;

b) A part of the purchases was utilized to cover the export orders and other part was sold locally and the sale transaction between the Appellant and the Lanka Walltile Meepe Ltd was a local sale transaction, which entitled the Appellant to receive a 5% commission on such entire purchases, whether in fact part of such sales were exports or not;

c) The commission income received by the Appellant comes under the income from "any other source" as stipulated in the section 3(j) of the Inland Revenue Act;

d) As the Appellant carries on more than one trade or business, the profit and income from such trade or business are chargeable with tax at different rates and therefore, the Appellant is required to maintain and prepare statements of accounts in a manner that the profits of income from each activity may be separately identified;

e) The Appellant has however, failed to maintain separate accounts to identify the income from commission as a part of the business income of the Appellant under section 3(1)(a) of the IRA 2006.

Questions of Law

[9] Being dissatisfied with the said determination of the Tax Appeals Commission, the Appellant appealed to the Court of Appeal and formulated the following questions of law in the case stated for the opinion of the Court of Appeal.

1. Does the computation method of qualified export profits specified in the section 60(b) of the Inland Revenue Act, for the purpose of section 52 of the Inland Revenue Act, override the provision of section 106(11) of the Inland Revenue Act?
2. Does non-compliance with the section 106(11) of the Inland Revenue Act, empower the Assessor to assess an income from business falling under section 3(1) (a) of the Inland Revenue Act, as "income from any other sources whatsoever…" under section 3(j) of the Inland Revenue Act?
3. Is commission payable, by the agent to his principal, on the ground purchased for own consumption of the agent?

[10] At the hearing of the appeal, Mr. Avindra Rodrigo, the learned President's Counsel for the Appellant and Mr. Suranga Wimalasena, the learned Deputy Solicitor General for the Respondent made extensive submissions on the questions of law submitted for the opinion of the Court of Appeal.

Submissions of the Parties

[11] At the hearing, Mr. Rodrigo submitted that the Appellant being a specified undertaking was engaged in selling tiles manufactured by Lanka Walltile Meepe Ltd, on a commission of 5% on gross value of local sales paid to the Appellant by Lanka Walltile Meepe Ltd, and that the tiles were sold locally for handling and promoting them through the Appellant's sales channels and the customer base using its own brand name. Mr. Rodrigo further submitted that the commission income received from selling tiles manufactured by Lanka

Walltile Meepe Ltd, for which the commission was received is a part of the business income of the Appellant under section 3(1)(a) of the Inland Revenue Act.

[12] He submitted that, as a separate transaction, the Appellant purchased tiles from Lanka Walltile Meepe Ltd to fulfil part of its export orders and the income received by the Appellant from such export sales constitutes a "qualified export profits and income" within the meaning of section 52 of the Inland Revenue Act. His contention was that no commission was paid for the tiles purchased from Lanka Walltile Meepe Ltd for the purpose of export, but the qualified export profits and income earned by the Appellant fall within the meaning of section 3(1)(a) of the Inland Revenue Act, instead of other income stipulated in section 3(1) (j) of the Act.

[13] Mr. Rodrigo further submitted that the income received from qualified export profits and income, shall, notwithstanding anything to the contrary in this Act, be chargeable with income tax, at the rate specified in the Fifth Schedule to the Inland Revenue Act, and therefore, the Appellant is entitled to the concessionary rate of tax specified in section 52 of the Inland Revenue Act. His contention was that the term "notwithstanding anything to the contrary in this Act" in section 52 overrides all other provisions of the Inland Revenue Act in the ascertainment of qualified export profits and income from business or trade stipulated in section 3(a) and therefore, applicability of the fifth schedule in section 52, shall have the effect notwithstanding anything to the contrary contained elsewhere in the Inland Revenue Act.

[14] Mr. Wimalasena however, disputed this contention of Mr. Rodrigo and submitted that as per the Board Minute dated 24.10.2008, a sales commission is paid to the Appellant on gross value of local sales, and local sales cover all purchases made by the Appellant from its subsidiary, whether for sale in the local or export market, and therefore, the Appellant received the commission income for the entire purchase of tiles from its subsidiary. He submitted that the Appellant has failed to disclose the sales commission received for the tiles exported by the Appellant and maintain separate accounts as required by section 106(11) of the Inland Revenue Act.

[15] He further submitted that the core business of the Appellant is manufacturing and marketing of ceramic wall tiles for local market and export, and section 3 (1) (a) of the Inland Revenue Act relates only to "profits" earned from such manufacturing and marketing of ceramic wall tiles for local market and export, which also includes qualified exports. He argued that the commission income received from purchasing tiles from Lanka Walltile Meepe Ltd cannot be regarded as profits and income from the main business activity of the Appellant under section 3(1)(a) of the Act, and therefore, the commission income of the Appellant can only be classified as income

generated from “any other source” stipulated in section 3(1) (j) of the Inland Revenue Act.

Main Issues for determination

[16] In view of the submissions made by Mr. Rodrigo and Mr. Wimalasena, the main issues to be determined by this Court are as follows:

1. (a) Was the commission paid to the Appellant by Lanka Walltile Meepe Ltd., only for selling the goods manufactured by Lanka Walltile Meepe Ltd, to third parties through the Appellant’s local outlets and channels?

   (b) Was the commission paid to the Appellant by Lanka Walltile Meepe Ltd on all the goods purchased by the Appellant from Lanka Walltile Meepe Ltd, irrespective of the usage of the goods purchased by the Appellant, either for selling locally or for the purpose of export?

2. Was the commission income received by the Appellant falls within the ambit of section 3 (1) (a) as business income, or section 3(1) (j) of the Inland Revenue Act?

3. Has the Appellant failed to maintain and prepare separate statement of accounts to identify the income from commission as part of the business income within the meaning of section 3(1)(a) as required section 106(11) of the Inland Revenue Act?

Analysis

Sources of Income

[17] Before embarking upon the rival contentions of the parties, I may proceed to consider the relevant statutory provisions which have a bearing on the issues before this Court. Section 3 of the Inland Revenue Act specifies different sources of income and profits which are chargeable with income tax. Section 3(a) of the Inland Revenue Act provides as follows:

> *“For the purpose of this Act, “profits and income” or “profits” or “income” means-*
>
> *(a) the profits from any trade, business, profession, or vocation for however short a period carried on or exercised”.*

[18] On the other hand, section 3(1) (j) of the Inland Revenue Act refers to income received from any other source whatsoever, except profits of a casual and non-recurring nature. It provides:

> *(j) “income from any other source whatsoever, not including profits of a casual and non-recurring nature”.*

[19] It is relevant to note that the classification of the source of income is significant as different rates apply to different sources of income specified in the five Schedules to the Inland Revenue Act. In the circumstance, it is necessary for the Assessor to ascertain and identify the source of income for the purpose of determining the profits and income chargeable with income tax and the rates applicable to such source of income.

[20] The Appellant first claims that it was a specified undertaking within the meaning of section 52 of the Inland Revenue Act and the income received from Lanka Walltile Meepe Ltd for exporting non-traditional goods constitutes "qualified export profits and income" under section 52 of the said Act. The Appellant claims therefore, that such income ought to be regarded as a profit from trade or business stipulated in section 3(1) (a) of the Inland Revenue Act, notwithstanding anything to the contrary in the Inland Revenue Act.

[21] Section 52 of the Inland Revenue Act specifies the rate of income tax on "**qualified export profits and income"** of a company which carries on any specified undertaking. Section 52 reads as follows:

> *"52-Where any company commenced prior to November 10, 1993, to carry on any specified undertaking and the taxable income of that company for any year of assessment* ***includes any qualified export profits and income from such specified undertaking,*** *such part of such taxable income as consists of such qualified export profits and income, shall, notwithstanding anything to the contrary in this Act, be chargeable with income tax at the appropriate rate specified in the Fifth Schedule to this Act".*

Rates specified in the Fifth Schedule

[22] The Fifth Schedule specifies *inter alia*, the rates for the application of section 52 as follows:

"Fifth Schedule

The following rates shall be applicable notwithstanding the rates specified in the First, Second and Third Schedules.

18. The rate of income tax on qualified export profits and income of a company, which commenced to carry on any specified undertaking prior to April 1, 2015, for-

*(a) any year of assessment commencing prior to April 1, 2011-**15 per centum***

(b) any year of assessment commencing on or after April 1, 2011-12 per centum (Section 52)".

[23] To be eligible for the concessionary tax rate under Section 52 of the Inland Revenue Act, as specified in the Fifth Schedule to the Inland Revenue Act, the Appellant must satisfy that:

I. it is a company carrying on any specified undertaking;

II. it commenced prior to November 10, 1993, to carry on such specified undertaking;

III. its taxable income includes any qualified export profits and income from such specified undertaking; and

IV. such part of such taxable income as consists of such qualified export profits and income.

[24] Section 60 of the Inland Revenue Act interprets the terms **"export turnover**", "**qualified export profits and income**" and **"specified undertaking"** for the purpose Chapter IX as follows:

"60. *For the purposes of this Chapter—*

(a) export turnover" in relation to any specified undertaking means the total amount receivable, whether, received or not, by that ***undertaking from the export of goods or commodities or from the provision of any service*** *referred to sub-paragraph (ii) of paragraph (c), but does not include—*

(i) any amount receivable, whether received or not, from the export of gems or jewellery or from the sale of any capital assets;

(ii) any amount receivable, whether received or not-from the export of black tea not in packet or package form and each packet or package weighing not more than one kilogram, crepe rubber, and, sheet rubber, scrap rubber, latex or fresh coconuts; or

(iii) any profits and income not being profits and income within the meaning of paragraph (a) of section 3;

(b) ***"qualified export profits and income" in relation to any person, means the sum which bears to the profits and income within the meaning of paragraph (a) of section 3,*** *after excluding there from any profits and income from the sale of gems and jewellery and any profits and income from the sale of capital assets, for that year of assessment from any specified undertaking carried on by such person, ascertained in accordance with the provisions of this Act, the same proportion as the* ***export turnover*** *of that undertaking for that year of assessment bears to the total turnover of that undertaking for that year of assessment;*

(c) "specified undertaking" means any undertaking which is engaged in–

(i) ***the export of non-traditional goods manufactured, produced, or purchased by such undertaking;*** *or*

(ii) the performance of any service of ship repair, ship breaking repair and refurbishment of marine cargo containers, provision of computer software, computer programmes, computer systems or recording computer data, or such other services as may be specified by the Minister by Notice published in the Gazette, for payment in foreign currency; and

(d) "total turnover" in relation to any specified undertaking means the total amount receivable, whether received or not, by that undertaking from any trade or business carried on by that undertaking, but does not include any amount receivable, whether received or not, from the sale of capital assets, gems or jewellery or any profits and income not being profits and income within the meaning of paragraph (a) of section 3.

For the purposes of this section the expression "non- traditional goods" means goods other than black tea not in packet or package form and each packet or package weighing not more than one kilogram, crepe rubber, sheet rubber, scrap rubber, latex or fresh coconuts or any other products referred to in section 16, but include organic tea in bulk".

[25] It is not in dispute that the wall tiles are non-traditional goods and the Appellant who is engaged in exporting and purchasing such non-traditional goods can be regarded as a specified undertaking within the meaning of section 52 of the Inland Revenue Act. The issue, however, is whether the commission income received by the Appellant from Lanka Walltile Meepe Ltd can be categorized as a "profits from business income" within the meaning of section 3(1)(a) of the Inland Revenue Act.

Non-obstante clause in section 52

[26] The first question that arises for decision is whether the words "notwithstanding anything to the contrary in this Act" overrides all other provisions of the Inland Revenue Act as contended by Mr. Rodrigo. Now, section 52 of the Act prescribes that the "qualified export profits and income" from specified activities of any specified undertaking shall, notwithstanding anything to the contrary in the Act, be chargeable at the rate set out in the Fifth Schedule to the Inland Revenue Act. Section 52, as noted above, contains a non-obstante clause, namely "notwithstanding anything to the contrary in this Act", and it is a settled principle of law that a statutory provision containing a non obstante clause must be given full effect. In *Union of India v. G.M. Kokil* (1984) Supp. SCC 196, the Indian Supreme Court laid down in para 11, the significance of such a clause as below:

"11. ... It is well known that a non obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions. Thus, the non obstante clause in section 70, namely, "notwithstanding anything contained in that Act" must mean notwithstanding anything to the contrary contained in that Act, and as such, it must refer to the exempting provisions which would be contrary to the general applicability of the Act. ..."

[27] In the High Court of Gauhati case of The *State of Assam v. Moslem Mondal*, decided on 03.01.2013, it was stated by Katakey, J. at paragraph 74 that:

"A non-obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions. It is equivalent to saying that in spite of the provisions or the Act mentioned in the non-obstante clause, the provisions in the enactment where such non-obstante clause is used will have its full operation or that the provision indicated in the non-obstante clause will not be an impediment for the operation of the enactment".

[28] It is relevant to note, however, that words in a non obstante clause give the provision in which they occur, **in case of conflict**, an overriding effect over the provision or Act mentioned in the non obstante clause (*Chandavarkar Sita Ratna Rao v. Ashalata S. Guram,* AIR 1987 SC 117). Therefore, this clause in section 52 can be used to clarify the intention of the legislature in cases where **two provisions appear contradictory** in a section or sub-section of a section in an enactment. Thus, the non-obstante clause in Section 52 of the Act can be used to clarify the intention of the legislature in cases where two provisions appear contradictory.

[29] It is relevant to note, however, that a non obstante clause is not a stand-alone section and thus, it does not operate on its own by divorcing it from the provisions of the law which are sought to be overridden or modified to the extent it is envisaged in the non obstante clause [(*Ashak Kumar Bakliwal v. Municipal Board, Abu Road,* AIR 2007 NOC 361 (Raj) (DB)]. P.M. Bakshi on Interpretation of Statutes First Ed. 2008, at p. 138 referring to several authorities, and in particular the Indian decision in R*.S. Raghunath v. State of Karnataka,* AIR 1992 SC 81 at p. 88 states:

"On a conspectus of several authorities, it emerges that the non obstante clause is appended to a provision with a view to give the enacting part of the provisional overriding effect in case of a conflict. But the non obstante clause need not necessarily and always be co-extensive with the operative part as to have the effect of cutting down the clear terms of an enactment and if the words of the enactment are clear and are capable of a clear interpretation on a plain and grammatical construction of the words, the non obstante clause cannot cut down the construction and restrict the scope of its operation. In such cases, the non obstante clause has to be read as clarifying the whole position, and must be understood to have been incorporated in the enactment by the legislature by way of abundant caution and not by way of limiting the ambit and scope of the Special Rules".

[30] It is relevant to note that the term "qualified exports profits and income" referred to in section 52 is defined in section 60(b) of the Inland Revenue Act, to mean "the sum which bears to the profits and income **within the meaning of section 3(a)** of the Act after excluding therefrom any profits and income from the sale of capital assets… ".Accordingly, section 52 is not a standalone

section having the effect of operating on its own by divorcing it from other provisions of the Act, in particular section 3 (1) (j), which is *inter alia,* sought to be overridden to the extent it is envisaged in the non obstante clause in section 52.

[31] By no means this provision of expression “notwithstanding anything to the contrary in this Act” contained in section 52 can be used to interpret that section 3 of the Act can have no effect at all, and it is only section 52 that will apply to the present case, disregarding the effect of section 3when section 60(b) provides clearly that the “qualified export profits and income” include the profits from any trade or business within the meaning section 3(1)(a) of the Act.

[32] Moreover, the fact that the “qualified export profits and income” may fall within the meaning of section 3 (1)(a) as set out in section 60(b) does not necessarily mean that the commission income could be regarded as part of its business under section 3(1)(a) and not under section 3(1)(j), unless it can be shown that such commission income is part and parcel of the business, which cannot be separated from the rest of the trade or business.

[33] In my view, the non obstante clause in section 52 cannot restrict the scope and the operation of section 3 (1)(a) or section 3(1)(j) of the Inland Revenue Act. It must be read together with section 3 of the Inland Revenue Act to ascertain whether the profits and income claimed by the Appellant from commission falls within the meaning of section 3(1)(a) as part of its business which cannot be separated from the rest of its business and if not, whether it is a separate income which can be separated from the rest of its business.

Characterization of profits and income earned by the Appellant under section 3 (1)(a) or 3(1)(j) of the Inland Revenue Act

[34] The next question is to consider whether the commission income can be categorized as “profits and income” earned by the Appellant as part and parcel of its business falling within the ambit of section 3(1)(a) of the Inland Revenue Act, and if not, whether the commission income falls within the ambit of section 3(1)(j) of the Inland Revenue Act.

[35] Mr. Rodrigo relied on the interpretation of the term “business” and the term “trade” in section 217 of the Inland Revenue Act, and several local and foreign authorities and argued that the terms “business” and “trade” are very broad in nature to encompass the “qualified profits and income” within the meaning of section 3(1)(a) of the Inland Revenue Act. He further argued that the terms “trade” and “business” do not distinguish between the main business activities of a company with its ancillary activities and therefore, qualified export profits and income earned by the Appellant fall within the meaning of section 3(1)(a) of the Inland Revenue Act instead of section 3(1)(j) of the Inland Revenue Act.

[36] The term “business” in section 217 includes “an agricultural undertaking, the racing of horses, the letting or leasing of any premises, including any land by a company and the forestry”, and the term “trade” includes “every trade and manufacture and every adventure and concern in the nature of trade”. The Appellant relied on the following statement made by Lord President Clyde in *L.R.C. v. Livingston* 11 TC 355at p. 115 of the judgment in support of its contention that the income received from the commission is “in the nature of trade or business” within the meaning of section 3 (1)(a) of the Inland Revenue Act:

> *“I think the test that must be used to determine whether venture such as we are considering is or not “in the nature of trade” is whether the operation involved in it are of the same kind and carried out in the same way as those which are characteristic of ordinary trading in the line of business in which the venture is made. If they are, I do not see why the venture should not be regarded as "in the nature of trade” merely because it was a single venture which took only three months to complete”.*

[37] The Appellant further relied on the following definition of ‘trade’ used by Lord Wilberforce in *Ransom v. Higgs* 50 TC 1:

> *"`Trade' cannot be precisely defined, but certain characteristics can be identified which trade normally has. Equally some indicia can be found which prevent a profit from being regarded as the profit of a trade. Sometimes the question whether an activity is to be found to be a trade becomes a matter of degree, of frequency, of organization, even of intention, and in such cases it is for the fact-finding body to decide on the evidence whether a line is passed...”*

[38] Having regard to the character and circumstances of the present case, I am of the view that the test adopted in *L.R.C. v. Livingston* (supra)-characterizing the profits or income “in the nature of trade”, or in *Ransom v. Higgs* (supra)-identifying the “characteristics of trade” to define the trade or business of the Appellant within the meaning of section 3(1)(a),where the business consists in the receipt of a single category of income or profit, is insufficient to determine the issue before us. The issue before us is not whether or not the income or profit generated from one source of income can be characterized “in the nature of trade or business”. The first issue before use is whether or not, when the business consists in the category of several profits or income, it is a part and parcel of the main business generated from the source of income stipulated in section 3(1)(a). The second issue before use is whether or not, when the business consists in the category of several profits or income, it is a separate category of income generated from “any other source of income” stipulated in section 3(1)(j) of the Inland Revenue Act.

[39] The Appellant heavily relied on the decision of the Delhi High Court case in *Commissioner of Income Tax v. FX Info Technologies (Pvt) Ltd ITA* No. 112/2011 &113/2011to buttress its argument that the profits and income claimed by it falls within the meaning of section 3(1) (a) of the Act. The facts of the said case reveal that the assessee company was carrying on the **business of distribution of Acer products** of M/s. Acer India Pvt. Ltd. The assesse decided, due to financial constraints to transfer the distribution of the Acer products to M/s. Salora International Ltd. (for short "SIL"), for which M/s. Acer India Pvt. Ltd., had also consented, by virtue of a written agreement between the assessee and SIL. The distribution of the products was to be taken over by SIL on certain terms and conditions including payment of commission on sale at the rate of one per cent.

[40] The assessee made profits of the same business, by virtue of the commission received from SIL. The assessee offered the commission income gained from its business as "business income" and set off the same against the business losses incurred in the same business. The Assessor treated the income of the assessee from the commission as "**income from other sources"** and declined to set off against the brought forward business losses on the basis that the commission income so received by the appellant-company from SIL is not a business income.

[41] The Commissioner of Income-Tax (Appeals) held that the commission amount to be a business income and the assessee was entitled to an assessment of the carried forward business losses. The Tax Tribunal upheld the order of the Commissioner of Income-Tax (Appeals) and accepted that the commission paid by SIL to the assessee was business expenditure, and such business expenditure in the hands of SIL by natural corollary is the business income in the hands of the assessee.

[42] The High Court confirmed the decision of the tribunal and dismissed the appeal. It stated in paragraph 5 of the decision as follows:

> *"We do not find any reason to differ with the Tribunal on the above findings. We may reiterate that both the authorities below have rightly arrived at a conclusion of the commission being business income at the hands of the assessee and we do not see any infirmity or perversity in those findings of the fact and thus we do not see any substantial question of law involved in these appeals. Hence, both the appeals are dismissed".*

[43] In my view, the facts of the present case are totally different from the facts of that case in that the assessee who was carrying on the **sole business of distribution of Acer products,** upon agreement entered with M/s. Acer India Pvt. Ltd., transferred its sole **business of distribution of Acer products** to SIL, and received a commission from SIL. In contrast, the business of the Appellant consists in the receipts of several other business income and the

Appellant has declared its profits and income from different sources. Accordingly, the decision in *Commissioner of Income Tax v FX Info Technologies (Pvt) Ltd ITA* will not support the Appellant's case.

[44] The Appellant further relied on the decision in *Thornhill v. Commissioner of Income Tax,* Reports of Ceylon Tax Cases Vol. 1, CTC 180.In *Thornhill v. The Commissioner of Income Tax* (supra), the main question was whether the sum of Rs. 19,622.19 was received by the Appellant in respect of his estate under the Tea and Rubber Control Ordinance as tea and rubber coupons to which he was entitled under the said Ordinance, and realised by the sale of these coupons constituted profit or income within the meaning of Section 6 (1) (a) or 6 (1) (b) of the Income Tax Ordinance, 1932 or whether it represented realisation of capital.

[45] Soertsz, J., in that case referred to the statement made in *Tennant v. Smith* (1892) A.C. 150 that "for income tax purposes, 'income' "must be money or something capable of being turned into money". Soertsz, J., held, however, that this statement needs qualification as all money and all things capable of being turned into money are not necessarily "income" for tax purposes. Soertsz, J., referred to the following essential characteristics of "income" identified by Cunningham and Dorland in their Treatise on Land and Income Tax and Practice, at p. 128 and held that these essential elements provide adequate tests by which to ascertain whether a particular receipt is "income" or not, within the meaning of the Income Tax Ordinance:

(a) It must be a gain;

(b) It must actually come in, severed from capital, in cash or its equipment;

(c) It must be either the produce of property or/and the reward of labour or effort;

(d) It must not be a mere change in the form of, or accretion to, the value of articles in which it is not the business of the taxpayer to deal; and

(e) It must not be a sum returned as a reduction of a private expense.

[46] Having applied the above-mentioned tests, Soertsz, J., held *inter alia,* that (i) the amount in question is "profits and income" derived from the business of an agricultural undertaking, and is therefore assessable under section 6 (1) (a); (ii) if it does not fall within the scope of section 6 (1) (a), it is caught up by the "residuary" subsection 6 (1) (h) as this is not something casual or something in the nature of a windfall (p. 190).

[47] No doubt, these elements provide adequate tests by which to ascertain whether a particular receipt is "income" receipt or "capital receipt", and if it is a capital receipt, whether it attracts section 3(1) (a) and if it is an income receipt from any other source, it attracts section 3(1) (j). There is no question that the commission fee is a gain that has actually reached the hands of the Appellant

in the form of income. However, the question is whether or not, when the income is generated from several categories of sources as it is here, it falls within the meaning of section 3(1)(a) or under "any other source of income" stipulated in section 3(1)(j) of the Inland Revenue Act.

[48] The Appellant relied on the five-bench decision of the Supreme Court in *Ceylon Financial Investments Limited V. Commissioner of Income Tax* 1 CTC 206/43 NLR 1 (hereinafter referred to as the 'CFI judgment') in support of its contention that as the income received from sources under section 3 are mutually exclusive and cannot be interchanged, the income received from commission/purchases by its nature falls into section 3(1)(a), which excludes the application of section 3(1) (j) of the Act. The Appellant however, quoted the following passage from the judgment of Howard, C.J. at p. 250 of the said case, completely disregarding the crucial tests laid down by the judges in that case to determine whether the interest and dividends can be regarded as a source, either under section 6(1)(a) or 6(1)(e) of the Income Tax Ordinance, 1932.

> *"The wording of sources (a), (b) and (c), shows that these sources are mutually exclusive, (d) excludes (a), (b) and (c) and (h) excludes all previous sources".*

[49] In the said CFI case, the issue was whether the interest received by the Appellant was a source of income under Section 6 (1) (a) or 6 (1) (e) of the then Income Tax Ordinance, 1932, which correspond to Section 3 (1) (a) and 3(1) (e) of the Inland Revenue Act, No. 10 of 2006.The judges in the CFI case proceeded to lay down tests for determining whether interest was a source of income under section 6(1)(a) or 6 (1)(e) of the Income Tax Ordinance 1932. Howard C.J., Keuneman, J. and Soertsz, J. delivered separate judgments, and De Kretser, J. did not deliver a separate judgment, but agreed with the judgment of Soertsz, J. Wijewardene, J. delivered a brief judgment without reasons in detail, but agreed with the reasoning of Keuneman, J.

[50] Howard, C.J., and Keuneman, J., acknowledged that the interest and dividends can potentially be a source of income, either, under section 6(1)(a) or section 6(1)(e), but finally held that the interest and dividends were a source of income under section 6(1)(e), and set out the tests for determining whether interest was a source of income under section 6(1)(a) or 6(1)(e). Howard, C.J. laid down the following test at page 250 of the judgment:

> **"*If the business of a company consists in the receipt of dividends, interest or discounts alone or if such a business can be clearly separated from the rest of the trade or business, then any special provisions applicable to dividends, interest or discounts must be applied.*** *Applying the principle laid down in the Egyptian case, the appellant company is within source (e) and cannot get out of it. To take such a view does not in any way disturb the scheme of the Ordinance. I*

agree, therefore, with Keuneman J. that the Commissioner was empowered to charge the appellant Company under ***section 6 (1) (e) in respect of the dividends and interest received from undertakings in which its capital was invested****"* (Emphasis added).

[51] Keuneman J., while disagreeing with Howard, C.J., on the question of the availability of an option, endorsed the views expressed by Howard, C.J. that the interest income is a source that falls under section 6(1)(e) and laid down the test to determine whether interest was a source of income under section 6(1)(a) or 6(1)(e). The following passage from Keuneman J.'s judgment reads at pp. 261-262 as follows:

'How then are we to treat income which comes under source (e) but can also be regarded as coming under source (a)? In my opinion, it was the intention of the Ordinance to regard dividends, interest or discounts as a separate source. ***If then the business of an individual or a company consists in the receipt of dividends, interest or discounts alone, or if the business of receiving dividends, interest or discounts can be clearly separated from the rest of the trade or business, then any special provisions applicable to dividends, interest or discounts must be applied.*** *I do not think any question of opinion arises.* (Emphasis Added)

[52] The combined effect of the tests applied by Howard CJ., and Keuneman, J., (with Wijewardene, J. agreed) was that "if the business of a company or individual consists in the receipts of dividends, interests or discounts alone or if such business can be clearly separated from the rest of the trade, business, then section 3(1)(e) will apply. In other words, if the business of a company or an individual consists in the receipts of dividends, interest or discounts and such business cannot be separated from the rest of the trade or business, it becomes part of the business activity of such company or individual. In such event, such interest or dividends or discounts falls within the meaning of section 3(1(a) of the Act.

[53] It is relevant to note however, that Soertsz J., (with whom de Kretser J., agreed) disagreed with Keuneman, J. that it was the intention of the Ordinance to regard dividends, interest of discounts as a separate source (p. 252) and held that the question whether it was profits from dividends or interests or discounts falls within section 6(1) or 6(1)(e) depends on whether or not the assessor deals with the profits of a "business" or the income of an "individual". Soertsz J., held that where it is appertaining to an income of a business, it falls within 3(1)(a), and where it is related to an income of an individual, as part of his business, it falls within section 6(1)(e). The relevant passage of the judgment at p. 252 reads as follows:

"*The view I have reached is that the categories enumerated in section 6 (1) are mutually exclusive, and that the question whether 6 (1) (a) or 6 (1) (e) applies in a particular case, depends on whether we are dealing*

*with the **profits of a business or the income of an individual. If it is a case of dividends, interests, or discounts appertaining to a business**, they fall within the words "profits of any business" and **section (6) (1)(a)** applies. If, however, it is a case of dividends, interest or discounts accruing to **an individual not, in the course of a business**, but as a part of his income from simple investments, then **section 6 (1) (e)** is the relevant section, and so far as interest is concerned, section 9 (3) modifies section 9 (1)"* (Emphasis added).

[54] The above passage of the judgment of Soertsz J., suggests that the following test would apply to identify whether the profits and income of an individual or business falls within section 3(1)(a) or 3(1) (e) as follows:

1. If the profits or income received from dividends or interest or discounts appertains to the business, it will fall within the profits of any business under section 6(1)(a);

2. If the profits or income received from dividends or interest or discounts accruing to an individual was earned, not in the course of a business, but as a part of his income from simple investments, it falls within section 3(1)(e).

[55] The test applied by Soertsz J., that section 6(1)(e) is limited to an income of an "individual" and section 6(1)(a) is limited to the profits of any "business" is not consistent with the scheme of the Inland Revenue Act, which does not restrict the application of section 3(1)(e) to an individual. The CFI case related to the receipts of interest and dividends, and the subject matter of the present case, related to commission income. However, in my view the test used by Howard CJ., and Keuneman, J. (with Wijewardene, J. agreed) equally applies to decide the question whether the commission income claimed by the Appellant can be regarded as a "profits and income" from trade or business falling under section 3(1)(a) or any other source stipulated in section 3(1)(j) of the Act. In the circumstance, I am inclined to agree with the test applied by Howard CJ., and Keuneman, J. (with Wijewardene, J. agreed) in determining whether the profits and income received by the Appellant from commission falls under section 3(1)(a) or 3(1)(j) of the Inland Revenue Act.

Business activities of the Appellant & the profits and income claimed by the Appellant

[56] At the hearing, Mr. Rodrigo contended that the Appellant was engaged in two separate transactions with Lanka Walltile Meepe Ltd. First, he stated that the Appellant sold tiles manufactured by Lanka Walltile Meepe Ltd to third parties through its local outlets, for which a commission of 5% was received by the Appellant.

Second, he stated that the appellant purchased tiles from Lanka Walltile Meepe Ltd for which no commission was involved.

According to the Appellant, the qualified export profit is calculated on the following basis:

$$\frac{\text{Export Turnover}}{\text{Total Turnover}} \times \text{Profits and Income from trade or business falling Under Section 3(a) excluding from sale of capital assets.}$$

[57] According to the letter sent by the Appellant's Chartered Accountants dated 16.06.2016 (pp. 135-136 of the TAC brief) to the Respondent, the Appellant has declared in its return of income submitted for the year of assessment 2009/2010 as follows:

Export Turnover Rs. 604,175,000

Total Turnover Rs. 920,178,000

Total profit from the business is Rs. 66,569,089 and profit after excluding interest income and sale of capital assets was Rs. 65,569,089 and profit after excluding interest income and sale of capital assets was Rs. 65,382,537.

1. The qualified export profits have been computed in the return of income tax as follows:

   (604,175,000/920,178,000 X 65,382,537)

2. The qualified export profits ascertained on the above basis was Rs. 42,929,188 which is liable @ 15% and the balance was liable @ 35%.

3. The above profit of Rs. 65,382,537 from the business of the company includes a profit of **Rs. 70,686,000 which is received from commission**.

[58] According to the Appellant, it had received a sum of Rs. 70,686,000 as its commission income from Lanka Walltile Meepe Ltd and the Assessor had excluded the said of Rs. 70,686,000 from the business profit and assessed the said commission income under section 3(j) of the Inland Revenue Act.

[59] It is not in dispute that the main business activities of the Appellant were the manufacture and sale of ceramic tiles for export and local markets. The Appellant has stated in paragraph 1 of its written submissions dated 10.05.2018 that the Appellant was also engaged in the business of selling tiles manufactured by its subsidiary company, Lanka Walltile Meepe Ltd, and received a commission income on the gross value of local sales from Lanka Walltile Ltd. The Board Paper of Lanka Walltile Meepe Ltd dated 24.10.2008 reads (p. 16 of the TAC brief) as follows:

*"A sales commission of 5% is recommended to be paid by Lanka Walltile Meepe (Pvt) Ltd to Lanka Walltile PLC**, on its local sales** gross value with effect from 01.07.2008 for the below mentioned reasons:*

a. Using Lanka Walltile brand names for local sales;
b. Handing and promoting sales through Lanka Walltitle sales channels;
c. Using the customer base of Lanka Walltile PLC".

[60] The Board Resolution approved by the Lanka Walltile Meepe (Pvt) Ltd dated 30.10.2008 (p. 15 of the TAC brief) reads as follows:

"EXTRACTS OF THE MINUTES OF THE 153rd MEETING OF THEBOARD OF DIRECTORS OF LANKA WALLTILE MEEPE (PVT) LIMITED HELD ON 30th OCTOBER 2008

The Board having considered, the Board Paper No. LWMPL/BP/2008/16.1, IT WAS RESOLVED to approve a payment of sale commission amounting to 5% to Lanka Walltile PLC on sales handled by them, on behalf of the company with effect from July 2008, considering the use of Lanka Walltile brand name for the promotion of sales and handling and promoting sales through their sales channels and customer base".

[61] It is apparent that the commission was paid by Lanka Walltile Meepe (Pvt) Ltd to Lanka Walltile PLC**, on its local sales,** gross value with effect from 01.07.2008 considering the reasons set out in the said board paper. Accordingly, itis not in dispute that in addition to the main business activities of the Appellant, it was engaged in selling tiles manufactured by its subsidiary company, Lanka Walltile Meepe Ltd, for which a commission of 5% on gross value was paid to the Appellant by its subsidiary company.

[62] According to the Appellant, it has generated income from more than one business category, namely, (i) business of manufacturing and marketing of ceramic tiles for export and local market; (ii) commission received from Lanka Walltile Meepe Ltd for selling tiles to third parties through its sales outlets and channels; and (iii) purchases of wall tiles from Lanka Walltile Meepe Ltd to fulfil its export orders.

[63] The board paper provides that the commission of 5% was paid to the Appellant on its local sales gross value for reasons set out in paragraph 55 of this judgment. It is not in dispute that Lanka Walltile Meepe Ltd had sold tiles manufactured by Lanka Walltile Meepe Ltd to the Appellant. The question is whether such purchases attract local sales referred to in the board paper for which the commission was received by the Appellant.

[64] The Appellant's position before the Commissioner-General was that goods purchased from Lanka Walltile Meepe Ltd had been exported by the company under the company's name and therefore, the company has not

handled or promoted sales in the names of its subsidiary. Paragraph 11 of the Appellant's written submissions (p. 18 of the TAC brief) reads as follows:

> *"However, company did not receive any commission from Lanka Walltile Meepe (Pvt) Ltd for the goods, the company purchased for their own use.* ***The goods purchased has been exported by the company under the company's name.*** *Therefore, in this instance, the company has not handled or promoted sales in the name of Lanka Walltile Meepe (Pvt) Ltd".*

[65] Contrary to the Appellant's position taken before the Commissioner General of Inland Revenue, that the "goods purchased had been exported by the company under the company's name", paragraphs 1 and47 of the Appellant's written submission filed on 10.05.2018 state that the Appellant purchased wall tiles from Lanka Walltiles Meepe Ltd to fulfil **part of its export** orders which are classed in the statement of accounts. Paragraph 51reads as follows:

> *"51- In a separate transaction, the Appellant also purchased wall tiles from Lanka Walltile Meepe (Pvt) Ltd to fulfill* ***part of its export orders*** *which are classified as purchases in the intercompany accounts".*

[66] Based on the Appellant's own written submission, it is clear that only a part of the sales from Lanka Walltile Meepe Ltd. had been exported by the Appellant and the other part would have fallen into local sales of Lanka Walltile Meepe Ltd.

[67] The question also arises whether the phrase "local sales" is restricted to commission paid for selling tiles manufactured by Lanka Walltile Meepe Ltd for the purpose of selling them to third parties, through the Appellant's own channels and sales outlets. In this context, it is necessary to understand the nature of the commercial arrangement between the Appellant and its subsidiary company, Lanka Walltile Meepe Ltd, and the factors and the circumstances that motivated the parties to earn a profitable income through this transaction, in addition to its core business activities.

[68] According to the Board Paper dated 24.10.2008, a sales commission of 5% is to be paid by Lanka Walltile Meepe Ltd, to Lanka Walltile PLC on its **local sales gross value** for (a) using Lanka Walltile brand; (b) handling and promoting sales through the Appellant's sales channels; and (c) using the customer base of the Appellant. Though the Appellant claims that the commission income (70,686,000) was received for selling tiles manufactured by Lanka Walltile Meepe Ltd through its local outlets to third parties, as its agent, and it was a distinct transaction from purchases made from Lanka Walltile Meepe Ltd, no document has been produced by the Appellant to identify such local sales made by the Appellant through its sales outlet to third parties other than the Board Paper and the Resolution.

[69] If the Appellant sold tiles manufactured by Lanka Walltile Meepe Ltd to third parties as its agent and the commission was received in connection with that transaction only, the Appellant could have easily produced relevant documents pertaining to the issuance of tiles to the Appellant by Lanka Walltile Meepe Ltd to be sold to third parties. Had the Appellant produced such documents, it would have indicated the quantity in pieces, description of goods, date and place of delivery and receipts of tiles handed over to the Appellant by Lanka Walltile Meepe Ltd, for which the Appellant claimed the receipt of the commission.

[70] Moreover, if the Appellant handled and promoted the tiles manufactured and provided by Lanka Walltile Meepe Ltd as its agent, only for the purpose of third-party sales through the Appellant's customer base and sales outlets, the Appellant could have easily produced the relevant documents in support of such sales. The Appellant could have produced the relevant invoices and separate accounts to substantiate its claim that it acted only as an agent for its subsidiary and claimed the sales commission on third party sales through its sales channels and sales outlets. No relevant documents or separate accounts have been provided by the Appellant to the satisfaction of the Assessor that the commission was paid only in respect of third-party sales through the Appellant's channels and sales outlets.

[71] The Appellant further claimed that in addition to the commission income, it purchased wall tiles from Lanka Walltile Meepe Ltd to fulfil its export orders, for which no commission was involved, and such purchases are classified in the inter-company accounts. On this basis, the Appellant claimed that the purchases for export purposes and commission income are distinct in nature, but the Assessor misinterpreted the Board Minutes dated 24.10.2008 of Lanka Walltile Meepe Ltd. and assessed a deemed commission income on the value of all purchases made by the Appellant from Lanka Walltile Meepe Ltd.

[72] The Appellant further argued that no commission is payable by the seller to the buyer in buying its own goods and therefore, no commission income was received by the Appellant on account of these purchases from Lanka Walltiles Meepe Ltd. The Appellant further argued that in purchasing tiles from Lanka Walltile Meepe Ltd, it has not rendered any of the services mentioned in the board paper, and accordingly, no commission is involved in respect of those purchases.

[73] A perusal of the TAC brief reveals that the Appellant has failed to satisfy that it received the commission income only from third party sales through the Appellant's sales outlets and channels and not from purchases made by the Appellant for local and export market or that the products could not have been sold to the Appellant for a commission, through indirect sales by its sales partner or affiliate or parent company.

[74] The Board Paper applies to all local sales made to the Appellant from Lanka Walltile Meepe Ltd and the commission was paid on its local sales gross value. Once the local sales take place, the Appellant is entitled to affix its own brand name on its subsidiary's tiles for the purpose of reselling them with its new brand name, through the customer channels of the Appellant.

[75] Under this arrangement between the parties, it is immaterial for the local seller (Lanka Walltile Meepe Ltd) whether the goods were in fact used for exports or not, as long its products are promoted or handled or sold through the Appellant's sales channels and customer base. It is immaterial for the Appellant to consider whether the purchases made from Lanka Walltile Meepe Pvt are used to fulfil its local orders or export orders as long as the Appellant is able to use its own brand name on tiles manufactured by Lanka Walltile Meepe Ltd, and earn profits former-selling them with its own brand name through its outlets and market channels.

[76] If the Appellant however, claimed that the exports profits are part and parcel of its business income, the Appellant should have produced separate accounts to identify such sales which were made by the Appellant to third parties though the Appellant's sales outlets and channels, and that the sales made from purchases for export purposes. Had it produced separate accounts, the Assessor could have identified the balance part of its sales which had been used for sales locally, when its case is that the commission is not related to the entire purchases made from Lanka Walltile Meepe Ltd.

[77] According to the schedule 1 of the Assessor's assessment, sales from Lanka Walltile Meepe Ltd was Rs. 210,148,000 (p. 23 of the TAC brief) and the Assessor has stated in his letter dated 26.11.2012 that the Appellant has not included the commission on local sales made to the Appellant for the purpose of export in its returns. (p. 24 of the TAC brief). If the Appellant however, claims that the commission income received from Lanka Walltile Meepe Ltd and purchases made from Lanka Walltile Ltd are distinct transactions, the Appellant should have maintained and produced separate accounts to identify such transactions and the income received from two transactions separately. The Appellant has failed to produced relevant documents and file separate accounts to identify the total purchases made by the Appellant from Lanka Walltile Meepe Ltd and the income received from export orders and the local orders separately.

[78] On the other hand, if the Appellant claims that the income received from commission related to the goods manufactured by Lanka Walltile Ltd and sold to third parties through its sales outlets and channels as per the board paper, it could have provided statement of accounts to identify the income from commission as part of the business income of the Appellant.

[79] In the circumstances, "local sales" must mean an intra-state transaction which covers all purchases made by the Appellant from Lanka Walltile Meepe Ltd, for sale in the local market and for export. In the present case, the Appellant has not satisfied that the commission income was received only for the sales made by its sales outlets and channels. Accordingly, the commission income referred to in the Board Paper applies to all purchases made by the Appellant from Lanka Walltile Meepe Ltd, and the Appellant received the commission for all purchases from Lanka Walltile Meepe Ltd, including for those exported.

[80] Paragraph 1 of the written submissions filed on behalf of the Appellant on 01.10.2018 reads as follows:

> *"The Appellant is also engaged in the business of selling titles manufactured by its subsidiary company, Lanka Walltile Meepe (Pvt) Ltd for which a commission of 5% on the gross value of local sales is paid to the Appellant as part of its principal business activities".*

[81] The Appellant's main business activities of manufacturing and marketing of ceramic wall tiles for export and local market fall within the ambit of its business under section 3(1)(a) of the Inland Revenue Act. In addition to such main business activities, the Appellant purchased tiles from its subsidiary company, Lanka Walltile Meepe Ltd and resold those tiles in the local market as well as for exports.

[82] Section 106(11) of the Inland Revenue Act provides as follows:

> *"Where any person carries on or exercises more than one trade, business, profession or vocation and the profits and income from such trade, business, profession or vocation are exempted or chargeable with tax at different rates, such person shall maintain and prepare statements of accounts in a manner that the profits of income from each such activity may be separately identified".*

[83] Unlike section 60(b), which sets out the method of calculating the qualified export profits and income, section 106(11) is a requirement of maintaining and preparing separate accounts for the purpose of identifying the profits and income from each business activity separately. If the commission income is to be regarded as part of the business income of the Appellant within the meaning of section 3(1)(a) of the Act, the Appellant should have maintained and furnished separate accounts so that the profits and income from each of the business could be identified separately as required by section 106(11).The Appellant has failed to maintain and keep separate accounts to identify the income from commission as a part and parcel of the business income as required by section 106(11) of the Act.

[84] The Appellant's main business activities are completely different from its receipt of a commission income from its subsidiary, which is a separate

business activity which can be clearly separated from the rest of its stated main business activities. According to the tests applied by Howard C.J. and Keuneman J., in the CFI case, where the business of receiving commission income can be clearly separated from the rest of the trade or business, such commission income falls under section 3(e) of the Income Tax Ordinance 1932.

[85] I hold that the Appellant has failed to disclose in the financial statement that the commission income received by the Appellant from its subsidiary can be regarded as part of its main business activities and therefore, they cannot be separated from the rest of the trade or business of the Appellant. For those reasons, I am of the view that the Appellant has failed to meet the tests laid down by Howard C.J., and Keuneman J., *Commissioner of Income Tax (*supra).

[86] For those reasons, I hold that the commission income received by the Appellant from Lanka Walltile Ltd falls within the meaning of section 3 (1) (j) and not section 3(1)(a) of the Inland Revenue Act. Accordingly, the Assessor has correctly assessed the commission income under section 3(1)(j) of the Inland Revenue Act, and the TAC was correct in confirming the determination made by the Commissioner General of Inland Revenue.

Conclusion & Opinion of Court

[87] For those reasons, I answer questions of law arising in the case stated in favour of the Respondent and against the Appellant as follows:

1. No. The overriding effect of section 52 read with section 60(b) is that the qualified export profits and income received by the Appellant could be regarded as business income of the Appellant if it is part and parcel of the main business activities of the Appellant within the meaning of section 3(1)(a) of the Act. Section 60(b) sets out the method of computing the "qualified export profits and income" and section 106(11) imposes an obligation on the Appellant to maintain and keep separate accounts for the purpose of identifying the profits and income from each business activity separately.

2. The Assessor must be satisfied that the profits or income received from commission falls within the meaning of section 3(1)(a) or 3(1)(j) and this decision is based on the finding that the commission income can be clearly separated from the rest of the trade or business. Non-compliance with section 106(11) makes it difficult to the Assessor to ascertain the profits or income received from each business activity separately, and identify the source of income stipulated in sub-sections 3 (1) (a)-3(1)(j). In the present case, the Appellant has failed to maintain and keep separate accounts for the purpose of identifying the profits and income from each

business activity separately and satisfy that the commission income is part and parcel of the Appellant's main business income. The Appellant has failed to establish that its commission income cannot be separated from the rest of its trade or business and therefore, the Assessor was justified in treating the commission income under section 3(1)(j) of the Inland Revenue Act.

3. The commission was paid by the Appellant's subsidiary on local sales gross value as per the decisions of the Board of Directors of Lanka Walltile MeepeLtd. Local sales of Lanka Walltile Meepe Ltd cover all purchases made by the Appellant from Lanka Walltile Meepe Ltd, for sale in the local market and for export. The Appellant thus, received the commission for all purchases from Lanka Walltile Meepe Ltd, including for those exported.

[88] For those reasons, I confirm the determination made by the Tax Appeals Commission dated 16.08.2016 and the Registrar is directed to send a certified copy of this judgment to the Tax Appeals Commission.

JUDGE OF THE COURT OF APPEAL

M. Sampath K.B. Wijeratne, J.

I agree

JUDGE OF THE COURT OF APPEAL