

[1974] GHANA LAW REPORT

COMMISSIONER OF INCOME TAX v. MAATSCHAPPIJ DE FIJNHOUTHANDEL
N.V. (FYNHOUT) [1974] 1 GLR 283-301

COURT OF APPEAL, ACCRA (FULL BENCH)

18 MARCH 1974

AZU CRABBE C.J., JIAGGE, ANIN AND ABBAN J.

Revenue—Income tax—Provisional assessment—Jurisdiction of Income Tax Commissioner—Commissioner for Income Tax satisfied that non-resident company liable to tax—Whether decision reviewable by certiorari—Income Tax Decree, 1966 (N.L.C.D. 78), paras. 6 (1) and 46.

Revenue—Income tax—Provisional assessment—Procedure to challenge—Party assessed proceeding by prerogative writ—Whether court entitled to consider whether finding of fact by Commissioner for Income Tax supported by evidence—N.L.C.D. 78, para. 49.

State proceedings—Certiorari—Income tax—Commissioner for Income Tax making provisional assessment—Whether acting in a quasi-judicial or administrative capacity.

HEADNOTES

The respondents were a non-resident company that operated in Takoradi. On 15 October 1969 the Commissioner for Income Tax raised the assessment on the respondents for the years 1959 to 1970 inclusive. The respondents then sought leave in the High Court to apply to quash the assessment on the ground that they were not liable to tax at all. Although leave was granted, the application was dismissed. On appeal to the Court of Appeal, it was held that certiorari would lie to quash the assessment because the finding that the respondents were carrying on a business or trade in Ghana was not supported by the evidence. On an application to the full bench of the Court of Appeal for a review, the two issues raised were: (1) whether if paragraph 46 of the Income Tax Decree, 1966, gave the commissioner the right to raise the assessment, that right ceased to exist if the respondents were not carrying on a trade or business within the meaning of paragraphs 5 (a) and 6 (1); and (2) if not, on what ground would the court interfere?

Held, allowing the application for review:

(1) on a proper construction of paragraphs 46 and 6 (1) of N.L.C.D. 78, the commissioner had jurisdiction to make a provisional assessment upon anybody whom he was satisfied was liable to tax, and this could include a person erroneously believed to be chargeable. Whether the respondents carried on a trade in Ghana was a question of fact which was conclusive and could not be reviewed by either prohibition or certiorari. Dictum of Lord Esher M.R. in *R. v. Income Tax Special Purposes Commissioners* (1888) 21 Q.13.D. 313 at pp. 319-320, C.A. applied.

(2) The Court of Appeal fell into grave error when they quashed the determination of the commissioner on the ground that there was no evidence to support his finding. Once the assessment had been made, the proper procedure for the respondents to challenge it was by raising an objection under paragraph 49. Since they had not availed themselves of that paragraph, the commissioner was not required to make a further express [p.284] finding. It was only if this stage had been reached that the Court of Appeal would have been entitled to consider whether the finding of fact was not supported by the evidence or made on a view of the facts which could not reasonably have been entertained. *R. v. Commissioners of Taxes for St. Giles and St. George, Bloomsbury; Ex parte Hooper* [1915] 3 K.B. 768, D.C. applied.

(3) The Court of Appeal correctly stated that certiorari always would lie against a person who had to act judicially but not against purely administrative acts. When the commissioner made the provisional assessment he was only acting in an administrative capacity, and his role would only have been transformed into that of an adjudicator, required to act judicially, if the respondents had raised an objection.

Judgment of the Court of Appeal reported sub nom. *Republic v. Commissioner of Income Tax; Ex parte Maatschappij de Fijnhouthandel N. V. (Fynhout)* [1971] 1 G.L.R. 213, reviewed and set aside; judgment of Cousey J., unreported; digested in (1970) C.C. 28, restored.

CASES REFERRED TO

(1) *R. v. Nat Bell Liquors, Ltd.* [1922] 2 A.C. 128; 91 L.J.P.C. 146; 127 L.T. 437; 38 T.L.R. 541; 27 Cox C.C. 253, P.C.

(2) *R. v. Electricity Commissioners; Ex parte London Electricity Joint Committee Co. (1920), Ltd.* [1924] 1 K.B. 171; 93 L.J.K.B. 390; 130 L.T. 164; 88 J.P. 13; 39 T.L.R. 715; 68 S.J. 188; 21 L.G.R. 719, C.A.

(3) *R. v. St. Lawrence's Hospital, Caterham, Statutory Visitors; Ex parte Pritchard* [1953] 1 W.L.R. 1158; [1953] 2 All E.R. 766; 117 J.P. 458; 97 S.J. 590, D.C.

(4) *R. v. Income Tax Special Purposes Commissioners* (1888) 21 Q.B.D. 313; 53 J.P. 84; 36 W.R. 776; sub nom. *R. v. Income Tax Special Purposes Commissioners; Ex parte Cape Cooper Mining Co., Ltd.* 2 T.C. 332; 57 L.J.Q.B. 513; 59 L.T. 455; 4 T.L.R. 636, C.A.

(5) *Erichsen v. Last* (1881) 8 Q.B.D. 414; 4 T.C. 422; 51 L.J.Q.B. 86; 45 L.T. 703; 46 J.P. 357; 30 W.R. 301, C.A.

(6) *Allen v. Sharp* (1848) 2 Exch. 352; 3 New Mag.Cas. 39; 17 L.J.Ex. 209; 11 L.T. (o.s) 155; 12 J.P. 693; 154 E.R. 529.

(7) *R. v. Commissioners of Taxes for St. Giles and St. George, Bloomsbury; Ex parte Hooper* [1915] 3 K.B. 768; 7 T.C. 59; 85 L.J.K.B. 129; 113 L.T. 1015; 31 T.L.R. 565, D.C.

(8) *R. v. Clerkenwell General Commissioners of Taxes* [1901] 2 K.B. 879; 85 L.T. 503; 65 J.P. 724; 17 T.L.R. 744; sub nom. *R. v. Income Tax Commissioners* 70 L.J.K.B. 1010; sub nom. *Kodak, Ltd. v. Clark (Surveyor of Taxes)* 4 T.C. 549, C.A.

(9) *R. v. Bolton* (1841) 1 Q.B. 66; Arn. & H. 261; 4 Per. & Dav. 679; 10 L.J.M.C. 49; 5 J.P. 370; 5 Jur. 1154.

(10) *Edwards (Inspector of Taxes) v. Bairstow and Harrison* [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48; 36 T.C. 207; 99 S.J. 588; [1955] T.R. 209; 48 R. & I.T. 534; 34 A.T.C. 198, H.L.

[p.285]

(11) *Griffiths v. J. P. Harrison (Watford), Ltd.* [1963] A.C. 1; [1962] 2 W.L.R. 909; 106 S.J. 281; [1962] 1 All E.R. 909; [1962] T.R. 33; 41 A.T.C. 36; 40 T.C. 281, H.L.

(12) *R. v. City of London Income Tax Commissioners; Ex parte Inland Revenue Commissioners* (1904) 91 L. T. 94, D.C.

(13) *Re Calvert* [1899] 2 Q.B. 145; 4 T.C. 79; 68 L.J.Q.B. 761; 80 L.T. 504; 47 W. R. 523; 43 S.J. 480; 6 Mans. 256.

(14) *Re Moschi* (1953) 35 T.C. 92; [1954] T.R. 59.

(15) *Inland Revenue Commissioners v. Lysaght* [1928] A.C. 234; 13 T.C. 526; 97 L.J.K.B. 385; 139 L.T. 6; 44 T.L.R. 374; 72 S.J. 270, H.L.

(16) *Errington v. Minister of Health* [1935] 1 K.B. 249; 104 L.J.K.B. 49; 152 L.T. 54; 99 J.P. 15; 51 T.L.R. 44; 78 S.J. 754; 32 L.G.R. 481, C.A.

(17) *Frost v. Minister of Health* [1935] 1 K.B. 286; 104 L.J.K.B. 218; 51 T. L. R. 171.

(18) *Robinson v. Minister of Town and Country Planning* [1947] K.B. 702; [1947] 1 All E.R. 851; [1947] L.J.R. 1285; 177 L.T. 375; 111 J.P. 378; 63 T.L.R. 374; 91 S.J.294; 45 L.G.R. 497, C.A.

(19) *Johnson (B.) & Co. (Builders), Ltd. v. Minister of Health* [1947] 2 All E.R. 395; [1948] L.J.R. 155; 177 L.T. 455; 111 J.P. 508; 45 L.G.R. 617, C.A.

(20) *Franklin v. Minister of Town and Country Planning* [1948] A.C. 87; [1947] 2 All E.R. 289; [1947] L.J.R. 1440; 111 J.P. 497; 63 T.L.R. 446; 45 L.G.R. 581, H.L.

(21) *R. v. Central Professional Committee for Opticians; Ex parte Brown* [1949] 2 All E.R. 519; 65 T.L.R. 599; 93 S.J. 647, D.C.

(22) *R. v. Metropolitan Police Commissioner; Ex parte Parker* [1953] 1 W.L.R. 1150; [1953] 1 All E.R. 717; 117 J.P. 440; 97 S.J. 590, D.C.

NATURE OF PROCEEDINGS

APPLICATION for review by the full bench of the Court of Appeal of a decision of the Court of Appeal, reported [1971] 1 G.L.R. 213, in which an application for certiorari to remove and quash the provisional assessment made by the Commissioner of Income Tax against the respondents was granted on an appeal from the dismissal of the same application by Coussey J. on 2 December 1969, unreported; digested in (1970) C.C. 28. The facts are sufficiently stated in the judgment of Azu Crabbe C.J.

COUNSEL

J.W. Blankson-Mills for the applicant (Commissioner of Income Tax).

E. A. K. Akuoko for the respondents.

JUDGMENT OF AZU CRABBE C.J.

This is an application for a full bench review of a joint judgment of the Court of Appeal (coram Apaloo, Sowah and Archer JJ.A.) dated 7 December 1970, reported [1971] 1 G.L.R. 213 allowing an appeal by the respondents from a ruling of the High Court, Accra (Coussey J.) dated 2 December 1969, unreported; digested in (1970) C.C. 28, whereby [p.286] an application for an order of certiorari to remove and quash the provisional assessment to income tax made on the respondents by the applicant (Commissioner of Income Tax) was dismissed.

The respondents are no doubt a foreign company that operate at Takoradi. On 15 October 1969, the commissioner addressed to the respondents a letter which read as follows:

"15th October, 1969.

The Resident Manager,

Fynhout N.V.,

P.O. Box 109,

Takoradi.

Dear Sir,

Income Tax Assessment

I have raised assessments on the company for the years of assessment 1959-60 to 1969-70, both years inclusive, and if you object to the assessments you should pay not less than fifty per centum of the total tax charged pending the determination of your objection.

Yours faithfully,

for: Commissioner of Income Tax."

The respondents' immediate reaction to this letter was the filing in the High Court, Accra, on 30 October 1969, of an application praying for leave to apply for an order of certiorari to remove to that court and "quash income tax assessments made on Fynhout together with an order made by the Commissioner of Income Tax for payment of fifty per centum of the amount assessed." The grounds upon which this application was based were stated as follows:

"(1) The said assessments and order for payment have been made even before the liability of the company to tax under the Income Tax Decree which the company has contested, has been determined by the competent authority.

(2) The Commissioner of Income Tax has made the said assessments without due consideration of representations made to him on behalf of the applicants that they are not liable to tax as aforesaid.

(3) The order to pay on the assessment is oppressive."

And the detailed facts in support of the application were set out in an accompanying affidavit sworn to by the respondents' representative at Takoradi, Mr. Paul John Van Aken. In the penultimate paragraph of the affidavit it is stated:

"That I am advised and verily believe that both the assessment and, especially the demand are ultra vires the Commissioner of Income Tax. And further that the order for payment is oppressive and constitutes a gross misuse by the commissioners of his powers under [p.287] the Income Tax Decree in so far as it seeks to compel the company to pay tax in the sum of N¢61,750.00 even before the liability or otherwise of the company to tax in Ghana, which is the subject of controversy between the commissioner and the company, has been determined under the law by the competent authority."

The application for leave was, on 4 November 1969, granted by Coussey J. and, subsequently on 2 December 1969, the learned judge, upon hearing argument, dismissed the application. The respondents' appeal to the Court of Appeal was upheld (see [1971] 1 G.L.R. 213) and Archer J.A. who read the judgment of the court, concluded as follows at p. 227:

"In conclusion, we hold that:

(1) The Commissioner has jurisdiction to determine whether or not a person or company is chargeable with income tax.

(2) Although the Income Tax Decree, 1966, makes provision for appeals against assessment, yet the machinery for appeals is co-existent with the machinery provided by the Constitution for the supervision by the superior courts over all adjudicating authorities through the use of the prerogative writs or orders.

(3) In the present appeal, certiorari will lie because the finding that the company is carrying on business or trade in Ghana is not supported by evidence and certiorari therefore lies to quash the assessments made by the commissioner."

Since this is a case of certiorari I think I can appropriately preface my judgment with the quotation of the well-known dictum of Lord Sumner in *R. v. Nat Bell Liquors Ltd.* [1922] 2 A. C. 128, P. C., when the learned Lord was speaking about the supervisory powers of superior courts over inferior courts. He said at p. 156:

"Its jurisdiction is to see that the inferior Court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would itself, in turn, transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise."

Defining the circumstances in which the writ of certiorari would issue to quash the decision of public bodies, Atkin L.J., said in the oft-quoted passage of his judgment in *R. v. Electricity Commissioners; Ex parte London Electricity Joint Committee Co. (1920), Ltd.* [1924] 1 K.B. 171 at pp. 204-205, C.A.:

"The question now arises whether the persons interested are entitled to the remedy which they now claim in order to put stop to the unauthorised proceedings of the Commissioners. The matter comes before us upon rules for writs of prohibition and certiorari which have been discharged by the Divisional Court. Both writs are [p.288] of great antiquity, forming part of the process by which the King's courts restrained courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; certiorari requires the record or the order of the court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed. It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognised as, Courts of Justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

What then does the expression "the duty to act judicially" mean? In *R. v. St. Lawrence's Hospital, Caterham, Statutory Visitors; Ex parte Pritchard* [1953] 1 W.L.R. 1158, D.C. Lord Goddard C.J. said at p. 1162:

"It is not easy to give a definition of exactly what is meant by 'act judicially', but, in my opinion, for this purpose the expression refers to a body which is bound to hear evidence from both sides. Although there need not be anything strictly called a lis, it must be a body which has to hear submissions and evidence and come to a judicial decision in approximately the way that a court must do. Unless there is an order or a determination which the body has made, the order of certiorari will not lie."

The jurisdiction of the commissioner to raise an assessment is conferred by paragraph 46 of the Income Tax Decree, 1966 (N.L.C.D. 78), which provides:

"46. (1) (a) As soon as may be after the commencement of each year of assessment, the Commissioner may proceed to make a provisional assessment, computed to the best of his judgment, on every person chargeable with tax.

(b) A provisional assessment shall not affect any liability otherwise incurred by such person by reason of his failure or neglect to deliver a return.

(2) Where a person has delivered a return, the Commissioner may—

(a) accept the return and make an assessment accordingly; or

(b) refuse to accept the return, and to the best of his judgment, determine the amount of the chargeable income of the person and make an assessment accordingly."

[p.289]

That jurisdiction is further enlarged in paragraph 47 as follows:

"47. Subject to the provisions of the proviso to paragraph 53 of this Decree, if the Commissioner discovers or is of the opinion at any time that any person liable to tax has not been assessed or has been assessed at a lesser amount than that which ought to have been charged, the Commissioner may and as often as may be necessary, assess such person at such amount or additional amount, as according to his judgment ought to have been charged, and the provisions of this Decree as to notice of assessment, appeal and other proceedings under this Decree shall apply to such assessment or additional assessment and to the tax charged thereunder."

(The emphasis is mine.)

Paragraph 49 prescribes the method by which an assessment can be challenged, and the manner in which a dispute is to be resolved. The material provisions of paragraph 49 are, in my view, contained in the following sub-paragraphs:

"(2) If any person disputes the assessment made upon him he may apply to the Commissioner, by notice of objection in writing, to review and to revise the assessment. Such application shall state precisely the grounds of his objection to the assessment and shall be made within thirty days after the date of the service of the notice of assessment . . .

(3) On receipt of the notice of objection referred to in sub-paragraph (2) of this paragraph, the Commissioner may require the person giving the notice of objection to furnish such particulars as the Commissioner may deem necessary with respect to the income of the person assessed and to produce all books or other documents in his custody or under his control relating to such income, and may summon any person who, he thinks, is able to give evidence respecting the assessment to attend before him and may examine such person on oath or otherwise."

Paragraph 51 makes provisions for an appeal from the decision of the commissioner, and for the purposes of the present case the relevant provision is sub-paragraph (2) of paragraph 51 (as amended by N.L.C.D. 406, para. 19 and Sched. II) which reads as follows:

"Where any person is dissatisfied with a decision made by the Commissioner on an objection to him under paragraph 49, such person may, within fifteen days after the date of such decision, appeal, where the amount of tax chargeable on the disputed portion of the income exceeds four hundred and eighty cedis, to the High Court; and such person or the Commissioner may appeal from the decision of such Court to the Court of Appeal."

Paragraph 53 also makes provisions as to the finality and conclusiveness of the commissioner's assessment. It reads:

[p.290]

"53. Where no valid objection or appeal has been lodged within the time limited by paragraph 49 or paragraph 51 of this Decree, as the case may be, against an assessment as regards the amount of the chargeable income assessed thereby, or where the amount of the chargeable income has been agreed to under the provisions of sub-paragraph (4) of paragraph 49 of this Decree, or where the amount of such chargeable income has been determined on objection, revision under the provisions of the proviso to sub-paragraph (4) of paragraph 49 of this Decree, or appeal, the assessment as made or agreed to or revised or determined on objection or appeal, as the case may be, shall be final and conclusive for all purposes of this Decree as regards the amount of such chargeable income and if the full amount of the tax in respect of any such final and conclusive assessment is not paid within the appropriate period or periods prescribed in this Decree the provisions of this Decree relating to the recovery of tax, and to any penalty imposed under the provisions of paragraph 62 of this Decree, shall apply to the collection and recovery thereof subject only to the set off of the amount of any tax repayable under any claim, made under any provisions of this Decree, which has been agreed to by the Commissioner or determined on any appeal against a refusal to admit any such claim:

Provided that nothing in paragraph 49 or in Part XI of this Decree shall prevent the Commissioner from making any assessment or additional assessment for any year of assessment which does not involve re-opening any issue, on the same facts, which has been determined by agreement or otherwise under the provisions of sub-paragraph (4) of paragraph 49 of this Decree or on appeal."

In this case the judgment of the Court of Appeal concedes that the commissioner clearly had jurisdiction to make the assessment, but the court set the assessment aside, because, in its opinion, there was no evidence that the respondents were trading in Ghana. This raises two fundamental questions: (1) whether if paragraph 46 gives the commissioner the right to raise the assessments in this case, that right ceases to exist if the respondents are not carrying on trade or business within the meaning of paragraphs 5 (a) and 6 (1) of the Income Tax Decree, 1966 (N.L.C.D. 78); and (2) if not, on what ground will the court interfere?

In my judgment, the answers to these questions depend upon the proper construction of the relevant provisions of the Income Tax Decree, 1966 (N.L.C.D 78). By paragraph 1 of the Decree the Commissioner of Income Tax is made responsible for the assessment and collection of all taxes, and paragraph 46 empowers him to make a provisional assessment after the commencement of each year, "computed to the best of his judgment." Paragraph 47 provides for the method of additional assessment in certain circumstances, and paragraph 49 gives to a person aggrieved by an assessment a right to apply to the commissioner for a review or revision of the assessment. Paragraph 53 provides that unless the commissioner's decision is thus disputed or challenged the assessment is final and conclusive.

[p.291]

Paragraphs 5 (a) and 6 (1) come under Part II of the Decree and the heading of this Part is: "Imposition of Income Tax and Income Chargeable." I think that the words "Income chargeable" are very significant, having regard to the conclusion arrived at by the Court of Appeal, Paragraph 5 (a) reads:

"5. The tax shall, subject to the provisions of this Decree, be payable at the rate or rates specified in this Decree, or in a rule or regulation made thereunder, for each year of assessment upon the income of any person accruing in, derived from, brought into, or received in, Ghana in respect of —

(a) gains or profits from any trade, business, profession or vocation, for whatever period of time such trade, business, profession or vocation may have been carried on or exercised . . ."

Paragraph 6 (1) also reads:

"6. (1) Where a non-resident person carries on any trade, business, profession or vocation in Ghana, part of the operations of which may be carried on outside Ghana, the full gains or profits of that trade, business, profession or vocation shall be deemed to be derived from Ghana:

Provided that —

(a) a person shall not be deemed to be carrying on a trade, business, profession or vocation in Ghana by reason of the mere supplying of goods or services to Ghana if his activities are carried on entirely outside Ghana;

(b) in the case of a company operating in Ghana which is a branch or subsidiary or associated company of a non-resident company, the profits for the period deemed to arise in connection with the operations of that company shall be computed by reference to the total consolidated profits of the whole group (including both the resident and non-resident companies) taking into account the proportion which the turnover of that company bears to the total consolidated turnover of the group;

(c) the Commissioner may, where he is satisfied with the results of a company operating in Ghana of the description specified in the preceding clause for any period,

compute the profits of such company without reference to the total consolidated profits of the whole of the group; and

(d) the Commissioner may take into account other relevant considerations in determining the proportion of the total consolidated profits of the group which should be attributed to the company operating in Ghana."

[p.292]

Although paragraph 5 (a) describes the income that is liable to tax, paragraph 46 directs that the provisional assessment should be made upon any person "chargeable with tax." This assessment is computed to "the best ... judgment" of the commissioner, that is to say, the commissioner has the power to make an assessment of anybody, who in his opinion or whom he is satisfied, is leviable to tax.

In my judgment this case falls within the category of cases referred to in the dictum of Lord Esher M. R. in *R. v. Income Tax Special Purposes Commissioners* (1888) 21 Q.B.D. 313 at pp. 319—320, C.A.:

"When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of thing which may exist. The legislature may entrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction."

There can be no doubt that the respondents are a "non-resident company" within the meaning of paragraph 83 of the Decree, and if they were carrying on a trade in this country, then all their gains and profits would be deemed to have been derived from Ghana. Whether a person is carrying on trade is a question of fact, and as Jessel M.R. said in *Erichsen v. Last* (1881) 8 Q.B.D. 414 at p. 416, C.A.:

"There is not, I think, any principle of law which lays down what carrying on trade is. There are a multitude of things which together make up the carrying on of a trade, but I know of no one distinguishing incident, for it is a compound fact made up of a variety of things."

[p.293]

In the present case the Decree has entrusted the commissioner with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists, as well as the jurisdiction to proceed to do something more, on finding that it does exist. In my judgment, the case of *Allen v. Sharp* (1848) 2 Exch. 352 is in point. In that case a person was assessed by a surveyor, acting under the statutes 48 Geo. 3, c. 55, and 52 Geo. 3, c. 93, for which the Taxes Management Act, 1880 (43 & 44 Vict., c. 19), had since been substituted, to the tax leviable on persons carrying on business as horse dealers. He did not pay and his goods were seized. He brought an action of replevin asserting that he was not subject to the tax, thereby challenging the jurisdiction of the commissioners to assess him or enforce the assessment, as the jurisdiction of the Commissioner of Income Tax was questioned in our present case by an application for an order of certiorari. It was held that, having regard to the peculiar incidents of the Income Tax Acts, the intention of the legislature, to be gathered from the terms of the statutes, was that the assessors appointed by the commissioners should have power to decide whether he came within the class of horse dealers, the remedy of the person assessed being to appeal to the General Commissioners. In delivering his judgment, Parke B. said at p. 363:

"On a careful consideration of these acts of Parliament they seem to me to differ from the statute of Elizabeth as to poor-rate (42 Eliz. c. 2), and that the legislature intended that the assessment of the assessors appointed by the commissioners should be final and conclusive, unless appealed from, in the first place, to the commissioners, and further, if necessary, to the judges of the superior courts. It would be singular if there were no such provision; for, what a flood of litigation would follow, if every subject of the Crown, who was dissatisfied with the judgment of the assessors, had a right to dispute the propriety of their assessment in an action against the collectors . . . Without referring to the statutes, I should say, a priori, that the object of the legislature was to make the decision of the assessor final and binding, unless disputed in the manner pointed out."

In my view, a person chargeable with tax under paragraph 46 of the Decree does not only mean a person whose liability is not in dispute, but it includes a person who is in fact not chargeable but is believed by the assessing authorities to be chargeable: see *R. v. Bloomsbury Income Tax Commissioners; Ex parte Hooper* [1915] 3 K.B. 768, D.C.

Paragraph 6 (1) of the Decree gives jurisdiction to the commissioner to, inquire whether there is a business or trade carried on by a non-resident person within Ghana, either wholly or in part, and, if there is, then he has jurisdiction to determine what the profits of that business or trade are, and his determination, as regards mere questions of fact, is conclusive and cannot be reviewed. In *R. v. Clerkenwell General Commissioners of Taxes* [1901] 2 K.B. 879, C.A., it was contended that the commissioners had only acquired jurisdiction to assess the duty by an erroneous finding of fact and therefore that prohibition should issue, but the Court of [p.294] Appeal discharged the rule. They held that the commissioners, having jurisdiction to assess the English company to income tax in respect of profits of a business, carried on either wholly or in part only in Great Britain, they had for the purposes of that assessment jurisdiction to decide all questions of fact necessary for ascertaining the

amount of those profits, and, therefore, prohibition would not lie, the proper remedy if the decision of the commissioners were wrong in point of law, being by appeal upon a case stated, and Stirling L.J. said at pp. 894-895:

"[T]he only essential requisite to the existence of the jurisdiction to charge a trader in respect of the whole profits is that he be found within the district carrying on the trade in part. Having jurisdiction to charge in respect of all profits, they have jurisdiction to decide all questions of fact necessary for making the full assessment, and, therefore, to determine the true extent of the trade."

Stirling L.J. thought that the case fell within the principle of *R. v. Bolton* (1841) 1 Q.B. 66, where Lord Denman C.J. stated at p. 75, when dealing with a question of the jurisdiction of magistrates:

"But if the charge be of an offence over which, if the offence charged be true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the *corpus delicti* brought under investigation."

In this case, the determination of the question whether the respondents were carrying on trade partly in Ghana was left to the commissioner who had to arrive at a preliminary or provisional finding whether or not the respondents were liable to taxation, and an allegation that he went wrong in determining this question gives no ground for prohibition or *certiorari*.

On what ground then can the superior courts interfere in a determination of the commissioner? The authorities are unanimous that the commissioner's determination can be interfered with by the superior courts only if it is shown to be erroneous in point of law. And what constitutes an error of law? In *Edwards (Inspector of Taxes) v. Bairstow and Harrison* [1956] A.C. 14, H.L., Lord Radcliffe said at p. 36:

"When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything *ex facie* which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and [p.295] contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur."

In *Griffiths v. J. P. Harrison (Watford) Ltd.* [1962] 2 W.L.R. 909, H.L., Lord Denning, speaking about the powers of the High Court in an appeal against the determination of the Income Tax Commissioner, said at p. 919:

"Now the powers of the High Court on an appeal are very limited. The judge cannot reverse the commissioners on their findings of fact. He can only reverse their decision if it is 'erroneous in point of law.' Now here the primary facts were all found by the commissioners. They were stated in the case. They cannot be disputed. What is disputed is their conclusion from them. And it is now settled, as well as anything can be, that their conclusion cannot be challenged unless it was unreasonable, so unreasonable that it can be dismissed as one which could not reasonably be entertained by them. It is not sufficient that the judge would himself have come to a different conclusion."

One ground upon which the findings of the commissioner can be impugned in the courts, occurs when the commissioner, purporting to act within his jurisdiction, considers a wrong question altogether. In those circumstances, his decision can be quashed on certiorari; but if he considered the right question, the court will not interfere by certiorari, even though he might have gone wrong in point of fact or law: see *R. v. City of London Income Tax Commissioners; Ex parte Inland Revenue Commissioners* (1904) 91 L.T. 94, D.C.

In this case the ground upon which the Court of Appeal quashed the determination of the commissioner was that there was no evidence to support his finding. It follows, therefore, that the court's decision was based on a question of law. With all due respect to the learned justices of the Court of Appeal, I think that they fell into grave error when they sought to interfere with the provisional assessment made by the commissioner. In its judgment, as delivered by Archer J.A. the court said at p. 218:

"As already pointed out, the commissioner has power under paragraph 46 of the Income Tax Decree, 1966, to make provisional assessment on every person chargeable with tax. It follows that he has jurisdiction to make assessment on persons chargeable with tax and it also follows that he has jurisdiction to determine whether any person is chargeable with tax or not."

The judgment continues (*ibid.*):

"The Ghana Decree is based on the English Income Tax Acts and in *R. v. Commissioners of Taxes for St. Giles and St. George, Bloomsbury; Ex parte Hooper* [1915] 3 K.B. 768, it was held that a person [p.296] chargeable under section 48 of the Act of 1842 cannot mean a person whose liability is not in dispute. It includes a person who is in fact not chargeable but is believed by the assessing authorities to be chargeable. Otherwise it would be extremely difficult for the commissioner to carry out his statutory duties. He has power to call for books of accounts. He has power to make local inspections. These powers are to enable him to decide whether a person is chargeable or not."

It seems to me that the case of *R. v. Bloomsbury Income Tax Commissioners* (*supra*) cited in the above passage of the judgment was decisive against the respondents, and the Court of Appeal ought to have dismissed their appeal. For the law is that an

assessment, duly made, if not appealed, cannot be challenged in other proceedings: see *Re Calvert* [1899] 2 Q.B. 145 and *Re Moschi* (1953) 35 T.C. 92.

The Court of Appeal, however, proceeded unwarrantably to examine the facts disclosed in the affidavits filed in the High Court, and then stated at p. 220:

"The Commissioner of Income Tax therefore relied on the magnitude of the business operations of the company in Ghana. The company denies that it is carrying on trade in Ghana. The issue therefore is whether the company is carrying on trade or business operations in Ghana."

Further the court said at p. 221: "Is the company carrying on business or trade in Ghana? The answer must be in the negative." With very great respect, the question whether the respondents were trading or were taxable was one of fact which could be properly determined by the commissioner only, and not by the appeal court, upon the evidence brought before him by the respondents in pursuance of paragraph 49 (3) of the Decree. Unless the assessment was based upon some condition precedent which the commissioner was bound to establish, the onus was on the respondents to prove by lawful and satisfactory evidence that the assessment ought to be reduced or set aside. If the respondents had led such evidence, then the Court of Appeal would have been entitled to set aside a finding of fact by the commissioner on the ground that he had acted without evidence or on a view of the facts which could not reasonably be entertained. In *Inland Revenue Commissioners v. Lysaght* [1928] A. C. 234, H.L., Viscount Sumner said at p. 243:

"It is well settled that, when the Commissioners have thus ascertained the facts of the case and then have found the conclusion of fact which the facts prove, their decision is not open to review, provided (a) that they had before them evidence, from which such a conclusion could properly be drawn, and (b) that they did not misdirect themselves in law in any of the forms of legal error, which amount to misdirection."

Due to the failure of the respondents to file a notice of objection to the provisional assessment, the stage was not reached where the commissioner would have been obliged to make express findings which could [p.297] be assailed. There can be no doubt that the commissioner had jurisdiction: (1) to make the provisional assessment, and (2) to determine those who were chargeable to income tax; and there being no complaint that the applicant had considered a wrong question, certiorari would not lie to challenge the assessment.

I cannot conclude this judgment without dealing with one important point raised by the Court of Appeal. In the course of its judgment that court said as follows at p. 216:

"Certiorari will always lie not only against decisions of inferior courts but also against any body of persons which has to act judicially but does not lie against purely administrative acts. What are the duties of the Commissioner of Income Tax? Does he act purely in an administrative capacity or at some stage in his activities does he have to act judicially?"

After quoting the provisions of sub-paragraphs (1) and (2) of paragraph 46 of the Decree the judgment continues at p. 217:

"It follows that the commissioner has power to make an assessment, computed to the best of his judgment, with or without the presence of a return filed by the person liable to be assessed. His role at this stage is purely of an administrative character because he may or may not have all the relevant materials before him and he is enjoined by paragraph 46 to do so to the best of his judgment thus allowing him sufficient latitude and amplitude to exercise his discretion as he thinks fit."

Then after referring to sub-paragraph (3) of paragraph 49 the court said at pp. 217-218:

"[T]he import of the whole sub-paragraph is to the effect that the commissioner should consider the objections raised. In other words, he cannot refuse to consider the objections; he cannot shut his eyes or close his ears to them. This means that he must act judicially once the objections have been brought to his notice. His earlier role of an administrative agent computing assessment to the best of his judgment is transformed into an entirely different role as an adjudicator who must act judicially after objections have been raised and brought to his notice. As an adjudicating authority, he is caught by the provisions of article 114 of the Constitution and his decisions are subject to the supervisory powers of the court including the power to grant an order of certiorari to quash his assessment on grounds known to the law."

I think the analysis of the applicant's functions by the Court of Appeal was perfectly correct. These functions constitute a hybrid mixture of administrative and quasi-judicial functions. A series of cases illustrate this intermingling of these two elements in the functions performed by the appellant. In *Errington v. Minister of Health* [1935] 1 K.B. 249, C.A., the issue was whether the Minister's decision to confirm a clearance order [p.298] was an administrative act or a quasi-judicial act and Greer L.J. said at pp. 258-259:

"The powers of the Minister are contained in the Act and the First Schedule to the Act and under those powers he could, if no objection be taken on behalf of the persons interested in the property, make an Order confirming the order made by the local authority; and in so far as the Minister deals with the matter of the confirmation of a closing order in the absence of objection by the owners it is clear to me, and I think to my brethren, that he would be acting in a ministerial or administrative capacity, and would be entitled to make such inquiries as he thought necessary to enable him to make up his mind whether it was in the public interest that the Order should be made. But the position, in my judgment, is different where objections are taken by those interested in the properties which will be affected by the order if confirmed and carried out. It seems to me that in deciding whether a closing order should be made in spite of the objections which have been raised by the owners the Minister should be regarded as exercising quasi-judicial functions."

In *Frost v. Minister of Health* [1935] 1 K.B. 286, Swift J. who considered himself bound by the decision in *Errington v. Minister of Health* (supra) approved of Greer L.J.'s statement and observed at p. 293:

"I accept that. From the moment an objection is made the Minister is exercising quasi-judicial functions, but it seems to me to be clearly recognised by the Court of Appeal

that up to the time of objection being made the Minister acts in an administrative, and not a judicial, capacity."

In *Robinson v. Minister of Town and Country Planning* [1947] 1 K.B. 702, C.A. Robinson and other property owners objected to an order applied for by the Plymouth City Council. A public local inquiry was held and the order was made by the Minister. Robinson and others then applied to the High Court to have the order quashed on the ground that on the evidence available to the Minister, or the evidence adduced at the inquiry, the Minister could not have been satisfied on reasonable grounds that the order was requisite. The Minister's order was upheld by the English Court of Appeal because in the opinion of the court the Minister's quasi-judicial functions under the Town and Country Planning Act, 1944 (7 & 8 Geo. 6, c. 47), were confined to the consideration of objections and the holding of a public inquiry. His decision whether or not to make the order was an administrative function. Lord Greene M.R. said at pp. 716-719:

" . . . I may point out that this case is different from a case where a Minister is given the duty of hearing an appeal from an order such as a closing order made by a local authority. This is not the case of an appeal. It is the case of an original order to be made by the Minister as an executive authority who is at liberty to base his opinion on whatever material he thinks fit, whether obtained in the ordinary [p.299] course of his executive functions or derived from what is brought out at a public inquiry if there is one. To say that in coming to his decision he is in any sense acting in a quasi-judicial capacity is to misunderstand the nature of the process altogether. I am not concerned to dispute that the inquiry itself must be conducted on what may be described as quasi-judicial principles. But this is quite a different thing from saying that any such principles are applicable to the doing of the executive act itself, that is, the making of the order. The inquiry is only a step in the process which leads to that result and there is, in my opinion, no justification for saying that the executive decision to make the order can be controlled by the courts by reference to the evidence or lack of evidence at the inquiry which is here relied on. Such a theory treats the executive act as though it were a judicial decision (or if the phrase is preferred, a quasi-judicial decision) which it most emphatically is not. How can this Minister, who is entrusted by Parliament with the power to make or not to make an executive order according to his judgment and acts bona fide (as he must be assumed to do in the absence of evidence to the contrary), be called upon to justify his decision by proving that he had before him materials sufficient to support it?"

In *B. Johnson & Co. (Builders), Ltd. v. Minister of Health* [1947] 2 All E.R. 395, C.A., the Minister had power to confirm compulsory purchase orders made by local authorities under the Housing Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 51). He was not bound to hold a public inquiry, but he was directed to consider any objections before deciding whether to confirm the order. A company which owned land, comprised in a compulsory purchase order, applied to the High Court to quash it on the grounds that the Minister, in considering objections to it, was bound to act in a quasi-judicial manner and that he had failed in that duty because he had not made available to objectors the contents of certain letters which had been addressed to him by the local authority before the order was made. It was held as stated in the headnote at p. 395 that:

"the confirmation of the order was essentially an administrative act, and the obligation of the Minister did not go beyond making available to both sides matter which had come into existence for the purpose of the quasi-lis, the inception of which was marked and constituted by the making of the objections. There was, therefore, no obligation on the Minister to make available material which came into his possession before that date."

In describing the various stages of the Minister's functions, Lord Greene M.R. said at pp. 398—399:

"Cases of this kind are to be found in the books in considerable numbers, and, although the provisions of every statute dealing with this class of matter have to be considered by reference to their own language, there are one or two general observations that I think may be made about the particular provisions with which we are [p.300] concerned. First, the functions of the Minister in carrying these provisions into operation are fundamentally administrative functions. In carrying them out, he has the duty which every Minister owes to the Crown, viz., to perform his functions fairly and honestly, and to the best of his ability. But his functions are administrative functions, subject only to the qualification that, at a particular stage and for a particular and limited purpose, there is superimposed on his administrative character a character which is loosely described as 'quasi-judicial.' The language which has always been construed as giving rise to the obligations, whatever they may be, implied in the words 'quasi-judicial' is to be found in the duty to consider the objections, which, as I have said, is superimposed on a process of Ministerial action which is essentially administrative. That process may begin in all sorts of manners—the collection of information, the ascertainment of facts, and the consideration of representations made from all sorts of quarters, and so forth long before any question of objections can arise under the procedure laid down by the Act. While acting at that stage, to carry the Act into effect or for purposes relevant to it and bearing on it, the Minister is an executive officer of government, and nothing else. The administrative character in which he acts reappears at a later stage because, after considering the objections which may be regarded as the culminating point of his quasi-judicial functions, there follows something which again, in my view, is purely administrative, viz., the decision whether or not to confirm the order. That decision must be an administrative decision, because it is not to be based purely on the view that he forms of the objections, vis-a-vis the desires of the local authority, but is to be guided by his view as to the policy which in the circumstances he ought to pursue."

See also *Franklin v. Minister of Town and Country Planning* [1948] A.C. 87, H.L.

Clearly, the Court of Appeal in this case accurately stated the principles enunciated in these cases, but I regret to say that it failed to apply those principles to the case before it. The proper question which, with all due respect, the court should have put to itself is: Was the appellant's earlier role of an administrative agent computing assessment to the best of his judgment transformed into an entirely different role as an adjudicator who must act judicially? The respondents raised no objections to the provisional assessment, and therefore, the stage was not reached where the appellant would have been required to act judicially. In my judgment, had the Court of Appeal put the proper question to itself, it would, in the absence of any objection, have come inevitably to the conclusion that the commissioner had only acted in his administrative capacity,

and that certiorari would not lie to challenge his provisional assessment. Where in the performance of his statutory duty a person has power to obtain information from any source, and he is in no way bound to hear evidence or to hold an inquiry or cause any inquiry to be held, it is impossible to hold that he is acting judicially or quasi-judicially: see R. v. Central [p.301] Professional Committee for Opticians; Ex parte Brown [1949] 2 All E. R. 519 and R. v. Metropolitan Police Commissioner; Ex parte Parker [1953] 1 W.L.R. 1150, D.C.

For the above reasons, in my opinion, there is no ground for saying that the commissioner's provisional assessment can be impeached for lack of evidence to support it, nor that the commissioner acted judicially or quasi-judicially. Consequently, certiorari would not lie, and this application for review must succeed. I would therefore allow the application for review and set aside the judgment of the Court of Appeal and restore the decision of the High Court.

JUDGMENT OF JIAGGE J.A.

I agree.

JUDGMENT OF ANIN J.A.

I agree.

JUDGMENT OF ANNAN J.A.

I agree.

JUDGMENT OF ABBAN J.

I also agree.

DECISION

Application for review allowed.

T.G.K.