ABD Pte Ltd *v* Comptroller of Income Tax
[2010] SGHC 107

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Decision Date	: 08 April 2010
Tribunal/Court	: High Court
Coram	: Andrew Phang Boon Leong JA
Counsel Name(s)	: Nand Singh Gandhi and Delphie Ann Gomez (Allen & Gledhill LLP) for the appellant; Foo Hui Min and Usha Chandradas (Inland Revenue Authority of Singapore) for the respondent.
Parties	: ABD Pte Ltd — Comptroller of Income Tax

Revenue Law – Income Taxation

8 April 2010 Judgment reserved.

Andrew Phang Boon Leong JA:

Introduction

1 Tax raises – not surprisingly, perhaps – *contrasting* responses. On the one hand, – and particularly from the taxpayer's perspective – it is often viewed negatively. As Hubert Monroe QC put it at the commencement of his 1981 Hamlyn Lectures (*Intolerable Inquisition? Reflections on the Law of Tax* (Stevens & Sons, 1981)) ("*Intolerable Inquisition?*") at p 1 (see also at p 15):

> Tax is scarcely a favourite topic. … Objections to the topic, some articulated and some no more than impressions, would range from the complexity and obscurity alleged to surround it to an uneasy feeling that the topic is somehow distasteful and in an indeterminate way alien to those principles of reason and fairness which distinguish the common law.

2 But there is, as alluded to above, another side to the coin, which is (in my view) reflected in the question mark placed after the main title of the lectures just referred to. In other words, whilst, on one view, tax may be viewed as an "intolerable inquisition", there is another view that can be adopted; in the learned author's words (*Intolerable Inquisition?* at p 1):

> Disagreeable topic though it may be, tax has a widespread relevance. Economists will happily devote time to discussing the form which tax should take since tax and the system adopted for its collection have profound economic effects. Those whose interests lie in the area of public finance and public administration will share with economists their interest in the consequences of this or that form of tax. For accountants tax is of particular relevance since it is pervasive in relation to their clients' affairs: all property and all sources of income have at some stage to come to terms with the demands of tax. Is not the Inland Revenue a partner in every trade, business or enterprise?

3 Indeed, one cannot gainsay the well-established public necessity for tax in general and tax law in particular which centres on, *inter alia*, the raising of revenue for the financing of public infrastructure and redistribution (see also, for example, John Tiley, *Revenue Law* (Hart Publishing, 6th Ed, 2008) ("*Revenue Law*") at pp 7–10). In this respect, the legal regime is *statutory* in nature.

The modern income tax regime in the local context dates back more than five decades. The traditional starting-point is located in R B Heasman, *Income Tax: A Report to Their Excellencies the Governors of the Malayan Union and Singapore, with Recommendations, including a Draft Bill and Proposals for Administration and Staffing* (Kuala Lumpur, Malayan Union Government Press, 1947) (popularly known as "the *Heasman Report*", and hereafter referred to as such) as well as the *Report of the Joint Committee appointed by Their Excellencies the Governors of the Malayan Union and Singapore to consider Mr. Heasman's recommendations for the institution of an Income Tax and to report whether, if the policy of Income Tax were adopted, the principles of the legislation, a draft of which is annexed to Mr. Heasman's Report, would, in their opinion, be suitable for the purpose* (Kuala Lumpur, Malayan Union Government Press, 1947). Much has, of course, happened since but the present Income Tax Act (Cap 134, 2008 Rev Ed) ("the Act") finds its roots in this historical setting (see also generally *Halsbury's Laws of Singapore – Revenue and Taxation* vol 16(2) (LexisNexis, 2008 Reissue) ("*Halsbury's Laws of Singapore*") at paras 205.004–205.009 as well as Andrew Halkyard and Stephen Phua Lye Huat, "Common Law Heritage and Statutory Diversion – Taxation of Income in Singapore and Hong Kong" [2007] SJLS 1 at 1–3 (which, as the title itself suggests, contains comparative aspects as well)).

4 Interestingly, perhaps, when income tax legislation was first being considered in the local context, it was noted thus (see the *Heasman Report* at para 15):

> The possibility of the re-introduction of Income Tax in Malaya was forecast early in 1946. Press and public comment tended on the whole, *but more noticeably in Singapore*, towards acceptance of the principle that the taxation of income is the fairest and most equitable method of raising revenue, and there seems to have been little disposition in the Colony to question the need for the provision of social services on an adequate scale. [emphasis added]

5 Apart from the historical context, the Act itself embodies a coherent system that seeks to balance the contrasting views as well as expectations referred to briefly above. For example, whilst income tax is levied (see generally s 10 of the Act), deductions are also permitted (see generally s 14 of the Act as well as below at [39]–[40] in so far as the various categories of deductions within that particular section are concerned). However, deductions of a capital nature are generally not permitted (see, in particular, s 15(1)(*c*) of the Act, a provision that will, in fact, figure prominently in this appeal, and which was accorded a broad scope by the Singapore Court of Appeal in *T Ltd v Comptroller of Income Tax* [2006] 2 SLR(R) 618). In order, however, to meet any unfairness to the taxpayer concerned in this last-mentioned regard (in particular, where the capital asset concerned is a depreciating one), the Act permits – in specific situations – capital allowances in favour of the taxpayer (see generally Pt VI of the Act). However, as already mentioned, the entire income tax regime is embodied wholly within a *statutory* framework. Hence, where the situation concerned is not provided for by the Act, just as no tax can be levied, by the same token, no tax concession operates in favour of the taxpayer (a clear instance of this in the context of capital allowances can be found in the Singapore Court of Appeal decision of *In re A B Ltd* [1957] MLJ 143 ("*A B Ltd*") (affirming the Singapore High Court decision in *In re A B Ltd* [1956] MLJ 197), which we will, in fact, have occasion to consider in more detail below; see also the *Heasman Report* at para 32, where proposed provisions in respect of capital allowances were said to "[modify] to some extent one of the cardinal principles of Income Tax Law, namely, that outlay of a capital nature, however desirable from the point of view of the trade or business, is not deductible in computing the amount of income to be taxed"). Monroe echoes the same sentiments made at the outset of the present paragraph. Although referring to the UK context, the following observations by the learned author are, it is suggested, equally applicable to the Singapore context (see *Intolerable Inquisition?* at pp 35–36):

> But there does seem to me to be a general failure of nerve: panache is missing. By that I mean

this: we are insufficiently interested in basic principles. Who teaches tax as a coherent branch of the law? What interests the profession? They will tell you all there is to know – and more – about the law and the practice … But when will they base advocacy on the potential coherence of the tax code? When will judges be invited to construe provisions in taxing statutes as part of a scheme designed, however imperfectly, to produce a reasonable result? When, in short, will confidence return that, within the familiar limits of our legal system, it is no less possible to predict how a tax question will be answered than to suggest how a problem in the common law will be resolved? When will it be possible for the practitioner to look with confidence at his client, straight in the face, and say: "You know, the law on occasions may be an ass, but the tax law is not currently as assinine as that!" The outlook is not entirely gloomy. Largely thanks to the heroic pioneering efforts of Professor Wheatcroft tax is more widely taught than ever before and not just as a practical craft. Systematic and comparative study must lead to increasing comprehension, comprehension to coherence. In any individual case the taxpayer's advocate may well strive to win the taxpayer's case by whatever argument is to hand. But it would do less than justice to those responsible for putting the Revenue's cases to doubt their concern to present the tax code as a coherent whole. If those outside the inner circle sometimes hear the theme but faintly, their listening or hearing may be at fault. The Courts' cooperation with Parliament may also be on the way towards achieving more sensible results.

6 To be sure, the very *nature* of tax legislation entails some measure of legal technicality, although it should also be pointed out that the presence of legal technicality does *not necessarily* mean that justice and fairness cannot therefore be achieved. In this regard, the following candid observations by Mr Heasman (commenting on what was to become, historically, the first piece of income tax legislation in the local context) are apposite (see the *Heasman Report* at para 39):

I was enjoined during my informal talks to make the draft Bill simple, and not difficult to understand. *Simplicity and intelligibility are undoubtedly most desirable objectives, but it is an unfortunate fact that Income Tax legislation must, by its nature, be abstract and technical, and can never be easy reading*. It is concerned with the principles and methods of calculation which it is difficult to express in words without an appearance of complication, or the presentation of loopholes whereby tax can be avoided or evaded. The intricacy of this type of legislation seems to have been a matter of concern from the outset, for when Income Tax was first introduced into the United Kingdom in 1799, the Government of the day sought to allay the dismay which the measure might occasion by issuing as a separate publication "A Plain, Short and Easy Description of the Different Clauses of the Income Tax, so as to render it familiar to the meanest capacity". The extent to which this well-meant effort achieved its purpose is not officially recorded. *However, I think the main principles of the present Bill are easily understandable, and will be quickly grasped by the majority*. [emphasis added]

7 Before proceeding to consider the specific issues that arise in the present appeal, one final general observation is appropriate. Of all areas of the law, perhaps the law relating to tax in general and income tax in particular are heavily fact-specific. It is true that facts are always important in every area of the law. However, because (as we shall see) it is difficult to formulate general principles in the context of income tax law, the factual matrix takes on an even greater importance. This is (as we shall also see) especially the case in relation to the fundamental distinction that has to be drawn between capital and revenue. Nevertheless, even here, the court must be careful not to slide down the slippery slope to the other extreme by subscribing to the (substantively meaningless) mantra embodied in the declaration that "It all depends on the facts". In order for a particular decision to be legally *justified*, legal rules and principles (which contain *normative* force) *must* be both formulated as well as applied. Put simply, a court *cannot* – and must not – justify a particular decision based *solely* on the facts (which, in and of themselves, are purely *descriptive* in nature and, hence do *not* contain

the *normative* force required to *justify* the decision arrived at by the court). Any recourse to the aforesaid mantra would, in substance, be a case of circular argument that seeks to justify decision that is based, in the final analysis, on a purely arbitrary decision on the part of the court. Such an approach must be assiduously avoided, not least because it is the very antithesis of the mission of the law itself (which is to aid the court in arriving at a just and fair decision in accordance with the objective application of the objective (and, of course, relevant) rules and principles of law). Hence, whilst the facts of any given case *are* of fundamental importance (particularly in the context of the law relating to income tax), they do *not* operate *alone*. A decision by the court is the product of an *integrated* process in which the relevant *legal rules and principles* are *applied* to the relevant *factual matrix*.

8 With these preliminary observations in mind, let us now turn to the facts as well as issues in the present appeal.

The factual background

9 The taxpayer ("the Appellant") was incorporated on 11 July 1996 to build and operate a proprietary club ("the Club"). It acquired, for a total consideration of $108,140,542, a 30-year lease of land from the State, commencing on 18 October 1996. The Appellant built the Club building on the land at the cost of $91,416,010. In November 1996, the Appellant initiated an introductory launch to invite members of the public to join the club. Each new member paid an entrance fee (payable in 36 monthly instalments) and undertook to pay a monthly subscription fee upon the Club commencing its operations. Membership of the Club entails a licence, for a period commencing from the date the member joins the Club until October 2026, to use and enjoy the facilities of the club. Between 30 November 1996 and 30 November 2000, the Appellant received entrance fees amounting to $526,139,770. The Club began its operations on 22 March 2000. The Appellant admitted too many members to the Club and the facilities of the Club were overcrowded. This led a class of members to institute a civil action against the Appellant. In 2005, the Court of Appeal ordered the Appellant to pay damages of $3,000 to each of the members who had participated in the civil action, being diminution in the value of their memberships in the Club arising out of the Appellant's breach of its obligation to its members to provide a premier club. Subsequently, the Appellant entered into a Scheme of Compromise and Arrangement ("the Scheme"), sanctioned by the High Court, with the rest of the members of the Club to pay $3,000 (partly in kind) to each member. The total amount to be paid to the 17,761 members (including those involved in the civil action) was $53,283,000.

10 This is an appeal against the decision of the Income Tax Board of Review ("the Board"), on 16 June 2009, which dismissed the Appellant's appeal against the Comptroller of Income Tax's decision to assess tax, for the Years of Assessment 1998–2003, on the gross entrance fees of $526,139,770 received by the Appellant, without deduction of: (a) the costs of acquiring the land and constructing the Club building thereon amounting to a total of $199,556,552; (b) geomancy fees of $2,338,750 incurred by the Appellant in 2002; and (c) the total sum of $53,283,000 which the Appellant was obliged to pay to its members in 2005, following the civil action referred to above.

The issues

11 The issues to be decided in the present appeal are as follows:

(a) Whether the profit from the entrance fees should be taxed in the year that the fees were levied on each member or whether such profit should be taxed equally over the period of club membership (*ie*, 30 years);

(b) Whether the costs of acquiring the land and constructing the Club building thereon, as well as the geomancy fees, are deductible from the gross entrance fees received; and

(c) Whether the sum of $53,283,000, which the Appellant was obliged to pay to the Club's members following the civil action against it, is deductible in the Year of Assessment 2001.

12 It should also be noted that the Appellant did not pursue the question as to whether the Appellant is entitled to capital allowances pursuant to ss 19 and 19A of the Act and I therefore need say no more about it. Indeed, as counsel for the Appellant, Mr Nand Singh Gandhi, admitted, pursuing this question would have been an uphill task of the steepest order for the Appellant; this is probably (if I may say so) an understatement of sorts.

The decision of the Board

13 The Board held that the entrance fees accrued as income and were thus taxable under s 10(1) of the Act once each member was admitted to the Club (see *ABD v Comptroller of Income Tax* [2009] SGIBTR 3 ("the GD") at [15]–[17]). The Board referred to the decision of the Court of Appeal in *Pinetree Resort Pte Ltd v Comptroller of Income Tax* [2000] 4 SLR(R) 1 ("*Pinetree*") where the word "accrue" was interpreted (at [23]) to mean "to which any person has become entitled" and observed that, in the present case, the constitution of the Club with respect to fees was similar to that of the club in *Pinetree*; hence, as a matter of law, the Appellant was legally entitled to the entrance fees once the members were admitted to the Club.

14 On the issue of the deductibility of the costs of acquiring the land and constructing the building, the Board held (see the GD at [21]) that these were outgoings of a capital nature, incurred once and for all with a view to bringing into existence an asset or advantage for the enduring benefit of the trade, and were therefore not deductible for the purposes of ascertaining the income brought to tax. The Board also held that the geomancy fees were a capital expenditure and were therefore not deductible from the income of the Appellant.

15 The Board held (see the GD at [34]) that, at the inception of the Club, it could not be seriously contended that there was already an accrued liability to the members who had yet to institute civil action against the Appellant. The liability of the Appellant to pay damages to the Club's members was not absolute and could not be said to have accrued at the very inception of the Club and its quantum ascertained subsequently, in the sense referred to in the English Court of Appeal decision of *Bernhard v Gahan* (1928) 13 TC 723 ("*Bernhard*"), a case relied upon by the Appellant. The Board held (see the GD at [37]) that to state that the Appellant's liability to pay the sums of money to the members had arisen from the inception of the Club would be a significant stretch of logic and contrary to law.

Analysis and decision

The date of assessment of the entrance fees

Introduction

16 It is a well-established principle of tax law that neither profit nor loss may be anticipated. Income accrues when a taxpayer becomes entitled to it (see also above at [13]). It is also clear from the Rules and Regulations of the Club ("Rules and Regulations") that the Appellant has two streams of income from its sale of memberships: (1) the entrance fees and (2) monthly subscription fees, respectively. The issue in the present case is whether the Appellant earned the entrance fees at the time the members were admitted to membership or whether the entrance fees are earned, instead,

over the course of 30 years.

17 The Appellant submits that the profits from the entrance fees received should be taxed over a period of 30 years, *ie*, the duration of the membership. It is the Appellant's position that, being contractually bound to deliver and maintain a premier club for the duration of its lease of 30 years, the Appellant earned the entrance fees for the sale of its memberships over the course of the term of the memberships. On the other hand, the Respondent points to the fact that the memberships are transferable and argues that the memberships sold are choses in action. The Respondent submits that the entrance fees are therefore taxable in full in the years in which the members were admitted to membership.

The relevant provision

18 Section 10(1)(*a*) of the Act states as follows:

> (10) – (1) Income tax shall, subject to the provisions of this Act, be payable at the rate or rates specified hereinafter for each Year of Assessment upon the income of any person *accruing in or derived from* Singapore or received in Singapore from outside of Singapore 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 …
>
> [emphasis added]

The relevant case law

19 The case, which constituted the sheet anchor for this part of the Appellant's case, is the decision of the Singapore Income Tax Board of Review in *MPD Pte Ltd v Comptroller of Income Tax* (1998) MSTC 5249 ("*MPD*"), where the salient facts were as follows. The taxpayer in *MPD* was a company involved in the development of a private residential condominium estate. It sold units of the condominium to purchasers. Under the contracts of sale, the purchasers of the units were required to make progress payments at various stages of construction. Under the Housing Developers (Project Account) Rules 1990 ("the HD(PA)R"), the proceeds of the instalment payments received were paid into a Special Project Account ("SPA") and any withdrawals had to be made in accordance with the HD(PA)R. The taxpayer kept its books of accounts in accordance with the percentage of completion method. This method matched the costs incurred in reaching a particular stage of completion with progress payments received at that particular point. It was held that the progress payments in the SPA did not constitute income for tax purposes at the material time as they were subject to a number of contingencies before the taxpayer could be said to have earned them. The taxpayer was still under a contractual obligation to complete the development and render title to the developers. Further, the use of the progress payments in the SPA by the taxpayer was severely limited due to statutory restrictions which effectively prevented the taxpayer from appropriating the progress payments. The Board held that as the taxpayer had effectively no control over the progress payments, it could not be said to have earned those payments for income tax purposes.

20 *MPD* is clearly distinguishable from the present case. In the present case, the Appellant became legally entitled to the entrance fees once a member was admitted to membership. This is apparent from the fact that, should the Appellant allow a member to pay the entrance fees by monthly instalments, any unpaid balance of the monthly instalments becomes immediately due and payable if a member transfers his membership (see Rule 8.2 of the Rules and Regulations), resigns his membership (see Rule 23 of the Rules and Regulations), or if he is expelled from the Club (see

Rule 25.2 of the Rules and Regulations). Moreover, there appears to have been no restriction on the right of the Appellant to deal with the entrance fees as it wished once they were received.

21 The Appellant also refers to the decisions of *Arthur Murray (NSW) Pty Ltd v Federal Commissioner of Taxation* (1965) 114 CLR 314 ("*Arthur Murray*"), *Eckel v Board of Inland Revenue* [1989] STC 305 ("*Eckel*"), *CIR v Montana Lands Ltd* (1968) HKTC 334 ("*Montana Lands*") and *J P Hall & Co Ltd v Inland Revenue Commissioners* [1921] 3 KB 152 ("*J P Hall*") to support its case. These cases all hold that income will only be taxed when the taxpayer has earned it. However, the facts of these cases can be distinguished from these in the present proceedings such that it cannot be said that the Appellant in the present proceedings earned the entrance fees over a period of 30 years. Let me elaborate.

22 The High Court of Australia decision of *Arthur Murray* concerned the taxation of income earned through contracts for the provision of services. In *Arthur Murray*, it was held that fees received in advance for a course of dancing lessons were not assessable income in the year of receipt. Although there was no contractual right to refunds, the Judge referred (at 319) to the "contingency that the whole or some part of [the fees] may have in effect to be paid back, even if only as damages, should the agreed *quid pro quo* not be rendered in due course." The court described (at 318) profits which constitute income as:

> … amounts which have not only been received but have "come home" to the taxpayer; and that must surely involve, if the word "income" is to convey the notion it expresses in the practical affairs of business life, not only that the amounts received are unaffected by legal restrictions, as by reason of a trust or charge in favour of the payer – not only that they have been received beneficially – but that the situation has been reached in which they may properly be counted as gains completely made, so that there is neither legal nor business unsoundness in regarding them without qualification as income derived.

23 Counsel for the Appellant, relying on that case, argued that the Appellant had not earned the entrance fees in the years it became legally entitled to receive such fees because the Appellant was contractually obliged to provide the members with a premier club for 30 years. *Arthur Murray*, however, can be distinguished from the present case. Whilst *Arthur Murray* involved the taxation of fees received for a specified number of dancing lessons given over a period of time such that the fees for each dance lesson were not taxed as income until the lesson was actually given, the present case involves the taxation of entrance fees received for the grant of membership to the Club. Once membership is granted, the taxpayer has earned the entrance fees. The monthly subscription fees are separately taxed upon receipt, throughout the period of 30 years, as the income of the Appellant earned through its management of the Club.

24 The cases of *Eckel*, *Montana Lands* and *J P Hall* concern income earned through contracts for the sale of goods. It is clear from the decisions in those cases, as will be discussed below, that a taxpayer will only be deemed, for tax purposes, to have earned his income when the goods which he has contracted to sell are delivered to the buyer.

25 In the Privy Council decision (on appeal from the Court of Appeal of Trinidad and Tobago) of *Eckel*, the taxpayer had contracted to sell land in 1970 but was not assessed to tax in respect of any trading profit until 1973 and 1974 when she conveyed the land to the buyer. The Board, having examined the cases of *J P Hall*, *Johnson (Inspector of Taxes v W S Try Ltd* (1946) 27 TC 167, and *IRC v Gardner Mountain and D'Ambrumenil Ltd* (1947) 29 TC 69, concluded (at 310) that:

> It is clear from these authorities that money will only be treated as being notionally in hand and

> hence as a trade debt when the trader has done all that is required of him to earn it. Delivery of goods or completion of services to be rendered are examples of events which may give rise to taxation in a fiscal year in which they occur, albeit payment is not made until a subsequent year. In the present case, their Lordships have no doubt that a stage comparable neither to delivery of goods nor to completion of services had been reached on 26 September 1970.

The Board held that the fact that the taxpayer had no legal title to the land and could not convey it in 1970, combined with the fact that her right to receive payment of the purchase price was contingent on the company requesting her to execute a prior conveyance, indicated that she had not done all that was required of her to reap the profit of her venture when she executed the contract in 1970.

26 In the Supreme Court of Hong Kong decision of *Montana Lands*, the taxpayer carried on the trade of constructing and selling flats on an instalment basis. Completion did not take place until the final instalment was paid although the purchaser was allowed to occupy the flat before completion. The taxpayer was assessed to tax on unpaid instalments. The court held that the unpaid instalments were not taxable as the profit on the transaction was merely in the course of realisation until actual completion. The court noted (at 188–189) that the purchaser of a flat does not contract for mere possession or occupation but "for a title, in the form of a registrable deed of assignment of the property agreed to be bought and sold".

27 In the English Court of Appeal decision of *J P Hall*, the company entered into a contract to supply motor and motor gears over a period of time. The Court of Appeal held that the profits were taxable as and when the goods were delivered, and not when the contract was entered into.

28 From a review of the above cases, it appears that the stage at which a taxpayer will be deemed to have done all that is required of it to earn the income depends on the particular trade it is engaged in. Where it has contracted to sell property (as in *MPD*, *Eckel* and *Montana Lands*), the taxpayer will have earned the income when: it is able to convey the property (*Eckel*); the purchaser of the property gets what he has contracted to buy from the taxpayer (*Montana Lands*); and the taxpayer has control over the purchase moneys received (*MPD*). Where the taxpayer has contracted to perform services, it will have earned the income when it has performed the service (*Arthur Murray*). When the taxpayer has contracted to supply goods, it will have earned the income when he supplies the goods (*J P Hall*).

The time of accrual of the entrance fees

29 In the present case, the obligation of the Appellant, upon receipt of the entrance fees, was merely to admit the payer of the entrance fees to membership. The Appellant fulfilled this obligation when the liability of the member to pay the entrance fees accrued. The entrance fees paid to the Appellant can fairly be said to have "come home" to the Appellant upon the grant of membership since the Appellant was legally entitled to the whole of the entrance fees once the application for membership was approved.

30 The Respondent relied on the decision in *Pinetree* to support its argument that entrance fees are taxable in full at the time the taxpayer receives them. In *Pinetree*, the Court of Appeal (at [23]), when considering what was labelled as an "initiation deposit" paid by a member of Pinetree Club upon being admitted to membership, interpreted the word "accrue" in s 10(1) of the Act to mean "to which any person has become entitled" (see also above at [13]). Although the issue in *Pinetree* was whether the initiation deposit was a loan or income rather than whether the initiation deposit could be regarded as income at the time of receipt, the court did consider the taxpayers' argument that the

initiation deposits should not be regarded as having accrued to the taxpayer as they were subject to legal impediments. The taxpayers in *Pinetree* cited the case of *Arthur Murray* in support of this proposition. The court observed (at [43]) that, in the court below, Tan Lee Meng J had distinguished *Arthur Murray* from *Pinetree* on the grounds that *Arthur Murray* concerned advance payments, which was unlike the circumstances in *Pinetree*. The court proceeded to observe as follows (at [43]):

> In our view, even where payments are subject to legal impediments, the cases show that this factor is not conclusive of whether the payments could be regarded as income. The courts clearly take into account other factors, in particular, how the taxpaying companies deal with the moneys, in deciding the matter. *Arthur Murray (NSW) Pty Ltd v FCT* was thus not very helpful to the appellants' case.

The court dismissed (at [45]) the appellants' claim that they had not "received" the moneys in a true sense of the word as the members were free to reclaim the initiation deposits on the ground that the appellants in *Pinetree* had been at liberty to use the moneys representing the initiation deposits as they pleased. It is clear from the reasoning of the court that the fact that the initiation deposits may have been forfeited at a later date did not prevent them from constituting income at the time of receipt. Similarly, in the present case, the fact that the Appellant might be liable to its members in an action for breach of contract if the Appellant fails to provide them with the use of a premier club for a duration of 30 years should not prevent the entrance fees (received in consideration for the grant of membership to the Club) from constituting income of the Appellant at the time of receipt.

31 By way of a coda, it might be noted that the views of learned scholars add further support to the conclusion that an entrance fee comprises only the consideration for the ability to join a club and should be taxable at the time it is incurred.

32 Ashton and Reid have commented as follows (see *Ashton and Reid on Club Law* (David Ashton and Paul Reid, Jordan Publishing Limited, 2005) ("*Ashton and Reid*") at para 4-38):

> Problems are sometimes encountered where the club has been dissolved and recently joined members have complained that they are entitled to a refund in whole or in part of the entrance fee in addition to the unexpired portion of the subscription. We consider that no part of this fee is refundable as it comprised the consideration for the ability to join the club in the first place and is in no wise carried forward into the period of membership.

Although *Ashton and Reid* recognised, by reference to the decision of Lawrence J in the English High Court decision of *Re Curzon Syndicate Ltd* [1920] LT Jo 232, that the point may not be free from doubt, they sought to distinguish this decision on its facts. In *Re Curzon Syndicate Ltd*, one of the plaintiffs successfully claimed back her entrance fee in the liquidation when the proprietary club closed down. The learned authors comment that special circumstances may have applied in the said case. In particular, they observed as follows (at para 4-38):

> In 1917, Mrs H, who was the governing director of the company which owned the club and who was personally the lessor of the club premises, posted in the clubhouse a notice, in reply to a rumour that the club was going to close down, stating that the club would be carried on permanently. On 25 March 1919, Mrs H obtained judgment against the company for arrears of rent and on the same day closed the club, with the notice still being in place. The law report does not indicate the date when the plaintiff paid her entrance fee or the date when she became a member, nor the basis of recovery of the entrance fee. The judge may have come to the conclusion that with the notice still in place for all to see, there was an implied term in the contract of membership that the club would not shut down save on reasonable notice. That being

> so, the company was in breach of the implied term by instant closure, and accordingly the entrance fee was recoverable as an item of wasted expenditure.

33 J F Josling and Lionel Alexander, in *Law of Clubs* (Longman, 6th Ed, 1987) referred (at p 34) to the decision of Hawkins J in *Re Duty on the Estate of the New University Club* (1887) 18 QBD 720 where the nature of members' subscriptions and entry fees to a members' club was considered. Hawkins J stated (at 727) that:

> I am not prepared to say that the entrance fee and first year's subscription could be sued for at all, for an elected member has an option to accept or refuse the membership offered him; but once fully admitted as a member, I see no reason why he should not be bound to fulfil all the obligations imposed upon him by the rules, to which he has given his submission as part of the consideration for the benefits he has acquired a right, so long as he continues a member, to enjoy.

Josling and Alexander comment (at pp 34–35) that:

> It may be deduced from his lordship's conclusions that the application for membership is simply a preliminary step. The offer is the election, and the proposed member has an option to accept or refuse it. The acceptance which completes the contract is the payment of the entry fee and first subscription in accordance with the offer. Thus Hawkins J thought that the entrance fee and first subscription could probably not, in ordinary cases, be sued for. Later subscriptions – when full membership has begun – can be sued for …

34 In the present case, the entrance fees were paid in exchange for admittance into membership of the Club. Although it is a term of the contract for the grant of membership that the membership would last for 30 years, this merely affects the characteristic of the membership granted. Just like those of the proprietary club taxpayer in *HU v Comptroller of Income Tax* [1999] SGITBR 1, the memberships of the Club in the present case are transferable (see Rules 8.1 and 9.1 of the Rules and Regulations). In *HU v CIT*, the Income Tax Board of Review held (at [65]) that:

> [We] are of the view that club membership is more than a mere personal right to use the club facilities subject to club regulations. We agree with the Respondent that club membership is a chose in action or some other form of intangible property. We agree that membership in the Club must be more than a mere personal right, if only because it is transferable.

I accept the Respondent's submission that a membership of the Club is a chose in action (although it does not confer any rights on the members to the assets of the Club as such (see the analysis below at [83]–[87])). This chose in action was granted to the members on the date that liability to pay the entrance fees accrued. As such, the Appellant earned the full amount of the entrance fees at that particular point in time.

35 The Appellant argues that if it is found, as the Respondent submits, that the entrance fees accrued as income once the members were admitted to membership, it must follow that the entire entrance fees received by the Appellant was income of a certain Year of Assessment (1998) and not income of the other years of assessment under appeal (*ie*, 1999–2003) whenever the instalment payments of the entrance fees were received. The Respondent contends that this is a concessionary tax treatment that was eventually granted to the Appellant. I find that the Respondent is entitled to allow this concessionary tax treatment and this should not detract from the Respondent's legal right to tax the income once it accrues.

The deductibility of the expenses incurred

The deductibility of the expenses incurred

Introduction

36 We turn now to consider the issue as to whether or not the cost of acquiring the land and of constructing the building constitute either capital or revenue expenditure. If it is the former, then the expenditure would fall within the ambit of s 15(1)(*c*) of the Act and, hence, *not* amount to a deductible expense.

37 However, although this issue may appear to be a simple one, nothing could be further from the truth. As I observed in the Court of Appeal decision of *Comptroller of Income Tax v IA* [2006] 4 SLR(R) 161 (at [1]–[2] and [65]–[66]):

> 1 It is a notorious and unfortunate fact that the distinction (in tax law) between the concept of capital on the one hand and that of revenue on the other is often elusive and even illusory. Even on the most promising of occasions, there are tremendous difficulties of application. This case is, unfortunately, no exception.
>
> 2 Indeed, it has often been stated that the difficulties referred to in the preceding paragraph arise precisely because it is all an issue of application. In other words, everything depends on the facts. This is true to some extent but it is, in our view, too facile a position to take without more (see also [65]–[66] below). The law must surely embody guiding principles that are both its lifeblood and hence its essence. The difficulty in discovering and/or stating these principles is no excuse for abandoning the search for them. The law is not – and cannot be – a mere agglomeration of disparate facts lost in the legal desert. To this end, we attempt, in the present proceedings, to both search for as well as state the relevant legal principles that are rooted in both logic as well as justice and fairness.
>
> …
>
> 65 … [T]he distinction between capital and revenue has often been described as being a factual inquiry. However, it will not do, in our view, to simply leave it at that. It is an abdication of judicial responsibility to merely state that "it all depends on the facts" when it is possible to furnish some further (if only rough) guidelines. As Choo Han Teck J put it in the Singapore High Court decision of Ngee Ann Development Pte Ltd v Nova Leisure Pte Ltd [2003] SGHC 168 at [6]–[7]:
>
>> In construing a contractual document the only immutable principle is that the court should extract such meaning from the words that the parties had chosen to reflect their intention at the time of the contract. It is wrong to give to the words a meaning that counsel thinks the words ought to mean, or even what the court thinks they ought to mean. Semantic interpretation is very often a very difficult exercise. What the words say and what the parties mean by the words they say may not be the same thing. ... One great fundamental in the application of the law is consistency because consistency is the alloy of predictability. In this regard, the courts ought to consistently adopt the approach that the meaning to be given to written words must first be that as appears from the text. The context becomes an aide in interpretation only if the words are vague or ambiguous, and only to the extent that a reasonable application of the context would easily bring out the meaning intended by both sides.
>>
>> For the above reason the phrase 'it all depends on the facts of the case' can so easily become the anthem of inconsistency. The phrase has such a magical ring to it. It seems that

whenever this incantation is made the court is at liberty to do as it pleases – because 'there is no case like the present'. That is the temptation we must all resist. …

[emphasis added]

66 Although the words italicised in the above quotation were espoused in a slightly different context, the general principle contained therein is germane to the point we have made in the preceding paragraph. In the circumstances, we proceed to attempt to furnish a couple of rough guidelines that are not only of assistance to the present court but which may also be of some assistance to courts in future cases relating to a similar type of transaction and/or set of facts. …

[emphasis in original]

38 The observations just quoted emphasise a point made in the Introduction to this judgment (at [7]) – that whilst the particular factual matrix in the case is of special importance in the context of income tax, one cannot (and must not) rely merely on the trite mantra that "It all depends on the facts". The applicable *legal rules and principles* (which possess the requisite *normative* force that *justifies* the decision arrived at by the court) *must* be *applied* to *the facts* at hand. That having been said, the applicable legal rules and principles are – unfortunately – not a model of precision, to say the least. Indeed, the courts have – over many years – mooted *several* tests which are supposed to aid the court in ascertaining whether or not a specific item (or items) of expenditure are either capital or revenue in nature. However, there is no clear guidance as to *which* test ought to prevail; indeed, as we shall see, some tests also appear to *overlap* with each other. Further, the very *application* of these principles in the *actual cases* themselves demonstrates that the tests concerned do not – except in the clearest fact situations – yield close to determinate results; more specifically, the presence of *dissenting judgments* is a clear indication in this particular regard. All this generates, with respect, more legal heat than light. Hence, it is important to review the various tests postulated before applying one of them (or a combination thereof) to the facts of the present appeal. However, before proceeding to do so, it would be apposite to set out the relevant provisions of the Act itself.

The relevant provisions

39 Section 14 of the Act provides for deductions against income. The provision itself comprises, in fact, a number of categories of deductions (*viz*, general, specific, special as well as further deductions, respectively; see also generally *Halsbury's Laws of Singapore* at paras 205.089–205.092). For the purposes of the present appeal, the relevant provision relates to general deductions under s 14(1), the material part of which reads as follows:

14. – (1) For the purposes of ascertaining the income of any person for any period from any source chargeable with tax under this Act (referred to in this Part as income), there shall be deducted all outgoings and expenses wholly and exclusively incurred during that period by that person in the production of the income …

40 *However*, s 15 of the Act lists the types of deductions which are *not* allowed (see also *Halsbury's Laws of Singapore* at para 205.089). In particular, s 15(1)(*c*) (referred to above at [36]) is of crucial relevance in the present appeal, and reads as follows:

15. – (1) Notwithstanding the provisions of this Act, for the purposes of ascertaining the income of any person, no deduction shall be allowed in respect of –

> (*c*) any capital withdrawn or any sum employed or intended to be employed as capital except as provided in section 14(1)(*h*).

Section 14(1)(*h*) of the Act allows for the deduction of capital expenditure:

> (*h*) where the income is derived from the working of a mine or other source of mineral deposits of a wasting nature, such deductions in respect of capital expenditure as may be prescribed in rules made under section 7.

In other words, the Act clearly prohibits the deduction of capital expenditure except where s 14(1)(*h*) of the Act applies or where the deduction of such expenditure is specifically provided for in the Act (see, in particular, s 14A–Q of the Act). In this regard, and as a matter of general principle, the following observations by Sir Wilfrid Greene MR in the English Court of Appeal decision of *Commissioners of Inland Revenue v British Salmson Aero Engines, Limited* [1938] 2 KB 482 ("*British Salmson Aero Engines*") (at 498) might be usefully noted (see also the reference to the *Heasman Report* above (at [5])):

> Income tax, as has been said over and over again, is a tax on income. It does not tax capital. As the corollary to that, in ascertaining profits, payments of a capital nature may not be deducted. It is income all the time which has to be considered under the Income Tax Acts …

41 Hence, in so far as the present proceedings are concerned, in order for the Appellant to be able to deduct the costs of acquiring the lease and constructing the Club for tax purposes, such expenditure cannot be of a capital nature.

42 This is an appropriate juncture to consider the various tests which are supposed to aid the court in ascertaining whether or not a specific item (or specific items) of expenditure are either capital or revenue in nature.

The tests considered

43 As already mentioned, there are a number of tests on offer, so to speak (and for general overviews, see, for example, *Halsbury's Laws of Singapore* at paras 205.095–205.096; Pok Soy Yoong & Damian Hong Chin Fock, *Singapore Taxation* (2nd Ed, Butterworths, 1989) ("*Singapore Taxation*") at pp 88–91; Peter G Whiteman, David Goy, Francis Sandison & Michael Sherry, *Whiteman on Income Tax* (Sweet & Maxwell, 3rd Ed, 1988) ("*Whiteman*") at paras 6-08–6.23 and (especially) 7-02–7-10 and Michael Sherry and Louise Rippon, *Eighteenth Cumulative Supplement to the Third Edition of Whiteman on Income Tax* (Sweet & Maxwell, 2008) at paras 7-02–7-11; as well as *Revenue Law* at pp 444–446).

(1) The "once and for all" test

44 At this juncture, it should be noted that there was, *first*, an early test (popularly referred to as the "once and for all" test, which is contained in the observations of Lord Dunedin in the Scottish Court of Session (First Division) decision of *Vallambrosa Rubber Co Ltd v Farmer* (1910) 5 TC 529 ("*Vallambrosa*"), where it was observed (at 536) that "capital expenditure is a thing that is going to be spent once for all, and income expenditure is a thing that is going to recur every year". However, this is a very broad test and is (as we shall see) subsumed within a more comprehensive test (which is considered next). Indeed, Lord Dunedin himself sounded a note of caution on this particular test by way of the following prefatory remark, as follows (at 536):

> Now, I don't say that this consideration is absolutely final or determinative, but in a rough way I think it is not a bad criterion of what is capital expenditure as against what is income expenditure …

More importantly, in a case which embodies the next – and more comprehensive – test, *viz*, the House of Lords decision of *British Insulated and Helsby Cables, Limited v Atherton* [1926] AC 205 ("*Atherton*"), Viscount Cave LC expressed the view (at 213) that the test enunciated by Lord Dunedin in *Vallambrosa* "is not, and was obviously not intended by Lord Dunedin to be, a decisive one in every case; for it is easy to imagine many cases in which a payment, though made "once and for all", would be properly chargeable against the receipts for the year". The learned law lord then proceeded to observe thus (at 213):

> Instances of such payments may be found in the gratuity of 1500l. paid to a reporter on his retirement, which was the subject of the decision in *Smith* v. *Incorporated Council of Law Reporting for England and Wales*[[1914] 3 KB 674], and in the expenditure of 4994l. in the purchase of an annuity for the benefit of an actuary who had retired, which, in *Hancock* v. *General Reversionary and Investment Co*.[[1919] 1 KB 25], was allowed, and I think rightly allowed, to be deducted from profits.

Most importantly, Viscount Cave LC then proceeded to enunciate what constitutes the *next* test – to which our attention must now turn.

(2) The "enduring benefit of the trade" test

45 The *second* – and, arguably, most well-known as well as well-cited – test is to be found in the judgment of Viscount Cave LC in *Atherton*. In that decision, the learned law lord observed thus (at 213–214):

> But when an expenditure is made, ***not only*** *once and for all*, but *with a view to bringing into existence and 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*. [emphasis added in italics and bold italics]

46 It is interesting to note that the actual decision in *Atherton* itself was *not* a unanimous one (the House holding that the relevant expenditure was capital in nature by a bare majority of three to two). In this case, the appellant taxpayer (who was a manufacturer of insulated cables) had a substantial complement of clerical and technical staff. In order to enhance its business and stem the loss of experienced staff, it established a pension fund for its clerical and technical staff. A sum was paid by the appellant into this fund and the issue was whether or not such payment was an admissible deduction in computing its profits for the purpose of assessment to income tax in that particular financial year. The majority (comprising Viscount Cave LC, Lord Atkinson and Lord Buckmaster) held that the payment was in the nature of capital expenditure and was thus not an admissible deduction. Lord Carson and Lord Blanesburgh disagreed. In particular, Viscount Cave LC was of the view that, without the said payment, the pension fund might not have come into existence at all. The learned law lord concluded (at 214) that:

> The object and effect of the payment of this large sum was to enable the company to establish a pension fund and to offer to all its existing and future employees a sure provision for their old age, and so to obtain for the company the substantial and lasting advantage of being in a position throughout its business life to secure and retain the services of a contented and efficient

> staff. I am satisfied on full consideration that the payment was in the nature of capital expenditure …

However, Lord Carson expressed a different view altogether; the learned law lord opined thus (at 225 and 226):

> It is clear form the terms of the trust deed [establishing the pension fund] … that in no sense was the sum an investment, that it would be eventually exhausted in payment of the pensions, and that in the event of a winding up of the company it could never form any part of the assets of the company. I cannot, under these circumstances, conceive any system of commercial accountancy under which this sum could ever appear in the capital accounts of the company. Nor is it capital withdrawn from the business, as it was admittedly paid out of the earnings of the year. … I can find no reason for holding that a payment paid to make up the contribution to a sufficient sum to enable the older servants of the company to enjoy the benefits of the pension fund brings into existence an asset or an advantage for the enduring benefit of trade and might therefore be attributed not to revenue but to capital.

And Lord Blanesburgh was of the view, *inter alia*, that the payment concerned was similar to an increased remuneration to the employees concerned. The difference in result is, at bottom, a difference in the *characterisation* of the facts. The majority of the House in this case viewed the payment concerned as strengthening the core structure and business of the company, so to speak, and was (looked at in that light) a capital expenditure, whereas the minority was of the view that the payment concerned was merely a revenue expense in relation to the payment of salaries. It cannot, in my view, be said that one view is *clearly and definitively* superior to the other, although the majority view is helpful in so far as it accords some flexibility to the manner in which a particular expenditure is analysed as being capital (as opposed to being revenue) in nature.

47 Further, although *Atherton* is considered a leading decision, it is by no means a panacea. Not surprisingly, therefore, Lord Macmillan proffered the following cautionary remarks in the House of Lords decision in *Van den Berghs, Limited v Clark (Inspector of Taxes)* [1935] AC 431 ("*Van den Berghs*") (at 439):

> This case [*Atherton*] has been generally recognized as the leading modern authority on the subject, though I fear that Romer L.J. was unduly optimistic when he said that it "placed beyond the realms of controversy" the law applicable to the matter: *Anglo-Persian Oil Co*. v. *Dale* [[1932] 1 KB 124 at 145].

48 Indeed, that part of Viscount Cave LC's judgment referring to the requirement of an "enduring benefit" (which is the key addition to the "once and for all" test enunciated in *Vallambrosa*) gives rise to particular difficulties as many types of expenditure may have an enduring effect but nevertheless not be of a capital nature (see, for example, *per* Lord Reid in the House of Lords decision of *Commissioner of Inland Revenue v Carron Company* (1968) 45 TC 18, where the learned law lord observed (at 68) that "money spent on income account, for example on durable repairs, may often yield an enduring advantage" and that "[i]n a case of this kind what matters is the nature of the advantage for which the money was spent").

(3) The "fixed and circulating capital" test

49 The *third* test centres on the distinction between *fixed and circulating capital*. As Prof Tiley helpfully observes (*Revenue Law* at p 445):

> Expenditure on the fixed capital of a business is capital expenditure, not revenue. Fixed capital is retained in the shape of assets which either produce income without further action, eg shares held by an investment company, or are made use of to produce income, eg machinery in a factory. Circulating capital is that which the company intends should be used by being temporarily parted with and circulated in the business only to return with, it is hoped, profit, eg money spent on trading stock.

50 However, as the learned author then proceeded to – both pithily as well as perceptively – observe (*Revenue Law* at p 445):

> The difficulty with this test is that it sometimes begs the very question at issue.

51 I would tend to agree with the view just expressed (see also *Singapore Taxation* at p 90 (where the test is stated by the learned authors to be "of limited usefulness only") as well as *Whiteman* at para 6-09 (where the learned authors observe that "[t]his distinction however has its own problems, as it is not possible to draw an exact line of demarcation between fixed and circulating capital)). The distinction between fixed and circulating capital does not, with respect, represent an advance – in *substance* at least – over the test in *Atherton* and may even be said, in some cases at least, to (as Prof Tiley has observed) assume the very thing (*viz*, the distinction between capital and revenue) that has to be proved. Indeed, in *Van den Berghs*, Lord Macmillan observed thus (at 443):

> I have not overlooked the criterion afforded by the economists' differentiation between fixed and circulating capital which Lord Haldane invoked in *John Smith & Son* v. *Moore* [[1921] 2 AC 13] and on which the Court of Appeal relied in the present case, *but I confess that I have not found it very helpful. Circulating* capital is capital which is turned over and in the process of being turned over yields profit or loss. *Fixed* capital is not involved directly in that process, and remains unaffected by it. [emphasis added]

52 This unfortunate result is, perhaps, not surprising. Absent the elaboration that is to be found in cases such as *Atherton*, there appears to be no real guidance in this particular test. Indeed, it is suggested that the *application* of the test might – on occasion at least – compound the problem, especially if the fact situation is a borderline or marginal one. That having been said, there is nevertheless case law which has applied this test, the seminal decision being that of the House of Lords in *John Smith and Son v Moore* [1921] 2 AC 13. In that case, Viscount Haldane observed thus (at 19–20):

> My Lords, it is not necessary to draw an exact line of demarcation between fixed and circulating capital. Since Adam Smith drew the distinction in the Second Book of his Wealth of Nations, which appears in the chapter on the Division of Stock, a distinction which has since become classical, economists have never been able to define much more precisely what the line of demarcation is. Adam Smith described fixed capital as what the owner turns to profit by keeping it in his own possession, circulating capital as what he makes profit of by parting with it and letting it change masters. The latter capital circulates in this sense.

53 The test was also applied in the Australian Privy Council decision of *BP Australia Ltd v Commissioner of Taxation of the Commonwealth of Australia* [1966] 1 AC 224 ("*BP Australia*"), where Lord Pearce, delivering the judgment of the court, observed thus (at 265–266):

> Fixed capital is prima facie that on which you look to get a return by your trading operations. Circulating capital is that which comes back in your trading operations.

Reference may also be made to *Atherton* (at 234 and 236); the Privy Council decision (on appeal from the Rhodesian Court of Appeal) of *British South Africa Company v Commissioner of Income Tax* [1946] AC 62 ("*British South Africa*") at 80; and the Privy Council decision (on appeal from the Federal Supreme Court of the Federation of Rhodesia and Nyasaland) of *Commissioner of Taxes v Nchanga Consolidated Copper Mines Ltd* [1964] AC 948 ("*Nchanga*") at 960.

54 Interestingly, though, Rowlatt J did, in the English High Court decision of *Anglo-Persian Oil Company, Limited v Dale (HM Inspector of Taxes)* (1931) 16 TC 253 (affirmed by the Court of Appeal and reported in the same citation as well at [1932] 1 KB 124), when referring to the "enduring benefit of the trade" test embodied within the judgment of Viscount Cave LC in *Atherton* (above at [45]), observe (at 262) that "[w]hat Lord Cave is quite clearly speaking of is a benefit which endures, in the way that *fixed capital* endures; not a benefit that endures in the sense that for a good number of years it relieves you of a revenue payment" [emphasis added]. Although the learned judge did not expressly equate the "enduring benefit of the trade" test with the present test (which draws a distinction between fixed and circulating capital), it is suggested that there is clearly an overlap and, having regard to the analysis I have proffered above, perhaps even a *complete* overlap (*viz*, *equivalence*) between both tests.

(4) The "identifiable asset" test

55 The *fourth* test is the "identifiable asset" test, which was described by Lord Wilberforce in the leading House of Lords decision of *Tucker (Inspector of Taxes) v Granada Motorway Services Ltd* [1979] 1 WLR 683 ("*Tucker*") as follows (at 686):

> I think that the key to the present case is to be found in those cases which have sought *to identify an asset. In them it seems reasonably logical to start with the assumption that money spent on the acquisition of the asset should be regarded as capital expenditure*. Extensions from this are, first, to regard money spent on getting rid of a disadvantageous asset as capital expenditure and, secondly, to regard money spent on improving the asset, or making it more advantageous, as capital expenditure. In the latter type of case it will have to be considered whether the expenditure has the result stated or whether it should be regarded as expenditure on maintenance or upkeep, and some cases may pose difficult problems. [emphasis added]

56 However, this particular test may not be as useful as it appears at first blush – save for the assumption that money spent on the acquisition of an asset should be regarded (in the first instance at least) as capital expenditure. However, even this assumption does not do away with the need for the court concerned to scrutinise the relevant factual matrix closely in any event. Further, this particular test appears simply to be another way of expressing the "enduring benefit of the trade" test in *Atherton* (see above at [45]) inasmuch as Lord Wilberforce proceeds, in *Tucker*, immediately to refer to the proposition laid down by Viscount Cave LC in *Atherton* (see at 686). Finally, the learned law lord himself, whilst arguing that the test should be maintained, nevertheless introduced the following qualification (at 687):

> The ["identifiable asset"] test may be to some extent arbitrary, but it provides a means which the courts can understand for distinguishing capital and income expenditure and I think that we would be wise to maintain it.

As an interesting coda of sorts, it should be noted that Lord Salmon dissented on the facts of *Tucker* itself.

(5) What is the present position?

(a) Commonsense and Uncertainty

57 What are we to make of the various tests? Unfortunately, the legal prognosis – as demonstrated in the case law – is far from "healthy". For example, that very experienced tax judge, Rowlatt J, observed, in the English High Court decision of *Countess Warwick Steamship Company, Limited v Ogg (Inspector of Taxes)* [1924] 2 KB 292 at 298, as follows:

> It is very difficult, as I have observed in previous cases of this kind, following the highest authority, to lay down any general rule which is both sufficiently accurate and sufficiently exhaustive to cover all or even a great number of the possible cases, and I shall not attempt to lay down any such rule.

58 And, not many years later, Sir Wilfrid Greene MR observed, in *British Salmson Aero Engines*, thus (at 498):

> There were in 1925, and there have been since, many cases where this matter of capital or income has been debated. T*here have been many cases which fall on the border-line. Indeed, in many cases it is almost true to say that the spin of a coin would decide the matter almost as satisfactorily as an attempt to find reasons. But that class of question is a notorious one, and has been so for many years*. [emphasis added]

59 This somewhat nebulous position has – unfortunately – not improved with the passage of time. In *BP Australia*, for example, Lord Pearce observed thus (at 264–265):

> *The solution to the problem is not to be found by any rigid test or description. It has to be derived from many aspects of the whole set of circumstances some of which may point in one direction, some in the other. One consideration may point so clearly that it dominates other and vaguer indications in the contrary direction*. ***It is a commonsense appreciation of all the guiding features which must provide the ultimate answer*** . Although the categories of capital and income expenditure are distinct and easily ascertainable in obvious cases that lie far from the boundary, the line of distinction is often hard to draw in border line cases; and conflicting considerations may produce a situation where the answer turns on questions of emphasis and degree. That answer:
>
> > "depends on what the expenditure is calculated to effect from a practical and business point of view rather than upon the juristic classification of the legal rights, if any, secured employed or exhausted in the process":
>
> per Dixon J. in *Hallstroms Pty. Ltd. v. Federal Commissioner of Taxation* [(1946) 72 CLR 634 at 648]. *As each new case comes to be argued felicitous phrases from earlier judgments are used in argument by one side and the other. But those phrases are not the deciding factor, nor are they of unlimited application. They merely crystallise particular factors which may incline the scale in a particular case after a balance of all the considerations has been taken*.
>
> One may approach the problem by considering the first of the matters mentioned by Dixon J. above, namely the character of the advantage sought, and in this both its lasting qualities and the fact of recurrence may play their parts. Under this head one might also take account of the nature of the need or occasion which calls for the expenditure: Dixon J. in *Hallstrom's* case.
>
> [emphasis added in italics and bold italics]

It may be worthy to note that another decision (of the House of Lords) was also handed down the same day as the decision in *BP Australia*, *viz*, *Regent Oil Co Ltd v Strick (HM Inspector of Taxes)* [1966] AC 295 ("*Strick*"). They were – in Brightman J's words in the English High Court decision of *ECC Quarries Ltd v Watkis (HM Inspector of Taxes)* [1977] 1 WLR 1386 (at 1396) – "comparable cases of petrol station ties". However, the actual results arrived at in both decisions were quite different inasmuch as the court in *BP Australia* held that the expenditure concerned was revenue in nature, whereas the court in *Strick* held that the expenditure in that particular case was capital in nature (see also *Whiteman* at paras 7-07–7-09). Indeed, as we have seen, there can be differing views even *within* the same case (see, for example, the decision in *Atherton*, referred to above (at [46])). It is true that one can explain such differences in result by referring to the different *fact situations*. *However*, the dangers of *unnecessary* uncertainty can, it is suggested, be at least reduced if more specific legal rules and principles are formulated – as opposed to relying merely on commonsense. In fairness, Lord Pearce may be said (in *BP Australia*) to have been concerned more with the use of commonsense in the *application* of the legal rules and principles to the facts of the case rather than relying on commonsense *per se* as the guiding normative principle. Indeed, in *Strick* itself, Lord Reid also observed thus (at 313):

> [I]t is not surprising that no one test or principle or rule of thumb is paramount. The question is ultimately a question of law for the Court, *but it is a question which must be answered in light of all the circumstances which it is reasonable to take into account*, and the weight which must be given to a particular circumstance in a particular case must depend rather on common sense than on a strict application of any single legal principle. [emphasis added]

60 And, in *Tucker*, Lord Wilberforce was (at 686) of the view that:

> It is common in cases which raise the question whether a payment is to be treated as a revenue or as a capital payment for indicia to point different ways. *In the end the courts can do little better than form an opinion which way the balance lies*. There are a number of tests which have been stated in reported cases which it is useful to apply, but we have been warned more than once not to seek automatically to apply to one case words or formulae which have been found useful in another … Nevertheless reported cases are the best tools that we have, even if they may sometimes be blunt instruments. [emphasis added]

61 Turning to an even more recent decision, that of the English High Court in *Vodafone Cellular Ltd v Shaw (HM Inspector of Taxes)* (1997) 69 TC 376, the overall situation appears to be the same. In that case, Jacob J (citing observations made by Lord Reid in *Strick* and by Lord Wilberforce in *Tucker* (see also above at [59] and [60], respectively)) observed (at 425) that:

> *One of the troubles with all the tests propounded by the courts is that they are necessarily imprecise*. Given that any expenditure has to be put in a box labelled "revenue" or "capital" there is an obvious difficulty in forcing many kinds of expenditure having some of the characteristics of both into one box or the other. Counsel on both sides used the expression "capital feel" or "revenue feel" about items under discussion. *Even though it is a question of law, there is a measure of gut reaction about the decision*. [emphasis added]

And, at the Court of Appeal stage (reported under the same citation), Millett LJ observed thus (at 433):

> *There is no single test or infallible criterion for distinguishing between capital and revenue payments* … On the contrary, there are *many factors which tend in one direction or the other, some of which are more relevant in some situations and some in others*. Some factors are

particularly relevant when the question arises on an acquisition and others are of particular relevance when the question arises on a disposal, as it does in the present case.

> *Two matters are of particular importance: the nature of the payment; and the nature of the advantage obtained by the payment*. The fact that the payment is a lump sum payment is relevant but not determinative. In a case such as the present, where the payment is made in order to get rid of a liability, a useful starting point is to inquire into the nature of the liability which is brought to an end by the payment. Where a lump sum payment is made in order to commute or extinguish a contractual obligation to make recurring revenue payments then the payment is *prima facie* a revenue payment.

> [emphasis added]

All this is reminiscent of Lord Denning MR's own observations in the earlier English Court of Appeal decision of *Heather (HM Inspector of Taxes) v P-E Consulting Group Ltd* [1973] Ch 189 ("*Heather*"), where the learned Master of the Rolls observed thus (at 216):

> The question—revenue expenditure or capital expenditure—is a question which is being repeatedly asked by men of business, by accountants and by lawyers. In many cases the answer is easy: but in others it is difficult. The difficulty arises because of the nature of the question. It assumes that all expenditure can be put correctly into one category or the other. But this is simply not possible. Some cases lie on the border between the two, and this border is not a line clearly marked out. It is a blurred and undefined area in which anyone can get lost. Different minds may come to different conclusions with equal propriety. It is like the border between day and night, or between red and orange. Everyone can tell the difference except in the marginal cases, and then everyone is in doubt. Each can come down either way. When these marginal cases arise, then the practitioners, be they accountants or lawyers, must of necessity put them into one category or the other: and then, by custom or by law, by practice or by precept, the border is staked out with more certainty. In this area, at least, where no decision can be said to be right or wrong, the only safe rule is to go by precedent. So the thing to do is to search through the cases and see whether the instant problem has come up before. If so, go by it. If not, go by the nearest you can find.

62 At this juncture, we are, I would suggest, dangerously close to moving (or even careening dangerously) down that slippery slope which I cautioned that we should avoid, *viz*, that "It all depends on the facts" (see also above at [7] and [38]). Is it possible, in the circumstances, to arrive at *a composite (albeit integrated) test* of sorts? In this regard, I am fortified by the optimism demonstrated in the following observations of Dixon J in the High Court of Australia decision of *Hallstroms Proprietary Limited v The Federal Commissioner of Taxation* (1946) 72 CLR 634 ("*Hallstroms*") (at 646):

> *For myself, however, I am not prepared to concede that the distinction between an expenditure on account of revenue and an outgoing of a capital nature is so indefinite and uncertain as to remove the matter from the operation of reason and place it exclusively within that of chance, or that the discrimen is so unascertainable that it must be placed in the category of an unformulated question of fact*. The truth is that, in excluding as deductions losses and outgoings of capital or of a capital nature, the income tax law took for its purposes a very general conception of accountancy, perhaps of economics, and left the particular application to be worked out, a thing which it thus became the business of the courts of law to do. The courts have proceeded with the task without, it is true, any very conspicuous attempt at analysis, but rather in the traditional way of stating what positive factor or factors in each given case led to a

> decision assigning the expenditure to capital or to income as the case might be. It is one thing to say that the presence among the circumstances of a case of a particular factor places the case within a specific legal category. It is another thing to infer that the absence of the same factor from some other case necessarily places that case outside the category and gives it an opposite description. But towards that kind of fallacy human reasoning constantly tends, and the decisions upon matters of capital and income contain much reasoning that is quite human. [emphasis added]

63 All this is not to state that commonsense ought to be avoided. Far from it. However, a *balanced* approach is required. As Megarry J observed in the English High Court decision of *Simpson v Jones (Inspector of Taxes)* [1968] 1 WLR 1066 ("*Simpson*") (at 1074–1075):

> In thickets so dense and statute-laden as the law of income tax, common sense is, I suppose, a frail guide. Certainly it cannot become the master, for then it would usurp the function of the Statute Book. But in territory which remains unoccupied by either statute law or case law, I do not see why common sense should be abjured.

64 I should also observe that I am *unable* to endorse *fully* the following observations by Viscount Radcliffe, delivering the judgment of the court in the Privy Council decision in *Nchanga*, where the learned law lord was (at 959) of the following view:

> Nevertheless, it has to be remembered that all these phrases, as, for instance, "enduring benefit" or "capital structure" are *essentially descriptive rather than definitive*, and, as each new case arises for adjudication and it is sought to reason by analogy from its facts to those of one previously decided, a court's primary duty is to inquire how far a description that was both relevant and significant in one set of circumstances is either significant or relevant in those which are presently before it. [emphasis added]

Whilst I agree – to a large extent – with the learned law lord's observations, to the extent that he views the various *legal* criteria as having merely *descriptive* (as opposed to *normative*) force, I must beg to differ. By *definition and inherent nature*, every *legal* rule or principle must *necessarily* have *normative* force if it is to *be* a "*legal*" rule or principle that is, by definition, potentially applicable in a *general* manner to all *future* fact situations as well. However, I do agree with Viscount Radcliffe that the various formulations in the various tests are by no means "definitive". Nevertheless, consistent with the positive spirit expressed by Dixon J in *Hallstroms* (above at [62]), I shall endeavour to lay down what appear to me to be helpful *legal* principles that can aid the court in ascertaining whether a particular expenditure is either capital or revenue in nature. Whilst they should obviously be viewed as mere guidelines, I have endeavoured to state them as *a related series of propositions, proceeding from the first (which is general) to the second (which comprises particular guidelines)*. The more particular or specific guidelines in the latter are intended to *elaborate upon* the general proposition (which comprises the former). It is also important to view the various guidelines in the various tests as the "bridge" or "link" between theory and practice. In particular, the guidelines – being more *specific and particular* by nature – assist courts in focusing on the *precise facts* in the case at hand. It is important to note that they *do* possess *normative* force (see above at [38]), although they are *more specific* than the (*general*) proposition embodied in the first proposition (below at [71]).

65 However, I should add that there is nothing new in so far as *content* is concerned. It is, rather, an attempt to consolidate the various tests into *a composite and integrated whole*. That such consolidation is necessary is evident, it is suggested, from *the very relationships amongst the various tests themselves*. Let me elaborate.

66 First, as we have already seen above (at [44]), the "once and for all" test has been *subsumed within* the "enduring benefit of the trade" test.

67 Secondly, as we have also seen above (at [54]), there is an overlap (or even complete coincidence or equivalence) between the "enduring benefit of the trade" test and the "fixed capital and circulating capital" test.

68 Thirdly, we have also seen above (at [56]) that there is a possible overlap (or even complete coincidence or equivalence) between the "enduring benefit of the trade" test and the "identifiable asset" test.

69 In the circumstances, it would appear that the "enduring benefit of the trade" test (enunciated by Viscount Cave LC in *Atherton* (see above at [45])) is, despite its weaknesses (see above at [48]), probably still – in substance at least – the main test.

70 With these preliminary observations in mind, let us gather the various threads together and attempt to set out a composite and integrated approach (comprising the two related propositions – one general, the other specific – which I have already alluded to above).

(b) Gathering The Threads Together – A Proposed Composite And Integrated Approach

(I) The First Principle (General)

71 *First*, the court must, as a matter of general principle, look closely at the *purpose* of the expenditure and ascertain whether or not such expenditure either *created a new asset or opened new fields of trading not hitherto available to the taxpayer* (and see *per* Lord Reid in *Carron* (at 68)) – in which case the expenditure concerned would be capital (and not revenue) in nature. In the *former* respect, I would think that an expenditure which *strengthens* an *existing asset* would also be one that is capital in nature. The *latter* aspect (*viz*, the opening of new fields of trading not hitherto available to the taxpayer) may – on one view at least – be viewed as *a more specific example of the former in so far as a new field of trading may be viewed (in substance, if not also form) as a new asset which inures to the benefit of the taxpayer*. A similar – and helpful – idea as well as approach is contained within the following passages from *Whiteman* (at para 6-09 (although dealing with the distinction between revenue and capital *receipts*, the *general* principles apply equally (as the authors themselves quite correctly acknowledge) to the distinction between revenue and capital *expenditure* as well (see *Whiteman* at para 7-02)):

> The first test for distinguishing between revenue and capital receipts requires transactions relating to *assets which form part of the permanent structure of the business and are the means whereby profits are earned*, to be *contrasted with* transactions relating to *the subject-matter of the trade*. Profits of the *former type* are *not* chargeable to income tax, whilst those of the latter type are. [emphasis added]

72 It is, I would observe, at this particular juncture, that we find the (albeit general) confluence between law and fact, between general rule (as well as principle) and the particular facts. However, how, it might be asked, is one to ascertain whether or not an expenditure has created a new asset (or strengthened) an existing asset, or opened new fields of trading not hitherto available? This is a highly relevant (as well as significant) question, and brings us to a second (and more specific, albeit closely related) proposition (which effects, as we shall see, a specific and complete (or bridging) confluence) between the general rule (as well as principle) and the particular facts in the case concerned.

(II) The Second Principle (Comprising Specific Guidelines)

7 3 *Secondly*, whether or not an expenditure has created (or strengthened an existing asset), or created a new field of trading not hitherto available to the taxpayer, would lead us back to the various tests. In this regard, we have seen that we are, in the main, brought back (see above at [66]–[69]) to the "enduring benefit of the trade" test embodied in the proposition by Viscount Cave LC in *Atherton* (above at [45]). In addition to that test, the following observations by Viscount Radcliffe in *Nchanga* (at 960) seem to me to constitute a cogent as well as practical approach (see also the endorsement by Lord Upjohn in *Strick* (at 343)):

> Again, courts have stressed the importance of observing a *demarcation between the cost of creating, acquiring or enlarging the permanent (which does not mean perpetual) structure of which the income is to be the produce or fruit and the cost of earning that income itself or performing the income-earning operations. Probably this is as illuminating a line of distinction as the law by itself is likely to achieve*, but the reality of the distinction, it must be admitted, does not become the easier to maintain as tea systems in different countries allow more and more kinds of capital expenditure to be charged against profits by way of allowances for depreciation, and by so doing recognise that at any rate the exhaustion of fixed capital is an operating cost. Even so, the functions of business are capable of great complexity and the line of demarcation is sometimes difficult indeed to draw and leads to distinctions of some subtlety between profit that is made "out of" assets and profit that is made "upon" assets or "with" assets. It does not settle the question, for instance, to say merely that an expenditure has been made to acquire a "source of income," as the appellant says here, unless one is clear that some forms of circulating capital itself, e.g., labour, raw material, stock-in-trade, are not themselves to be regarded as such a source. [emphasis added]

One other set of observations which are, in my view, also of cogent as well as practical assistance is to be found in the judgment of Dixon J in the High Court of Australia decision of *Sun Newspapers Limited v The Federal Commissioner of Taxation* (1938) 61 CLR 337 ("*Sun Newspapers*"), as follows (at 636):

> Again, the cases which distinguish between capital sums payable by instalments and periodical payments analogous to rent payable on revenue account illustrate the fact that rights and advantages of the same duration and nature may be the subject of recurrent payments which are referable to capital expenditure or income expenditure according to the true character of the consideration given, that is, whether on the one hand it is a capitalized sum payable by deferred instalments or on the other hire or rent accruing *de die in diem*, or at other intervals, for the use of the thing: Compare *Ogden* v. *Medway Cinemas Ltd*. [(1934) 18 TC 691] with *Inland Revenue Commissioners* v. *Adam* [(1928) 14 TC 34] and *Green* v. *Favourite Cinemas Ltd*. [(1930) 15 TC 390].
>
> There are, I think, ***three matters*** to be considered, ***(a) the character of the advantage sought, and in this its lasting qualities may play a part, (b) the manner in which it is to be used, relied upon or enjoyed, and in this and under the former head recurrence may play its part, and (c) the means adopted to obtain it; that is, by providing a periodical reward or outlay to cover its use or enjoyment for periods commensurate with the payment or by making a final provision or payment so as to secure future use or enjoyment*** .
>
> [emphasis added in bold italics]

The guidelines set out in the preceding quotation are of particular significance as well as utility because Dixon J attempts to consolidate as well as integrate the tests and guidelines that had been set out in the prior precedents. This is precisely the ideal which I have already referred to above (at [64]). Indeed, Lord Upjohn referred to the judgment of Dixon J in *Sun Newspapers* as containing "very useful observations" (see *Strick* (at 343)) and Lord Wilberforce referred to it a "classic judgment" (see *Strick* (at 347)). Further, the learned authors of *Whiteman* were "of the opinion that as valuable a guide as any in distinguishing between capital and revenue expenditure is to be found in the classic judgment of Dixon J. in *Sun Newspapers Ltd. v. Federal Commissioner of Taxation*" (see *Whiteman* at para 7-06). Finally, in his very comprehensive and erudite biography, Prof Philip Ayres observed that "the most important common-law judgment [Dixon J] wrote in the late 1930s was that for a revenue case, *Sun Newspapers Ltd*, the first of several in which he analysed in a fresh way the concepts of capital and revenue in relation to deductible outgoings, the analysis extending to capital and income in relation to assessable income" (see Philip Ayres, *Owen Dixon* (The Miegunyah Press, 2003) at p 93). The learned author also observed (at p 94) that "in writing his judgment, Dixon, unlike his brother judges, had developed the law".

74 More specifically, the authors of a leading textbook have proffered – in the context of receipts (which would, in my view, be applicable as a matter of general principle to expenditure as well) – "five basic propositions which they consider emerge from the cases on the capital/revenue receipt question", as follows (see *Whiteman* at para 6-11):

1. Payments for the sale of the assets of a business are prima facie capital receipts.

2. Payments received for the destruction of the recipient's profit-making apparatus are receipts of a capital nature.

3. Payments in lieu of trading receipts are of a revenue character.

4. Payments made in return for the imposition of *substantial* restrictions on the activities of a trader are on capital account.

5. Payments of a recurrent nature are more likely to be treated as revenue receipts.

[emphasis in original]

75 Taking into account the various propositions as well as observations set out in the preceding two paragraphs, the position (*vis-à-vis* the *second* proposition) may (at least tentatively) be *summarised* as follows:

(a) In ascertaining whether or not the expenditure relates to the creation of a new asset or new field of trading (or the strengthening thereof), the *purpose* of the expenditure must be ascertained; in particular, the court should have regard to the following guidelines (bearing in mind that the categories of guidelines are not closed):

(i) The *manner* of the expenditure, in particular, whether the expenditure was a one-time expenditure or a recurrent expenditure. Although this is not conclusive in and of itself, a one-time expenditure would tend to suggest that that expenditure is capital in nature.

(ii) The *consequence or result* of the expenditure. In particular, if the expenditure results in either the strengthening of the existing core business structure of the taxpayer or adds to that structure, it is more likely to be capital in nature. In this regard, the concept of a "core business structure" may be seen as comprising *the permanent (albeit not necessarily* *perpetual) structure of the taxpayer's business which* is *utilised for the generation of profits* and is (to that extent) to be viewed as constituting the *(permanent) assets* of the business itself (an oft-used analogy in this regard is the distinction between the tree (which is the source of the fruit) and the fruit itself). *However*, where the "assets" are *themselves the stock-in-trade* of the business, expenditure in relation to such "assets" is more likely to be revenue in nature.

(b) In applying the various guidelines set out above (as well as any other specific (and applicable) guidelines to be found in the case law generally), the *specific facts* are obviously of the first importance. However, the facts – in and of themselves – have no normative force and therefore cannot be the justification (in and of themselves) for the decision arrived at by the court because to do so would be, in effect, to hoist oneself by one's own legal petard. As noted in the introduction (above at [7]), the categorisation of an expenditure as being of capital or income nature cannot rest simply on the court's appraisal of the facts. Whilst different factors may be relevant in each case to the determination of the nature of the expenditure in light of all the circumstances of that case, the underlying principle is that for the expenditure to be of a capital nature, the *first principle* (as detailed above at [71]–[72]), *viz*, that the expenditure must have either created a new asset or opened new fields of trading not hitherto available to the taxpayer, must be complied with. The guidelines laid down at (a) above are useful factors to be considered in the analysis of whether the expenditure in a particular case complies with this principle although the weight of each factor depends upon the nature of the expenditure. Moreover, previous decisions of the courts provide guidance as to the factors which may point towards an income or capital expenditure in each unique set of circumstances, particularly where the facts of the case at hand are analogous to those in a previous decision.

76 Let us turn now to apply the various tests in general and the approach just proposed in particular to the facts of the present appeal.

Application of the tests and proposed approach to the facts of the present appeal

(1) The deductibility of the costs of acquiring the land and constructing the building

77 It is important, first, to set out the precise factual matrix. As already mentioned, the Appellant was incorporated in order to build and operate the Club. Hence, it was imperative that the Appellant acquire the land as well as construct the requisite building in order to furnish the basic (and permanent) infrastructure without which the Club could not even begin to operate in the first instance. Indeed, the *raison d'être* of the Club was to provide its members with the promised facilities and such facilities required a land and a building to begin with. The land and building themselves represent *assets as well as (as just mentioned) basic (and permanent) infrastructure* which belonged to the Appellant and did not comprise stock-in-trade which the Appellant dealt with in the course of its business (which was, as also just mentioned, to provide the promised *facilities* to its members instead).

78 It is also important to note, at this juncture, that it would appear that the acquisition of land or any interest in land would point very strongly to a *capital* – as opposed to a revenue – expenditure (see also *Strick* at 336, *per* Lord Pearce). Indeed, in *Strick* itself, Lord Upjohn opined thus (at 341):

My Lords, *in the field of real property in relation to taxation certain matters are so fundamental as now to be axiomatic. Thus, in cases other than those where a man is a property dealer so that property is his stock-in-trade it is quite clear that the purchase of a fee simple for a purchase price by a trader is the acquisition of property for the purposes of trade and the* *purchase cannot be regarded as a cost of carrying on the trade, it is therefore capital*. This is so though the trader may desire to acquire the property for the purpose of providing himself with circulating capital by mining operations on the property acquired, even if he is intending to acquire the property only for a short time … Exactly the same principle applies if the purchase price is payable by instalments spread over a period; it is a capital payment. [emphasis added]

79 The underlying rationale for the view expressed in the preceding paragraph is both logical as well as commonsensical. It stems not simply from an irrational fixation with real property. In other words, it is not rooted in the concept of physicality but is, rather, related to the concept of the acquisition of a real asset (to which the physical attributes merely serve to drive home the point).

80 Turning to the various guidelines (particularly those contained in the second principle set out above (see especially at [75]), it is clear that the purchase of the land as well as the construction of the building by the Appellant is a *one-time* expenditure. More importantly, as already pointed out, the *result* of such expenditure is the acquisition of an asset which simultaneously constitutes the permanent (albeit not perpetual) structure of the Appellant's business of furnishing facilities to its members. That the asset is not perpetual is clear since the lease is for 30 years, although that is not (as we have just noted) a critical factor since permanence is not to be equated with perpetuity. Moreover, the asset is lasting insofar as it lasts throughout the duration of the trade and is not extinguished or diminished by each trading transaction.

81 Indeed, despite potential difficulties that arise with regard to fact situations (especially in the context of tax), this is (as I have detailed above) a very clear case.

82 However, perhaps recognising this, counsel for the Appellant, Mr Gandhi, sought to argue along a completely different tack, commencing from the fact that the lease was in fact for a fixed term of 30 years. In this regard, the sheet anchor of his case in terms of the case law was the Privy Council decision in *British South Africa*. In particular, Mr Gandhi argued that the Appellant had, in economic substance, "sold" the entire assets of the Club (*including the land and the building*) *to its members*, especially if one has regard to the fact that the lease is for a fixed period of 30 years. The argument is an ingenious one but is – to put it mildly – rather radical in the light of the conventional view that has been adopted *vis-à-vis* land and buildings (as briefly set out above). More importantly, it is an argument which does not, with respect, comport with what was the true bargain between the Appellant on the one hand and each of its members on the other. Let me elaborate.

83 The essence of the transaction between the Appellant and each of its members was clear right from the outset. In the application form for membership, each applicant had, in the section entitled "Applicant's Declaration", [note: 1] to declare, *inter alia*, the following:

I am fully aware and agree that the right to utilise and enjoy the Facilities and membership herein *does not confer upon me any rights, title or interest in any property or Assets owned by the Proprietor or in the Facilities or the Assets*. [emphasis added]

84 The declaration set out in the preceding paragraph did not comprise mere formal words devoid of substance or meaning. That this is the case is confirmed in no uncertain terms by the salient Rules and Regulations of the Club ("Rules and Regulations") themselves. Indeed, it is clear beyond peradventure that the Rules and Regulations comprise a binding legal contract between the Appellant on the one hand and each of its members on the other. In particular, Rule 21.2 [note: 2] and (especially) Rule 34 [note: 3] of the Rules and Regulations ought to be noted, and read as follows:

21.2Membership: Where the Proprietor has despatched to a successful applicant the Acceptance Notice, his name and address shall be entered in the register of members ("Register of Members") and he shall thereafter be a Member and entitled [*sic*] to all the rights and privileges of membership *and shall be deemed to have agreed to be bound by these Rules and the Bye-laws made in accordance therewith*.

…

Relationship between Members

34. Nothing in these Rules and the Bye-laws shall constitute or result in any relationship between the Members inter se. *Each Member shall only have a contractual relationship with the Proprietor*. There shall be no meeting held amongst the Members in respect of the Club or the management of the Club.

[emphasis added]

85 Rule 1 [note: 4] as well as Rule 3.1 [note: 5] and Rule 3.2 [note: 6] of the Rules and Regulations may also be usefully noted and read as follows:

Name

1. The name of the Proprietor (which expression shall include its successors-in-title and assigns) is [ABD Pte Ltd] (the "Proprietor").

…

Constitution of Club

3.1 Club: The proprietor and sole manager of the Club shall be the Proprietor.

3.2 Supervision: The Proprietor is a public company incorporated in Singapore. Its Board of Directors will be entrusted with the supervision of the policies, management, maintenance, finance, accounts and operation of the Club.

86 More importantly, for the purposes of the present issue, Rule 3.5, [note: 7] Rule 3.6, [note: 8] Rule 4 [note: 9] as well as Rule 5.1, [note: 10] Rule 5.5 [note: 11] and Rule 24.1 [note: 12] (in particular the first three Rules) are relevant, and read as follows:

3.5 Ownership : *All the assets, property and Facilities provided at the Club and located at the Premises (the "Assets") shall be deemed to be owned by the Proprietor. No Member shall have any rights interest or title whatsoever in relation to the same*. Use of Facilities by Members will be subject to these Rules and the Bye-laws.

3.6 Licence : In consideration of the Member agreeing to pay in accordance with the provisions herein the Entrance Fee, the monthly subscription and any other sum payable hereunder, and subject to these Rules and the Bye-laws, *the Proprietor grants to the Member a licence for a period commencing from the date the Member becomes a member of the Club till October 2026 to:-*

(*i*) *use and enjoy the Facilities; or* (*ii*) *in the case of a Corporate Member, nominate a Nominee to use and enjoy the Facilities*,

in common with other Members, the Nominees of other Members, the persons entitled thereunder and such other persons as the Proprietor may in its absolute discretion decide subject to these Rules and the Bye-laws, Provided Always That in the event that the lease of the Premises is extended after October 2026 or the Facilities are relocated to different premises after October 2026, the Proprietor shall grant to the Members an option to extend the licence granted to them pursuant to this Clause to use and enjoy the Facilities on such terms and conditions as are mutually acceptable to the Proprietor and the Members.

Club Property

4 *All the Assets shall at all times be and remain the property of the Proprietor and no Member shall take away or permit to be taken away from the Premises or shall injure, damage, misuse or destroy any of the Assets*.

…

5.1 Use of Facilities : Every Member shall, subject to these Rules and the Bye-laws and such restrictions or conditions as the Proprietor may from time to time in its absolute discretion impose, be entitled to use and enjoy in common with the other Members the Facilities provided by the Proprietor for the use of the Members, subject to the payment of all fees, subscriptions, and any other monies due to the Proprietor. The Proprietor may in its absolute discretion also impose charges for any services, food, drinks or the use of any of the Facilities and the Proprietor shall have the right at any time and from time to time to vary any such changes.

5.5 Financial Liability : For the avoidance of doubt, a Member shall not by reason of his membership be under any financial liability in respect of the provision of the Assets and Facilities except for payment of all monies payable under these Rules and the Bye-laws to the Proprietor.

…

Bankruptcy, Conviction, etc.

24.1Automatic Termination : If any Member becomes of unsound mind or is the subject of winding-up proceedings (voluntary or compulsory), or (being a Member which is a partnership) is dissolved (save where the dissolution is due to the death of one of the partners) or is adjudicated a bankrupt or makes a composition with his creditors under the provisions of any statute or is convicted of any offence (other than a traffic offence) such a Member shall automatically cease to be a Member PROVIDED that if such Member's adjudication is annulled or his conviction is set aside, the Proprietor may in its absolute discretion restore him to membership as from the date when he ceased to be a Member. Nothing in this Rule shall prejudice the right of the Proprietor to recover any amount due prior to the date of cessation.

[emphasis added]

87 It is clear beyond any doubt whatsoever, from the rules reproduced in the preceding paragraphs, that every member of the Club was only furnished with a *licence* to use the facilities of the Club and that all the assets of the Club (which included the land and the building) belonged to the Appellant. This could not, in my view, have been expressed in clearer language than that contained in the aforementioned Rules. As already noted, however, the Appellant nevertheless continued to argue that all the assets of the Club had, in economic substance, been conveyed by the Appellant to the members. Since legal title to, *inter alia*, the land and the building continued to reside in the Appellant, if the Appellant is correct in its argument, this must mean that it holds, *inter alia*, the land and the building *on trust* for its members. With respect, this is an argument that is a last-ditch attempt to avoid what is clear from the facts and the case law – which is that the land and the building constitute *capital* (and *not* revenue) expenditure (see the analysis above at [77]–[81]). When pressed during oral submissions, even Mr Gandhi (quite correctly and candidly, in my view) conceded that the argument from a trust was difficult to maintain, to say the least. Indeed, it is clear, from the *contract* between the Appellant on the one hand and each of its members on the other, that only a *licence* was granted to the latter by the former. Nothing could be plainer and this is wholly consistent with the *context* of the business of the Appellant, *viz*, the operation of a club for the benefit of its members. Indeed, if the Appellant's argument holds good, then every member of every club which is operated from land belonging to a club that is of a fixed duration would be able to claim *pro rata ownership* of the assets of the club concerned. A moment's reflection will reveal that this is, with respect, completely untenable. There was no evidence whatsoever of an underlying (and alternative) arrangement between the Appellant and its members. Indeed, the Appellant's argument creates interpretive contortions where none is present and distorts, in the process, the clear and unambiguous language as well as intention underlying the contractual relationship between the parties themselves.

88 However, relying on the Privy Council decision in *British South Africa*, Mr Gandhi nevertheless persevered during oral submissions with this line of argument. With respect, however, a close reading of that decision will reveal a *very different* context as well as fact situation altogether. Let me elaborate.

89 The fact situation in *British South Africa* was a straightforward one. Simplifying the facts somewhat, the appellant taxpayer, which was incorporated by Royal Charter, had acquired numerous concessions with regard to minerals and mining rights. It subsequently granted concessions conferring prospecting as well as other rights in respect of the minerals it owned to third parties and the issue arose as to whether or not the receipts in money and shares from the third parties was to be included as income for the purposes of income tax. The Privy Council held, first, that whilst the receipts did not fall within s 5(*f*) of the Income Tax Ordinance of Northern Rhodesia (relating to "rents, royalties, premiums and any other profits arising from property"), they fell, instead, with s 5(*a*) of the same Ordinance (relating to "gains or profits from any trade, business, profession or vocation"). However, the further issue arose as to whether or not there could be a *deduction* in favour of the appellant taxpayer against these receipts. In this regard, Viscount Simon, who delivered the judgment of the court, observed thus (at 80–81):

> If, however, *the business of the company was (as, in their Lordships' opinion, it was) to "turn to account" its mining rights or other property*, it does not follow that the proceeds of such turning to account are chargeable to tax without any deduction for the cost of acquisition. Rather it would seem that the ordinary rule must apply, and that no gain or profit can be said to arise unless and until a balance has been struck between the cost of acquisition and the proceeds of sale. Nor is it, in their Lordships' opinion, material that in dealing with its mineral rights the company has retained an interest either by way of a possible reverter of the property or by a shareholding in a company to which it made a special grant. [emphasis added]

The licences were exclusive, conditional, non-transferable, for a period of years only and subject to forfeiture. However, in their Lordships' view, it was immaterial that in dealing with its mineral rights, the company retained an interest either by way of a possible reverter of the property or by a shareholding in a company to which it made a special grant. Whilst Viscount Simon acknowledged the general rule to the effect that where the income of a taxpayer is derived from the exhaustion of a capital asset, no deduction can be allowed for the cost of that asset, he was of the view that an *exception* to that rule existed, as follows (at 82):

> But it appears to them that it [the general rule just referred to] is excluded as soon as the conclusion is reached that the article sold is that which it was the business of the company to acquire and to sell. So, here, though the mixed character of the company's objects as stated in the preamble of its Charter makes it difficult to define its trade or business, yet it appears reasonably clear that in order to effectuate its desire (to use the words of the preamble) "to carry into effect divers concessions and agreements. ... and such other concessions agreements grants and treaties as the petitioners may hereafter obtain" the acquisition and realization of mining rights must take a leading place. [emphasis added]

In the circumstances, the court was of the view that, as some deduction ought to be allowed, the judgment of the Rhodesian Court of Appeal to the contrary was set aside, and the matter was referred back to the Commissioner of Income Tax for re-assessment "to the best of its judgment" pursuant to s 40(2)(*b*) of the Ordinance.

90 It can be seen immediately that the fact situation in *British South Africa* was *completely different from* that which obtained in the present proceedings. Put simply, the *very pith and marrow of the business of the taxpayer* in *British South Africa* centred on not only the acquisition, *but also the sale*, of its mineral concessions and mining rights. In other words, these concessions and rights constituted *the stock-in-trade* of the taxpayer and were therefore deductible against the income it received. In the present proceedings, however, the *pith and marrow of the business of the Appellant* is *not* the acquisition and sale of the land or the building – or, indeed, *any* of the assets of the Club for that matter. On the *contrary*, the Appellant's business centred on the operation of the Club for the benefit of its members. Indeed, the members did *not* possess any rights to the assets of the Club. As I have demonstrated above, they merely obtained a *licence* to use the facilities of the Club in accordance with the terms contained in the Rules and Regulations.

91 It is my view that the case that *is* in point is *A B Ltd*. Indeed, both parties were referred to this case prior to oral submissions. This case cited *British South Africa*, and Mr Gandhi chose (as pointed out above) to rely on the latter case instead. However, as I have already elaborated upon above, *British South Africa* is *not* relevant to the present appeal. In *A B Ltd* itself, the respondents were estate owners carrying on the trade or business of rubber planting in different parts of Malaya. After the Japanese occupation, they resumed the business of rubber planting, with the exception of a portion of an estate on Singapore Island. This particular portion of the estate had had all its rubber trees felled during the Japanese occupation. The high cost of replanting as well as the relative infertility of the land itself made the resumption of rubber growing an economically unfeasible prospect. The respondents therefore applied to the Government of the day for permission to use the said land for burial purposes and a licence was duly issued to the respondents for the same. The respondents then built a temple, a tiffin shed as well as caretaker's quarters and an access road on the land itself. They also appointed one of their staff as a caretaker at a small wage but with free quarters to look after the buildings and site as well as to show the site to prospective purchasers of burial plots. This particular business grew and the area for burial purposes expanded as a result. The Comptroller of Income Tax subsequently assessed the respondents to tax on the excess of the

latter's income over their expenditure. The issue arose as to whether or not when the respondents made available a burial plot to a member of the public, that was an outright sale of the plot concerned or whether it was merely the grant of a licence. If it was the latter and the respondents were subject to assessment to income tax, the further issue arose as to whether or not the capital cost of the road, the temple, the tiffin shed and the caretaker's quarters as well as the capital cost of the land itself could be *deducted* against the revenues received by the respondents *vis-à-vis* the burial plots.

92 The Court of Appeal held that the respondents had only granted a *licence* to each member of the public to use the plot concerned for burial purposes and the revenue received was therefore liable to be assessed for the purposes of income tax. Indeed, it is significant, at this juncture, to point to the analogous situation which exists in respect of the facts of the present proceedings. As already pointed out above, the contractual relationship between the Appellant and each of its members was clearly that of a licensor-licensee.

93 Returning to the second issue (relating to whether or not the various costs referred to above (at [91]) could be deducted), the court held that it was clear that the expenditure on these various costs constituted *capital* expenditure. In the absence of an applicable capital allowance being granted *via* legislation, such costs could therefore not be deducted by the respondents against the revenue that they had received in respect of the granting of licences to members of the public to use the plots concerned for burial purposes. The court also held that the holding in *British South Africa* could *not* be invoked as an alternative route for the taxpayer concerned to obtain the benefit of a deduction. Both Whitton J and Tan Ah Tah J distinguished the *British South Africa* case on two grounds. First, in their transactions concerning the land, the taxpayers in *A B Ltd* only sold certain rights of burial over the land but not the land itself, unlike the *British South Africa* case where the taxpayer acquired and realised mining rights. Secondly, whilst it was the taxpayer's business in the *British South Africa* case to acquire and realise mining rights, the disposal of lots of land for burial purposes in *A B Ltd* was, at most, an entirely incidental business upon which the taxpayers had embarked; the taxpayers' business was, in fact, that of rubber planting. Whilst counsel for the Appellant rightly observed that the second reason does not apply to the present proceedings since it is the Appellant's business to sell the Club memberships, the first reason discussed above, upon which the facts of *A B Ltd* were distinguished from that in the *British South Africa* case, is pertinent here and the dicta of Whitton J and Tan Ah Tah J discussing this reason are set out below.

94 Having noted that it was within the company's objects to realise its land by selling it for burial lots, Whitton J commented (at 149) that:

> As far as the mere selling is concerned I am, therefore, disposed to think the appellants are on good ground, but I see some difficulty in that when the Privy Council spoke of something "which it was the business of the company to acquire and sell" it seems reasonable to infer what was envisaged was something which in the normal course of events would *become exhausted in the process between acquisition and sale*; and accordingly I think it does not necessarily follow the principle would apply to land, a commodity which in the ordinary way would not fall within this description, and in fact in the present case does so only by reason of the particular use to which the appellants turned it. [emphasis added]

95 And the following observations by Tan Ah Tah J (at 153) merit quotation in full:

> The last point which remains to be considered arises out of the proposition put by counsel for the appellants that if the appellants were held to be carrying on a trade they would be entitled to claim the market value of the land as a deduction from the income derived from the sale of burial

rights. In support of this proposition counsel for the appellants cited, ***inter alia*** , the case of ***British South Africa Co. v. Commissioner of Income Tax*** [[1946] AC 62]. *It is to be observed that in that case an important part of the business of the appellant company was the acquisition of mining rights on terms which seemed most advantageous to the appellant company. In short, it was the business of the appellant company in that case to acquire and realize mining rights. Now the principle which is ordinarily applicable is to be found in such cases*, decided under the English Income Tax Acts, as ***Alianza Co., Ltd. v. Bell*** [[1905] 1 KB 184] which *establish that where the income of a taxpayer is derived from the exhaustion of a capital asset no deduction can be allowed for the cost of that asset*. *What was decided in* **British South Africa Co. v. *Commissioner of Income Tax*** **wa**s *that this principle is excluded in cases where the article sold is that which it was the business of the taxpayer to acquire and to sell*. ***Now it is clear that in the present case the appellants' business was not the acquisition of land for the purpose of selling it as burial plots. The appellants' business was that of rubber planters but because of the high cost of replanting and the infertile nature of the area in question they decided to use part of it as a cemetery. I have already stated my view that in their transactions concerning the land they only sold certain rights of burial over the plots of land but not the land itself. There is therefore a fundamental distinction between the facts of the present case and those in British South Africa Co. v. Commissioner of Income Tax*** . In my opinion the decision in ***British South Africa Co. v. Commissioner of Income Tax*** does *not* support the appellants' contention that deductions of the market value of the land should be allowed. On this point I have reached the conclusion that the principle which was applied in ***Alianza Co., Ltd. v. Bell*** also be applied in the present case. [emphasis added in italics and bold italics]

96 Not surprisingly, perhaps, the observations just quoted in the preceding two paragraphs apply with equal force to the present appeal. As opposed to the assets in the *British South Africa* case which were transferred upon sale, albeit with the taxpayer retaining some rights in the assets in the form of a possible reverter of property or through its shareholding in companies to which it had sold the mining rights, the Appellant in the present case retains ownership of the Club premises, as discussed above (at [87]). Whilst the Appellant in the present case may have acquired the Club premises in order that he may operate his business, the Appellant has not realised these assets. The fact that the Appellant had granted memberships which are co-terminous with its lease of the premises does not derogate from the fact that, after granting the memberships, the Appellant still retained ownership of the lease and Club building. It is clear, from the perspectives of both legal principle as well as factual application, that *British South Africa* is *wholly inapplicable* to the facts of the present appeal.

97 For the reasons set out above, it is clear that the cost of acquiring the land and of constructing the building are *capital* in nature and hence fall within the ambit of s 15(1)(*c*) of the Act. No deduction is legally permissible and the Appellant therefore fails with regard to this particular issue.

(2) The deductibility of the Geomancy Fees

98 The Appellant submitted that the categorisation of the Geomancy Fees as income or capital expenditure follows the categorisation of the costs of purchasing the land and building the Club. As such, the Geomancy Fees are not deductible from the income of the Appellant as they are of a capital nature.

Whether the sum of $53,283,000 is deductible in the Year of Assessment 2001

99 Section 14(1) of the Act provides that expenditure is deductible in the period in which it is

incurred. The Appellant seeks to deduct, from the income earned through the receipt of the entrance fees, the $3,000 that it had undertaken to pay to each member of the Club following the civil action taken against it for which the Court of Appeal had handed down its decision determining the Appellant's liability in 2003 and had decided on the extent of the Appellant's liability in 2005. In 2003, the Court of Appeal held that by failing to control the number of people the Club had admitted as members, it had breached its obligation of delivering a premier club to those who were admitted. In 2005, the sum of $3,000 was assessed as damages arising from the breach and measured by the diminution in value of the Club due to the reach. The Court of Appeal made it clear that the plaintiffs were only trying to determine the loss due to the breach. It is clear from the judgment of the Court of Appeal that the sum of $3,000 was calculated as damages arising from the breach rather than as a refund of the entrance fees.

100 The Appellant seeks to reopen the tax assessment in the Year of Assessment 2001 in order to deduct, from the income earned in that year, the sum of $53,283,000 which it was liable to pay to the members (see above at [9]). The Appellant points out that its breach of contractual obligations can be linked back to the opening of the Club in March 2000. The Appellant argues that when liability is determined, it should be related back to and be deductible from the profits in the year in which the incident giving rise to such liability occurred. On the other hand, the Respondent argues that as no liability had been ascertained in 2000, the Appellant had no clear legal obligation to pay such moneys to its members at that point in time and cannot deduct the sum of $53,283,000 from the income received in those years of assessment.

101 The issue that arises in the present context is whether, for the purposes of tax assessment, the liability to pay the sum of $53,283,000 to the members is deemed to have accrued on the date the cause of action arose (in March 2000), as the Appellant submits. In my view, the liability, not having been admitted or adjudged to exist on the date the breach occurred, did not accrue in March 2000 and the sum of $53,283,000 is therefore not deductible in the subsequent Year of Assessment.

102 The sheet anchor of the Appellant for this particular issue – in so far as the relevant cases law is concerned – is the English Court of Appeal decision of *Bernhard*.

103 The decision in *Bernhard* can, in fact, be distinguished as the liability in respect of the debt owed to the bank had already crystallised and the issue before the court was merely one of *quantum*, *viz*, whether or not £22,410 or £8,000 (which was the amount the bank ultimately agreed to accept in full settlement of the debt owed) should appear in the accounts (see also *Simpson*, especially at 1074). Unlike the present case where the Appellant's liability to pay damages to the members of the club had not been ascertained in the years of assessment in which the Appellant seeks a deduction of the damages paid from profits assessed to tax, the liability of the taxpayer in *Bernhard* was undisputed at the time the liability was included in the taxpayer's tax assessments as a deductible expense. It was the quantum of the liability that had yet to be ascertained, specifically, the amount by which the liability was to be reduced. The taxpayer in *Bernhard* was a trader who exported cloth to buyers overseas. He financed his business by borrowing money from a bank on the security of bills and shipping documents. The advances made by the bank to the taxpayer were satisfied out of the proceeds of the bills. In 1920, the taxpayer was liable to the bank in respect of the bills which he had discounted with the bank and that liability, at its face value, was a sum of £45,000. A considerable deduction would have to be made from this figure in respect of goods which, if not paid for by the buyer of the goods, could be sold and the proceeds of the goods would be received by the bank in reduction of the liability upon the bills. The amount by which the liability was to be reduced had not yet been ascertained. In computing his profits for the year ended 31 March 1921, the taxpayer was allowed to deduct a sum of £22,410, being the estimated amount of the bank's claim against him. Subsequently, at the end of 1922, the bank accepted £8,000 in settlement of its claim against the

taxpayer. The English Court of Appeal ordered that the taxpayer's assessments be reopened to adjust the sum of £22,410 deducted as a trading loss in 1921 to reflect the amount of the taxpayer's actual liability to the bank (*i.e*., £8,000). It is clear from the decision of the court that the fact of liability was determined in 1921 although the quantum of liability was still being disputed. In particular, Lord Hanworth MR commented (at 742) that "it seems quite impossible to hold that there was anything more than an interim determination when the £22,410 was reached, and a determination which could be revised by the later events" and Lawrence LJ characterised (at 745) the "real dispute between the parties in this case" as "the amount of the deductions which can properly be made from [the] sum of £45,000."

104 The Appellant seeks to rely on the following observations in *Bernhard* by Lord Hanworth MR (at 741):

> We have had a powerful argument by Mr Dickinson … He has said, and quoted authorities to shew … that if there is a liability which is subsequently determined, but which is none the less to be a liability existing at a particular date, the fact that it is, subsequently to that date, determined and ascertained, does not prevent that liability belonging historically to its right place in the accounts. The quantum of it is ascertained at a later date; but the payment is to be made as at the date when it rightly occurs in the accounts, even if the quantum of it cannot be fixed at that moment … All those principles which were contended for are true.

105 As discussed above at [103], the facts of *Bernhard* are different from those in the present case. Thus, Lord Hanworth MR's observations only apply to the situation where liability has already been ascertained in the Year of Assessment but the quantum of liability is determined at a later stage.

106 Indeed, the need for an *actual* legal obligation or liability to be incurred or to have been crystallised can be seen from the Scottish Court of Session decision of *James Spencer & Co v Commissioners of Inland Revenue* (1950) 32 TC 111 ("*James Spencer*"). There, the Lord President Cooper, having referred, *inter alia*, to the decisions in *Newcastle Breweries* and *Bernhard*, held (at 117) that:

> … it seems to follow that, if in the earlier period there is only a provisional or contingent "liability", it is not until it has been subsequently determined to be an actual "liability" by admission or decision that it can properly be brought into computation, and it should then be debited even if it is not until a still later period that the exact quantum can be inserted, if need be by re-opening the accounts.

James Spencer concerned the date on which liability for workmen's compensation claims were to be included. It was held that the claims were not to be properly included until they had been admitted or determined. Lord President Cooper held (at 117) that:

> Until then the "liability" is only provisional or contingent for the purposes of tax computation. The contingency is purified and the provisional "liability" becomes actual when the fact of "liability" is so ascertained, and it is then that the debit should appear in the accounts.

Applying the decision in *James Spencer* to the facts of the present case, the Appellant's liability to pay $3,000 to each member only became actual when the fact of liability was ascertained by the Court of Appeal in 2003.

107 The Appellant also refers to the decision of the Privy Council in *Commissioner of Inland*

Revenue v Lo and Lo (a firm) [1984] STC 366 ("*Lo and Lo*") where it was held (at 370) that "'an expense incurred' is not confined to a disbursement, and must at least include a sum which there is an obligation to pay, that is to say an accrued liability which is undischarged." This applies irrespective of whether the recipient of the disbursement has the choice to forfeit his right to payment. In *Lo and Lo*, the taxpayers operated a staff retirement benefit scheme whereby a retiring employee who had completed not less than 10 years' service was entitled to a lump sum payment. It was held (at 371) that whilst a long service employee had a vested right to his accrued lump sum payment such that the taxpayer had an accrued liability for that sum, the employees who had not worked for at least 10 years did not have any present right to demand payment and different considerations may apply in their cases. This decision does not support the Appellant's claim to deduct the damages paid to its members in the year the alleged breach of contract occurred. There was no obligation to pay damages at that particular point in time.

108 The editors of *Halsbury's Laws of Singapore* state (at para 205.098) that:

> Expenses which are anticipatory in nature, commonly referred to in accounting parlance as 'provisions' where a sum is set aside by a taxpayer at the end of the basis period to meet a liability which is merely contingent, are not deductible for the relevant Year of Assessment. Such anticipatory expenses remain so until such time, if any, a legal liability to pay *actually crystallises*, at which point then, the amount which is actually incurred will rank for deduction. [emphasis added]

109 Other case authorities also support the view that a taxpayer must be committed to an expenditure, even if this liability is defeasible, in order for the expenditure to be treated as having been incurred. In the High Court of Australia decision of *New Zealand Flax Investments Ltd v FCT* (1938-39) 61 CLR 179, quoted with approval in many subsequent cases (see, for example the New Zealand High Court decision of *A M Bisley Ltd v CIR* (1985) 8 TRNZ 513 (at 528); as well as the High Court of Australia decisions of *FCT v James Flood Pty Ltd* (1953–54) 88 CLR 492 (at 507) and *Nilsen Development Laboratories Pty Ltd v FCT* (1979–80) 144 CLR 616 ("*Nilsen Laboratories*") (at 623)), Dixon J attempted to define the term "incurred" for the purposes of determining the deductible expenditure for tax purposes; the learned judge observed as follows (at 207):

> … there must be a loss or outgoing actually incurred. "Incurred" does not mean only defrayed, discharged, or borne, but rather it includes encountered, run into, or fallen upon. It is unsafe to attempt exhaustive definitions of a conception intended to have such a various or multifarious application. But it *does not include a loss or expenditure which is no more than impending, threatened, or expected*. [emphasis added]

In *Nilsen Laboratories*, Barwick CJ placed emphasis on Dixon J's statement that the term "incurred" "does not include a loss or expenditure which is no more than impending, threatened, or expected" and added the phrase "no matter how certain it is in the year of income that that loss or expenditure will occur in the future" to it. Similarly, in the Privy Council decision (on appeal from the Court of Appeal of New Zealand) of *Commissioner of Inland Revenue v Mitsubishi Motors New Zealand Ltd* [1996] AC 315 ("*Mitsubishi Motors*"), the court held (at 327) that to determine whether a liability was incurred, the question is whether "in the light of surrounding circumstances, a legal obligation to make a payment in the future can be said to have accrued". The taxpayer in *Mitsubishi Motors* sold motor vehicles and provided a warranty to its dealers under the terms of which the dealers were entitled to return the vehicle to the taxpayer for repair if a defect arose within a certain period or mileage use of the vehicle after delivery. The taxpayer was able to estimate that some 63% of all vehicles it sold contained defects which would manifest themselves within the warranty period and was able to make a reasonably accurate forecast of the total cost of remedial work of these vehicles. The court held that the fact that 63% of the vehicles had defects was a matter of existing fact, not future contingency and that the contingency that some owners might be content not to require remedial work would be real only in the case of the most trivial defects. As such, the court allowed the taxpayer to deduct the estimated repair costs from its profits in the year that the vehicles were sold.

110 In the present proceedings, there is no provision in the contract between the Appellant and the members of the Club to the effect that the members would be entitled to damages if the number of members in the club exceeded a stipulated number. The liability of the Appellant to the members for damages for breach of contract was a contingent and yet to be determined liability at the date when the cause of action accrued (and was later contested). Since the Appellant's liability to pay damages was only determined by the Court of Appeal much later, the money paid to the members was not deductible in the Year of Assessment 2001.

Accounting treatment

111 Where ordinary accounting principles run counter to the principles of tax law, they must yield to the latter for the purposes of computing gains and profits for tax. Accounting and tax have different objectives in mind: Financial accounting is intended to provide information regarding firm performance to the market place while taxable income is prescribed by the government to meet budgetary needs (see Michelle Hanlon & Terry Shevlin, "Book-Tax Conformity for Corporate Income: An Introduction to the Issues" in (2005) 19 Tax Policy and the Economy 101 at 106). Regardless of how persuasive accounting evidence is, the prerogative still lies with the court to decide whether a particular item should be regarded as income that has accrued for the purposes of liability to tax (see *Pinetree* at [33]).

112 In so far as the specific question of what is capital and what is revenue, this is a "question of law for the courts" and the courts are "not to be deflected from their true course by the evidence of accountants, however eminent" (see the English Court of Appeal decision of *Heather*, *per* Lord Denning MR at 217). Accounting treatment focuses on the balance sheet whereas taxation requirements are centred on the profit and loss accounts, so that the distinctions between revenue and capital, which are vital for tax purposes, may be lost in the accounting treatment (see Judith Freedman, "Defining Taxable Profit in a Changing Accounting Environment" (1995) 5 BTR 434 at 438). Items which may be listed as deductible expenditure in the accounts may be considered capital expenditure under the Act and therefore not deductible for income tax purposes.

113 At the hearing before the Board in the present proceedings, the Appellant sought to rely on accounting evidence to show that it would be wrong to regard the company's revenue from entrance fees as having no costs associated with it. The Appellant called three accountants to give expert testimony as to how the various items of claim of the Appellant ought to be treated. The Comptroller also called an expert witness to give evidence.

114 However, in their submissions to this court, both the Appellant and the Respondent agreed that even if the accounts were prepared in accordance with the correct principles of commercial accountancy, they cannot be used to determine profit for tax purposes if they do not conform with the provisions of the Act. What they disagree on is the effect of the application of tax principles to the facts of the present case. In *Pinetree*, the Court of Appeal noted (at [33]) that a court has an overriding power to form its own conclusions and that this is particularly so when the issue at hand has been accepted by the party concerned (in that case, the appellants) to be a question of law as the facts are not in dispute. I am also of the view that the present case turns on how well-established tax principles and tax law would apply rather than on the correct accounting treatment of the items brought to tax.

Conclusion

115 Although Mr Gandhi is to be commended for the enthusiasm and candour with which he argued his client's case, the Appellant's arguments with regard to all the issues fail for the reasons I have set out above. The appeal is therefore dismissed with costs and with the usual consequential orders.

116 I would also like to take this opportunity to reiterate my gratitude (which was expressed after oral submissions) to both counsel for presenting their arguments clearly and as persuasively as they could. This is especially welcome in the context of the law of tax which, by its very nature, can be extremely technical and complex indeed.

[note: 1] *Record of Appeal*, vol V (pt A) ("5(A)RA"), p 882.

[note: 2] 5(A)RA, p 892.

[note: 3] *Ibid*, p 894.

[note: 4] *Ibid*, p 886.

[note: 5] *Ibid*.

[note: 6] *Ibid*.

[note: 7] *Ibid*.

[note: 8] *Ibid*.

[note: 9] *Ibid*.

[note: 10] *Ibid*.

[note: 11] *Ibid*, p 887.

[note: 12] *Ibid*, p 891.