

9, 1956

In the Privy Council.

No. 27 of 1954.

ON APPEAL FROM THE COURT OF APPEAL OF  
THE SUPREME COURT OF THE FEDERATION  
OF MALAYA

UNIVERSITY OF LONDON  
W.C.1.  
19 FEB 1957  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

BETWEEN  
COMPTROLLER OF INCOME TAX ... .. *Appellant*  
AND  
HARRISONS AND CROSFIELD (MALAYA) LIMITED ... *Respondent.*

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

No.	Description of Document	Date	Page
IN THE INCOME TAX BOARD OF REVIEW.			
1	Petition of Appeal and Annexure " A " ...	18th April, 1952 ...	1
2	Notes of Proceedings ... ..	12th August, 1952 ...	4
3	Minutes of the 12th Meeting of Board of Review	12th August, 1952 ...	10
4	Notes of Proceedings ... ..	26th August, 1952 ...	11
5	Minutes of the 13th Meeting of Board of Review	26th August, 1952 ...	15
6	Judgment ... ..	... ..	19
IN THE HIGH COURT, KUALA LUMPUR.			
7	Notice of Appeal ... ..	30th August, 1952 ...	24
8	Memorandum of Appeal ... ..	3rd October, 1952 ...	25
9	Judge's Notes of Hearing ... ..	21st November, 1952	27
10	Judge's Notes of Hearing ... ..	28th November, 1952	30
11	Judgment ... ..	11th February, 1953...	31
12	Order ... ..	11th February, 1953...	33

No.	Description of Document	Date	Page
	IN THE COURT OF APPEAL, KUALA LUMPUR.		
13	Notice of Appeal ... ..	23rd February, 1953...	34
14	Memorandum of Appeal ... ..	11th March, 1953 ...	35
15	Notes of Arguments		
	(a) Chief Justice, Federation of Malaya ...	8th June, 1953 ...	36
	(b) Chief Justice, Singapore ... ..	8th June, 1953 ...	37
	(c) Bellamy J. ... ..	8th June, 1953 ...	38
16	Order ... ..	8th June, 1953 ...	40
17	Reasons for Judgment ... ..	... ..	41
18	Order granting conditional leave to appeal to Her Majesty in Council ... ..	28th December, 1953	46
19	Order granting final leave to appeal to Her Majesty in Council ... ..	12th March, 1954 ...	47

## EXHIBITS.

Exhibit Mark	Description	Date	Page
A(1).	Agreed Facts ... ..	... ..	49
A(2)	Agreed bundle of correspondence		
	(1) Letter, Appellant to Respondent ...	14th March, 1952 ...	51
	(2) Letter, Respondent to Clerk to Income Tax Board of Review ... ..	20th March, 1952 ...	52
	(3) Letter, Bannon & Bailey to Comptroller-General of Income Tax ... ..	29th April, 1952 ...	52
	(4) Letter, Acting Comptroller-General to Bannon & Bailey ... ..	30th April, 1952 ...	53
	(5) Letter, Bannon & Bailey to Acting Comptroller-General ... ..	16th May, 1952 ...	54
	(6) Letter, Bannon & Bailey to Acting Comptroller-General ... ..	10th June, 1952 ...	54
	(7) Letter, Acting Comptroller-General to Bannon & Bailey ... ..	13th June, 1952 ...	55
	(8) Letter, Bannon & Bailey to Appellant ...	17th June, 1952 ...	56
	(9) Letter, Appellant to Bannon & Bailey ...	27th June, 1952 ...	56
	(10) Letter, Bannon & Bailey to Appellant ...	15th July, 1952 ...	57
	(11) Letter, Acting Comptroller of Inland Revenue to Bannon & Bailey ... ..	19th July, 1952 ...	58
	(12) Letter, Bannon & Bailey to Comptroller of Inland Revenue ... ..	22nd July, 1952 ...	59
	(13) Letter, Bannon & Bailey to Comptroller of Inland Revenue ... ..	24th July, 1952 ...	59
	(14) Letter, Bannon & Bailey to Comptroller of Inland Revenue ... ..	1st August, 1952 ...	60

INSTITUTE OF ADVANCED  
LEGAL STUDIES,  
25, RUSSELL SQUARE,  
LONDON,  
W.C.1.

Exhibit Mark	Description	Date	Page
A(3)	Example Statement of Figures ... ..	... ..	62
A(4)	Example Statement ... ..	... ..	63
R(1)	Letter, Appellant to Clerk to Board of Review ...	31st July, 1952 ...	64

DOCUMENT.

Document Mark	Description	Date	Page
X	Notes of Appeals to Board of Review . .	December 1951 to February, 1952	67

19 FEB 1957

In the Privy Council.

No. 27 of 1954.

45921

ON APPEAL FROM THE COURT OF APPEAL OF  
THE SUPREME COURT OF THE FEDERATION  
OF MALAYA

BETWEEN

COMPTROLLER OF INCOME TAX ... .. *Appellant*

AND

HARRISONS AND CROSFIELD (MALAYA) LIMITED ... *Respondent.*

RECORD OF PROCEEDINGS

No. 1.

Petition of Appeal.

In the  
Income Tax  
Board of  
Review.

No. 1.  
Petition of  
Appeal.  
18th April  
1952.

FEDERATION OF MALAYA.

(Section 75 of the Income Tax Ordinance 1947).

To: The Clerk to the Income Tax Board of Review,  
Federation of Malaya,  
The Treasury,  
Kuala Lumpur.

HARRISONS & CROSFIELD (MALAYA) LIMITED.

10

STATEMENT OF THE GROUNDS OF APPEAL.

Harrisons & Crosfield (Malaya) Limited (hereinafter referred to as "the Company") is a company incorporated in Singapore and has a place of business at No. 96 Ampang Road, Kuala Lumpur.

In the  
Income Tax  
Board of  
Review.

No. 1.  
Petition of  
Appeal.  
18th April  
1952—  
*continued.*

The Company in November, 1950, paid out of its chargeable income for the year of assessment 1951 (basis year 1950) a dividend of \$533,333.

The Company deducted from the dividend so paid income tax at the rate then payable by the Company, namely twenty per centum. The Company was not permitted by the provisions of the Income Tax Ordinance, 1947, to deduct income tax at any higher figure.

The whole of the chargeable income of the Company for the year of assessment 1951 (basis year 1950), including the amount of the dividend paid as aforesaid, has been assessed for income tax at the rate of thirty per centum.

10

The Company on the 27th day of February, 1952, gave to the Comptroller of Income Tax written Notice of Objection to the assessment made on the Company by the Comptroller for the year of assessment 1951 (basis year 1950) and a copy of such Notice of Objection is attached hereto and marked "A."

The Company failed to agree with the Comptroller of Income Tax in the manner provided by sub-section (4) of Section 72 of the Income Tax Ordinance, 1947, and gave Notice of Appeal.

1.—The Company contends that the Comptroller of Income Tax has wrongfully refused to re-assess for income tax at the rate of twenty per centum that part of the Company's chargeable income for the year of assessment 1951 (basis year 1950) equivalent to the said dividend of \$533,333 paid by the Company in November, 1950, out of such chargeable income in accordance with the power in that behalf given to him by the proviso to Section 39 of the Income Tax Ordinance, 1947.

20

2.—The Company is not permitted by law to deduct from any future dividends or otherwise the difference between income tax which has been assessed at the rate of thirty per centum on the amount of the said dividend of \$533,333 and income tax at the rate of twenty per centum on the same dividend which has been deducted and was the only deduction legally permissible at the time of the declaration of the said dividend in accordance with the provisions of the Income Tax Ordinance, 1947.

30

3.—That the main shareholders of the Company are not resident in the Federation of Malaya and in any event are only liable to pay income tax at the rate of twenty per centum on their chargeable income.

4.—It is clear from the Income Tax (Amendment) Ordinance, 1951, and in particular Sections 1 (2) and 4 thereof that the intention of the legislature is that in respect of that part of the chargeable income of a Company for the year of assessment 1951 (basis year 1950) equivalent to the amount of any dividend declared and paid out of such chargeable income prior to the 1st day of January, 1951, income tax shall be charged at the rate of twenty per centum and not at the rate of thirty per centum.

40

5.—That the refusal of the Comptroller of Income Tax to make such re-assessment as aforesaid by virtue of the power in that behalf given to him under the proviso to Section 39 of the Income Tax Ordinance, 1947, is—

In the  
Income Tax  
Board of  
Review.

- 10 (a) illegal, since the Comptroller of Income Tax has only a discretion under that proviso to charge tax at a lower rate or not to charge with any tax, and has no discretion to charge tax at the full rate, in the circumstances outlined above, OR
- (b) if the Comptroller of Income Tax has such discretion to charge tax at the full rate, his refusal to make such re-assessment is improper, unjudicial and inequitable and leads to inequity in the administration of the said Ordinance and to excessive taxation of the same subject-matter.

—  
No. 1.  
Petition of  
Appeal.  
18th April,  
1952—  
*continued.*

6.—The Company contends that the Comptroller of Income Tax should under the proviso to Section 39 of the Income Tax Ordinance, 1947, re-assess for income tax at the rate of twenty per centum that part of the Company's chargeable income for the year of assessment 1951 (basis year 1950) equivalent to the said dividend paid by the Company in November, 1950, out of such chargeable income and that the Comptroller of Income Tax should be ordered by the Board to do so.

20

HARRISONS & CROSFIELD (MALAYA) LTD.,  
(Sgd.) ?

*Director.*

Filing Fee of \$10/- for Petition of Appeal  
is sent herewith.

Address for service :—c/o Bannon & Bailey, Advocates & Solicitors, Laidlaw  
Building, Kuala Lumpur.

Kuala Lumpur,  
18th April, 1952.

Annexure " A."

30

Finance & Accounts Dept.

27th February, 1952.

The Comptroller of Income Tax,  
P.O. Box 1044,  
Kuala Lumpur.

No. 1.  
Annexure  
" A " to  
Petition of  
Appeal,  
dated  
18th April  
1952.

Dear Sir,

Assessment Notice C/1002—1951  
dated 9th February, 1952.

We refer to your letter of 5th February, 1952, and the abovementioned Notice of Assessment dated the 9th February, 1952.

In the  
Income Tax  
Board of  
Review.

No. 1.  
Annexure  
" A " to  
Petition of  
Appeal,  
dated  
18th April  
1952—  
*continued.*

In accordance with Section 72 (2) of the Income Tax Ordinance, 1947, we hereby give you Notice of objection to the said assessment on the grounds that out of the chargeable income of the Company for the year of Assessment, 1951 (basis year 1950) gross dividends amounting to \$533,333/- were paid in November, 1950. From such dividends Income Tax was deducted in accordance with the provisions of Section 40 of the said Ordinance at the rate then payable by the Company, namely at the rate of 20 per cent. An amount equal to the said dividends has now been assessed for Income Tax at the rate of 30 per cent. against which the Company has only been entitled to deduct tax at the rate of 20 per cent. as mentioned above. 10

We now apply to you to review and revise the said assessment made upon the Company and to re-assess that amount of the chargeable income of the Company for the Year of Assessment 1951 (basis year 1950) which is equal to the amount of the said dividends and to charge it at a lower rate, namely at the rate of 20 per cent. instead of at the rate of 30 per cent. in accordance with the power in that behalf given to you by the proviso to Section 39 of the said Ordinance.

We return the assessment notice to you so that this may be done.

We have no objection to making an advance payment now of say \$340,000/- against the assessment for the Year of Assessment 1951 (basis year 1950) pending the review and revision of the assessment as above mentioned. 20

Kindly acknowledge receipt of this letter, so that we may have formal confirmation that our objection to the assessment has been received by you within the specified time.

Yours faithfully,

HARRISONS & CROSFIELD (MALAYA) LTD.,

(Sgd.) N. S. BEATON,

*Director.*

No. 2.  
Notes of  
Proceed-  
ings.  
12th August  
1952.

No. 2.

30

Notes of Proceedings.

HARRISONS & CROSFIELD (MALAYA) LTD.	...	...	...	<i>Appellant</i>
and				
COMPROLLER OF INCOME TAX	...	...	...	<i>Respondent.</i>

WOODWARD for Appellant.

MORTON on behalf of Respondent.

WOODWARD begins.

Puts in by consent of Respondent :—

(a) Book of agreed facts marked Exhibit A (1).

(b) Book of agreed correspondence marked Exhibit A (2).

Respondent is taking a preliminary point, namely, that no appeal lies in this case to the Board as this is a matter which is entirely within discretion of Comptroller. In view of Exhibit A2, Respondent is debarred from taking this point.

In the  
Income Tax  
Board of  
Review.

No. 2.  
Notes of  
Proceed-  
ings.  
12th August  
1952—  
*continued.*

MORTON.

There is nothing in Ordinance to prevent my taking this preliminary point.

WOODWARD in reply.

10 Nothing further to say.

DECISION.

The Committee decide to hear the Respondent on the preliminary point.

MORTON.

Puts in letter of 31.7.52 to Clerk of Board of Review marked R1.

Corrects error in R1 by deleting " 39(b) " in line 6 of letter and inserting " 39 " in place thereof.

Committee of Board constituted under Section 74: Powers in Section 74. Committee have power to hear appeals in those cases where the Ordinance expressly confers authority.

20 Section 75. Any person aggrieved by an assessment may appeal. In most cases, persons are aggrieved and appeal under Section 75.

Express provisions for appeal.

Reads Section 30. Any discretion exercised by Comptroller under Section 27 or 28 or 29 can be questioned in an appeal.

In Section 53, Comptroller can declare any person to be agent of any person.

In Section 53, provides for appeal by any person aggrieved. Section 39 confers a discretion on Comptroller. No provision for appeal to the Board of Review.

30 Therefore no appeal lies to the Board of Review under Section 39. I agree that every act within the discretion of the Comptroller must be exercised judicially and not arbitrarily. If Comptroller exercised such act arbitrarily, the remedy is by writ of certiorari or mandamus and not by appeal to the Board.

WOODWARD.

Refers to Exhibit A(1)—Reads Exhibit A(1).

(Morton objects to reading of agreed facts Exhibit A(1).

Woodward says that facts have bearing on his arguments.

Woodward is allowed to read Exhibit A(1).

40 So far, up to paragraph 9, there is an assessment and an objection to assessment on the ground that too much tax has been charged.

Exhibit A2, page 51—the Comptroller gives notice that he is not prepared to amend the assessment and say that if you are aggrieved by the decision, you are entitled to appeal to the Board . . . within 7 days.

In the  
Income Tax  
Board of  
Review.

No. 2.  
Notes of  
Proceed-  
ings.  
12th August  
1952—  
*continued.*

Comptroller did not say that " you can appeal by writ of certiorari or mandamus " to the High Court.

The Appellant here is aggrieved—gave notice letter 2 of Exhibit A2.

Refers to appeal of B Ltd.—in notes of appeals heard by Board from December 1951 to February 1952 (p. 65).

In that appeal, Comptroller advanced the same arguments and the Respondent advanced the same arguments—

Reads arguments in appeal of B. Ltd.

An appeal can lie against an assessment in respect of quantum as well as rate of tax. The decision on that preliminary point in that appeal was against the Comptroller. That decision is a precedent which binds the Board. Respondent cannot be allowed to say (in correspondence) that Appellant can appeal to the Board and to say, to-day, that Appellant cannot appeal to the Board. 10

MORTON in reply.

3 points :—

- (a) letter of Comptroller—(letter 1 of Exhibit A2)—This is a printed form—Form I.T. 23—It was issued in error by a clerk—Board should not take letter 1 into consideration—Government is not bound by a mistake of its servants— 20
- (b) Board is not bound by its previous decision if the Board thinks that its previous decision was wrong.
- (c) Appellant is against amount of tax in assessment. Assessment depended upon the Comptroller's discretion which is non appealable.

DECISION.

The Appellant is a person aggrieved within the meaning of Section 75 (1) of the Ordinance by an assessment made by the Comptroller and can appeal to the Board.

MORTON. 30

I prefer the appeal to go on and if necessary to appeal against this decision and other decision on the appeal in due course.

The appeal is to proceed.

Adjourned to 2.15 p.m.

2.15 p.m.

WOODWARD.

Appeal against assessment on chargeable income for year of assessment 1951. Comptroller refused to amend assessment after notice from Appellant.

Respondent gave no grounds of refusal—Appellant had to file notice of appeal within 7 days and petition of appeal within 30 days of notice of appeal. 40

Appellant had to find out grounds of refusal—so I, through correspondence, got agreed Facts and Correspondence, Exhibits A1 and A2—  
To avoid evidence—

Reads petition of appeal—

Refers to agreed Facts, Exhibit A(1).

Amount in dispute is \$53,333.30 referred to in paragraph 9 of Exhibit A(1)—i.e. 10% of \$533,333 distributed dividends.

Refers to paragraph 11 of agreed Facts—In certain cases, proviso to Section 39 was used to relieve companies on a part of their chargeable income equal to amount of dividends paid in 1947.

Reads letter 3 of Exhibit A(2)—

Reads letter 4 of Exhibit A(2)—Admission by Comptroller that proviso to Section 39 was used in certain cases to relieve companies.

Reads letter 5 of Exhibit A(2)

” ” 6 ” ” ”

” ” 7 ” ” ”

” ” 8 ” ” ”

” ” 9 ” ” ”

—Appellant's chargeable income for year of assessment 1951 is income accruing to Appellant in that year.

Reads letter 10 of Exhibit A(2)—only issue to be decided by Board.

Reads letter 11 of Exhibit A(2)

” ” 12 ” ” ”

” ” 13 ” ” ”

” ” 14 ” ” ”

The result of Exhibit A(2) is that the Comptroller would be willing to apply the proviso if he was satisfied that the dividends were paid out of the chargeable income for the year of assessment 1951.

MORTON in answer to Committee says that that is not the only issue. The pre-condition to proviso 39 is that the Comptroller must be satisfied after proof that dividends were paid out of the chargeable income for year of assessment 1951.

The *onus* is on Appellant to show that :—

(a) the dividends were paid in 1950 out of chargeable income for the year of assessment 1951

(b) the Comptroller was wrong in not exercising his discretion in favour of Appellant.

WOODWARD (continues).

It is a little unfair for Appellant to be asked to prove (b) set out. Issues as agreed between WOODWARD and MORTON.

(1) Whether the dividends paid in 1950 were paid out of the chargeable income for the year of assessment 1951 ?

(2) Whether the Comptroller was wrong in determining not to charge any part of the chargeable income of the Appellant for the year of assessment 1951 at 20% instead of at 30%.

In the  
Income Tax  
Board of  
Review.

No. 2.

Notes of  
Proceed-  
ings.

12th August  
1952—

continued.

In the  
Income Tax  
Board of  
Review.

No. 2.  
Notes of  
Proceed-  
ings.  
12th August  
1952—  
*continued.*

WOODWARD agrees to proceed on 2 issues.

Issue (1)—

Reads proviso to Section 39.

Points to agreed Facts Exhibit A(1)—dividends of \$533,333 were paid out of the profits for year ended 30.6.50.

“Such chargeable income” is the chargeable income in respect of which Appellant pays tax.

See Section 39 (a) “chargeable income.”

See Section 34 “chargeable income”—defines chargeable income as the remainder of “assessable income” after deductions. 10

See Section 33 “Assessable income” defines it as the remainder of “statutory income” after deductions.

See Section 31 “Statutory income” defines it as full amount of income for the year preceding the year of assessment.”

On the strength of these sections, chargeable income is the income for the previous year. Chargeable income for year of assessment 1951 is the trading year 1950. If dividends have been paid out of the profits for trading year 1950, they have been paid out of chargeable income for year of assessment 1951—

I refer to appeal of B. Ltd.—(December 1951—February 1952)— 20

I refer to appeal of A. Ltd., M. Ltd. and P.C. (December 1951—February 1952).

Board decided against the Comptroller in all those appeals—Decision should be followed in this appeal.

MORTON.

Issue (1).

Appeals of B. Ltd., A. Ltd., M. Ltd. and P.C.

If Board considers that decision in those appeals is not correct, Board should not hesitate to come to a different decision.

Appellant’s account was made up to 30.6.50—for period from 1.7.49 30 to 30.6.50—Account for year to 30.6.50 was allowed by Comptroller under Section 31 (2).

Woodward only referred to Sections 31, 33 and 34—He did not refer to Section 10—Section 10 provides for income tax to be payable on income for each year of assessment.

For year of assessment 1950, the Comptroller accepted the income for the year ended 30.6.49—accounting year under Section 31 (2).

Part V Ascertainment of Statutory Income

“ VI “ „ assessable ;;

“ VII “ „ chargeable ;;

Section 31 : no significance can be attached to the words “ shall be ” in line 3—They mean “ shall be computed as ” or “ shall be computed by reference to.” It is purely a measuring rule.

Section 39 Rate of Tax upon companies.

Section 39 : the words “ chargeable income thereof ” in line 3 have the meaning of “ chargeable income ” as in Section 34. The words

40

"chargeable income thereof" in (a) have the same meaning of chargeable income as in Section 34.

In proviso the words "chargeable income" cannot have the same meaning and dividends must be paid out of "profits."

*Attorney-General vs. Metropolitan Water Board.* 13 T.C. 294.

Section 40 Proviso (i).

The relief to certain companies on a part of their 1948 chargeable income equal to the amount of dividends paid in 1947 was purely a relief—a concession.

10 "income" in Proviso (i) of Section 40 means "chargeable income" with same meaning as chargeable income in Section 34.

WOODWARD in reply.

This appeal concerns a continuing Company—Statutory income of a Company for any year of assessment can be ascertained—If it cannot be, the chargeable income cannot be ascertained. Chargeable income is based on statutory income.

If I prove that dividends have been paid out of its Statutory income, I have proved that dividends have been paid out of its chargeable income.

20 Appellant has paid dividends in 1950 out of income for trading year ending 30.6.50—That is the statutory income for year of assessment 1951 subject to certain deductions.

If "chargeable income" mean something else, the Ordinance out to say so.—The word "such" before the words "chargeable income" shows clearly that the words have the same meaning as those in 39 (a) and in line 3 of Section 39.

30 *Attorney-General vs. Metropolitan Water Board*, 13 T.C. refers to rules 19 and 21 of old schedule to Finance Acts.—These rules do not refer to deduction of dividends at all—rules 19 and 21 are analogous to Section 41 of our Ordinance.

*Neumann vs. Inland Revenue Commissioners* (1934)A.C. 215 p. 229. Lord Tomlin's remarks. "Attorney-General vs. M.W. Board 13 T.C. does not apply."

useless to apply English cases as the sections are different.

Vol. I of Simon on Income Tax.

reads p. 184.

That disposes of the contention of Respondent that chargeable income in proviso to Section 39 is chargeable income for 1951.

40 I agree that "income" in proviso (i) of Section 40 is "chargeable income" which has same meaning as "chargeable income" in Section 34.

MORTON with consent of WOODWARD.

Proviso to Section 39 was applied as a concession.

Reads from Lord Simon's judgment *Allchin vs. Corporation of South Shields*. 25 T.C. p. 461.

Decision on issue 1.

The Committee hold that the dividends paid in 1950 were paid out of the chargeable income for the year of assessment 1951.

Further hearing adjourned to 26th August 1952.

In the  
Income Tax  
Board of  
Review.

No. 2.  
Notes of  
Proceed-  
ings.  
12th August  
1952—  
*continued.*

In the  
Income Tax  
Board of  
Review.

## No. 3.

## Minutes of the 12th Meeting of Board of Review.

No. 3.  
Minutes of  
the 12th  
Meeting of  
Board of  
Review.  
12th August  
1952.

IN THE COMMITTEE ROOM OF THE FEDERAL LEGISLATIVE COUNCIL,  
KUALA LUMPUR, on Tuesday, the 12th August, 1952.

The Committee of the Board consisted of the following members :

The Hon'ble Mr. YONG SHOOK LIN, C.B.E., J.P.  
" " CHE YAHYA BIN SHEIKH AHMAD, J.P.  
Mr. A. H. FLOWERDEW, J.P.  
Mr. R. S. JENNINGS.

Clerk to the Board.

Mr. C. E. Howe, M.B.E., M.C.S.

10

The Committee duly met at 8.45 a.m.

## 1. Chairman.

The Hon'ble Mr. Yong Shook Lin was elected Chairman for the meeting and assumed office.

\* \* \* \*

## 4. ITBR 151.

Mr. W. A. T. Morton, Acting Comptroller-General of Income Tax, appears for the Comptroller.

- (a) Name and address of Appellant : Messrs. Harrisons & Crosfield 20  
(Malaya) Ltd. Address for service—c/o Messrs. Bannon & Bailey,  
Advocates and Solicitors, Laidlaw Building, Kuala Lumpur.  
Mr. F. J. Woodward of Messrs. Bannon & Bailey appears for the  
Appellant.
- (b) The Committee hears and decides on a preliminary point by the  
Comptroller-General of Income Tax and adjourns from 12.50 p.m.  
to 2.15 p.m.
- (c) The Committee resumes at 2.15 p.m. in the Treasury Conference  
Room, Clarke Street, Kuala Lumpur, and it is agreed that there  
are two issues in this case. The Committee hears and decides on 30  
the first issue, and it is agreed not to announce the decisions until  
the final conclusion of the case.
- (d) During the hearing the Appellant hands in agreed facts containing  
3 sheets marked as Exhibit A1 and agreed correspondence con-  
taining 14 enclosures marked as Exhibit A2 and the Respondent  
puts in letter marked R.1.

5. The Committee adjourns until 9 a.m. on Tuesday, the 26th August.

Approved.

(Sgd.) YONG SHOOK LIN,  
*Chairman*

Committee of the Income Tax Board of Review

Submitted.

(Sgd.) C. E. HOWE,  
*Clerk,*

Income Tax Board of Review,  
Federation of Malaya.

10

In the  
Income Tax  
Board of  
Review.

No. 3.  
Minutes of  
the 12th  
Meeting of  
Board of  
Review.  
12th August  
1952—  
*continued.*

---

No. 4.

Notes of Proceedings.

WOODWARD for Appellant.

MORTON on behalf of Respondent.

WOODWARD begins.

Issue No. 2.

Committee has decided that chargeable income for year of assessment 1951 is the chargeable income for trading year 1950.

20 Committee has decided that the Comptroller should have been satisfied dividends were paid out of chargeable income for year of assessment 1951.

Comptroller has refused to determine rate at 20 per cent. 533,333/- dividends paid instead of at 30 per cent.

Former decision of Board in similar appeal.

Respondent will argue that he has a discretion.

Respondent in refusing to determine rate at 20 per cent. on 533,333/- is doing an illegal act or alternatively is doing an act which is wrong and unjudicial—Ground 5 of grounds of appeal.

Reads grounds of appeal.

30 Where there is an increase in the rate of tax, Comptroller has 2 discretions :—

(a) to charge tax at a lower rate, or

(b) to charge no tax at all.

Proviso to Section 39 not applicable in 1949 and 1950—“dormant” in those years.

Discretion must be exercised “judicially.”

No. 4.  
Notes of  
Proceed-  
ings.  
26th August  
1952.

In the  
Income Tax  
Board of  
Review.

No. 4.  
Notes of  
Proceed-  
ings.  
26th August  
1952—  
*continued.*

Maxwell on Interpretation of Statutes, 9th Ed., p. 368. Heading  
“ Implied duty to act judicially.”

Reads portion.

Here Comptroller arbitrarily refuses to exercise his discretion, appeal  
lies to Board—inherent right of appeal to Board.

Refers to Section 39.

(1) Intention of proviso to Section 39 is to give relief in certain cases.

(2) Enacted in 1948 to give relief.

(3) Never been repealed.

(4) Expressly re-enacted by amending Ordinance 1951 which incor- 10  
porated the new rate of tax.

(5) In 1948, proviso was used to give relief in cases where Companies  
had paid dividends out of income which had been taxed at 20 per  
cent. and which tax the Companies had not been able to deduct  
out of the dividends.

(6) An increase in the rate of tax is analogous to the position in 1948  
when the tax was freshly imposed.

Reads material words of proviso to Section 39.

Question is :—What are the Comptroller’s rights and duties ? If the  
last words had been “ as the Comptroller shall in his absolute discretion 20  
determine,” it would give him complete discretion.

Last words of Proviso should be construed as they stand. Comptroller  
must make a determination—He must do a positive act.—He cannot sit  
back and do nothing. Comptroller is under a duty to elect to charge tax  
at a lower rate or to charge no tax.

Weight must be given to word “ may ” in last line but 2 of proviso.

*Julius vs. Bishop of Oxford* (1880) 5 A.C. p. 214.

p. 222 judgment of Lord Cairns.

Construction of words “ It shall be lawful ”—

Reads Lord Blackhum’s judgment—portion thereof—

30

If Comptroller does not exercise discretion, it results in double duty—  
In revenue act, relief must be given to benefit of tax-payer.

Points out SS. 26 and 40.

Refers to Maxwell on Interpretation of Statutes—p. 246  
under commentary “ may : must ”—Reads portion.

p. 372 reads portion thereof.

If rate is increased, relief should be given by charging tax at lower rate  
on dividends paid.

In 1948, relief should be given by charging no tax at all.

There is no discretion in proviso—Even if “ yes,” it must be exercised 40  
judicially.

Elaborates ground 5 (b) of grounds of appeal.

Maxwell at p. 129 “ Construction to prevent abuse of powers ” at  
p. 291 “ Statutes imposing burdens.”

*Carr vs. Fowle* (1893) 1 Q.B. p. 251 at p. 254 double taxation or excessive taxation is anathema to Courts.

Relief was given in 1948—It is common sense that relief should be granted in this case. Precedent created by Comptroller in 1948.

Unfair to taxpayer—Leading to inequities.

On distributed income—Tax at rates to which individual shareholders are liable.

On undistributed income—tax at Company rate.

A shareholder includes dividends received under Section 10(1)(d).  
10 Under Section 26, a shareholder includes gross dividend.

He deducts tax deducted by Company.

Refers to Konstom's Income Tax 10th Ed. p. 259—

p. 261—

provision in Finance Act 1930 S. 12(3) for relief—

proviso to Section 39 gives the equivalent relief here—This proviso was re-enacted in 1951 with full knowledge of the relief given by Comptroller under proviso in 1948—Puts in figures—(Exh. A(3)) by way of illustration.

Elaborates Exh. A3.

Puts in further figures (Exh. A(4)).

20 Transitory provisions at bottom of page 56 of Income Tax Ordinance 1947.

See objects and reasons of amending Ordinance 1951.

Equality of treatment of shareholders between 1.1.51 and 26.2.51.

Comptroller shall not receive more tax than is due to him. Exercise of discretion by Comptroller in 1948 was a proper one—

Relief is never a concession—It is properly or improperly given—It can never be a concession.

Grounds of appeal in B., Ltd., are identical with grounds of appeal here. Decision in B., Ltd., of the Board.

30 MORTON.

(1) "Failure to determine is an illegal act."—Contention of Appellant. "may" has been argued by Appellant to mean "must." That argument cannot stand—Legislature did not use "shall."

Application of proviso is "permissive."

(2) Contention of Appellant—appeal must lie to Board. Board has already decided on this point.

(3) System of taxation—Companies and shareholders. Distributed and undistributed profits—no distinction in Section 39 between distributed and undistributed profits. Transitional provisions were necessary in

40 Federation in 1951—not in Singapore as the Singapore amending Ordinance was passed long before 26.2.51.

(4) Contention of Appellant—Inequitable act. Transitional provisions have no bearing on this appeal. Refers to Exhibit A3—which does not take into account :—

In the  
Income Tax  
Board of  
Review.

—  
No. 4.

Notes of  
Proceed-  
ings.  
26th August  
1952—

*continued.*

In the  
Income Tax  
Board of  
Review.

No. 4.  
Notes of  
Proceed-  
ings.  
26th August  
1952—  
*continued.*

(a) distinction between Company and shareholder—*Neuman vs. Com. of Inland Revenue* 18 T.C. p. 368

(b) fallacy lies in identifying dividends with profits.

Refers to Exhibit A3—intention of Legislature was to tax Companies to the extent of extra 10 per cent. in 1st example in Exh. A3—Exh. A3 does not carry any weight.

(5) Practice of Department in 1948.

It was a concession—not legal—an administrative concession—The Department did not act under proviso to Section 39—There is no provision in Ordinance to enable Department to make the concession. 10

(6) “Appeal of B. Ltd.”

In report of this appeal, the point—about Comptroller exercising his discretion if he is satisfied that dividends were paid out of chargeable income—was not taken.

Board decided wrongly in appeal of B. Ltd.

(7) “Proviso to Section 39 was enacted to give relief in 1947 Re-enacted in 1951.”—Contention of Appellant

Report of R. B. Heasman—Proviso to Cl. 35 of draft Bill—Report of 4th meeting—It was stated that this proviso was intended to give relief to small companies. Ord. 54/50 S. 19. 20

Proviso to S. 19 is proviso to S. 39(2)—except for the addition thereto of reference to trustee.

See objects and reasons to Ordinance 54/50.—Clause (Sect.) 19.

“Where a beneficiary is not liable to tax or is liable at a rate less than 20 per cent., payment of the tax by the trustee and subsequent repayment to the beneficiary is avoided by a provision in Clause 19.”

These words are important.

Proviso to S. 39 of Income Tax Ordinance has remained unchanged except for the addition of “trustees and beneficiaries.” 30

Proviso is not to be exercised to obtain equity or equality—It is a machinery proviso and not a relief proviso. Power of Comptroller is exercised under proviso to Section 39 in certain cases of beneficiaries of trusts—beneficiaries who are not liable to tax. (S. 82—discretion of Comptroller). It saves Comptroller assessing trustees at 20 per cent. and giving refund to beneficiaries—

Power of Comptroller has been exercised under proviso to Section 39 in respect of small companies.

Onus is on Appellant who must prove that the Comptroller has exercised his discretion in an arbitrary manner or not judicially. 40

Woodward in reply.

(a) There is a duty on part of Comptroller to exercise his discretion.

(b) Company pays the tax and shareholder does not have to pay more tax on profits of Company.

(c) See agreed facts. Exhibit A1—admission by Comptroller that in certain cases, proviso to Section 39 was used to give relief to Companies in similar circumstances.

(d) If there is an inequity, is the Board not going to give relief to Company? Refusal to give relief is arbitrary and not judicial.

Committee reserve decision.

The Committee decides that the Comptroller was wrong in determining not to charge any part of the chargeable income of the Appellant for the year of assessment 1951 at 20 per cent. instead of at 30 per cent.

10 The Committee orders that the assessment be adjusted so as to charge at 20 per cent. an amount equal to the amount of the dividends paid in 1950.

In the  
Income Tax  
Board of  
Review.

—  
No. 4.  
Notes of  
Proceed-  
ings.  
26th August  
1952—  
*continued.*

---

No. 5.

**Minutes of the 13th Meeting of Board of Review.**

IN THE COMMITTEE ROOM OF THE FEDERAL LEGISLATIVE COUNCIL CHAMBER  
on Tuesday, 26th August, 1952.

No. 5.  
Minutes of  
the 13th  
Meeting of  
Board of  
Review.  
26th August  
1952.

The Committee of the Board consisted of the following :—

The Honble. Mr. YONG SHOOK LIN, C.B.E., J.P.

„ „ CHE YAHYA BIN SHEIKH AHMAD, J.P.

Mr. A. H. FLOWERDEW, J.P.

20 Mr. R. S. JENNINGS.

and duly met at 9.30 a.m.

Proceedings of the Committee of the Board.

1. Chairman.

Mr. Yong Shook Lin was elected Chairman for the meeting and assumed office.

2. The Committee has already heard and decided on a preliminary point by the Comptroller-General of Income Tax and heard and decided on the first of the two agreed issues, at the 12th meeting of the Board on the 12th August, 1952, when it was agreed not to announce the decisions until  
30 the final conclusion of the case. The decisions at both meetings are accordingly recorded in these minutes.

3. ITBR 151.

Mr. W. A. T. Morton, Acting Comptroller-General of the Income Tax appears for the Comptroller.



1st day of January, 1951, income tax shall be charged at the rate of twenty per centum and not at the rate of thirty per centum.

In the  
Income Tax  
Board of  
Review.

(e) The refusal of the Comptroller of Income Tax to make such re-assessment as aforesaid by virtue of the power in that behalf given to him under the proviso to Section 39 of the Income Tax Ordinance, 1947, is—

—  
No. 5.  
Minutes of  
the 13th  
Meeting of  
Board of  
Review.

10

(a) illegal, since the Comptroller of Income Tax has only a discretion under that proviso to charge tax at a lower rate or not to charge with any tax, and has no discretion to charge tax at the full rate, in the circumstances outlined above, or

26th August  
1952—  
*continued.*

20

(b) if the Comptroller of Income Tax has such discretion to charge tax at the full rate, his refusal to make such re-assessment is improper, unjudicial and inequitable and leads to inequity in the administration of the said Ordinance and to excessive taxation of the same subject-matter.

4.—The Board heard on the 12th August a preliminary point by the Comptroller-General of Income Tax that no appeal under Section 75 of the Income Tax Ordinance, 1947, lies in this case ; that the application of the proviso to Section 39 of the Ordinance is a matter which is entirely within the discretion of the Comptroller and is not subject to appeal to the Board of Review.

5.—The Board having heard the preliminary point according to the rules of the Board decided as follows :—

30

The Appellant is a person aggrieved within the meaning of Section 75(1) of the Ordinance by an assessment made by the Comptroller and can appeal to the Board.

The decision of the Committee having been signed by the Chairman was read over to the Appellant and filed with the records of the petition, it being agreed not to convey this decision in writing until the final conclusion of the hearing.

6.—The Comptroller-General of Income Tax preferred the appeal to go on and, if necessary, to appeal against this decision and other decisions on the appeal in due course, The Committee agreed that the appeal is to proceed and adjourns at 12.50 p.m. to 2.15 p.m.

40

7.—The Committee resumed at 2.15 p.m. on the 12th August in the Treasury Conference Room, Clarke Street, Kuala Lumpur. It was agreed that there were two issues in this case, namely :

In the  
Income Tax  
Board of  
Review.

No. 5.  
Minutes of  
the 13th  
Meeting of  
Board of  
Review.  
26th August  
1952—  
*continued.*

Issue I Whether the dividends paid in 1950 were paid out of the chargeable income for the year of assessment, 1951.

Issue II Whether the Comptroller was wrong in determining not to charge any part of the chargeable income of the Appellant for the year of assessment 1951 at 20 per cent. instead of at 30 per cent.

8.—The Committee heard Issue I according to the Income Tax Board of Review (Procedure in Hearing Appeals) Regulations, 1949, and decided as follows :—

The Committee holds that the dividends paid in 1950 were 10  
paid out of the chargeable income for the year of assessment 1951.

The decision is signed by the Chairman, read over to the parties concerned and filed with the records of the petition, it being agreed not to convey the decision in writing until the final conclusion of the hearing.

9.—The Committee adjourned at 5.45 p.m. until 9.30 a.m. on Tuesday, the 26th August.

10.—At the resumed hearing on the 26th August the Committee heard Issue II according to the Board of Review (Procedure in Hearing Appeals) Regulations 1949 and decided as follows :— 20

The Committee decided that the Comptroller was wrong in determining not to charge any part of the chargeable income of the Appellant for the year of assessment 1951 at 20 per cent. instead of at 30 per cent.

The Committee orders that the assessment be adjusted so as to charge at 20 per cent. an amount equal to the amount of the dividends paid in 1950.

11.—During the hearing the Appellant handed in agreed facts containing 3 sheets marked as Exhibit A1, agreed correspondence containing 14 enclosures marked as Exhibit A2, and 2 statements of examples marked 30  
A3 and A4 and the Respondent puts in letter marked R1.

12.—The Committee requested the Clerk to convey these decisions in writing to the parties in the case and there being no further business the meeting concluded at 1.10 p.m. on the 26th August.

(Sgd.) C. E. HOWE,  
*Clerk,*  
Income Tax Board of Review,  
Federation of Malaya.

Approved,

(Sgd.) YONG SHOOK LIN,  
*Chairman,*  
Committee of the Income Tax  
Board of Review.

40

No. 6.  
Judgment.

In the  
Income Tax  
Board of  
Review.

No. 6.  
Judgment.

The Appellant, at the commencement of the appeal, puts in as evidence, with the consent of the Respondents, the following :—

- (1) a book of agreed facts which is marked Exhibit A.1.
- (2) A book of agreed correspondence which is marked Exhibit A.2.

2.—The Respondent puts in a copy of a letter dated 31st July, 1952, and addressed to the Clerk of the Board, which is marked Exhibit R.1.

3.—The Respondent takes a preliminary point that no appeal under Section 75 of the Income Tax Ordinance 1947 (hereinafter referred to as “ the Ordinance ”) lies in this matter on the ground that the application of the proviso to Section 39 of the Ordinance is a matter which is entirely within the discretion of the Respondent and is not subject to appeal to the Board.

4.—On behalf of the Appellant, it is contended that the Respondent is debarred from taking the preliminary point in view of Exhibit A.2. The Committee decides to hear the Respondent on the preliminary point which is one of law, on the following grounds, namely :—

- (a) if the Respondent, under Regulation 9 of the Board of Review (Procedure in hearing appeals) Regulations, 1949, raises this point of law in reply to the Appellant after the statement of the Appellant and his evidence, the Committee cannot prevent the Respondent from so doing.
- (b) the determination of this point of law as a preliminary point by the Committee, if it is decided in favour of the Respondent, will dispose of this appeal.

5.—In support of the preliminary point of law, the Respondent contends that—

- (a) Section 39 of the Ordinance confers a discretion on the Respondent and there is no provision in that section for an appeal to the Board.
- (b) the Board has power under paragraph 75 to hear an appeal by any person who, being aggrieved by an assessment made upon him, fails to agree with the Comptroller in the manner provided by Section 72 (4) of the Ordinance and the power of a Committee of the Board is limited to the power of the Board in that respect.

In the  
Income Tax  
Board of  
Review.

—  
No. 6.  
Judgment  
—continued.

6.—The Respondent, in support of his first contention, cites—

- (i) Section 30 of the Ordinance which provides for an appeal to the Board against the decision of the Comptroller in the exercise of his direction under Section 27, 28 or 29 of the Ordinance and
- (ii) Section 53 of the Ordinance which provides for an appeal to the Board against any declaration by the Comptroller under Section 53 of the Ordinance,

and contends that Section 39 of the Ordinance confers on the Comptroller a discretion, the exercise of which cannot be the subject of an appeal to the Board. 10

7.—Section 27 of the Ordinance provides that where it appears to the Comptroller that, with a view to the avoidance or reduction of tax, a company has not distributed to its shareholders as dividend, profits made in any period ending after the commencement of the basis period for the first year of assessment under the Ordinance, which could be distributed without detriment to the company's business, he (the Comptroller) may treat any such undistributed profits as distributed and the persons concerned shall be assessable accordingly. The decision of the Comptroller, which can be made under this section in exercise of his discretion, is the treating 20 of any undistributed profits of a company as distributed and can be appealed against under Part XII of the Ordinance by reason of Section 30 of the Ordinance. The persons affected or concerned by such decision, who shall be assessable accordingly under Section 27 of the Ordinance, can appeal against their assessment under Part XII of the Ordinance.

8.—Section 28 of the Ordinance provides that the value of any trading stock of any trade or business which has been discontinued or transferred shall be valued in accordance with sub-section (1) of Section 28 and any question arising under the said sub-section (1) regarding value attributable to any trading stock shall be determined by the Comptroller. The decision of 30 the Comptroller under Section 28, in exercise of his discretion regarding value attributable to any trading stock, can be appealed against under Part XII of the Ordinance by reason of Section 30 of the Ordinance.

9.—Section 29 of the Ordinance provides that where the Comptroller is of the opinion that any transaction which reduces or would reduce the amount of tax payable by any person is artificial or fictitious or that any disposition is not in fact given effect to, he (the Comptroller) may disregard any such transaction or disposition and the persons concerned shall be assessable accordingly. The decision of the Comptroller, in exercise of his discretion under this section, is that any transaction is artificial or fictitious 40 or that any transaction is not in fact given effect to and that he disregards the transaction or disposition. Such decision can be appealed against under Part XII of the Ordinance by reason of Section 30 of the Ordinance.

10.—Section 53 of the Ordinance provides that the Comptroller may, by notice in writing, if he thinks it necessary, declare any person to be the agent of any other person and the person so declared to be the agent shall be the agent for the purpose of the Ordinance. The person aggrieved by such declaration of the Comptroller, in exercise of his discretion, can appeal against such declaration under Part XII of the Ordinance.

In the  
Income Tax  
Board of  
Review.  
—  
No. 6.  
Judgment  
—continued.

11.—Section 39 of the Ordinance provides—

- 10 (a) in paragraph (a) thereof, that every company shall pay tax at the rate of 30 per cent. of the chargeable income of such company and
- (b) in the proviso thereof, that where any company proves to the satisfaction of the Comptroller that any dividends have been paid out of such chargeable income, an amount equal to such dividends—may be charged at a lower rate or not charged with any tax as the Comptroller shall determine.

12.—In the opinion of the Committee, the proviso to Section 39 of the Ordinance does not confer on the Respondent any discretion. As soon as any company has proved to his satisfaction that dividends have been paid out of the chargeable income of such company, the Respondent shall determine the rate at which the amount equal to such dividends so paid out of the chargeable income may be charged. Such amount may be charged at—

- (a) a lower rate  
or  
(b) no rate.

30 The words “ as the Comptroller shall determine ” at the end of the proviso make it the duty on the part of the Comptroller, on whom the power of determination is conferred, to exercise the power of determination. If there is a duty on the part of the Comptroller to determine, the exercise of that power of determination is not discretionary. (See Maxwell on Interpretation of Statutes, 9th Edition, p. 249.)

13.—The book of agreed facts (Exhibit A.1) shows that :—

- (a) an assessment was made by the Respondent of the chargeable income of the Appellant for the year of assessment 1951 at \$1,323,155 for tax amounting to \$396,840.75.
- (b) the Appellant objected to the assessment of the Respondent.
- (c) the refusal on the part of the Respondent to amend the assessment.

40 The book of agreed Correspondence (Exhibit A.2) shows, on page 1 thereof, inter alia, the following :—

“ With reference to your objection to the assessment made  
“ upon you in respect of your income from trading for the year

In the  
Income Tax  
Board of  
Review.

No. 6.  
Judgment  
—continued.

“ of assessment 1951, I hereby give notice that I am not prepared  
“ to amend the assessment. If you are aggrieved by this decision  
“ you are entitled to appeal to the Board of Review on giving  
“ notice in writing in duplicate within 7 days of the date of service  
“ of this notice to the Clerk to the Board of Review (Income Tax)  
“ The Treasury, Kuala Lumpur.  
“ . . . . ”

14.—The Respondent contends that the letter on page 1 of Exhibit A.2 is a printed form and was issued in error by a clerk and asks the Committee not to take the letter into consideration as the Government is not bound 10 by a mistake of its servants. It is to be noted that this letter was sent in the name of the Respondent.

15.—Section 75 (1) of the Ordinance provides that any person who, being aggrieved by an assessment made upon him, has failed to agree with the Comptroller in the manner provided in subsection (4) of Section 72 of the Ordinance, may appeal to the Board.

What is the meaning of the words “ any person aggrieved ” ? “ a person aggrieved ” is, in the words of James, L.J. in *Ex parte Sidebotham* (1880) 14 Ch.D. at p. 465, a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully refused him 20 something or wrongfully affected his title to something. The definition of James, L.J. was cited and explained in *Re Read Bowen & Co. Ex parte Official Receiver* (1887) 19 Q.B.D. 174, at p. 177.

(See *R. vs. Surrey (Mid Eastern Area) Assessment Committee* (1948) All E.R., p. 856.

*R. vs. Surrey Quarter Sessions Appeal Committee* (1951) All E.R., p. 659.)

16.—The Committee does not accept the contention of the Respondent and holds that the Appellant is a person aggrieved within the meaning of Section 75 of the Ordinance by an assessment made upon the Appellant by the Respondent and that the Appellant can appeal under Section 75 30 of the Ordinance.

17.—With the consent of the Appellant and the Respondent, the following issues were framed :—

Issue 1. Whether the dividends paid in 1950 were paid out of the chargeable income for the year of assessment 1951 ?

Issue 2. Whether the Comptroller was wrong in determining not to charge any part of the chargeable income of the Appellant for the year of assessment 1951 at 20 per cent. instead of at 30 per cent.

Issue 1.

40

18.—The Appellant contends that :—

(i) The book of agreed Facts (Exhibit A.1) shows that dividends of \$533,333/- were paid by the Appellant out of the profits

for the year ended 30th June 1950, which is the basis year for the year of assessment 1951.

- (ii) the words "such chargeable income" refer to the chargeable income in respect of which the Appellant pays tax and the chargeable income of the Appellant for the year of assessment 1951 is the income of the Appellant (after deductions) for the accounting period ended 30th June 1950, which period is the basis period for the year of assessment 1951.

In the  
Income Tax  
Board of  
Review.

No. 6.  
Judgment  
—continued.

19.—The Respondent admits that the Respondent accepted the income of the accounting period for the year ended 30th June 1949 for the year of assessment 1950 and that, for the year of assessment 1951, the accounting period for the year ended 30th June 1950 is the basis period.

20.—The Respondent contends that—

- (a) the words "the chargeable income" in line 3 of Section 39 of the Ordinance and the words "the chargeable income" in lines 2 and 3 of paragraph (a) of Section 39 of the Ordinance have the same meaning as the words "the chargeable income" in line 1 of Section 34 of the Ordinance but the words "chargeable income" in lines 3 and 4 of the proviso to Section 39 of the Ordinance cannot have the same meaning as the words "the chargeable income" in Section 34 of the Ordinance.
- (b) the dividends referred to in the proviso to Section 39 of the Ordinance must be dividends paid out of profits.

21.—The Committee does not accept the contention of the Respondent that the words "chargeable income" in lines 3 and 4 of the proviso to Section 39 of the Ordinance have a meaning different from that of the words "the chargeable income" in Section 34 of the Ordinance. It is to be noted that the word "such," which precedes the words "chargeable income" in lines 3 and 4 of the proviso to Section 39 of the Ordinance, must relate "chargeable income" to "the chargeable income" in line 3 of Section 39 of the Ordinance.

The Committee holds that the words "chargeable income" used in each of Section 39, Section 39 paragraph (a) and the proviso to that section have the same meaning as the words "chargeable income" in Section 34 of the Ordinance and that "the chargeable income" for the purpose of Section 39 and the proviso thereto of the Ordinance is the chargeable income for the year preceding any year of assessment and that the chargeable income of the Appellant for the year of assessment 1951 is the chargeable income for the accounting year ended 30th June 1950.

22.—The combined effect of Sections 31 (1), 33, 34 and 39 of the Ordinance is that generally the chargeable income of any person including a company for any year of assessment is—the statutory income for the year

In the  
Income Tax  
Board of  
Review.

No. 6.  
Judgment  
—continued.

preceding the year of assessment (Section 31 (1)) after the deductions allowed under Sections 33 and 34 of the Ordinance. In short, statutory income after deductions allowed in Section 33 becomes assessable income. Assessable income after deductions allowed in Section 34 becomes chargeable income for the purpose of Sections 38 and 39 of the Ordinance.

23.—In the book of agreed Facts (Exhibit A.1), it is agreed that the sum of \$533,333/- was declared as dividends on November 18th 1950 in respect of the year ended 30th June 1950.

24.—The Committee holds in respect of Issue 1, that the dividends paid in 1950 were paid out of the chargeable income for the year of 10 assessment 1951.

Issue 2.

25.—In view of the opinion of the Committee as set out in paragraph 12 hereof, the Committee holds in respect of Issue 2, that the Comptroller was wrong in determining not to charge any part of the chargeable income of the Appellant for the year of assessment 1951 at 20 per cent. instead of at 30 per cent.

26.—The Committee accordingly orders that the assessment be adjusted so as to charge at 20 per cent. an amount equal to the amount of the dividends paid in 1950. 20

(Sgd.) YONG SHOOK LIN.  
(Sgd.) YAHYA BIN SHEIKH AHMAD.  
(Sgd.) A. H. FLOWERDEW.  
(Sgd.) R. S. JENNINGS.

In the High  
Court,  
Kuala  
Lumpur.

No. 7.  
Notice of  
Appeal.  
30th August  
1952.

No. 7.

Notice of Appeal.

FEDERATION OF MALAYA.

IN THE HIGH COURT AT KUALA LUMPUR.

In the Board of Review of Income Tax at Kuala Lumpur  
held on the 12th and 26th August, 1952. 30

Between

THE COMPTROLLER OF INCOME TAX, FEDERATION OF MALAYA *Appellant*  
and  
HARRISONS AND CROSFIELD (MALAYA) LTD. ... .. *Respondent*.

TAKE NOTICE that the Comptroller of Income Tax, Federation of Malaya, being dissatisfied with the decision of the Board of Review of Income Tax at Kuala Lumpur given on the 26th August, 1952, appeals to the High Court against the whole of the said decision.

Dated this 30th day of August, 1952.

(Sgd.) T. V. A. BRODIE,  
*Solicitor-General*,  
for Comptroller of Income Tax,  
Federation of Malaya.

In the High Court,  
Kuala Lumpur.  
No. 7.  
Notice of Appeal.  
30th August 1952—  
*continued.*

10 To The Chairman, Board of Review of Income Tax, c/o Messrs. Shook Lin & Bok, Kuala Lumpur.

Harrisons & Crosfield, Ltd., c/o  
Bannon & Bailey, Laidlaw  
Building, Kuala Lumpur.

Copy to

THE SENIOR ASSISTANT REGISTRAR,  
Supreme Court,  
Kuala Lumpur.

---

No. 8.

Memorandum of Appeal.

No. 8.  
Memorandum of Appeal.  
3rd October 1952.

30

The Comptroller of Income Tax, the Appellant above-named, appeals under Section 77 of the Income Tax Ordinance, 1947, to the High Court against the whole of the decision of the Income Tax Board of Review at Kuala Lumpur given on the 26th August, 1952, on the following grounds :—

1.—That the Income Tax Board of Review was wrong in law in holding that in any case in which a company proved to the satisfaction of the Appellant that any dividends had been paid out of chargeable income the Appellant was by virtue of the proviso to Section 39 of the Income Tax Ordinance, 1947, under a duty either to charge a rate lower than 30 per cent. or to charge no rate at all and that he had no discretion in such a case to leave the rate unaltered.

20

In the High  
Court,  
Kuala  
Lumpur.

No. 8.  
Memoran-  
dum of  
Appeal.  
3rd October  
1952—  
*continued.*

2.—That the Income Tax Board of Review was wrong in law in holding that, if the Appellant was under any such duty, it was within the jurisdiction of the Income Tax Board of Review to perform such duty and the said Board was wrong in law and acting without jurisdiction in purporting to perform such duty and in purporting to determine a lower rate of charge.

3.—That the Appellant has under Section 39 aforesaid full discretion to determine whether the rate of charge should be reduced or left unaltered and that no appeal lies to the Income Tax Board of Review in respect of the exercise of such discretion.

4.—That the Income Tax Board of Review was wrong in law and in fact in holding that the Respondent Company had paid any dividends out of chargeable income for the year of assessment, 1951, within the meaning of the proviso to Section 39 aforesaid. 10

5.—That the Income Tax Board of Review was wrong in law in holding that dividends paid by the Respondent Company out of profits earned and received by the Company during the year 1950 were paid out of the chargeable income of the Company for the year of assessment 1951.

6.—That the Income Tax Board of Review was wrong in law in holding that the chargeable income of the Respondent Company for the year of assessment 1951 is the income for the accounting year ended 30th June, 1950. 20

7.—That the Income Tax Board of Review should have held that the chargeable income of the Respondent Company for the year of assessment 1951 was its gains and profits for the year 1951 and that while such gains and profits are, under the provisions of Sections 31, 33 and 34 of the Income Tax Ordinance, in general, but subject to certain qualifications, computed by reference to the gains and profits of preceding years, they are not identical therewith.

8.—That under the proviso to Section 39 aforesaid it is a condition precedent to the making of any order reducing the rate of charge for any year of assessment that the Appellant should have been satisfied that the Respondent Company had proved that dividends had been paid out of the chargeable income of that year of assessment and that the Appellant is under such proviso the sole judge thereof both as to facts and law, subject only to the control of the Courts. The Income Tax Board of Review was wrong in law in making its order when such condition precedent was not complied with. 30

The Appellant therefore Prays that the order of the Income Tax Board of Review be set aside and the assessment made by the Appellant be

restored and that such further or other order may be made as the nature of the case may require.

Dated this 3rd day of October, 1952.

(Sgd.) A. W. HODGES,

*Appellant.*

To : The Asst. Registrar, Supreme Court, Kuala Lumpur; and to The Clerk, Income Tax Board of Review, Federation of Malaya, Kuala Lumpur.

Messrs. BANNON & BAILEY,  
*Solicitors for the Respondent,*  
Kuala Lumpur.

In the High Court, Kuala Lumpur.

No. 8. Memorandum of Appeal. 3rd October 1952—*continued.*

---

No. 9.  
Judge's Notes of Hearing.

Friday, 21st November, 1952.

No. 9. Judge's Notes of Hearing. 21st November 1952.

Cor. WILSON, J.

BRODIE (Sol. Gen.) for Appellant.  
WOODWARD for Respondents.

20 S.G. :—

Sec. 39 Income Tax Ordinance.

Facts are agreed and are in Appeal Record (p. 49).

Facts read.

Further point taken on appeal that proper construction of proviso to Sec. 39 Comptroller had complete discretion.

That is first point at issue.

Second point whether dividend paid in 1950 can be regarded as paid out of chargeable income for 1951.

Para. 12 of Grounds of Judgment.

30 "no discretion."

This is erroneous view.

Page 23, para. 21, etc.

I contend statutory income for any year of assessment is the income of that year.

Four questions

In the High  
Court,  
Kuala  
Lumpur.

No. 9.  
Judge's  
Notes of  
Hearing.  
21st  
November  
1952—  
*continued.*

Three on question of discretion under Section 39.

Is there discretion ?

Is Comptroller bound to exercise discretion when rate of tax changed ?

Assuming there is discretion has Board any power to disagree with

Comptroller's exercise of discretion.

Is it correct that dividends paid in 1950 are paid out of chargeable income for 1951 ?

If no discretion on proof of payment of dividend in any one year Comptroller is bound regardless of any other circumstances reduce rate of tax or remit altogether.

Nothing in proviso to show why he should reduce the rate or to what he should reduce it.

If there is no discretion matter is reduced to an absurdity.

Is he bound to exercise his discretion where rate of tax has been changed ?

Gold Coast Ordinance 1943 Sec. 26 same proviso.

Ordinance 54/50 enacted to bring in trustees as well as companies.

Amended in 1951 to provide for increased tax on companies.

No intention to give trustees relief when rate of tax changed, as rate of tax not changed.

Objects and Reasons—1950 Ord. p. 12.

Sec. 4(1) of Amendment Ordinance, 1951.

Can discretion be exercised by Board ?

Section 30 Income Tax Ordinance.

Fourth question.

Section 31(1) Ordinance.

Statutory income is full amount of income, etc.

Section 10 Ord.

Section 31(2) Ord.

Chargeable income means income of year of assessment.

Section 31(2) Ord.

Section 40 second proviso.

In 1948 when dividends paid over tax was deducted as it was known income tax was coming in.

By reason of second proviso above company did not come within proviso to Sec. 39 in any event.

Dividend paid in 1950 cannot come within proviso to Sec. 39.

Woodward :—

Comptroller is relying on his own interpretation of Income Tax Ordinance.

Appellant contends Comptroller under proviso to Sec. 39 is law unto himself.

S.G. says chargeable income in proviso means income in year of assessment. Not so.

See definition in Sec. 34.

In proviso the words "to charge tax at full rate" do not appear.

10

20

30

40

- Comptroller's powers arise when asked to exercise them. Then is duty to do so. "shall determine."
- Only discretion is to do one of two things.  
*Julius v. Bishop of Oxford*—(1879) 5 A.C. 214 at p. 243.  
 Maxwell p. 129 9th Ed. p. 246, p. 372.
- Company was placed in inequitable position as dividends paid in 1950 and then rate of tax increased.  
 Same when tax imposed first time in 1948.  
 Objects and Reasons of Ordinance, 1951.  
 Page record shows how inequity arises.
- 10 In 1950 Inland Revenue receives 10 per cent. more than in 1951 and in each case 10 per cent. too much.  
 Legislature intended undistributed company income should be taxed at company rates and that distributed income should be taxed at rate of individual shareholder.  
 Proviso to Section 39.  
 Para. 11(A) of Agreed facts.  
 Page 53. Agreed correspondence.  
 Comptroller is under duty to use his powers.
- 20 Necessity for proviso was dormant during 1949 and 1950 as there was no increase of tax. That is what I argued before Board whatever is recorded.
- Second ground of appeal.  
 Appeal was against assessment. Sec. 75(1) Ord. Sec. 76(10).
- Third ground of appeal.  
 Dealt with mostly under Ground 1.  
 Section 30 "nothing shall prevent."  
 There are other sections—53, 63, 71.  
 Section 74—Appeals.  
 Board to hear all appeals from Comptroller.
- 30 Section 87 for right of appeal before assessment. No tax payable except under Section 87 till notice of assessment served.  
 Konstam p. 378 (10th edition).  
 "Aggrieved." *Ex parte Sidebotham*—1880 14 Ch. Div. 465.  
*Barratt v. Gravesend Assessment Committee*, 1941, 2 K.B. 107.  
 Agreed correspondence letter 1, p. 51.
- Grounds of Appeal 4, 5, 6, 7.  
 See agreed facts.  
 You do not pay dividends out of fictitious income.  
 S.G. :—That is my point.
- 40 Chargeable income is income on which Company pays tax.  
 Sec. 34 definition of chargeable income.
- Woodward :—  
 Objects and Reasons of 1950 Bill, p. 2024 proviso Sec. 40(1).  
 See Sec. 31(1) proviso shows reason for proviso Sec. 40(1).

In the High Court,  
 Kuala Lumpur.  
 No. 9.  
 Judge's Notes of Hearing.  
 21st November 1952—  
*continued.*

(Sgd.) H. W. WILSON.

In the High  
Court,  
Kuala  
Lumpur.

No. 10.  
Judge's Notes of Hearing.

Friday, 28th November, 1952.

No. 10.  
Judge's  
Notes of  
Hearing.  
28th  
November  
1952.

Civ. Appeal 17/52 (contd.)  
BRODIE (S.G.) for Appellant.  
WOODWARD for Respondents.

Woodward :— .

Section 34 Income Tax Ordinance.

Section 40 provisos.

Chargeable income (Sec. 39) means income of company for previous 10 year.

Page 52 of record (letter) supports my contention.

If dividends paid in 1947 paid out of chargeable income for 1948.

Proviso (ii) to Sec. 40 is in two parts—part relied on by S.G. does not mean what he thinks it means.

Under proviso (i) company entitled to deduction of 1948 tax from 1947 income.

Objects and Reasons 1950 Ord. p. 2024 1950 Cl. 20.

Shareholder pays tax when company not liable to pay tax at all.

Section 42.

*Newmann v. Inland Revenue*—1934 A.C. p. 215.

20

Ground of Appeal 8.

Board can hear appeals on fact and law.

Sec. 77 (2).

Sec. 89.

Board has discretion.

No case cited of appeal in England to High Court where tribunal has discretion.

Is company entitled to relief as shareholder is not ?

If relief not granted is Board correct tribunal to deal with matter ? 30

S.G. :—

Fundamental question is whether Comptroller is under duty to exercise powers. If he has discretion no appeal to Board.

Highest at which Woodward can put his case is that his construction is possible.

Comptroller has complete discretion. Only person who can decide what is proper case is Comptroller. *Julius v. Bishop of Oxford*, L.R.5 A.C. 214.

Perfectly plain that where there is a legal right vested in particular person and there is a power vested a public officer by legislature to give effect to that legal right and where legal right will be defeated if such power is not exercised in that case only is it obligatory on the official to exercise it. 40

There was no inequity in refusing application of Respondents.  
 What is meant by chargeable income? If Comptroller has discretion  
 this question does not arise.

Does Sec. 31 provide that statutory income is income of preceding  
 year?

Section 31 provides no such thing.

If one ceases business at end of 1950 income tax not payable in 1951.

C.A.V.

(Sgd.) H. W. WILSON,

28.11.52.

In the High  
 Court,  
 Kuala  
 Lumpur.

No. 10.  
 Judge's  
 Notes of  
 Hearing.  
 28th  
 November  
 1952—  
*continued.*

10

### No. 11.

### Judgment.

The Respondent Company applied to the Comptroller of Income Tax  
 under Section 39 of the Income Tax Ordinance for an amendment to the  
 1951 assessment on the grounds that the dividends paid by the Company  
 in 1950 were paid out of the Company's chargeable income for 1951. The  
 Comptroller refused this request because, he stated, he was not satisfied  
 that the dividends paid by the Company in 1950 were paid out of the  
 Company's chargeable income for 1951. The Respondent Company  
 thereupon appealed to the Income Tax Board of Review.

The facts and correspondence were agreed and are attached to the  
 grounds of judgment of the Committee of the Board. A preliminary point  
 was taken by the Comptroller of Income Tax that Section 39 of the  
 Ordinance confers a discretion on the Comptroller and that there is no  
 provision in that section for an appeal to the Board. The same preliminary  
 point was taken before this Court.

The material words of Section 39 are as follows :—

“ There shall be levied and paid for each year of assessment  
 “ upon the chargeable income of every company, tax at the rate  
 “ of thirty per centum on every dollar of the chargeable income  
 “ tax thereof.

“ Provided that where any company proves to the satisfaction  
 “ of the Comptroller that any dividends have been paid out of  
 “ such chargeable income . . . an amount equal to such dividends  
 “ . . . may be charged at a lower rate or not charged with any  
 “ tax as the Comptroller shall determine.”

The Respondents maintain that the words “ may be charged ” must be  
 construed to mean “ shall be charged.” The Appellant, however, contends

30

No. 11.  
 Judgment.  
 11th  
 February  
 1953.

In the High  
Court,  
Kuala  
Lumpur.

No. 11.  
Judgment.  
11th  
February  
1953—  
*continued.*

that if the Legislature intended the words “ may be charged ” to be construed as “ shall be charged,” they would have used the words “ shall be charged,” and maintains that the Comptroller has an absolute discretion to refuse to charge at a lower rate and to refuse not to charge with any tax at all. In other words, he has a discretion to charge at the full rate of thirty per cent. Clearly, the Comptroller has some discretion as he may at any rate charge at a lower rate or not charge with any tax as he shall determine. There is nothing in the proviso to Section 39 to guide the Comptroller as to how to fix the lower rate if he decides to charge at a lower rate. It would, therefore, appear that if it was intended that the Comptroller must charge either at a lower rate or not charge with any tax the Comptroller could evade the intention of the Legislature by charging at the rate of 29½ per cent. instead of thirty cent. and from such a charge there would appear to be no appeal. He clearly has some discretion under the proviso to Section 39 and Section 39 is not referred to in Section 30 which gives a right of appeal in respect of the exercise of a discretion in certain cases. 10

The question as to whether the donee of a power may either exercise it or leave it unused was fully discussed in the case of *Frederic Guilder Julius* and *The Right Rev. The Lord Bishop of Oxford : The Rev. Thomas Thellusson Carter*, reported in Vol. 5, A.C. at p. 214. In that case the words discussed were “ it shall be lawful ” and it was held that the use of these words gave the Bishop complete discretion to issue or decline to issue a commission. The principle involved in construing enabling words are set down shortly in one sentence by Lord Blackburn at page 244 as follows :— 20

“ The enabling words are construed as compulsory whenever  
“ the object of the power is to effectuate a legal right.”

The question, therefore, arises as to whether the proviso to Section 39 confers a legal right upon the Respondents. I have come to the conclusion that the Legislature must have intended to confer a legal right and that if the Comptroller were to arbitrarily fix a lower rate there would be a right of appeal under Section 75 of the Ordinance to the Board of Review. 30

It now becomes necessary to consider whether the dividends paid in 1950 were paid out of the chargeable income for 1951. In order to do this, it is necessary, in the first place, to consider what is the meaning of the words “ chargeable income.” I agree with the view of the Committee of the Board that these words which appear in Section 39 paragraph (a) and the proviso to that section have the same meaning as the same words which appear in Section 34 of the Ordinance. That section reads as follows :—

“ The chargeable income of any person for any year of  
“ assessment shall be the remainder of his assessable income for  
“ that year after the deductions allowed in this Part of this  
“ Ordinance have been made.” 40

It now becomes necessary to consider the meaning of the words “ assessable income.” Section 33 (1) of the Ordinance reads as follows :—

“The assessable income of any person from all sources chargeable with tax under this Ordinance for any year of assessment shall be the remainder of his statutory income for that year after the deductions allowed in this Part of this Ordinance have been made.”

In the High Court, Kuala Lumpur.

No. 11. Judgment. 11th February 1953—

*continued.*

In Section 31 (1) “statutory income” is defined as “the full amount of income for the year preceding the year of assessment.”

In view of these definitions I am of opinion that the Committee of the Board were right in finding that assessable income after the deductions allowed in Section 34 becomes chargeable income for the purposes of Section 39 of the Ordinance and that the chargeable income of the Respondents for the year of assessment 1951 was the statutory income of the trading year 1950.

In these circumstances, I agree with the Committee that the dividends paid in 1950 were paid out of the chargeable income for the year of assessment 1951.

The Respondents being aggrieved and having appealed to the Board, I am of opinion that the Committee were entitled to order that the assessment be adjusted so as to charge at twenty per cent. per annum, an amount equal to the amount of the dividends paid in 1950.

The appeal to this Court must be dismissed with costs.

(Sgd.) H. W. WILSON,  
*Judge,*  
Supreme Court, Federation of Malaya.

No. 12.  
Order.

No. 12.  
Order.  
11th  
February  
1953.

IN THE SUPREME COURT OF THE FEDERATION OF MALAYA.  
IN THE HIGH COURT AT KUALA LUMPUR.

Civil Appeal No. 17 of 1952.

30 COMPROLLER OF INCOME TAX ... .. *Appellant*  
*versus*  
HARRISONS & CROSFIELD (MALAYA) LIMITED ... .. *Respondents.*

Before the Honourable Mr. Justice WILSON, Judge, Federation of Malaya.

This 11th day of February, 1953.

In the High Court, Kuala Lumpur.

No. 12.  
Order.  
11th February 1953—  
*continued.*

THIS APPEAL coming on for hearing on the 21st and 28th days of November, 1952, before this Court and UPON READING the Record and the Memorandum of Appeal filed herein AND UPON HEARING Mr. T. V. A. Brodie, Q.C., of Counsel for the Appellant and Mr. F. J. Woodward of Counsel for the Respondent THIS COURT DID ORDER that this Appeal should stand for judgment and the same standing for judgment this day IT IS ORDERED that the Appeal be dismissed and that the decision of the Income Tax Board of Review given on the 26th August, 1952, be affirmed AND IT IS FURTHER ORDERED this Appellant do pay to the Respondent the costs of this Appeal as taxed by the proper officer of the Court.

10

Given under my hand and the seal of the Court this 11th day of February, 1953.

(Sgd.) J. W. D. AMBROSE,  
*Senior Assistant Registrar,*  
Supreme Court,  
Kuala Lumpur.

In the Court of Appeal at Kuala Lumpur.

No. 13.  
Notice of Appeal.  
23rd February 1953.

No. 13.  
Notice of Appeal.

IN THE SUPREME COURT OF THE FEDERATION OF MALAYA.  
IN THE COURT OF APPEAL AT KUALA LUMPUR.

20

F.M. Civil Appeal No. 9 of 1953.

Between

COMPROLLER OF INCOME TAX ... .. *Appellant*  
and

HARRISONS AND CROSFIELD (MALAYA) LTD. ... .. *Respondents.*

(In the matter of Income Tax Appeal No. 17 of 1952).

Between

THE COMPROLLER OF INCOME TAX ... .. *Appellant*  
and

HARRISONS AND CROSFIELD (MALAYA) LTD. ... .. *Respondents.* 30

(In the matter of the Income Tax Ordinance, 1947, and in the matter of the decision of the Income Tax Board of Review given under Part XII of the Income Tax Ordinance, 1947, on the 26th August, 1952).

TAKE NOTICE that the Comptroller of Income Tax being dissatisfied with the decision of the Honourable Mr. Justice Wilson given at Kuala Lumpur on the 11th day of February, 1953, appeals to the Court of Appeal against the whole of the said decision.

Dated this 23rd day of February, 1953.

(Sgd.) A. D. FARRELL,  
*Ag. Solicitor-General,*  
*For the Appellant.*

10 To The Assistant Registrar, Supreme Court,  
Kuala Lumpur ; and to Messrs. Bannon  
& Bailey, Solicitors for Harrisons and  
Crossfield (Malaya) Ltd., Kuala Lumpur.

The address for service of the Appellant is :  
c/o Attorney-General's Chambers,  
Kuala Lumpur.

In the  
Court of  
Appeal at  
Kuala  
Lumpur.

No. 13.  
Notice of  
Appeal.  
23rd  
February  
1953—  
*continued.*

---

No. 14.

Memorandum of Appeal.

20 The Comptroller of Income Tax, the Appellant above-named, appeals to the Court of Appeal, against the whole of the decision of the Honourable Mr. Justice Wilson given at Kuala Lumpur on the 11th day of February, 1953, on the following grounds :—

1.—The learned Judge was wrong in law in holding that the proviso to Section 39 of the Income Tax Ordinance, 1947, conferred a legal right upon the Respondents and imposed a duty on the Comptroller to reduce the rate of tax payable by the Company.

2.—The learned Judge was wrong in law in not holding that under the proviso to Section 39 aforesaid the Comptroller had an unfettered discretion whether to reduce or remit the rate of tax or to leave the rate of tax unaltered.

30 3.—That the learned Judge was wrong in fact in holding that if the Comptroller was under any duty at all there were any circumstances affecting the Respondents which entitled them to the exercise of the discretion of the Comptroller in their favour.

4.—The learned Judge was wrong in law and in fact in holding that profits received by the Respondents for the financial year ending June, 1950, formed part of the chargeable income of the Company for the year of assessment, 1951.

No. 14.  
Memoran-  
dum of  
Appeal.  
11th March  
1953.

In the  
Court of  
Appeal at  
Kuala  
Lumpur.

5.—The learned Judge was wrong in law in holding that the Respondents were persons aggrieved by reason of the decision of the Comptroller not to exercise his discretion in their favour and that they were entitled to appeal to the Income Tax Board of Review.

No. 14.  
Memorandum of  
Appeal.  
11th March  
1953—  
*continued.*

6.—The learned Judge was wrong in law in holding that the Board of Review was entitled to exercise on appeal the discretion vested in the Comptroller under the proviso to Section 39 of the Ordinance.

Dated this 11th day of March, 1953.

(Sgd.) T. V. A. BRODIE,  
*Ag. Attorney General,  
Solicitor for the Appellant.*

10

To The Assistant Registrar, Court of Appeal,  
Supreme Court, Kuala Lumpur ; and to  
Messrs. Bannon and Bailey, Solicitors  
for Harrison and Crosfield (Malaya)  
Ltd., Kuala Lumpur.

The address for the service of the Appellant is :—  
c/o Attorney-General's Chambers,  
Kuala Lumpur.

No. 15.  
Notes of  
Arguments.

No. 15.  
Notes of Arguments.

20

(a) Chief  
Justice,  
Federation  
of Malaya.  
8th June  
1953.

(a) CHIEF JUSTICE, Federation of Malaya.

8th June, 1953.

GOOD for Appellant—WOODWARD for Respondents.

GOOD :—Facts agreed p. 49. Basic issues.

The Company applied to the Comptroller of Income Tax to reduce the rate of tax under proviso to s. 39 as amended by the 1951 Ord. " may be charged . . . shall determine " vital words.

On appeal judgment p. 31.

Memorandum of Appeal 1 & 2.

1, 2, 5 & 6 interdependent. All come under umbrella. Judgment p. 31.

There is nothing in the Income Tax Ord. which suggests a legal right to have discretion exercised in his favour.

*Frederick Julius v. Bishop of Oxford*, 5 A.C. 214.

Permission sometimes implies power compared with a duty p. 244.

30

I have a legal right because somebody can exercise a discretion in my favour—p. 235.

Page 244—examples of personal liberties and private rights—legal right must be there before an authority with discretion is under a legal obligation to exercise it.

Based on the finding of a legal right.

Lord Selborne says cannot do.

Am aware of defects of legislation. Never charge 30 per cent. at the full rate. No dividends paid. No legal right to have discretion exercised.

10 There is no right of appeal. Section 30.

Section 53(3)—appeal and discretion.

No express right of appeal against prosecution under s. 39. Section 75(1).

WOODWARD :—Section 76(10). Increases in tax. Risky to retain profits undistributed. Company rates or individual rates. Company rate 20 per cent. up till 1951 1st January.

Effect of Comptroller's decision that he gets paid twice. *Carr v. Fowle*, (1893) 1 Q.B. 254.

Court can charge no tax at all.

Grounds 5 & 6. Approval and tax assessment.

20 Discretion to Comptroller re assessment—s. 68.

GOOD :—Cannot be said that proviso to section 39 has anything to do with tax increase.

Right of appeal.

ORDER :—Appeal dismissed with costs. Reasons in writing. Deposit if any to Respondents.

(Sgd.) CHARLES MATHEW.

(b) CHIEF JUSTICE, Singapore.

8.6.53.

30 GOOD, S.G.

WOODWARD.

GOOD :—Facts—  
sec. 39.

trading year ending 30.6.50.

6/51—new section—proviso.

Comptroller declined to reduce rate of tax—Judgment p. 31.

duty of Comptroller to exercise discretion.

pp. 31–32.

Grounds of appeal 1, 2, 5, 6.

40 don't propose to argue 3–4.

In the  
Court of  
Appeal at  
Kuala  
Lumpur.

No. 15.  
Notes of  
Arguments.

(a) Chief  
Justice,  
Federation  
of Malaya.  
8th June  
1953—  
*continued.*

(b) Chief  
Justice,  
Singapore.  
8th June  
1953.

In the  
Court of  
Appeal at  
Kuala  
Lumpur.

No. 15.  
Notes of  
Arguments.

(b) Chief  
Justice,  
Singapore.  
8th June  
1953—  
*continued.*

p. 31. Judgment.  
nothing to suggest existence of legal right.  
*Julius v. Bishop of Oxford*, 5 A.C. 214.  
Blackburn, L.J., at p. 244.  
“ object of the power is to effectuate a legal right.”

argument in circle.  
There must be a legal right before there can be a duty on the  
Comptroller.

p. 235. Selborne, L.J.—  
no legal right.  
no appeal to board.  
Os. 30.  
s. 53(3).  
no express provision for appeal or exercise of discretion in proviso 39.  
s. 75(1)—“ aggrieved ”—

10

WOODWARD (contra).  
(Good agrees dividends paid out of profits for relevant year).  
Powers of board.

76(10).  
Ordinance came into force in 1948.  
Declaration of tax at source on dividends—  
*Carr v. Fowle* (1893) 1 Q.B. 254.  
Meaning of aggrieved—  
Express right of appeal in discretion cases—  
Review of assessment—

20

(stopped by Court).

Good in reply.

Appeal dismissed with costs.  
Deposit if any to Respondents.

(c) Bellamy  
J.  
8th June  
1953.

(c) BELLAMY, J.  
8th day of June, 1953.

30

Good for Appellant.  
WOODWARD for Respondent.

Good heard.

He refers to statement of agreed facts, page 49. Company applied to C. of I.T. to reduce the assessment under the proviso to Section 39 of the Income Tax Ordinance, 1947. The appeal is brought on the interpretation of this proviso: crucial words “ may be charged at a lower rate or not charged with any tax as the Comptroller shall determine.” Judgment

appealed against is at page 31—relevant passage is at page 32. He now refers to M/A : paras. 1, 2, 5 & 6 are interdependant. He does not propose to argue paras. 3 & 4. Paras. 1 & 2, in effect, say the same thing ; and paras. 5 & 6 depend on them. He refers to Judgment at pages 31 & 32. He submits that there is nothing in the I.T. Ordinance to suggest a legal right in the taxpayer. Permissive words imply, sometimes, a power coupled with a duty. He refers to *Julius's* case, 5 A.C. 214. He refers to passage in the judgment of Blackburn at page 244. To say that because a person has a discretion that confers a legal right is arguing in circles. He refers to judgment of Lord Selborne at page 235. There must be an established legal right before a public authority can exercise a discretion. Is there a legal right in the taxpayer to have the discretion of C. of I. Tax exercised in his favour ? He submits not. If no such right in taxpayer, then he is clearly not an aggrieved party. Then, no right of appeal for refusal to exercise that discretion. Rights of appeal expressly provided in Sections 30 and 53(3). No express right of appeal provided in the case of C. of I.T. refusing to exercise his discretion under Section 39. He has to fall back on Section 75. But he must be “aggrieved” in the sense that he has been deprived of a legal right, and if he has no such legal right he has no right of appeal at all (para. 5 of M/A). He deals with para. 6 of M/A.

WOODWARD heard.

He refers to background of case. Object of tax collector is to collect as much tax as possible. Right of appeal is to be found in Section 75(10). On undistributed income the Company pays tax at Company rates. Rate was 20 per cent. up to 1.1.51. In this case, effect is that C. of I.T. receives more tax than he is entitled to. *Carr v. Fowle*, (1893), 1 Q.B. 251, 253. He refers to page 61 of the record. He submits that Company has a legal right. He refers to page 37 of the record “A.” He refers to page 43, “B.” On grounds of appeal 5 & 6, this was an appeal against an assessment—one can appeal against any assessment, if you are aggrieved : Section 75. As to right of appeal, he submits that the scheme here is the same as in U.K. Here there is the Board of Review established under Section 74. Whatever discretion Comptroller has under Section 39, the Board’s function is to review the assessment. He refers to Section 68 : no express right of appeal given there although Comptroller there has a discretionary power. Also, Section 69.

Good replies.

Proviso applies to paras (a) and (b).

Right of appeal. Letter at page 53 does not confer jurisdiction.

40 Appeal dismissed, reasons in writing to be delivered later. Deposit to be paid to Respondents.

(Sgd.) A. W. BELLAMY.

In the Court of Appeal at Kuala Lumpur.  
—  
No. 15.  
Notes of Arguments.  
(c) Bellamy, J.  
8th June 1953—  
*continued.*

In the  
Court of  
Appeal at  
Kuala  
Lumpur.

No. 16.

Order.

No. 16.  
Order.  
8th June  
1953.

IN THE SUPREME COURT OF THE FEDERATION OF MALAYA.  
IN THE COURT OF APPEAL AT KUALA LUMPUR.

F.M. Civil Appeal No. 9 of 1953.  
(Kuala Lumpur High Court Appeal No. 17/52.)

COMPTROLLER OF INCOME TAX ... .. *Appellant*  
*against*  
HARRISONS & CROSFIELD (MALAYA) LTD. ... .. *Respondents.*

Before the Honourable Sir CHARLES MATHEW, Chief Justice, Federation 10  
of Malaya.

Before the Honourable Sir CHARLES MURRAY-AYNSLEY, Chief  
Justice, Colony of Singapore.

Before the Honourable Mr. Justice BELLAMY, Acting Judge, Federation  
of Malaya.

IN OPEN COURT.

This 8th day of June, 1953.

This Appeal coming on for hearing on the 8th day of June 1953  
before this Court AND UPON READING the record and the Memorandum  
of Appeal filed herein on the 11th day of March 1953 AND UPON HEARING 20  
Mr. D. B. W. Good, Acting Solicitor General, Federation of Malaya, for the  
Appellant and Mr. F. J. Woodward, Counsel for the Respondents IT IS  
ORDERED that the Appeal be dismissed and that the judgment herein of  
the Honourable Mr. Justice Wilson dated the 11th day of February 1953  
in favour of Harrisons & Crosfield (Malaya) Ltd. be affirmed. IT IS  
FURTHER ORDERED that the Appellant do pay to the Respondents the  
costs of this Appeal and in the Court below as taxed by the proper Officer  
of the Court, AND IT IS LASTLY ORDERED that the sum of \$500.- deposited  
by the Appellant towards the costs of this Appeal be paid out of Court 30  
to the Respondent.

Given under my hand and the seal of the Court this 8th day of  
June 1953.

(Sgd.) P. SAMUEL,  
*Senior Assistant Registrar,*  
Court of Appeal,  
Kuala Lumpur.

No. 17.  
Reasons for Judgment.

In the  
Court of  
Appeal at  
Kuala  
Lumpur.

No. 17.  
Reasons for  
Judgment.

At the close of the arguments the Court unanimously dismissed this appeal, and we now proceed to give our reasons for the judgment.

This is an appeal under the Income Tax Ordinance, 1947, from the judgment of Wilson, J., dated 11th February, 1953, in which he dismissed the appeal of the Comptroller of Income Tax from the decision of the Board of Review in which the Board held that the Comptroller had erred in his decision not to charge the taxpayer, Harrisons & Crosfield (Malaya) Limited (hereinafter called "the Company"), with tax at a lower rate than thirty per centum, namely, twenty per centum, on every dollar of the amount equal to the dividends which the Company had paid in 1950 out of its chargeable income for the year of assessment 1951 (under the proviso to Section 39 of the Income Tax Ordinance, 1947, as amended by the Income Tax (Amendment) Ordinance, 1951) and ordered that the assessment of the Company be amended accordingly.

The material facts may be summarised as follows. The Company is a company incorporated in Singapore and has a place of business at No. 96 Ampang Road, Kuala Lumpur in the Federation of Malaya. On 18th November, 1950, the Company declared a gross dividend of \$533,333 on a declared net profit of \$973,226 in respect of its trading year ended 30th June, 1950. After deduction of \$106,666 in respect of income tax at the rate then payable by the Company of twenty per centum, the Company paid to its shareholders a net dividend of \$426,667. The Company computed its chargeable income for the year of assessment 1951 by reference to the income for its trading year ended 30th June, 1950, and furnished the Comptroller with a return of its income at the figure of \$1,320,963 (which included the said declared net profit of \$973,226). On 5th February, 1952, the Comptroller determined the amount of the chargeable income of the Company for the year of assessment 1951 on the basis of its income for the year ended 30th June, 1950, at the figure of \$1,323,155, and on 9th February, 1952, he assessed the Company to tax at the figure of \$396,840.75. The Company disputed the assessment and by notice of objection dated 27th February, 1952, applied to the Comptroller to review and to revise the assessment made upon it on the grounds that in November, 1950, the Company had paid to its shareholders dividends amounting to \$533,333 out of such chargeable income, that from the amount of such dividends the Company had deducted tax at the rate of twenty per centum on every dollar so paid (under Section 40 of the Income Tax Ordinance, 1947), that the rate of tax upon companies at that date was twenty per centum, and that an amount equal to such dividends had now been charged by the Comptroller at the rate of thirty per centum. On 1st March, 1952, the Comptroller agreed that the amount of tax in dispute was \$53,333.30 and at his request, on 6th March, 1952, the Company paid the amount of tax not in dispute, namely, \$343,507.45. On

In the Court of Appeal at Kuala Lumpur.

No. 17. Reasons for Judgment. —continued.

14th March, 1952, the Comptroller gave notice to the Company of his refusal to amend the assessment as desired, and consequently, on 20th March, 1952, the Company appealed to a Board of Review. The Board allowed the claim of the Company that it was entitled to be assessed on the amount paid in dividends in 1950 at the rate of twenty per centum and made an order amending the assessment accordingly.

Section 39 of the Income Tax Ordinance, 1947, as amended by the Income Tax (Amendment) Ordinance, 1951, enacts, omitting words which for the present purpose are immaterial :

39. “ Subject to the provisions of Section 36 of this Ordinance, there shall be levied and paid for each year of assessment upon the chargeable income of—
- “ (a) every company, tax at the rate of thirty per centum on every dollar of the chargeable income thereof ;
- “ .....
- “ Provided that where any company proves to the satisfaction of the Comptroller that any dividends have been paid out of such chargeable income .....
- “ an amount equal to such dividends in the case of a company .....
- “ .....may be charged at a lower rate or not charged with any tax as the Comptroller shall determine.”

Section 36 is inapplicable and need not be set out.

The reason on which the Comptroller had founded his decision not to amend the assessment of the Company was that he was not satisfied that the dividends which had been paid by the Company in 1950 were paid out of the chargeable income of the Company for 1951. This point was raised, and fully argued, in the course of the appeal before the Board which held that the dividends paid in 1950 were paid out of the chargeable income of the Company for the year of assessment 1951. The point was considered by Wilson, J., who agreed with the finding of the Board. The learned judge, in the course of his judgment, said :

“ In view of these definitions (‘ chargeable income ’, ‘ assess-  
 “ ‘ able income ’, and ‘ statutory income ’) I am of opinion that  
 “ the Committee of the Board were right in finding that assessable  
 “ income after the deductions allowed in Section 34 becomes  
 “ chargeable income for the purposes of Section 39 of the Ordinance  
 “ and that the chargeable income of the Respondents for the year  
 “ of assessment 1951 was the statutory income of the trading  
 “ year 1950.”

We think that the learned judge’s view on this point was clearly right, and inasmuch as no argument to the contrary was presented to this Court we need not consider it further.

As a result of concessions made in the course of the hearing by Counsel for the Appellant, we are left to determine three questions :

- (1) Does the proviso to Section 39 of the Income Tax Ordinance, 1947, as amended by the Income Tax (Amendment) Ordinance, 1951, vest in the Comptroller an absolute and uncontrolled discretion to reduce or remit the rate of tax or to leave the rate of tax unaltered ?
- (2) Is there any right of appeal to the Board of Review if the Comptroller refuses to act under the said proviso ?
- (3) Has the Board of Review power to exercise on appeal the discretion (if any) vested in the Comptroller under the said proviso ?

In the Court of Appeal at Kuala Lumpur.  
 No. 17.  
 Reasons for Judgment  
 —continued.

10 We proceed to consider these questions seriatim.

As to the first question, Counsel for the Appellant contended that the language of the proviso to Section 39 of the Ordinance is permissive only, and that while the words employed therein indubitably conferred on the Comptroller the power, in the particular circumstances set out in the proviso, either to charge tax at a lower rate (than thirty per centum) or not to charge any tax, they did not bind him to exercise that power. It was argued that in *Julius v. Lord Bishop of Oxford*, 5 A.C. 214, the words "it shall be lawful" were construed as being permissive and enabling only, and that the decision in that case applies in the present case.

20 We cannot accept this contention in its entirety. There is no doubt that there is a long line of cases indicating that words such as these, in enactments of a certain class, have been construed as importing permission, not obligation: see *York and North Midland Railway Company v. The Queen*, 11 E.L. & B.L. 858; *In re Bridgman*, 29 L.J. (Ch.) 844; and *Re Newport Bridge*, 2 E.L. & E.L. 377. But there is an equally long line of cases where the Courts decided that "although the statute in terms had only conferred a power, the circumstances were such as to create a duty": see the cases conveniently set out in the speech of Lord Cairns, L.C., in *Julius v. Lord Bishop of Oxford* (*Ibid.* p. 223 *et seq.*).

30 Lord Cairns very clearly states what these cases decided in these words (*ibid.* p. 225):

" . . . where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised."

Lord Selborne dealt with the point in these words (*ibid.* p. 235):

40 "The language (certainly found in authorities entitled to very high respect) which speaks of the words 'it shall be lawful', and the like, when used in public statutes, as ambiguous, and susceptible (according to certain rules of construction) of a discretionary or an obligatory sense, is in my opinion inaccurate. I agree with my noble and learned friends who have preceded me, that the meaning of such words is the same, whether there

In the  
Court of  
Appeal at  
Kuala  
Lumpur.

No. 17.  
Reasons for  
Judgment  
—continued.

“ is or is not a duty or obligation to use the power which they  
“ confer. They are potential, and never (in themselves) significant  
“ of any obligation. The question whether a Judge, or a public  
“ officer, to whom a power is given by such words, is bound to use  
“ it upon any particular occasion, or in any particular manner,  
“ must be solved aliunde, and, in general, it is to be solved from  
“ the context, from the particular provisions, or from the general  
“ scope and objects, of the enactment conferring the power.”

To this should be added Lord Blackburn’s statement of the law in the same case (ibid. p. 244) :

10

“ The enabling words are construed as compulsory whenever  
“ the object of the power is to effectuate a legal right.”

The relevant words of the proviso to Section 39 of the Income Tax Ordinance, 1947, as amended by the Income Tax (Amendment) Ordinance, 1951—“ an amount equal to such dividends in the case of a company . . . “ may be charged at a lower rate or not charged with any tax as the “ Comptroller shall determine ”—appear straightforward enough and are not difficult to construe. It is important to bear in mind in construing the words “ may be charged at a lower rate or not charged with any tax “ as the Comptroller shall determine ” that the Legislature has thought 20 fit to use in the same short phrase the words “ may ” and “ shall.” It is further to be observed that under the Income Tax Ordinance the only officer empowered to determine the rate of tax—and in certain instances directed to do so (for example, see Section 43)—is the Comptroller. Giving effect to all the words used in the phrase “ may be charged at a lower rate “ or not charged with any tax as the Comptroller shall determine ” we think it is crystal clear that whether a company shall be charged at a lower rate or not charged with any tax is discretionary, and that in order to define the power given to the Comptroller to charge either at a lower rate or not to charge any tax at all, the Legislature has expressly used the 30 word “ may.” But once the Comptroller has exercised that discretion, he is bound to give effect to it, and therefore the word “ shall ” is used. In our judgment once a company proves to the satisfaction of the Comptroller that any dividends have been paid out of its chargeable income, such a company has a legal right to be assessed on the amount equal to such dividends either at a lower rate of tax or at no rate ; it is for the Comptroller, in the exercise of the discretion vested in him, to determine the rate of tax (either a lower rate or no rate) and, having done so, he is bound to give effect to it. There is nothing in this reasoning which clashes with the reasoning in *Julius v. Lord Bishop of Oxford*. The primary object of the 40 proviso to Section 39 of the Ordinance, one would think, is that a company should have a reduction of tax in the circumstances of the present case, and it cannot be said that the Legislature intended that the company should be deprived of this benefit by the act of the Comptroller for whose benefit the proviso was not inserted. The conclusion, therefore, at which we arrive is that the answer to the first question is that the Comptroller,

in the particular circumstances set out in the proviso to Section 39, cannot leave the rate of tax unaltered and is bound either to charge at a lower rate (namely, twenty per centum) or at no rate in his discretion.

This being our view it follows that the answer to the second question is in the affirmative. Prima facie, a company which has been assessed to tax at a figure greater than the law allows and has applied to the Comptroller to review and to revise the assessment and the Comptroller refuses to do so is, one would think, in common parlance, "a person aggrieved." In *Ex parte Sidebotham. Re Sidebotham*, XIV Chancery 458, James, L.J., said at page 465 :

" But the words ' person aggrieved ' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A ' person aggrieved ' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something."

We think that the Company in the present case can be said to come within that definition, and in our opinion clearly has a right of appeal to the Board of Review under Section 75 (1) of the Ordinance.

It only remains to consider the third, and last, question. No argument was addressed to us on this point. We think that the answer to this question is to be found in subsection (10) of Section 76 of the Ordinance. That subsection reads :

" The Board may, after hearing an appeal, confirm, reduce, increase or annul the assessment or make such order thereon as to it may seem fit."

In ordering that " the assessment be adjusted so as to charge at 20% an amount equal to the amount of the dividends paid in 1959 " the Board was clearly acting in the exercise of powers conferred by this subsection, and we think that the Board were right in so acting.

For these reasons we dismissed the appeal.

(Sgd.) CHARLES MATHEW,  
*Chief Justice,*  
Federation of Malaya.

(Sgd.) ALEXANDER BELLAMY,  
*Judge,*  
Federation of Malaya.

In the  
Court of  
Appeal at  
Kuala  
Lumpur.

—  
No. 17.  
Reasons for  
Judgment  
—continued.

In the Court of Appeal at Kuala Lumpur.

No. 18.

Order granting conditional leave to appeal to Her Majesty in Council.

No. 18. Order granting conditional leave to appeal to Her Majesty in Council. 28th December 1953.

IN THE SUPREME COURT OF THE FEDERATION OF MALAYA. IN THE COURT OF APPEAL AT KUALA LUMPUR.

F.M. Civil Appeal No. 9 of 1953.

Between

COMPTRROLLER OF INCOME TAX ... .. Appellant and HARRISONS AND CROSFIELD (MALAYA) LTD. ... .. Respondents.

(In the Matter of Income Tax Appeal No. 17 of 1952

10

Between

COMPTRROLLER OF INCOME TAX ... .. Appellant and HARRISONS AND CROSFIELD (MALAYA) LTD. ... .. Respondents.)

Before the Honourable Sir CHARLES MATHEW, Chief Justice, Federation of Malaya.

IN OPEN COURT.

This 28th day of December, 1953.

This Motion for conditional leave and for extension of leave to appeal to Her Majesty in Council coming on for hearing on the 28th day of December, 1953, before this Court in the presence of Mr. T. V. A. Brodie, Q.C., Solicitor-General, Counsel for the Appellant and Mr. Morris Edgar, Counsel for the Respondents AND UPON READING the Notice of Motion dated the 22nd day of December, 1953, and the affidavit of Thomas Vernor Alexander Brodie, Solicitor-General affirmed on the 22nd day of December, 1953, and upon hearing Counsel for both parties IT IS ORDERED that extension of time to make this application be allowed and that the Appellant do have leave to appeal against the Judgment of the Court of Appeal given at Kuala Lumpur on the 8th day of June, 1953, UPON CONDITIONS THAT (a) he do before the 28th day of March, 1954, enter into good and sufficient security to the satisfaction of the Court in the sum of Five thousand dollars (\$5000/-) for the due prosecution of the appeal and the payment of all such costs as may become payable to the Respondents in the event of the Appellant not obtaining an order granting him final leave

20

30

to appeal, or of the appeal being dismissed for non-prosecution or of Her Majesty in Council ordering the Appellant to pay the Respondents' costs of the appeal, as the case may be and (b) he do before the 28th day of March, 1954, take the necessary steps for the preparation of the record and the despatch thereof to England.

Given under my hand and the seal of the Court this 28th day of December, 1953.

10

(Sgd.) P. SAMUEL,  
Senior Assistant Registrar,  
Court of Appeal,  
Kuala Lumpur.

In the Court of Appeal at Kuala Lumpur.

No. 18.  
Order granting conditional leave to appeal to Her Majesty in Council.  
28th December 1953—  
*continued.*

No. 19.

Order granting final leave to appeal to Her Majesty in Council.

IN THE SUPREME COURT OF THE FEDERATION OF MALAYA.

IN THE COURT OF APPEAL AT KUALA LUMPUR.

F.M. Civil Appeal No. 9 of 1953.

Between

COMPTROLLER OF INCOME TAX ... .. *Appellant*  
and

HARRISONS AND CROSFIELD (MALAYA) LTD. ... .. *Respondents*

20

(In the Matter of Income Tax Appeal No. 17 of 1952)

Between

COMPTROLLER OF INCOME TAX ... .. *Appellant*  
and

HARRISONS CROSFIELD (MALAYA) LTD. ... .. *Respondents.*)

Before the Honourable Sir CHARLES MATHEW, Chief Justice,  
Federation of Malaya.

IN OPEN COURT.

This 12th day of March, 1954.

No. 19.  
Order granting final leave to appeal to Her Majesty in Council.  
12th March 1954.

In the  
Court of  
Appeal at  
Kuala  
Lumpur.

No. 19.  
Order  
granting  
final leave  
to Appeal  
to Her  
Majesty in  
Council.  
12th March  
1954—  
*continued.*

UPON MOTION made unto the Court this day by Mr. T. V. A. Brodie, Q.C., Solicitor-General, for the Appellant abovenamed AND UPON READING the Notice of Motion dated the 9th day of March, 1954, and the affidavit of Thomas Vernor Alexander Brodie affirmed on the 4th day of March, 1954, and filed herein, AND UPON HEARING Mr. T. V. A. Brodie, Q.C., Solicitor-General, for the Appellant and Mr. Morris Edgar, Counsel for the Respondents IT IS ORDERED that final leave be and is hereby given to the Appellant abovenamed to appeal to Her Majesty in Council against the judgment of the Court of Appeal herein dated the 8th day of June, 1953.

Given under my hand and the seal of the Court this 12th day of March, 1954.

(Sgd.) P. SAMUEL,  
*Senior Assistant Registrar,*  
Court of Appeal,  
Kuala Lumpur.

10

---

## EXHIBITS.

## A(1).—Agreed Facts.

Exhibits.

A (1).  
Agreed  
Facts.

1.—Harrisons & Crosfield (Malaya) Ltd. (hereinafter called “the Company”) is a company incorporated in Singapore and has a place of business at No. 96 Ampang Road, Kuala Lumpur, in the Federation of Malaya.

2.—The Company in the Report of its Directors dated the 18th November, 1950, for its trading year ended 30th June, 1950, declared a net profit of \$973,226.

10 3.—The Company at its Annual General Meeting held on the 18th November, 1950, in respect of its trading year ended 30th June, 1950, declared a gross dividend of \$533,333.

4.—The Company in respect of the said gross dividend of \$533,333 deducted Income Tax at the rate then payable by the Company of 20 per cent. namely \$106,666 and paid a net dividend of \$426,667.

5.—The Company in respect of the Year of Assessment 1951 submitted a computation of its chargeable income to the Comptroller of Income Tax at the figure of \$1,320,963 (which included the said declared net profit of \$973,226) based on the income of the Company for its trading year ended  
20 30th June, 1950.

6.—The Comptroller of Income Tax on the 5th February, 1952, computed the said chargeable income of the Company for the Year of Assessment 1951 based on the income of the Company for its trading year ended the 30th June, 1950, at the figure of \$1,323,155.

7.—The Comptroller of Income Tax on the 9th February, 1952, assessed the Company for the Year of Assessment 1951 on the chargeable income of \$1,323,155 for tax amounting to \$396,840.75.

8.—The Company on the 27th February, 1952, objected to the said assessment “on the grounds that out of the chargeable income of the  
30 “Company for the Year of Assessment 1951 (basis year 1950) gross dividends amounting to \$533,333 were paid in November, 1950. From such  
“dividends Income Tax was deducted in accordance with the provisions of  
“Section 40 of the said (Income Tax) Ordinance at the rate then payable by  
“the Company, namely at the rate of 20 per cent. An amount equal to the  
“said dividends has now been assessed for Income Tax at the rate of  
“30 per cent. against which the Company has only been entitled to deduct  
“tax at the rate of 20 per cent. as mentioned above. We now apply to you  
“to review and revise the said assessment made upon the Company and  
“to re-assess that amount of the chargeable income of the Company for the

Exhibits. “ Year of Assessment 1951 (basis year 1950) which is equal to the amount of  
 ——— “ the said dividends and to charge it at a lower rate, namely at the rate of  
 A (1). “ 20 per cent. instead of at the rate of 30 per cent. in accordance with the  
 Agreed “ power in that behalf given to you by the proviso to Section 39 of the said  
 Facts— “ Ordinance. We return the assessment notice to you so that this may be  
 continued. “ done.”

9.—The Comptroller of Income Tax on the 1st March, 1952, agreed that the amount of Income Tax in dispute was \$53,333.30 and requested the Company to pay the amount of the Income Tax not in dispute namely \$343,507.45 and the Company paid this on the 6th March, 1952, subject to the revision of its assessment in respect of profits made by its Kuching Branch which does not affect the subject matter of this appeal. 10

10.—The Comptroller of Income Tax on the 14th March, 1952, refused to amend the assessment assigning no reasons for such refusal and the Company on the 20th March, 1952, gave Notice of Appeal.

11.—In the course of subsequent correspondence exchanged between the Company, the Comptroller-General of Income Tax and the Comptroller of Income Tax . . .

(a) The Comptroller-General of Income Tax admitted that in certain cases the proviso to Section 39 of the Income Tax Ordinance, 1947, was used to relieve companies of tax on a part of their 1948 chargeable income equal to the amount of dividends paid by them in 1947. 20

(b) The Comptroller-General of Income Tax stated that the Comptroller of Income Tax had refused to amend the Company's assessment because he was not satisfied that the dividends paid by the Company in 1950 were paid out of the Company's chargeable income for 1951.

(c) The Company through their Solicitors pointed out that the Comptroller of Income Tax had at no time called upon the Company to satisfy him that the dividends paid by the Company in 1950 were paid out of the chargeable income of the Company for the Year of Assessment 1951 and the Comptroller-General of Income Tax stated that the Company was at liberty to make representations to the Comptroller of Income Tax on this point. 30

(d) As a result of such representations by the Company to the Comptroller of Income Tax, the Comptroller of Income Tax stated that the reason why he was not satisfied that the dividends paid by the Company in 1950 were paid out of the Company's chargeable income for the Year of Assessment 1951 was that, in his view, the Company's chargeable income for the Year of Assessment 1951 was the income accruing to the Company in that year, notwithstanding the fact that its quantum might be measured by the profits of some other period, and that, in those circumstances, the Company would appreciate that dividends paid by the Company in 1950 could not, in his view, be regarded as paid out of the Company's chargeable income for 1951. 40

A(2) (1).—Letter, Appellant to Respondent.

Exhibits.

FEDERATION OF MALAYA:

FORM D.

INCOME TAX—YEAR 19

NOTICE OF AMENDMENT OR REFUSAL.

(Section 72 of the Income Tax Ordinance, 1947)

A(2) (1).  
Letter,  
Appellant  
to Respond-  
ent.  
14th March  
1952.

Office of Comptroller of Income Tax,  
Suleiman Building,  
P.O. Box 1044,  
Kuala Lumpur.

10

To

Harrisons & Crosfield (Malaya) Ltd.,  
P.O. Box 1007,  
Kuala Lumpur.

14h March, 1952.

Sirs,

With reference to your objection to the assessment made upon you in respect of your income from trading for the year of assessment 1951, I hereby give you notice that I am not prepared to amend the assessment.

20 If you are aggrieved by this decision you are entitled to appeal to the Board of Review on giving notice in writing in duplicate within 7 days of the date of service of this notice to the Clerk to the Board of Review (Income Tax), The Treasury, Kuala Lumpur. Such notice cannot be accepted after 7 days unless you are able to satisfy the Board that you were prevented from giving due notice owing to absence from Malaya, sickness, or other reasonable cause.

2.—If no appeal is made the tax assessed is payable as follows :

- 30 (a) where no amendment is made to the assessment, in accordance with the notes on the original notice of assessment. The remittance slip forming part of that notice should be enclosed with your remittance ;
- (b) where the assessment is amended, in accordance with the notes on the attached amended notice of assessment. The remittance slip forming part of that notice should be enclosed with your remittance.

In either case, if payment is not made by the due date a penalty of 5 per cent. will be added. (Section 84.)

I am, Sir,

Your obedient servant,

*Comptroller of Income Tax.*

Exhibits. **A(2) (2).—Letter, Respondent to Clerk to Income Tax Board of Review.**

A(2) (2).  
Letter, Re-  
spondent  
to Clerk to  
Income Tax  
Board of  
Review.  
20th March  
1952.

20th March, 1952.

Finance & Accounts Dept.

To :

The Clerk to the Income Tax Board of Review,  
The Treasury,  
Secretariat,  
Kuala Lumpur.

Dear Sir,

In accordance with section 75 of the Income Tax Ordinance, 1947, we, **10**  
Harrisons & Crosfield (Malaya) Limited, being aggrieved by an assessment  
made upon us dated the 9th day of February, 1952 for the Year of  
Assessment 1951, and having failed to agree with the Comptroller in the  
manner provided in subsection (4) of section 72 of the said Ordinance, appeal  
to the Income Tax Board of Review and hereby give to and lodge with  
you written Notice of Appeal against the said Assessment. This Notice  
of Appeal is given to and lodged with you in duplicate in accordance with  
the provisions of the said section.

Kindly acknowledge receipt.

Yours faithfully,

**HARRISONS & CROSFIELD (MALAYA) LTD.**  
*Director.*

20

A(2) (3).  
Letter,  
Bannon &  
Bailey to  
Comptroller  
General of  
Income  
Tax.  
29th April  
1952.

**A(2) (3).—Letter, Bannon & Bailey to Comptroller-General of Income Tax.**

29th April, 1952.

Our Ref. : 5340/H/117.

The Comptroller General of Income Tax,  
Kuala Lumpur.

Dear Sir,

Income Tax Appeal.  
Harrisons & Crosfield (Malaya) Ltd.

30

On behalf of the Appellants in the above appeal it is proposed to  
establish at the hearing that the Comptroller in respect of the year of  
assessment 1948 had applied the proviso to section 39 of the Income Tax  
Ordinance to relieve companies of tax on that part of their 1948 chargeable  
income equal to the amount of dividends paid in 1947.

In order to save the trouble involved to your department in our having to subpoena an official of the department to give evidence of this, we should be glad to know if you would be prepared to admit it.

In order that the issues that are to be placed before the Board of Review may be clearly defined we should be glad to have the reasons for the refusal of the Comptroller to amend the assessment on the Company for the year of assessment 1951.

Yours faithfully,  
(Sgd.) BANNON & BAILEY.

10 FJW/JC.

Exhibits.  
A(2) (3).  
Letter,  
Bannon &  
Bailey to  
Comptroller  
General of  
Income  
Tax.  
29th April  
1952—  
*continued.*

A(2) (4).—Letter, Acting Comptroller-General to Bannon & Bailey.

COMPTROLLER-GENERAL OF INCOME TAX.  
FEDERATION OF MALAYA & SINGAPORE.

Suleiman Building,  
P.O. Box 1044,  
Kuala Lumpur.  
30th April, 1952.

Ref.C.G./Conf.205/126.

Your Ref. 5340/H/117.

20 Messrs. Bannon & Bailey,  
Advocates & Solicitors,  
Laidlaw Building,  
Kuala Lumpur.

A(2) (4).  
Letter,  
Acting  
Comptroller  
General to  
Bannon &  
Bailey.  
30th April  
1952.

Dear Sirs,

Income Tax Appeal.  
Harrisons & Crosfield (Malaya) Ltd.

I thank you for your letter of 29th April.

I am prepared to agree that in certain cases the proviso to Section 39 of the Income Tax Ordinance, 1947, was used to relieve companies of tax on a part of their 1948 chargeable income equal to the amount of dividends paid by them in 1947.

The Comptroller has refused to amend the 1951 assessment on your clients because he is not satisfied that the dividends paid by the company in 1950 were paid out of the company's chargeable income for 1951.

Yours faithfully,  
(Sgd.) W. A. T. MORTON,  
*Ag. Comptroller-General.*

WATM/OMD.

Exhibits. **A(2) (5).—Letter, Bannon & Bailey to Acting Comptroller-General**

A(2) (5).  
Letter,  
Bannon &  
Bailey to  
Acting  
Comptroller  
General.  
16th May  
1952.

16th May, 1952.

Your ref : C.G./Conf.205/126.

Our ref. 5340/H/117.

The Ag. Comptroller-General of Income Tax,  
Suleiman Building,  
P.O. Box 1044,  
Kuala Lumpur.

Dear Sir,

We refer to your letter dated the 30th April, 1952, giving as the reason 10 for refusal to amend the 1951 assessment that the Comptroller is not satisfied that the dividends paid by the Company in 1950 were paid out of the company's chargeable income for (the year of assessment) 1951.

We wish to put it on record that the Comptroller has made this decision without calling upon our clients or giving them any opportunity to satisfy him that the said dividends were paid out of the company's chargeable income for (the year of assessment) 1951.

Yours faithfully,  
(Sgd.) BANNON & BAILEY.

FJW/JC.

20

A(2) (6). **A(2) (6).—Letter, Bannon & Bailey to Acting Comptroller-General.**

Letter,  
Bannon &  
Bailey to  
Acting  
Comptroller  
General.  
10th June  
1952.

10th June, 1952.

Your ref : C.S./Conf.205/126.

Our ref. : 5340/H/117.

The Ag. Comptroller-General of Income Tax,  
Suleiman Building,  
Kuala Lumpur.

Dear Sir,

Income Tax Appeal.  
Harrisons & Crosfield (Malaya) Ltd.

30

We refer to our letter to you on 16th May, 1952, of which we do not appear to have had an acknowledgment.

Our clients would be glad to know whether or not the Comptroller intends to give them an opportunity before the hearing of the appeal to

satisfy him that the dividends paid by the Company in 1950 were paid out of the Company's chargeable income for the year of assessment 1951.

If the Comptroller does so intend, we should be grateful if he would let us know what point or points he wishes to be satisfied about so that our clients may endeavour to furnish the satisfaction which he requires.

Yours faithfully,

(Sgd.) BANNON & BAILEY.

c.c. Harrisons & Crosfield,  
(Malaya) Ltd.—Mr. Beaten,  
Kuala Lumpur.

10

FJW/JC.

Exhibits.

A(2) (6).  
Letter,  
Bannon &  
Bailey to  
Acting  
Comptroller  
General.  
10th June  
1952—  
*continued.*

A(2) (7).—Letter, Acting Comptroller-General to Bannon & Bailey.

COMPTROLLER-GENERAL OF INCOME TAX.  
FEDERATION OF MALAYA & SINGAPORE.

Suleiman Building,  
P.O. Box 1044,  
Kuala Lumpur.

13th June, 1952.

Ref. C. G. Conf. 205/126.

20 Your Ref: 5340/H/117.

Messrs. Bannon & Bailey,  
Advocates & Solicitors,  
Laidlaw Building,  
Kuala Lumpur.

Dear Sirs,

Harrisons & Crosfield (Malaya) Ltd.

I thank you for your letter of 10th June. There is of course no objection to your clients making such representations as they may think suitable to the Comptroller on the subject of the appeal against the assessment on the company's income for the year of assessment 1951.

30

Yours faithfully,

(Sgd.) W. A. T. MORTON,  
*Ag. Comptroller-General.*

A(2) (7).  
Letter,  
Acting  
Comptroller  
General to  
Bannon &  
Bailey.  
13th June  
1952.

Exhibits.

**A(2) (8).—Letter, Bannon & Bailey to Appellant.**

A(2) (8).  
Letter,  
Bannon &  
Bailey to  
Appellant.  
17th June  
1952.

Your Ref. C/1002.  
Our Ref. No. 5340/H/117.

17th June, 1952.

The Comptroller of Income Tax,  
Federation of Malaya,  
Suleiman Building,  
Kuala Lumpur.

Dear Sir,

Harrisons & Crosfield (Malaya) Limited  
Income Tax Appeal.

10

We send herewith copies of correspondence which we have been conducting recently with the Comptroller-General of Income Tax.

The letters are self-explanatory.

The Comptroller-General has stated that our clients may make representations to you.

Our clients have, therefore, instructed us to represent to you that you have made your decision to refuse to amend our clients' assessment without calling upon them to satisfy you that the dividends referred to in their notice of objection to the assessment were paid out of their chargeable income for the year of assessment 1951.

20

Please let us know, therefore, the point or points about which you wish to be satisfied so that our clients may endeavour to furnish you with the satisfaction you require.

Yours faithfully,  
(Sgd.) BANNON & BAILEY.

Encs.  
FJW/C.

A(2) (9).  
Letter,  
Appellant  
to Bannon  
& Bailey.  
27th June  
1952.

**A(2) (9).—Letter, Appellant to Bannon & Bailey.**

COMPTROLLER OF INLAND REVENUE.  
FEDERATION OF MALAYA.

Suleiman Building,  
P.O. Box. 1044,  
Kuala Lumpur.

30

Ref. C/1002.  
Your No. 5340/H/117.

Messrs. Bannon & Bailey,  
P.O. Box 80,  
Kuala Lumpur.

27th June, 1952.

Gentlemen,

Harrisons & Crosfield (Malaya) Ltd.

With reference to your letter of 17th June last, in my view the Company's chargeable income for the year of assessment 1951 is the income

accruing to the Company in that year, notwithstanding the fact that its quantum may be measured by the profits of some other period. In these circumstances you will appreciate that dividends paid by the Company in the year 1950 cannot, in my view, be regarded as paid out of the Company's chargeable income for 1951.

Yours faithfully,

(Sgd.) Illegible,  
for *Comptroller of Income Tax,*  
*Federation.*

Exhibits.  
A(2) (9).  
Letter,  
Appellant  
to Bannon  
& Bailey.  
27th June  
1952—  
*continued.*

10 AWH/HE.

A(2) (10).—Letter, Bannon & Bailey to Appellant.

15th July 52.

C/1002.  
5340/H/117.

A(2) (10).  
Letter,  
Bannon &  
Bailey to  
Appellant.  
15th July  
1952.

The Comptroller of Income Tax,  
Federation of Malaya,  
Kuala Lumpur.

Dear Sir,

Harrisons & Crosfield (Malaya) Ltd.

20 On 30th April 1952 the Comptroller-General of Income Tax informed us that your reason for refusing to amend the 1951 Assessment of the above company was because you were not satisfied that the dividends paid by the company in 1950 were paid out of the company's chargeable income for 1951.

30 On 27th June 1952 you informed us that the reason why you were not so satisfied was because it was your view that the Company's chargeable income for the year of assessment 1951 is the income accruing to the company in that year, notwithstanding the fact that its quantum may be measured by the profits of some other period, and that, in these circumstances, it was your view that dividends paid by the company in the year 1950 could not be regarded as paid out of the company's chargeable income for 1951.

This is a question of law and will have to be decided by the Income Tax Board of Review at the hearing of the appeal. According to the recent correspondence between the Comptroller-General, you and ourselves, which was conducted with a view to clarifying the issue or issues between the

Exhibits. company and yourself, this question of law is the only issue to be decided  
by the Board at the appeal.

A(2) (10).

Letter,  
Bannon &  
Bailey to  
Appellant.  
15th July  
1952—  
*continued.*

Copies of the correspondence will be placed before the Board by us  
and the Board will be informed by us that this is the only issue to be  
decided. Please let us have your confirmation on this.

Yours faithfully,  
(Sgd.) BANNON & BAILEY.

A(2) (11).  
Letter,  
Acting  
Comptroller  
of Inland  
Revenue to  
Bannon &  
Bailey.  
19th July  
1952.

A(2) (11).—Letter, Acting Comptroller of Inland Revenue to  
Bannon & Bailey.

COMPTROLLER OF INLAND REVENUE.  
FEDERATION OF MALAYA.

10

Suleiman Building,  
P.O. Box No. 1044,  
Kuala Lumpur.  
19th July, 1952.

Ref :—C/1002(B.4/49 SJ.39).

Your ref : 5340/E/117.

Messrs. Bannon & Bailey,  
P.O. Box 80,  
Kuala Lumpur.

20

Dear Sirs,

re Harrisons & Crosfield (M) Ltd.

I refer to you letter of 15th July last and Mr. Woodward's telephone  
conversation with Mr. Morton on 18th July.

I shall be happy to consider any statement which you may care to  
submit with a view to having the facts agreed before the hearing.

Yours faithfully,  
(Sgd.) Illegible.  
*Ag. Comptroller of Inland Revenue.*



Exhibits.  
—  
A(2) (13).  
Letter,  
Bannon &  
Bailey to  
Comptroller  
of Inland  
Revenue.  
24th July  
1952—  
*continued.*

telephone conversation between Mr. Hodges and Mr. Woodward on 23rd July, 1952, and confirm that in the course of that conversation Mr. Hodges stated that the confirmation requested by us in the last paragraph of our letter of 15th July above referred to was implicit in the wording of your letter to us of 27th June, 1952.

Accordingly we now send herewith a Statement of Facts relative to this Appeal and, on receiving your approval that this Statement is a correct one, we shall have fair copies made to be placed before the Board of Review. This will save evidence having to be called and will greatly shorten the proceedings before the Board in the same manner as proceedings before the High Court are shortened by the exhibition of an agreed bundle of correspondence. 10

If you agree the Statement without amendment, please retain it so that you may have it for comparison when we send you a fair copy later.

Yours faithfully,  
(Sgd.) BANNON & BAILEY.

A(2) (14).  
Letter,  
Bannon &  
Bailey to  
Comptroller  
of Inland  
Revenue.  
1st August  
1952.

A(2) (14).—Letter, Bannon & Bailey to Comptroller of Inland Revenue.

BANNON & BAILEY.

1st August, 1952.

C/1002(B.4/49 SJ.39)  
5340/E/117.

20

The Comptroller of Inland Revenue,  
Federation of Malaya,  
Suleiman Building,  
Kuala Lumpur.

Dear Sir,

Harrisons & Crosfield (Malaya) Ltd.,  
Income Tax Appeal.

We thank you for your letter of 30th July, 1952.

We agree your amendments to paragraphs 5, 9, 11 (c) and 11 (d) of 30 the Statement of Facts which we submitted to you. We have prepared copies of the Statement of Agreed Facts paragraphs 1 to 11 (d) as amended accordingly and we now send you a copy of it for your retention and reference.

We asked you to agree the following fact :

“ The Comptroller of Income Tax agrees that his contention expressed  
 “ in 11 (d) above is a point of law to be decided by the Board of Income  
 “ Tax Review and that it is the only point at issue between himself and the  
 “ Company and the only issue to be decided by the Board (or by any  
 “ higher tribunal to which this appeal might eventually be submitted).”

We regret that you are unable to agree this and must therefore put  
 before the Board the correspondence which has been conducted with a view  
 to clarifying the issue or issues between yourself and the Company to be  
 10 decided by the Board. We enclose a bundle containing copies of the relevant  
 correspondence and should be glad to have your agreement of this early  
 by telephone. This will obviate asking you to produce the originals of  
 the letters sent to you by the Company and ourselves.

We understand from a telephone call received yesterday from the  
 Clerk to the Board of Review that the Comptroller-General of Income Tax  
 proposes to take a preliminary legal point before the Board of Review to  
 the effect that the Company has no right of appeal in any event against  
 any decision of the Comptroller under the Proviso to Section 39 of the  
 Income Tax Ordinance. We have not yet received the letter which the  
 20 Clerk to the Board of Review has undertaken to send to us on this subject.  
 We should like to point out, however, in order to put it on record, that  
 this is the first intimation that the Company, or ourselves as the Company's  
 solicitors, have received that this is a contention of the Comptroller and  
 presumably a reason for the Comptroller's refusal to amend the Company's  
 assessment when asked to do so. The only reason which we have been  
 given for the refusal to amend the assessment was given in your letter to  
 us of the 27th June, 1952, and was quite a different one. We have  
 included in the bundle of copy correspondence the letter from you to the  
 Company dated 14th March 1952 and the Company's letter to the Clerk  
 30 to the Board of Review dated 20th March 1952 giving Notice of Appeal,  
 which are relevant.

Yours faithfully,  
 (Sgd.) BANNON & BAILEY.

Exhibits.  
 —  
 A(2) (14).  
 Letter,  
 Bannon &  
 Bailey to  
 Comptroller  
 of Inland  
 Revenue.  
 1st August  
 1952—  
*continued.*

A(3).—Example Statement of Figures.

Exhibit A(3).

1. The Company makes a profit for its accounting year ending 30th June, 1950 (S. 10(i) (a)).
2. The Company declares a gross dividend for its accounting year ending 30th June, 1950.
3. The Company deducts Income Tax from the gross dividend at the rate in force for the year of assessment within which the dividend is declared payable (S.40 (i)).
4. The Company pays a net dividend to shareholders, namely the gross declared dividend less the deduction for Income Tax.
5. The Company pays in respect of its chargeable income for the Year of Assessment 1951 based on its profits for the accounting year ending 30th June, 1950, Income Tax at the rate of 30% (S.31, 33, 34 & 39).

		If the Dividend is Declared Payable in November, 1950.		If the Dividend is Declared Payable in April, 1951.			
Company entitled to deduct tax at (S.40)	Company Pays Tax on Gross Dividend	Shareholder Pays Tax on Gross Dividends (S.26) on Income of 1950.	Inland Revenue on same Taxable Profits	Company entitled to deduct tax at	Company Pays Tax on Gross Dividend	Shareholder Pays Tax on Gross Dividends (S.26) on Income of 1951	Inland Revenue on Same Taxable Profits
20%	30%	(1) 30% Tax Category e.g., another resident company or resident shareholder paying 30% Tax payable Set Off Allowed Balance Tax Payable	40%	30%	30%	Tax Payable Set Off Allowed Balance Tax Payable	30%
		(2) 20% Tax Category, e.g., Non-Resident Shareholder or Resident Shareholder paying 20% Tax Payable Set Off allowed Balance Rebate to be claimed	Nil	30%	30%	20% Tax Category, e.g., Non-Resident Shareholder or Resident Shareholder paying 20% Tax Payable Set Off allowed Balance Rebate to be claimed	20%
20%	30%		Nil	30%	30%		10% 20%

## A(4).—Example Statement.

Exhibits.

## TRANSITIONAL PROVISIONS

A (4).  
Example  
Statement.

## Income Tax (Amendment Ordinance), 1951.

These are designed to allow full set-off of 30% on dividends paid between 1st January 1951 and 27th February 1951 from which the paying company was only permitted to deduct 20% under Section 40 of the principal Ordinance.

Preference Dividends—The Company can deduct the difference from the next dividend.

- 10 Variable Dividends—The recipient is allowed to set off the full 30% tax but must gross up the amount of the dividend accordingly.

Example :—

Gross Dividend	\$350.00
Tax Deducted (20%)	70.00
Net Dividend Paid	<u>\$280.00</u>
Tax Payable—30%	<u><u>\$105.00</u></u>

	Gross Dividend	Tax Deducted 20%	Net Dividend
20 Actual	\$350.00	\$70.00 Tax to be set off—30%	\$280.00
To be declared	400.00	<u>120.00</u>	280.00

So the recipient of the dividend must declare his income from the dividend as \$400.00 (and not the actual gross dividend of \$350.00) BUT he is entitled to set off the full rate of tax namely 30% against his total tax payable on his chargeable income.

Exhibits.

R(1).—Letter, Acting Comptroller-General Income Tax to Clerk to Board of Review.

R(1).  
Letter,  
Acting  
Comptroller  
General of  
Income Tax  
to Clerk to  
Board of  
Review.  
31st July  
1952.

COMPTROLLER-GENERAL OF INCOME TAX.

Kuala Lumpur,  
31st July, 1952.

Ref. C.G.Conf.205/126.

Your Ref. ITBR 151.

Clerk to the Board of Review,  
Federation of Malaya,  
The Treasury,  
Kuala Lumpur.

10

Sir,

Harrisons & Crosfield (Malaya) Ltd.

Appeal—Year of Assessment 1951.

I shall be glad if you will inform the Board of Review that I propose to submit as a preliminary point at the hearing on 4th August that no appeal under Section 75 of the Income Tax Ordinance, 1947, lies in this case. My point is that the application of the proviso to Section 39 of the Ordinance is a matter which is entirely within the discretion of the Comptroller and is not subject to appeal to the Board of Review.

20

2.—No doubt you will wish to notify the Appellant's representatives that I propose to take this preliminary point at the hearing on 4th August next.

I am, Sir,

Your obedient servant,

(Sgd.) W. A. T. MORTON,  
*Ag. Comptroller-General of Income Tax,*  
Malaya.

Original Exhibit R1.(b) in line 6 deleted  
by Respondent with agreement of  
the Committee of the Board and  
the Appellant.

30

(Sgd.) C. E. HOWE,  
*Clerk,*  
Income Tax Board of Review,  
Federation of Malaya.

## DOCUMENTS.

Documents.

## X.—Notes of Appeals heard by Board between December 1951 to February 1952.

X.  
Notes of  
Appeals  
heard by  
Board  
between  
December  
1951 to  
February  
1952

## FEDERATION BOARD OF REVIEW.

1. B. Ltd.

10 Facts. B. Ltd. a trading concern paid a dividend in 1950 from which tax was deducted at 20 per cent., the rate payable by the Company on its income for the year of assessment 1950. The Company's basis period for the year of assessment 1951 was the year ended 31st December, 1950. The Company claimed that the Comptroller should apply the proviso to Section 39 so as to charge at 20 per cent. a part of the 1951 assessment on the Company's income equal to the amount of the dividend paid in 1950. The Comptroller refused to apply the proviso.

20 Arguments. A preliminary point was taken on behalf of the Comptroller that no appeal lay to the Board of Review from a determination of the Comptroller under the proviso to Section 39. The application of the proviso, it was submitted, was permissive and not mandatory. If the legislature had intended to provide a right of appeal from the Comptroller's determination it would have done so explicitly, as it had in other sections conferring a discretion on the Comptroller, e.g. Sections 27, 28, 29 and 53(3) of the Ordinance. For the Company it was contended that an appeal always lay in cases involving the exercise of judicial discretion. The Company in any event clearly came within the terms of Section 75(1) as a person "aggrieved by an assessment." The assessment comprised not only the amount of statutory and chargeable income, but also the rate and amount of tax charged. It was against the rate of tax charged that the Company was appealing. The Board decided that an appeal lay from the Comptroller's determination under the proviso to Section 39.

30 For the Company it was argued that the dividend paid in 1950 had been paid out of chargeable income of 1951. The Company was assessed for 1951 on its income arising in the preceding year 1950. Section 31 of the Ordinance stated that a person's statutory income was the full amount of his income for the preceding year (except in the specific cases provided for later in the section which had no bearing on the present case). Chargeable income was arrived at by making the deductions authorised in Sections 33 and 34 from statutory income. Accordingly, the dividend paid in 1950 was paid out of the Company's chargeable income for 1951. The Comptroller had, as regards the year of assessment 1948, applied the proviso to Section 39 to relieve the company of tax on a part of its 1948 income equal to the amount of dividends paid in 1947, from which the Company had had no right to deduct tax. This was a situation analogous to the case before the Board and therefore the Comptroller in failing to apply the proviso to Section 39 in this case had exercised his discretion arbitrarily.

40

Documents.

X.  
Notes of  
Appeals  
heard by  
Board  
between  
December  
1951 to  
February  
1952—  
*continued.*

For the Comptroller it was submitted that the Company's view of chargeable income was unsound inasmuch as it involved the principle that income became chargeable income only when it entered into the computation of an assessment for a year of assessment. It was demonstrated that on the basis of the Company's arguments the Company would have no right to deduct tax from dividends paid out of income which did not enter into such a computation. Accordingly if the Company ceased to trade in 1954 it would have no right to deduct tax from dividends paid out of either its income arising in 1952 or its income arising in 1953, whichever was the less. The subject of charge was laid down in Section 10(1) of the Ordinance and was clearly the income of the year of assessment itself. Section 31 provided merely the method by which that income was to be measured for Income Tax purposes and could not affect the general proposition laid down by Rowlatt, J., in *A.G. v. Metropolitan Water Board*, 13 T.C. 300 that "what is brought into charge in any Income Tax year is the profits of that year." The application of the proviso to Section 39 in the year of assessment 1948 was concessional; 1948 was the first year of assessment and the adjustment had been made in view of the transition from a period when Income Tax was not payable to a period when it was payable. A change in the rate of tax on the other hand must be regarded as a normal incident of commercial life. 10

Decision. The Board held that the dividend paid by the Company in 1950 was paid out of its chargeable income for the year of assessment 1951 and that the assessment for 1951 should be adjusted so as to charge at 20 per cent. an amount equal to the amount of the dividend paid in 1950. 20

2. A. Ltd., M. Ltd., and P.C.

Facts. The point at issue in these cases was the same as in the case of B. Ltd. (No. 1 of these notes). The facts differed from the facts in B. Ltd. in two material respects only :— 30

- (i) the three Appellant companies constituted a group, A. Ltd. being a subsidiary of M. Ltd., and M. Ltd. a subsidiary of P.C.; and
- (ii) the net dividends paid in 1950 by A. Ltd. exceeded the profit earned in 1950 as shown in the Company's profit and loss account; similarly, the net dividends paid by M. Ltd. in 1950 exceeded the profit (apart from the dividend received by M. Ltd. from A. Ltd.) earned in 1950 as shown in the company's profit and loss account. 40

Arguments. The same arguments were advanced as in the case of B. Ltd. In addition, it was contended on behalf of the Companies that the Comptroller's refusal to apply the proviso to Section 39 had resulted in double taxation inasmuch as dividends paid by A. Ltd. were charged

with an additional 10 per cent. tax in the hands of M. Ltd., although the income of A. Ltd. out of which the dividends were paid was itself charged with tax at 30 per cent. The same position obtained in the case of dividends paid by M. Ltd. to P.C.

10 On behalf of the Comptroller it was submitted that the identification of a company's income with dividends paid to shareholders had been held to be fallacious in the case of *Neumann v. C.I.R.*, 18 T.C. 332. In this particular case it was, in any event, demonstrably impossible for A. Ltd. to have paid the whole of its 1950 dividend out of 1950 profits, or for M. Ltd. to have paid the whole of its 1950 dividends out of its 1950 profits (apart from the dividends received by M. Ltd. from A. Ltd.). The plea of double taxation was not supported by the facts.

Decision. The Board held that the chargeable income of each of the Appellant companies for the year of assessment 1951 was its income for the year 1950. The case was remitted to the Comptroller-General to ascertain how much of the dividends paid in 1950 by A. Ltd. and by M. Ltd. was paid out of 1950 income, and to have the 1951 assessments on these companies adjusted so as to charge the amount so ascertained at 20 per cent.

20 [Note. In each case the amount of dividends paid out of 1950 income was determined by reference to the ratio which the net profits shown by the company's accounts for 1950 bore to the aggregate of the net 1950 profits and the balance of profits brought forward in the company's account as at 1st January, 1950].

### 3. Lodge K.

30 Facts. A Lodge of Freemasons was assessed to Income Tax in respect of the net annual value of property owned and occupied by it comprising on the ground floor a lounge and reading room, used occasionally as a school, and on the first floor a Masonic Temple and Robing Room. The Lodge claimed exemption from Income Tax insofar as the net annual value of the Temple was concerned.

Arguments. For the appellant, two contentions were advanced :

- (i) that the Temple was held in trust for charitable purposes only and that accordingly its net annual value was exempt from tax under section 13 (1) (g) of the Income Tax Ordinance, 1947 ; and
- (ii) that the Lodge did not use the Temple for the purpose of residence or enjoyment within the meaning of section 10 (1) (c).

40 Evidence was tendered on behalf of the Lodge that the Temple was used solely for the purpose of Christian worship. (It was admitted that services held in the Temple could be attended only by Freemasons). The Temple was accordingly used solely for a charitable purpose and income therefrom was exempt from tax under section 13 (1) (g). As

Documents.

X.  
Notes of  
Appeals  
heard by  
Board  
between  
December  
1951 to  
February  
1952—  
*continued.*

Documents.

X.  
Notes of  
Appeals  
heard by  
Board  
between  
December  
1951 to  
February  
1952—  
*continued.*

regards the second ground of appeal the Lodge did not reside in the Temple, and further the term “enjoyment” could not properly be applied to the use of the Temple as a place of worship.

It was submitted on behalf of the Comptroller that to bring the net annual value of the Temple within the exemption conferred by section 13 (1) (g) the appellant must show that the net annual value was income of a charitable institution, or of a body of persons or trust established for charitable purposes only. It had never been contended that the Lodge was a charitable institution, nor could it be regarded as a body of persons or trust established for charitable purposes only. 10  
It was true that the advancement of religion had been established as a charitable purpose in the case of *Pemsel v. the Special Commissioners*, 3 T.C. 53 but a later case *In re White*, 13 T.C. 228 had made it clear that there must be a public element in the religious activities of a body before it could be regarded as established for the advancement of religion. That public element was lacking in the case before the Board. The object of Freemasonry as defined in the Oxford English Dictionary was “mutual help and the promotion of brotherly feeling among its members.” As regards the appellant’s second ground of appeal it seemed clear that if a Lodge of Freemasons had any residence, that 20  
residence must be in the Lodge’s Temple. Further, the word “enjoyment” had a varied and neutral quality. Its use in section 10 (1) (c) might be compared with the use of the word “enjoy” in the General Rule of No. 1 of the Schedule A.I.T.A. 1918.

Decision. Held that the property was not owned by a charitable institution or body of persons or trust established for charitable purposes only. Held further that the property was used by the appellant for the purpose of enjoyment. The appeal was dismissed.

4. C.

Facts. C, a Director of R. Ltd., was killed by bandits on 1st December, 30  
1950. R. Ltd., subsequently made an ex-gratia payment to C’s widow of an amount equal to the amount which the deceased would have received for the year ended 31st December, 1950 under the Company’s Bonus Participation Scheme had he lived and remained in the service of the Company until 31st December, 1950. The relevant company’s minute read as follows :—

“It was agreed that the bonus due to the late Mr. C. in  
“respect of 1950 should, since it did not constitute a legal due  
“and therefore was not part of his Estate, be paid direct  
“to Mrs. C.” 40

C’s widow appealed against an assessment on her husband for the year of assessment 1950 in which the amount of the ex-gratia payment was included as part of his remuneration from the company.

Arguments. For the appellant it was contended that the deceased was not entitled to any bonus under the Company's Bonus Participation Scheme for the year 1950. The payment was an ex-gratia payment and it was made to the deceased's widow solely in view of her straitened circumstances. The wording of the Company's minute was perhaps unfortunate but the contrast drawn therein between the terms "due" and "legally due" made clear the Company's intention. The sum in question had been held not to be liable for Estate Duty. Accordingly it was in no sense income of the deceased. Even if the Board decided that the payment was made in consideration of the deceased's past service, the payment would be exempt from Income Tax under section 13 (1) (i) as a death gratuity, or compensation for death.

It was submitted on behalf of the Comptroller that the fact that the deceased had no legal title to the sum in question was irrelevant. It was well established that a voluntary payment to an employee might be remuneration assessable to Income Tax. In the U.K., where the law in this particular was similar to the law in Malaya, this proposition had been established by a series of cases amongst which were *In re Strong*, I.T.C. 207, *Herbert v. McQuade* 4 T.C. 489, and *Calvert v. Wainwright*, 27 T.C. 475. Further, there was nothing in section 10 (2) which would limit remuneration of an employment to sums, allowances, etc. paid to the employee, or which would prevent the inclusion of the payment in question in the deceased's statutory income on the ground that it had been made to his widow. The Company's minute voting the payment described it as a "bonus due to the late Mr. C. in respect of 1950" and it was difficult to go beyond these clear words.

Decision. The Board held that the payment was a bonus paid in respect of the deceased's employment with R. Ltd. and that it was correctly included in the assessment on the deceased's income for 1950.

5. W.

Facts. The appellant accepted appointment to the Colonial Legal Service in 1947 whilst living in the United Kingdom, and informed the Colonial Office that he would be prepared to embark for Malaya at any time after 1st September, 1947. In fact he left the U.K. on 17th October, 1947 and arrived in Malaya on 11th November, 1947. For the period 1st September to 16th October, 1947 the appellant was granted an allowance equal to half salary plus half C.O.L.A. He was paid at the same rate during the voyage. From 11th November, 1947 he received full salary and C.O.L.A. The appellant was assessed to Income Tax on the basis that his appointment dated from 17th October, 1947. The appellant claimed:—

(i) that his employment commenced on 1st September, 1947; and

Documents.  
X.  
Notes of Appeals heard by Board between December 1951 to February 1952—  
*continued.*

Documents.

X.  
Notes of  
Appeals  
heard by  
Board  
between  
December  
1951 to  
February  
1952—  
*continued.*

- (ii) that the allowance paid to him for the period from that date to 16th October, 1947 was a subsistence allowance exempt from Income Tax as being within the exception referred to in section 10 (2) (a).

Arguments. The appellant contended that he had been under the orders of the Malayan Government continuously since 1st September, 1947. The allowance paid to him for the pre-embarkation period was in effect a retaining fee for this services. He was bound to sail for Malaya at any time after 1st September, 1947 and to this extent he was not thereafter a free agent. No change had taken place in his employment since 1st September, 1947. In this respect his case was distinguishable from that of Capt. Roche—II M.L.R. page 1. 10

The appellant did not argue his second point fully at this stage on the grounds that it would arise only if he succeeded on the first one.

For the Comptroller it was pointed out that under M.E. Regulations, Chapter I, paragraph 6 (1), the appointment of an officer engaged outside Malaya in the absence of any special agreement dated from the date of embarkation to assume duty. For pension purposes the appellant's date of appointment was taken to be 17th October, 1947. This was also the date of appointment shown in the printed Establishment List. The pre-embarkation payment to the appellant was simply an ex-gratia payment to compensate him for loss of employment during the period which elapsed before a passage could be obtained for him. The mere payment of money did not of itself establish an employer/employee relationship. (*Cowan v. Seymour*, 7 T.C., 373 and *Henry v. Galloway*, 17 T.C. 470.) Such independent evidence as there was pointed clearly to 17th October, 1947 as the date of W's appointment to the Colonial Legal Service. 20

Decision. The Board held that the date of W's appointment was 17th October, 1947 and confirmed the assessment. No decision was made on the second ground of appeal, as it did not fall to be considered in view of the Board's decision on the first ground. 30

Kuala Lumpur,  
March, 1952.

---

In the Privy Council.

No. 27 of 1954.

ON APPEAL FROM THE COURT OF APPEAL OF  
THE SUPREME COURT OF THE FEDERATION  
OF MALAYA.

---

BETWEEN  
COMPTROLLER OF INCOME  
TAX ... .. *Appellant*  
AND  
HARRISONS AND CROSFIELD  
(MALAYA) LIMITED ... *Respondent.*

---

RECORD OF PROCEEDINGS

---

CHARLES RUSSELL & CO.,  
37 Norfolk Street,  
Strand, W.C.2,  
*Solicitors for the Appellant.*

STEPHENSON HARWOOD & TATHAM,  
16 Old Broad Street,  
London, E.C.2,  
*Solicitors for the Respondent.*