IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Hancox ,Nyarangi, JJ.A. and Platt, Ag.J.A.)

CIVIL APPAL N0. 83 OF 1984

BETWEEN

COMMERCIAL & INDUSTRIAL CREDIT LIMITED ..... APPELLANT

AND

THE COMMISSIONER OF INCOME TAX .....RESPONDENT

(Appeal from a judgment and order of the High Court of Kenya at Nairobi(Aganyanya, J. dated 20th December, 1983

in

Civil Appeal No. 18 of 1983)

JUDGMENT OF HANCOX JA

The appellant company, formerly Meka Plantations Ltd., has for some years carried on the business of a licensed moneylender. It had a substantial paid up capital, but, being desirous of expanding its business, obtained from its Bankers, the Bank of Credit and Commerce (Overseas) Ltd, the facility of overdrawing on its two accounts, namely the current account and bill discount account, up to a nominal limit of six million shillings. This enabled the company to borrow at the appropriate bank rate of interest and lend to its customers at a higher rate, the difference between the two rates being its gross profit, or income.

Naturally, the income of the company being taxable, it would be entitled to deduct as part of the expenditure wholly and exclusively incurred by it, under section 15(1) of the Income Tax Act, cap 470, the interest charged by the bank on its overdrafts, and the assessment for the year 1980 allowed this interest against the company's chargeable income. This is in accordance with the decided authorities which Mr Couldrey, appearing for the Company, cited to us.

However, the Commissioner of Income Tax, who is the respondent to the appeal, disallowed the legal expenses charged by Messrs Shapley Barrett & Co., amounting to Shs 52,987.50, for preparing the debenture and collateral charges which the bank required as a condition of granting the overdrafts. The company's appeals to the Local Committee and, in turn, to the High Court were both dismissed.

Mr Couldrey submitted that they were wrong in doing so. He said that the overdrafts could not have been obtained without complying with the bank's conditions and that legal expenses incurred in respect of them were, logically and necessarily, an essential expense incurred and should have been admissible as

such under section 15(1).

The converse of section 15(1) is section 16(1)(a) which disallows any deduction for loss or expenditure not wholly and exclusively incurred by the taxpayer in the production of the income. An examination of the two accounts produced as exhibits shows that while the current account was in credit for most of the time, with debit balances shown intermittently, the bill discount account was always substantially overdrawn. Mr Couldrey submitted that the net result of the combination of both accounts was that there was a fluctuating debit balance only consistent with the money being used to lend to customers, which would naturally vary according to the number of borrowers and the amount of borrowing that the company had at any given time. In this way the company avoided having to raise further capital by the issue of shares, which might either be excessive or inadequate, according to the amount required to be borrowed from the company, whereas the overdraft facilities enabled it to obtain the right amount of money required for lending at any given time. In other words a running overdraft was the answer to any problems that might arise in conducting its business.

Mr Couldrey relied, *inter alia*, on the speech of Lord Atkinson in *Scottish North American Trust Ltd v Farmer* (1910) 5 Tax Cases 693, in which the main business of the company in question was to buy and sell investments and, because of cash flow problems they obtained a fluctuating overdraft, on which interest was charged at current rates from day to day. At page 717 of the Report, Lord Atkinson said:-

> "The authorities show that money borrowed by such a company as the appellant company in this case in the fluctuating temporary manner in which it has been borrowed by them – the daily borrowing and lending of money being part of their trade and business— is not to be treated under the Joint Stock Companies Act as"capital." There is nothing to show that that word should bear a different meaning in the Income Tax Acts when applied to the proceedings of Joint Stock Companies. The interest is, in truth, money paid for the use or hire of an instrument of their trade as much as is the rent paid for their office or the hire paid for a typewriting machine. It is an outgoing by means of which the company procures the use of the thing by which it makes a profit and like any similar outgoing should be deducted from the receipts, to ascertain the taxable profits and gains which the company earns. Were it otherwise they might be taxed on assumed profits when, in fact, they made a loss."

This passage was cited by Finlay J in *European Trust Co. v Jackson*, (1932) 18 Tax Cases, page 1, at page 11 where he also said:-

> "Now, here it seems to me that the principle may be stated in this way: if you get a company dealing with money, buying or selling stocks or shares, treasury bills, bonds, all sorts of things, and if you get that company getting, as such companies constantly do get, temporary loans from their bank – accommodation, I suppose, for sometimes twenty-four hours, or even less, sometimes for a good deal longer – if you get that sort of thing, then the interest on that money, the hire, so to speak, paid for that money, may properly be regarded as an expenditure of the business, an outgoing to earn the profits. On the other hand, if the truth of the thing is that by the payment of the interest the company does not obtain mere temporary accommodation, day to day accommodation of that sort, but does, in truth, add to its capital and get sums which are used as capital and nothing else, then I think that in that case all the authorities show that that deduction cannot properly be made."

Before going further, I feel I must comment on one of the passages to which Mr Couldrey referred us in *Scottish North American Trust v Farmer*, where it is stated at page 706:-

> "In *Bryon v The Metropolitan Saloon Omnibus Company Limited* (3 DG and J, 123) it was held that the borrowing of money for the purposes of the business of the defendants, a carrying company; was a mode of conducting their business within the meaning of the thirty-third and thirty-fourth sections of the Joint Stock Companies' Act of 1856; and the

> decision has been treated as having also determined that the borrowing by such a company of money by the issue of debentures does not amount to an increasing of the capital of the company."

In fact a study of *Bryon v Metropolitan Saloon Omnibus Co* (1858) 44 English Reports, p 1215, did not decide, or even imply, that the borrowing of money by a company by the issue of debentures did not amount to increasing its capital. It decided that under the Joint Stock Companies Act [1856], in the absence of any articles of association, a majority of over three-quarters of the shareholders was sufficient to empower the directors to borrow on the security of debentures.

Returning to the present case, applying the principles stated above, and having examined the respective accounts, it does not seem to me that the overdrafts, though the debit balances varied, were of the nature envisaged by the above statements. The one account was always substantially overdrawn whereas the other, I think it is fair to say, was only so occasionally. I am of the opinion that the statement of Aganyanya J at the conclusion of his judgment namely:

> "…… I am convinced the expenditure herein was designed to improve the capital position of the appellant and hence of a capital, and not, a revenue nature. In any event, how can legal fees for preparation and registration of certain legal documents in anticipation that these will (in) future be utilized as security for over draft facilities to be offered by the bank be construed an expense incurred wholly or exclusively in the production of income? These legal fees were not paid (for) the direct purpose of introducing profits"

is entirely right. By no reasonable canon of construction can the legal expenses for the execution of securities to cover matters which might arise in the future be regarded as wholly and exclusively incurred in producing the income for the year 1980. These were not therefore deductible and I would dismiss the appeal with costs.

After some thought, and, I must confess, a degree of hesitation, I am prepared to accede to the views of Nyarangi JA, on this aspect, and I would also therefore certify for two counsel.

As Nyarangi JA agrees with the main result this appeal is ordered to be dismissed with costs certified for two counsel.

Nyarangi JA. The question for decision in this appeal is whether the expenditure incurred by the taxpayer appellant in payment of legal costs to the advocates for its bankers in connection with preparation of security documents to provide overdraft facilities is an expenditure wholly and exclusively incurred in the production of the appellant's income. The facts are clearly and succinctly stated in the judgment of Hancox JA which I have had an opportunity of reading.

The decisions in *Vallombrosa Rubber Co. Ltd. v Farmer* (*Surveyor of Taxes*) 5T.C. 529 and *The Commissioner Inland Revenue v Adam* 147 T.C 34 attempted to lay down tests for determining when a particular item of expenditure is of a capital or revenue character. The two sets of tests were set out in *Commissioner of Income Tax v Hutchings Biemer Ltd* [1969] EA 681 at page 682, letters G-H per Law JA as he then was. The running overdraft which the appellant company arranged afforded it a facility over and above its existing assets or capital. The facility was not on the facts used to maintain an existing asset but to augment the lending operations of the company. On the decision of Finlay J in *The European Trust Company Limited v Jackson* (1932) vol. XVIII T.C page 1 at page 12, the sums which accrued to the company were intended to improve the business of the company and therefore were of a capital not a revenue character.

Black's Law Dictionary, 5th Edition on page 189 defines capital as accumulated goods, possessions and assets used for the production of profits and wealth…..

It is worthy of note that according to *Simon's Taxes*, Part B, 3rd Edition, page 599, on general principles,

legal expenses incurred in acquiring a lease or in the renewal of a lease are capital expenditure are not allowable deductions although in practice legal expenses incurred in the renewal of a short lease are allowed as deductions. In this case, the extra funds were derived from the running overdraft. The word 'derive' suggests a source: *Drummond (Inspector of Taxes) v Brown* [1984] 2 All ER 699 at page 702. But the application of the money obtained by the overdraft can provide the real criterion; see for instance, *Red's Brewery Co v Male* 3 T.C 279, 1890-1898, Part XLVII page 279, and *Jennings v Barfield* 40 T.C 365 at 373 per Lord Buckmaster.

I agree that the appeal should be dismissed. With regard to costs a question has arisen as to whether the Court should certify for costs of two counsel. I am conscious of the fact that this was a revenue case, that a decision of this court, either way, would have a final and binding effect, that in recent months the Kenya Parliament has debated issues of banks and financial institutions e.g. The Banking (Amendment) Bill, 1985 Kenya Gazette Supplement No. 38 whose object was to provide for greater efficacy in the management of the banking industry and that the judgment of this court would be of interest to the several other licensed financial institutions in the country which accept deposits of money from the public and employ those deposits by lending. It is reasonably understandable that the respondent Republic decided that the appeal raises an issue of general importance as a result of which Mr Shields, Chief State Counsel, led Mr Ole Keiwa and in his submission stressed that the appellant company utilized the facility available to it as an added extra asset. That contention was advanced with force, making it possible for me to see the whole matter in better light. For those reasons I would certify for costs of two counsel as was sought by Mr Shields.

Platt Ag JA (dissenting)**.** It is often the case when senior counsel appear, that the issue for determination may be stated shortly, although it may not be easy to provide the answer. The issue set out in the memorandum of appeal in this case, is whether Aganyanya J erred in law in holding that the appellant's payment of legal expenses incurred in borrowing money for its business is not properly allowable against taxation, because he refused to accept that the payment of such expenses was a payment made for the purpose of producing income. It has taxed most courts since the early years in this century to draw the line satisfactorily between what pertains to capital and what pertains to income.

The facts are not in dispute and may be stated shortly. The appellant company, Commercial and Industrial Credit Limited, is a licensed money lender. When the appellant company was transformed from a plantation company to a banking company in 1975, its paid up share capital was Shs 3,000,000. Its authorised capital was Shs 5,000,000. The appellant company commenced business on this capital, and its chairman and director, Mr Shah, explained in evidence, that in 1979 there was no overdraft; its account reflected a credit balance. The appellant operated on bills discounted. Later the appellant carried on two types of banking; it continued to provide money for business people and industrialists on a short term basis, by way of discounting their bills, and further it gave them direct short term loans. This led the appellant to operate two types of account, the account for discounting bills, and the current account where straight loans are accounted for, and this current account has overdraft facilities. It was the provision of overdraft facilities that led to the dispute in this case. It seems that the overdraft facility was there to support both accounts if need be.

It appears from the statement of facts, that during the tax year 1980, the appellant arranged borrowing facilities of Shs 6,000,000 from the Bank of Credit and Commerce (International) Ltd. The money so borrowed was and is used for the purpose of lending at a higher interest, thus making a profit for the appellant. The increased operation of the appellant, after the borrowing facility was arranged is illustrated by the profit and loss account for the year ended June 30, 1980, which shows the position in 1979 and 1980. It is also clear from the notes on the accounts as at June 30, 1980, that the volume of business approximately doubled in 1980 from the level of 1979, (though not necessarily its profit which increased modestly). The profit was derived from both sources of its business. For the purpose of gaining the overdraft facility, the Bank of Credit and Commerce (International) Ltd required security. The security comprised of a mortgage and charge over two properties respectively, and a floating debenture charging all assets of the appellant. The bills to be discounted were themselves a further security. The Advocates, Messrs. Shapley Barrett & Company prepared the necessary legal documents providing security and tendered their fee note. The total demanded was Shs 52,987.50.

The Commissioner for Income Tax, by his assessment No. 54/3326/80, declined to treat the sum of Shs 52,987.50 as an expenditure incurred wholly and exclusively in the production of income, as provided by section 15(1) of the Income Tax Act (cap 470). Instead the commissioner treated the expenditure as of a capital nature under section 16 of the Act, and therefore that it was not liable to be deducted in calculating the taxable profits for 1980.

The appellant appealed first to the Local Committee. But being unsuccessful there, the appellant appealed again to the High Court, being the upper division of the appellate body as provided by sections 86 and 87 of the Income Tax Act. The High Court agreed with the commissioner, and now the appellant appeals to this court for the third time. As there is no specific provisions for such an appeal, it is not certain what type of an appeal this is; but presumably it is one on matters of law, as it would be illogical to give this court wider powers than the High Court. (see section 86(2) of the Act).

It may be useful at this stage to set out the statutory provisions relating to the dispute. Section 15(1) provides:-

> "15(1) For the purpose of ascertaining the total income of a person for a year of income there shall, subject to section 16, be deducted all expenditure incurred in that year of income which is expenditure wholly and exclusively incurred by him in the production of that income, and where under section 27 any income of an accounting period ending on some day other than the last day of that year of income is, for the purpose of ascertaining total income for a year of income, taken to be income for a year of income, then the expenditure incurred during that period shall be taken as having been incurred during that year of income."

Section 16 provides:-

> "16.(1) Save as otherwise expressly provided, for the purposes of ascertaining the total income of a person for a year of income, no deduction shall be allowed in respect of-
>
> (a) Expenditure or loss which is not wholly and exclusively incurred by him in the production of the income;
>
> (b) Capital expenditure, or any loss, diminution or exhaustion of capital."

Applying these provisions to the facts of the case, the High Court having advised itself of the views expressed in other cases such as the *Vallombrosa Rubber Co. Ltd. v Farmer* 5 T.C 529; and *The Commissioner of Income Tax v Adam* 14 T.C. 34; came to the conclusion that the expenditure was designed to improve the capital position of the appellant and therefore was of a capital, and not, a revenue nature. The reasoning seems to have been that the overdraft facility was an additional source of capital from Shs 2,000,000 to Shs 6,000,000. The overdraft gave the appellant rights of a permanent nature. Therefore the fees spent on creating the floating debenture and collateral charge and mortgage over the assets were of a capital nature. Alternatively, it was held that the expenditure was not incurred wholly and exclusively in the production of income.

These notions of what is capital and what is revenue are not as obviously the opposite sides of the same penny as the provisions of the Act might suggest, and Mr Couldrey engagingly opened his case as being a borderline case. Anyone glancing at the introduction to *Simon's Income Taxes* Vol. A.1 and observing the often fine distinctions between capital and revenue, indeed distinctions sometimes drawn in opposition to the methods of accounting of the parties themselves, will sympathise with Mr Couldrey. It is not unkind to point out that it was the commissioner's own dilemma which appears to have prompted this appeal. There was an overdraft facility. It was of the usual type, arranged on two considerations; the one, the payment of some 14% interest, and the other, the giving of security. It was necessary for the security to be recorded in mortgage and debenture agreements. These agreements were drawn up by lawyers and the latter charged fees. The taxpayer was therefore obliged to pay both recurrent interest and the once-for-all fees. The commissioner thought that the recurrent interest must be charged to revenue account, while the

fees to create the security, must be charged to capital account. In Mr Couldrey's submission that is inconsistent. It is all one agreement. The taxpayer could not acquire his overdraft anymore by the payment of interest as by the production of suitable security. He had to agree to both, and to provide both. Therefore on this view, the borrowing on overdraft was the central feature, and there was no difference in quality between the two forms of consideration.

When that is grasped, then one refers to the classic distinction drawn by Finlay J in *The European Investment Trust Co Ltd v Jackson (H.M. Inspector of Taxes)* 1932 Vol. XVIII part 1 Tax Cases which is better set out in full from page II:-

"Now, here it seems to me that the principle may be stated in this way: if you get a company dealing with money, buying or selling stocks or shares, treasury bills, bonds, all sorts of things, and if you get that company getting, as such companies constantly do get, temporary loans from their bank – accommodation, I suppose, for sometimes twenty four hours, or even less, sometimes for a good deal longer– if you get that sort of thing, then the interest on that money, the hire, so to speak, paid for that money, may properly be regarded as an expenditure of the business, an outgoing to earn the profits. On the other hand, if the truth of the thing is that by the payment of the interest the company not obtain mere temporary accommodation, day to day accommodation of that sort, but does, in truth, add to its capital and get sums which are used as capital and nothing else, then I think that in that case all the authorities show that that deduction cannot properly be made."

So Mr Couldrey submits, if the commissioner has allowed interest on the overdraft to be calculated in revenue account, then the sums borrowed were not a capital accretion but a mere accommodation. Consequently, the security provided was simply a consideration for this accommodation. The course of dealing on the bank statements illustrated day to day borrowing by the taxpayer on a fluctuating basis, payments in and payments out.

Mr Shields supported the commissioner. His first point was that if Mr Couldrey could only present a borderline case, then he must fail, because the onus fell upon the appellant to show that the commissioner was wrong. This, the appellant had failed to do, because the creation of the security (and the attendant fees for its creation) concerned the enlargement of the taxpayer's capital. The taxpayer had need of additional capital to expand its business. It was only possible to expand from discounting bills to direct loans of money by the overdraft facility.

In order to test the commissioner's distinction between the concept of the facility and the fluctuating overdraft account, the Court asked Mr Couldrey whether he would support a distinction between the creation of the facility and the use of it. His answer was that if the Court considered the facility an asset, then the fees paid for the creation of the asset must be capital. But he contended that the facility was not an asset. The fundamental question in this appeal, is whether the right to overdraw an account is an asset by itself, or whether it is simply the result achieved by the agreement of the parties; thus 'you may overdraw, if you give me security and pay interest.'

There are certain arrangements which arise form time to time whereby a taxpayer has purchased the right to do or obtain something, which furthers the conduct of the business he does or intends to do. Take for instance the person who wishes to win a mineral from under the surface of land which belongs to another. He may have to purchase the right to go upon the land. Without that, he cannot prospect. Having decided to drill under the surface, he must have the right to go upon the land for that purpose, and may have to put back the land in a suitable condition. He may have to pay a royalty on the mineral he wins from the ground. Thus a distinction was drawn in *H. J. Rorke Ltd. v Inland Revenue Commissioners* [1960] 3 All ER 359, between the sums paid for the right to go upon the land and leave it in a suitable condition, and those paid for actually winning the mineral from the ground (see also *Granville Building Co. Ltd. v Oxby* (1954) 35 T.C. 244; *Knight v Calder Grove Estates* (1954) 35 T.C. 447.

So also one may pay an advocate a retainer so that one's business is properly conducted according to law.

The distinction in that sort of case lies between a sum paid for trading stock and a sum paid for the right

to obtain trading stock. Applying that distinction to the present case, the dealing in money was the purpose of the company, the money was stock-in-trade, but the right to borrow money, the facility, was it an asset in obtaining its stock-in-trade? Or was it simply part of the agreement producing the stock-in-trade, which produced the profits?

This prompts the next question which must be asked, whether an asset can exist in any practical sense as an entity by itself without any value? In this case, the facility to overdraw was said to have a beneficial effect upon the business of the company, allowing it to expand its business. There are situations where an expenditure may have an intangible benefit and the expenditure may be of a capital nature. The words of Lord Cave in *British Insulated & Helsby Cables Ltd. v Atherton* [1926] AC 205, 213, explain that situation:-

"But when an expenditure is made, not entirely once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

What is be said of "an advantage of an enduring nature"? It may result from the discharge of an onerous obligation, or the provision of a pension scheme for the benefit of the employees concerned (see the *Atherton* case). Is the overdraft in this case such an advantage? In the *Commissioner of Income Tax v Hutchings Biemar Ltd* [1969] EA 681 at p684 Sir Charles Newbold P made the following comments:-

"Mr Lutta stressed that what the expenditure in this case brought into existence (was) an advantage by reason of the fact that the recovery of possession of the premises was an advantage. That is true in one sense; but strictly the advantage was always in existence. There was nothing new which was brought into existence, it was merely new form of utilization of an existing asset."

The situation in the *Hutchings Biemar* case was very different from this case, and indeed exemplified an expenditure on revenue account. But Sir Charles Newbold's remarks have an important general point, that whether a company acts on capital or revenue account, there will be a benefit to the company in some sense. The inquiry must however go past that general benefit, and be directed to whether the expenditure has brought something new into existence which is of an enduring benefit.

In this case, the so-called facility to borrow money was not produced by the creation of the securities. The fees paid for those securities did not produce this advantage any more than interest paid. The fees paid were not a special payment by themselves in any sense giving the taxpayer the right to obtain its stock-in-trade, the money with which it traded. They were not even paid to the lending bank to obtain advantage. They were paid to third parties, and merely brought into existence the securities required in the agreement between the parties. It was the agreement that produced the advantage, whereby, the bank agreed to allow the company the right to overdraw, as against the consideration given by the company of security and payment of interest. The facility is in truth nothing at all by itself; it was not specifically paid for, and was nothing new in itself apart from the general agreement. The operation of the general agreement as to one of the considerations stipulated, namely payment of interest, was found to constitute a revenue transaction. It was all one transaction.

It cannot be thought that the sums borrowed were themselves in any sense capital, so that the fees for the securities could on that account be capital. The commissioner's decision to treat interest as payable on revenue account demolishes any such notion. The nature of this transaction was quite different from that in *Jackson's* case, where specific sums were advanced as additional capital for the purchase of motor cars. As Finlay J pointed out, it was because of that, that interest payments on the borrowing were capital payments. Otherwise, the contrast was with accommodation made periodically with the lending bank. Here no specific sum was lent; no assets were purchased; but merely accommodation by fluctuating overdraft. The nearest one can get to calling this money capital, would be to call it circulating capital, which is not really capital at all, but stock-intrade. Borrowing money by a company is a different thing from increasing capital (see *Scottish North Trust v Farmer* (1911) 5 Tax Cases 703 at p.707 per *Lord Atkinson & Gower's Modern Company Law* 3rd Ed).

It appears to me therefore that while one must bear in mind the warnings of Romer LJ in the *Golden Horse Shoe* case (1934) 1 KB at p564, that these distinction are not always easy to discern or to expound, and Jenkins LJ in *Stow Bardolph v Poole* [1954] 3 All E.R. 647 that the distinctions drawn by the cases are not altogether satisfying to some minds, nevertheless there is in this case, merely a contract to allow the taxpayer to overdraw on provision of security and interest. These considerations were made on payment of fees or paid as interest respectively, to acquire the money for the purpose of producing profits wholly and exclusively. The appellant has discharged the onus on it, (see section 87(2)(b) of the Act).

This conclusion has caused me some anxiety, because it is not certain what the nature of this appeal really is, as I have commented before. Assuming that the appeal is on a question of law, then the finding whether an expenditure is on capital or revenue account is one of fact. That was the view of Lord Cave in *Artherton's* case (*supra*). But Sir Charles Newbold has assisted me with the following comment at p.684 in *Hutchings Biemer* case (*supra*):-

"I agree with him (i.e. Lord Cave) that whether the expenditure was incurred for the direct purpose of producing profits and consequently is expenditure wholly and exclusively incurred in the production of income is, once the legal principles have been ascertained, a question of fact."

The question then concerns the legal principles to be applied. It seems to me that while the proceedings in the High Court, in calling evidence were suspicious, in view of the fact that section 86(2) of the Income Tax Act provides that the appeal to the High Court shall be on matters of law or mixed law and fact, this Court should not go beyond matters of law. It is matter of law whether the evidence has been correctly appraised, and the legal principles properly applied. I do not think that that is the case here. In the words of Lord Greene in the Privy Council, [1949] 2 All ER 654) the "High Court has adopted an approach to the question which has diverted its view from the real point ….." It appears to me that the High Court misdirected itself, in law. It considered that the borrowed money was an asset in view of its trade in dealing with money. From there it presumed that the expenditure on the securities was made in the process necessary for the acquisition of property or rights of a permanent nature: indeed an expenditure incurred in the ordinary course of maintaining assets of the appellant company. The judge was convinced that the expenditure was designed to improve the capital position of the appellant. Those are *non-sequiturs*. It is a capital outlay to acquire property or rights of permanent nature; but it is revenue to maintain an existing asset. Law JA makes that clear in the *Hutchings Biemar*case (*supra* – p685).

"In the words of Lawrence J (as he then was) in *Souther v Borax Consolidated Ltd*.23 T.C 597, it was expenditure incurred in the ordinary course of maintaining the assets of the company" and was thus wholly, exclusively and directly laid out for the purpose of the company's trade in order to earn revenue."

The learned judge cannot have both the acquisition of permanent capital, and the maintenance of assets in one breath. His final statement begs the question, what sort of capital was improved, permanent capital or circulating capital? It seems to me, with great respect, that the learned judge failed to come to terms with the real nature of this transaction on matters of law, and therefore that this court is entitled to interfere, although its powers are not clarified by statutory provision.

Consequently I would hold that the fees paid in this case, pertain to revenue, and should be deducted. I would allow the appeal with costs both here and in the High Court, and Local Committee. I would order the commissioner to adjust his assessment as appears may have been envisaged in section 93(2) of the Income Tax Act (cap 470).

Delivered at Nairobi this 16th day of January,1986.

A.R.W.HANCOX

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JUDGE OF APPEAL

J.O.NYARANGI

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JUDGE OF APPEAL

H.G.PLATT

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AG. JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR