25,1958

IN THE PRIVY COUNCIL No. 7 of 1957

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA

UNIVERSITY OF LONDON INSTITUTE OF ADVANCED LEGAL STUDIES

B E T W E E N:

GOKULDAS RATANJI MANDAVIA Appellant

52072

- and -

THE COMMISSIONER OF INCOME TAX (Eastern Africa) Respondent

CASE for the APPELLANT RECORD

10 1. This is an appeal from an Order of the Court of Appeal for Eastern Africa dated the 28th September, 1956, varying a Decree by the Supreme Court of Kenya dated the 6th March, 1956, whereby the Appellant's appeal under Section 78(1) of the East African Income Tax (Management) Act, 1952, against notices by the Commissioner of Income Tax (Eastern Africa) refusing to amend assessments made on the Appellant for the years 1943 to 1951 inclusive was dismissed, and the said assessments were confirmed, 20 save that the treble additional tax for 1951 was remitted. P.175 P.144

2. The assessments against which the Appellant appealed were all made upon the 26th June 1953 and are as follows :- P. 23

Year of Assessment	Income	Tax	Penalty
1943	£ 800	Sh. 2,150	Shs. 6,450
1944	£ 900	2,531	7,593
1945	£1,600	5,900	17,700
30 1946	£1,600	5,900	17,700
1947	£2,100	9,056	27,168
1948	£2,250	8,190	24,570
1949	£2,800	11,800	35,400
1950	£4,000	22,112	66,336
1951	£6,250	46,018	138,054

RECORD

The Court of Appeal for Eastern Africa confirmed the assessments for all the years in so far as they related to the basic tax and for the years 1943 - 1950 inclusive in so far as they levied penalties equal to the basic tax in each year; the balance of the assessments for 1943 - 1950 inclusive was remitted to the Supreme Court for a Judge other than the Judge of first instance to re-try whether the whole or any and what part thereof should be remitted. There was no cross-appeal by the Respondent with regard to the remission by the Supreme Court of the penalty of 138,054/- in respect of 1951.

The Court of Appeal further ordered that the Commissioner of Income Tax should have power before the re-hearing to require all such returns, accounts and information including claims for allowances to be submitted as would enable the Commissioner to assess the true basic liability to tax of the taxpayer for the years in issue.

3. The relevant statutes are the East African Income Tax (Management) Act, 1952, (hereinafter referred to as "the Act") and the Income Tax Ordinance (Cap. 254) of Kenya (hereinafter referred to as "the Ordinance") which it replaced. Subject to the provisions of the Fifth Schedule thereto the Act was deemed to have come into operation on the 1st January, 1951 - Section 1(1). Paragraph 1 of the Fifth Schedule provides that the Ordinance (notwithstanding its repeal by Section 99(a) of the Act) shall continue to apply to years of assessment up to and including 1951 with the modification that as from the date of publication of the Act the procedural provisions of Parts VIII to XIII of the Act (which comprise Sections 49 - 95 inclusive) are deemed to be incorporated in it; the proviso to paragraph 1 states that no party to any legal proceedings pending by or against the Commissioner on the day of such publication is to be prejudicially affected by the paragraph.

4. The relevant parts of the Act are set out below together with references to the corresponding provisions of the Ordinance and a note of any material differences between them.

Charge of tax

Section 8(1) of the Act provides that "tax shall,

subject to the provisions of this Act, be charged in respect of each year of income at the rate imposed for that year ..... "

By Section 2(1) of the Act "year of income" is defined as "the period of twelve months commencing on the 1st January 1951 and each subsequent period of twelve months".

There is no material difference between the Act and the Ordinance so far as the effect is concerned, but under the Ordinance the method was to assess in a particular year of assessment the income arising in the previous year. The corresponding Sections of the Ordinance are Sections 7(1), 8(1) and 2 which defines "year of assessment".

Chargeable Income

Section 25 of the Act provides that "the chargeable income of any person for any year of income shall be his total income for that year less any personal allowances to which he is entitled at the rate specified in respect of that year in the appropriate territorial Income Tax Ordinance ..... "

Section 35 of the Act provides: "Every claim to a personal allowance shall be made on the specified form and the allowance shall not be granted unless such claim contains such particulars and is supported by such proof as the Commissioner may require".

Section 23 of the Ordinance provides: "The chargeable income of any person for any year shall be his total income for that year subject to the deduction allowed in this Part".

Section 26 of the Ordinance provides: "Every person who claims deduction under this Part shall make his claim on the proper form. Such deduction shall be granted if the claim contains such particulars and is supported by such proof as the Commissioner may require".

Notice of chargeability and returns

Section 59(1) of the Act provides: "The Commissioner may, by notice in writing, require any person to furnish him within a reasonable time, not being less than thirty days from the date of service of

RECORD

such notice, with a return of income and of such particulars as may be required for the purposes of this Act with respect to the income upon which such person appears to be chargeable".

Section 6(2) of the Act provides: "Where a notice is served by ordinary or by registered post it shall be deemed to have been served not later than the seventh day succeeding the day on which the notice would have been received in the ordinary course by post ....."

Section 43(1) of the Ordinance resembles Section 59(1) of the Act except that in place of the words "appears to be chargeable" at the end there are the words "is chargeable". There is no material difference between Section 6(2) of the Act and Section 6(1) of the Ordinance.

Section 59(3) of the Act provides: "Where any person chargeable with tax has not furnished a return within nine months after the end of the year of income, it shall be the duty of every such person notwithstanding that no notice has been served upon such person under sub-section (1) to give notice to the Commissioner before the 15th October in the year following the year of income that he is so chargeable".

Section 43(2) of the Ordinance provides: "Where any person chargeable with tax has not furnished a return within nine months after the commencement of the year of assessment, it shall be the duty of every such person to give notice to the Commissioner before the 15th October in the year of assessment that he is so chargeable".

Power to call for returns, books etc.

Section 61(1) of the Act provides: "For the purpose of obtaining full information in respect of any part of the income of any person, the Commissioner may, by notice in writing, require that person or any other person to produce for examination by the Commissioner, or any person appointed by the Commissioner for that purpose, at such time and place as may be specified in the notice any deeds, plans, books, accounts, trade or stock lists, returns, or other documents, which the Commissioner may consider necessary".

RECORD.

The corresponding Section of the Ordinance is Section 45.

Additional tax in the event of default or omission

Section 40 of the Act provides as follows :-

"(1) Any person who -

(a) makes default in furnishing a return, or fails to give notice to the Commissioner as required by the provisions of Section 59, in respect of any years of income shall be chargeable for such year of income with treble the amount of tax for which he is liable for that year under the provisions of Sections 36 to 39 inclusive; or

(b) omits from his return for any year of income any amount which should have been included therein shall be chargeable with an amount of tax equal to treble the difference between the tax as calculated in respect of the total income returned by him and the tax properly chargeable in respect of his total income as determined after including the amounts omitted,

and shall be required to pay such amount of tax in addition to the tax properly chargeable in respect of his true total income

(2) If the Commissioner is satisfied that the default in rendering the return or any such omission was not due to any fraud, or gross or wilful neglect, he shall remit the whole of the said treble tax and in any other case may remit such part or all of the said treble tax as he may think fit.

(3) The additional amounts of tax for which provision is made under this section shall be chargeable in cases where tax has been assessed by the Commissioner under the provisions of Section 72 as well as in cases where such income or any part thereof is determined from returns furnished".

The corresponding provision in the Ordinance is Section 28(1) - (3), the only material difference being that sub-section (1)(b) provides for a penalty of double tax only.

RECORD.

Commissioners to make assessment

Section 71 of the Act provides :-

"(1) The Commissioner shall proceed to assess every person chargeable with tax as soon as may be after the expiration of the time allowed to such person for the delivery of his return.

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

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

(b) if he has reasonable ground for thinking that the return is not a true and correct return, refuse to accept the return and, to the best of his judgment, determine the amount of the income of the person and assess him accordingly.

(3) Where a person has not delivered a return and the Commissioner is of the opinion that such person is liable to tax, he may, according to the best of his judgment, determine the amount of the income of such person, and assess him accordingly, but such assessment shall not affect any liability otherwise incurred by such person by reason of his failure or neglect to deliver a return".

The corresponding provision in the Ordinance is Section 55.

Additional assessment

Section 72 of the Act provides :-

"Where it appears to the Commissioner that any person liable to tax has not been assessed or has been assessed at a less amount than that which ought to have been charged, the Commissioner may, within the year of income or within seven years after the expiration thereof, assess such person at such amount or additional amount as, according to his judgment, ought to have been charged, and the provisions of this Act as to notice of assessment, appeal and other proceedings under this Act shall apply to such assessment or additional assessment and to the tax charged thereunder :-

Provided that -

(a) where any fraud or wilful default has been committed by or on behalf of any person in connexion with or in relation to tax for any year of income, the Commissioners may, for the purpose of making good to the revenue of the Territories any use of tax attributable to the fraud or wilful default, assess that person at any time;

(b) an objection to the making of such assessment or additional assessment on the ground that the time limited for the making thereof has expired shall only be made on objection or appeal as provided for under the provisions of this Act".

The effect of the corresponding provision of the Ordinance, namely Section 56, is the same since "within a year of assessment or within six years after the expiration thereof" in the Ordinance corresponds to "within a year of income or within seven years after the expiration thereof" in the Act.

Power of Commissioner to revise assessment in case of objection

Section 74(2) of the Act provides :-

> "(2) If any person dispute the assessment he may apply to the Commissioner, by notice of objection in writing, to review and to revise the assessment made upon him. Such application shall state precisely the grounds of his objection to the assessment and shall be made within thirty days from the date of the service of the notice of assessment :
>
> Provided that the Commissioner, upon being satisfied that owing to absence from the Territories, sickness or other reasonable cause, the person disputing the assessment was prevented from making the application within such period, may extend such period".

Section 58(2) of the Ordinance is substantially the same except for providing that the Commissioner shall extend the period in the circumstances mentioned in the proviso.

RECORD.

Procedure in cases where objection or appeal is pending

Section 81 of the Act provides :-

"Collection of tax shall, in cases where notice of an objection or an appeal has been given, remain in abeyance until such objection or appeal is determined:

Provided that the Commissioner may in any such case enforce payment of that portion of the tax, if any, which is not in dispute".

The corresponding provision of the Ordinance is Section 65.

Appeals to Court

Section 78 of the Act provides as follows :-

"(1) Any person who, being aggrieved by an assessment made upon him, has failed to agree with the Commissioner in the manner provided in sub-section (4) of Section 77, or having appealed to a local committee, is aggrieved by the decision of such committee, may appeal against the assessment to a judge upon giving notice in writing to the Commissioner within sixty days after the date of service upon him of the notice of an amended assessment or the notice of the refusal of the Commissioner to amend the assessment as desired, or within sixty days after the date of the decision of the local committee, as the case may be.

(2) .....

(3) .....

(4) .....

(5) The onus of proving that the assessment complained of is excessive shall be on the person assessed.

(6) The judge may confirm, reduce, increase, or annul, the assessment or make such order thereon as to him may seem fit.

(7) .....

(8) .....

(9) .....

RECORD.

(10) No appeal shall lie from the decision of a judge, except on a question of law or of mixed law and fact.

(11) Notwithstanding that an appeal from the decision of the judge has been lodged, tax shall be assessed and collected in accordance with the decision of the judge:

Provided that, if the amount of the assessment is altered by the order or judgment of Her Majesty's Court of Appeal for Eastern Africa or Her Majesty in Council, then -

(a) if too much tax has been paid, the amount overpaid shall be refunded with such interest, if any, as such Court of Appeal or Her Majesty in Council may order; or

(b) if too little tax has been paid, the amount unpaid shall be deemed to be arrears of tax, except that no penalty shall be due on such arrears under Section 83".

The corresponding provisions of the Ordinance are to be found in Section 62 (1), (5). (6), (10) and (11). The only material difference is that under Section 62(1) the appeal must be within thirty days of service of notice of refusal instead of sixty days.

5. The facts of this case, the relevant portions of which are summarised below, are to be found in the Appellant's Statement of Facts dated the 14th July, 1954, which accompanied his Memorandum of Appeal to the Supreme Court (pages 20 - 23 of the Record), in the Respondent's Statement in reply dated the 9th May, 1955, and the letters annexed thereto (pages 23 - 47), in the oral evidence before the Supreme Court (pages 51 - 97), in the Exhibits (pages 190 - 209) and in the Income Tax Assessments for 1943 - 1951 (pages 1 - 17).

Oral evidence was given by the Appellant and by three officials or past officials of the Revenue, namely, Leslie Russell Fisher, Charles Martin and Arthur Holden, who were respectively Deputy Commissioner, Regional Commissioner and an Assistant Commissioner of Income Tax at the relevant time. The Respondent was unwilling to call the first and third of these officials, though their evidence was clearly relevant, and the Appellant accordingly had

RECORD.

to do so but without, of course, the right to cross-examine them.

PP.20,53,57. 6. The Appellant has resided in Kenya since 1921. On the 5th December, 1941, he was admitted to practice as an Advocate and began to practice the following year. At this time he had no income except £20 per month from rents on which he subsisted. At the end of 1942 a Mr.Monjee Raghavjee (referred to in the oral evidence and hereafter as "Mr. Monji"), who was co-owner with the Appellant of certain properties, ceased to account for the Appellant's share. This dispute was never resolved. Mr. Monji died in February, 1955.

In 1943, the Appellant became a partner in a legal firm with one D.N. Khanna, who, in January, 1944, similarly failed to give accounts of the partnership though he retained the partnership books in his possession. After various disputes, the Appellant eventually brought a suit against Mr. Khanna in 1950. A defence was filed and the action was pending at the time of the hearing before the Supreme Court; in 1955 notice of motion for stay of the action was dismissed.

P.53 LL.17-39 7. The Appellant gave evidence that in 1943 he saw Mr. Gledhill, the official of the Income Tax Department dealing with names beginning "M" with a view to being assessed on the basis of returns made by the partner who was not rendering accounts. He was told that this would involve a disclosure of confidence; on asking if he could omit that part he was warned that he had to make a declaration of total income and told he should try to settle the dispute by litigation or otherwise.

P.33 L.22. In letter "F" dated the 14th July, 1953, the Appellant stated that his first approach to the Income Tax Department was made "about 1943" when a Mr. Deadman issued a form of return under a different file number. Mr. Holden said the Appellant mentioned this to him in 1951. The Appellant said that during the hearing he was given a description of Mr. Deadman which did not tally with that of the man he had seen and who was in fact the European in charge of the "M" files in 1943; the name of Deadman was given him in 1945 when he made a further visit to the Department. Mr. Martin gave evidence that Mr. Deadman did not return to Kenya till 1944.

P.61 L.36.
P.73 LL.23-38.
P.85 LL.22-30.

RECORD.

8. Nothing further appears to have transpired until the Appellant visited the then Deputy Commissioner of Inland Revenue, Mr. L.R. Fisher, on the 20th June, 1951. However, in paragraph 3 of the Appellant's Statement of Facts he stated that the officers of the Income Tax Department were aware of his assessability and his difficulties in making returns of total income for such years and this was not specifically denied in the Respondent's counter-statement. There is, however, no direct corroboration though Mr. Holden said he had known the Appellant for some time before 1951 and the general tenor of Mr. Fisher's account of the interview is not that of a first meeting. Mr. Fisher's evidence in fact strongly suggests that a file was already in existence and this received some indirect confirmation from Mr.Martin but Mr. Holden said he opened a file for Mr. Mandavia himself and could trace "nothing definite earlier to 1951". Mr. Martin agreed that the Department's records were not infallible.

P.20 L.29.
P.23.
P.60 L.28.
P.51 LL. 6-18.
P.51 LL.18,28 and 35.
P.89 LL.13-19.
P.61 LL.34-39.
P.96 L.6.

9. The Appellant's visit was voluntary. Mr. Fisher thought he was frank. "It was not a false account. He could not get the accounts". There was some conflict of evidence with regard to whether anything was said or implied at the interview with regard to the imposition of penalties.

P.51.

(a) The Appellant said Mr. Fisher told him he would not be regarded as a defaulter. (b) Mr. Fisher seemed to have no very clear remembrance of the interview but was sure that penalties would have been mentioned; if a full explanation were forthcoming quickly, penalties would be small; he would not have mentioned penalties in a case of fraud; he would have made no promise as to the amount of any penalty but might have said the matter would be treated leniently or seriously. (c) Mr. Holden was left with the impression, "that as Mr.Mandavia had come forward, Mr. Fisher would not be hard upon him. It was more an impression than a direct statement". Mr. Holden's evidence (e.g. at page 64, lines 13-18), did not conflict with the Appellant's Statement in Letter "F" on the 14th July, 1953, (which was not expressly traversed in Mr. Martin's reply on the 27th July, 1953) that the communications with Mr. Holden proceeded on the basis that no penalty was to be charged. There is no suggestion of any penalty in Mr.Holden's letter

P.54 LL.5-7.
P.51 L.13 to P.52 L.15.
P.33 L.39.
P.190.

RECORD.

to the Appellant dated the 20th June, 1951 (Exhibit "L") or in the Appellant's letter to Mr. Holden dated the 20th September, 1951, which, the Appellant said, followed Mr. Holden's statement that he "would do a provisional assessment to which partnership income would be added". (d) In paragraph 4 of the Respondent's Statement of Facts dated the 9th May, 1955, it was denied that any remission of penalties had been agreed by any authorised member of the Income Tax Department.

P.25
P.54 L.33.
P.24.

10. The interview with Mr. Fisher lasted some twenty minutes. The Appellant was then handed on to Mr. Holden and gave him certain preliminary information saying, inter alia, that he had not been able to make his return before because of accounting difficulties with his partners. He was given two months (subsequently extended to three months) to supply accounts in respect of his practice as an Advocate - Exhibit "1" - and in due course submitted Trial Balances for 1944-1950, and, later, 1951, that for 1950 being set out on pages 194-206 of the Record as an example.

PP.60-61.
P.190.

11. Other relevant matters which emerged from Mr. Holden's evidence are as follows :-

(a) He did not ask the Appellant to fill in any returns. Of the first interview he said: "On balance of probability I think I probably did not give him returns". When asked in cross-examination whether it would be normal when a member of the public came in to give him return forms, he replied, "Normally, yes. But in this case I know Mr. Mandavia had accounting difficulties and it is likely I did not give him returns at that stage". He also fancied he would not have asked for returns when the Appellant wrote about his personal allowances, that is to say, letter "A" dated the 20th September, 1951.

P.61 L.6.
P.63 L.41 to P.64 L.9.
P.25.

(b) Though Mr. Holden had meant Balance Sheets and Income and Expenditure Accounts when he asked for "accounts", he did not express dissatisfaction with what the Appellant produced. "I fancy I did not ask for audited accounts. I was prepared to take a risk". Notwithstanding cross-examination with regard to the unsatisfactory nature of trial balances, he

P.61 L.4.
P.62 L.26.
P.63 L.38.

RECORD.

said, "I would have been prepared to accept the trial balance - relative to professional earnings".

(c) He made it clear that the Appellant was co-operative. "There was no difficulty about information, it was more a divergence of views of what was necessary". "He gave all the information". "We tried to reach agreement. We never got as far as a figure. First we could not agree to carry into suspense the three items; second, I had no information on properties. He did not impede me". P.61 L.41. P.61 L.49. P.62 L.39.

(d) He confirmed that the Appellant was anxious to discharge his liability to tax at that time. "During the period 1951 to 1953 Mr. Mandavia may have called twice. The object I surmise to arrive at a settlement of his liability. He told me he would like to make a payment on account as he had responsibility to his son. I wanted outstanding points cleared before assessments were raised. From 1951 to 1953 nothing had been concluded so far as I am personally concerned. I had not brought the matter to finality". This links up closely with evidence the Appellant had already given. "He knew I was anxious to pay tax but he was not able to find a junior to do calculations for him. I saw him several times between September and December. I asked for assessment so I could remit to my son in England". P.61 L.25. P.54 L.35.

The reason for the only divergence, namely, as to the number of calls made by the Appellant, may either be that Mr. Holden was not subject to cross-examination by the Appellant or that he tended to minimise the visits because of his consciousness that his own dilatory conduct was open to criticism. There is actual evidence of at least three interviews, on the 20th June, 1951, on the 19th September, 1951, and in May, 1952 and at least one more must presumably have taken place to discuss the various matters referred to on pages 61 to 62 of the Record. It is also significant that notwithstanding that in paragraphs 4 and 5 of his Statement of Facts the Commissioner was alleging that the Appellant was guilty of wilful default, there is no denial of the allegation in the Appellant's Statement that he "made numerous calls on P.24 L.16. P.89 L.10. P.24. P.21 L.9.

RECORD.

the said A. Holden, Esq., during 1951 and 1952, and requested directions and any provisional assessments that he had promised to give and make".

12. In August or September the Appellant was suspended from practice in Kenya. In October, 1952, he had to go to Tanganyika and in February, 1953, to London in connection with his appeal against suspension.

13. Thereafter until at any rate May 1953, if there was any delay or neglect it was that of the Income Tax Department; Mr. Martin, who had taken up the post of Regional Commissioner of Income Tax on the 1st July, 1952, said it was "unco-operative". Mr. Holden had been detailed to assist him. Mr. Martin did not consider himself in any way responsible for the inaction of his subordinate. He finally conceded that the Appellant was not to blame for the delay; in fact, his first step on taking over the case was to express regret to the Appellant that more rapid progress had not been made in dealing with his tax liabilities.

P.79 L.7.
P.96 L.2.
P.79 L.13.
P.88 LL.21-27.
P.91 LL.7-15.
P.26 L.29-32.

14. On the 26th May, 1953, Mr. Martin wrote letter "B" to the Appellant. He said he was informed that the Appellant was in England and would not return before the end of June. In order to save time in bringing the Appellant's case up to date on his return to Kenya, and so that any preliminary work necessary might be undertaken in his absence, he wished the Appellant to note that there would be required from him correctly prepared Profit and Loss Accounts and Balance Sheets relating to his professional activities for all years from 1942 onwards and also a full statement regarding all property transactions from 1942 onwards. He enclosed forms covering the years of assessment 1942 to 1953 to be "completed and submitted to me along with the Accounts of your professional activities and your property dealings as set out in preceding paragraphs". In conclusion, he suggested an immediate payment on account of not less than £2,000, before the Appellant's return from the United Kingdom, such sum to be placed on deposit pending final ascertainment of the full liability.

P.26.

On the 4th June, 1953, the Appellant sent letter "C" in reply stating that he had informed

P.28.

RECORD.

Mr. Holden that his partnership accounts with Mr. Khanna for the years 1943-44 were the subject matter of a pending Court action, that the accounts of his partnership property with Mr. Monji were still not settled, and that Mr. Holden "had kindly promised to make a provisional assessment but unfortunately the misfortune referred to above intervened, and I did not hear from him about it until I left for this country on the 15th February last". (Mr. Martin said in evidence that he accepted this and in fact asked Mr. Holden why he had not made provisional assessments; he was told that Mr.Holden was otherwise engaged and that the matter was put on one side). The Appellant expressed his willingness to co-operate with the Department by submitting such accounts, books, papers, vouchers and other evidence as might be required, and by completing forms of the Return, but pointed out that these things could only be done on his return to East Africa since he had no resident staff at Dar-es-Salaam and no proper clerk at Nairobi. He said "I should be extremely glad if you would grant me indulgence till my return to East Africa, which should not take very long - compared at least to the time which elapsed when I first submitted copies of my Trial Balances to your office". He continued,

P.91 LL.7-12.

> "The expense of coming to East Africa and then coming back to England is something I cannot afford in my present circumstances, as my income has practically dwindled down to a little amount of monthly rent and I have some overhead expenses yet. My books are in East Africa and I have to collect my debts also, and until I have adjusted the amounts of income paid into my office and clients' accounts at the National Bank of India Ltd., Nairobi, I am not in a position to pay you any deposit. I also venture to hope to be able to satisfy you from my books and other evidence that the fees I charged did not become all my property and that quite a substantial amount had and has to be returned in view of my misfortune, and perhaps you will then revise your views about the amount you would assess against me.
>
> As a resident of Nairobi for some thirty two years with landed interests also in Nairobi, you will, I hope consider it right to leave

RECORD.

the matter in abeyance till the hearing of my appeal is over; and if you so prefer it, I shall write to you from time to time to say when it will be so. At present there is no prospect of my being able to return before the end of July next, but if I do I shall report to you soon after my arrival in East Africa".

The Appellant gave oral evidence about the financial difficulties caused by his suspension - see the first answer on page 68.

P.30. 15. Mr. Martin replied on the 15th June, 1953, by letter "D". He said he noted the Appellant's explanation about his absence from Kenya and that there was no prospect of his being able to return before the end of July, 1953, and went on -

"In these circumstances, and in order that there may be no undue delay in collection of duty, I propose to submit estimated Income Tax Assessments for all years for which, on the basis of the figures which you have already submitted, you would appear to be liable. These assessments will, of course, be subject to adjustment on final agreement of liability.

In view of the fact that you were clearly liable and must have been aware of the fact that you were liable to taxation for a considerable period before any approach was made to this Department I propose to have the assessments made with the addition of penalties. The quantum of the penalties will also be subject to adjustment at the discretion of the Commissioner when your liability has finally been established.

The notices of assessment will be issued to your Nairobi address and you will presumably be advised of their receipt and be able to give formal notice of appeal if you so desire.

I am unable to agree that you are not in a position to pay any deposit. On your own showing you have substantial properties in Nairobi, from which presumably you could obtain funds. In these circumstances I would repeat my request for a payment on account of £2,000".

RECORD.

16. There was a considerable amount of oral evidence regarding the reasons for making these assessments at this time, as to why they were post-dated and as to the Section or Sections under which they were made.

When Mr. Martin was asked why, when he could have assessed under Section 72 of the Act, he sent forms first, he said that he wanted particulars of income and allowances, though not with a view to making assessments. When asked why he did not raise assessments on the 26th May, he said that that was not necessarily the action he meant to take on the 26th May but that "subsequently" he learned that the Appellant was out of Nairobi. He added that if he had intended to assess the Appellant on his return, he would not have asked for returns. P.93 LL.5-17.

When asked how long he expected preparation of the necessary accounts would take on the 26th May, 1953, Mr. Martin replied, "three months if he had access to his books"; he agreed that the Appellant could not comply with the letter of the 26th May before he was assessed. P.90 LL.21-27. P.91 LL.16-18.

17. Mr. Martin said that the assessments were post-dated to 26th June, 1953, in accordance with normal practice which is designed to ensure that the taxpayer has at least his full 30 days to lodge Notice of Objection; it has nothing to do with the date of issue of the Return. The existence of this practice was confirmed by Mr. Fisher and by Mr. Holden. P.81 LL.6-16. P.51 L.39. P.63 L.9.

18. Mr. Fisher, who said he had an extensive knowledge of income tax procedure, stated that the Revenue would let the statutory period of 30 days run from service of notice (unless the assessee were thought to be leaving the country) and then, if no return had been made, would raise estimated assessments with treble tax under Section 71(3). If assessing under Section 72 he would not send out a return first. If a notice were sent out but there were no return, assessment would be under Section 71(3) in the first place. Section 72 was the Section for years outside the 6 year period. P.52 LL.25-45.

Mr. Holden said the Commissioner would assess P.63 LL.15-28.

RECORD.

under Section 72 without notice if there were fraud or wilful default; he would not send a notice first but would do so eventually. He would not send out a notice and then assess within 30 days unless the assessee were about to leave the country or fail to meet his liabilities. (This reservation and the reference by Mr. Fisher to persons thought to be leaving the country appear to be references to the special procedure provided for such cases by Section 68 of the Ordinance and Section 84 of the Act.)

P.80 LL.31-37. Mr. Martin said, "I caused these assessments to be made under Section 72. It was the only section I could make them under. There is an analogous section in England. I am thoroughly familiar with it. It is only section I could use which permits raising of assessments outside normal seven years time limit". "I am particularly concerned with fraud or wilful default and sections under which I can assess. I have never made an assessment under Section 71 in my life. I deal with Section 72. I was only interested in dealing with cases of fraud or wilful default".

P.96 LL.25-30.

P.32. 19. On the 19th June, 1953, the Appellant acknowledged letter "D" by letter "E" in which he expressed regret that Mr. Martin had thought fit to add to his difficulties in England despite the Appellant's assurances of co-operation and his promise to submit accounts.

P.33. By letter "F" dated the 14th July, 1953, the Appellant acknowledged the receipt of several assessment notices mailed on the 18th June, 1953, but post-dated to the 26th June, 1953. He mentioned inter alia his original approach to the Income Tax Department about 1943, and said that, because of the difficulties with Messrs. Monji and Khanna, Mr. Holden agreed to the submission of his accounts as an Advocate only. "There was no question of any wilful default, and the communications with Mr. Holden continued on the basis that no penalty was to be charged. I am sure he will remember that in 1951, he did not propose to go beyond six years assessments and the 1942 accounts were therefore not called for". He objected to the assessments on the grounds that no reasonable time had been allowed for completing the returns, that the assessments were premature and unjustifiable, that

RECORD.

he had been treated as a London resident, and that the assessments had not been made according to the best of the Commissioner's judgment because details of his personal allowances and other particulars furnished had been ignored. He argued that he should be allowed a reasonable opportunity to complete the returns and accounts, and stated his willingness to send for his books from East Africa and to have the returns and accounts submitted by a reputable firm of English accountants.

Mr. Martin stated that he regarded this letter as a formal notice of objection and recorded it as such. P.82 L.2.

The Appellant said in evidence that he had been advised by tax counsel that he should not admit liability for invalid assessments; he thought this was before he wrote letter "F". Confirmation of the Appellant's remarks that no question of wilful default had been raised by Mr. Holden is provided by the fact that the first Trial Balance in fact produced to him was for 1944; i.e. the earliest year for assessment purposes in the absence of fraud or wilful default; the earliest assessment made by Mr. Martin, on the other hand, was for 1943, which would be based on the 1942 Trial Balance and income. There is no trace that Mr. Holden asked for any earlier year. See, also, letter "A" which deals with 1944 on both life insurance premiums and other personal allowances. P.55 LL.23-28. P.26 L.35. P.194 L.2. P.1. P.25.

20. Copies of the relevant assessments are to be found on pages 1 to 17 of the Record. All these state that unless written notice of objection stating the precise grounds was given within 30 days of the 26th June, 1953, the tax would be payable on the 5th August. 1953, failing which a penalty of 20% of the tax would be added.

Each assessment shows tax at four times the normal rate and no personal allowances of any kind have been made.

In each case the word "additional" before the word "assessment" has been deleted.

21. On the 27th July, 1953, the Commissioner sent letter "G" to the Appellant in reply. He said he could not agree that no reasonaable time had been allowed because the Appellant had a form of return P.35.

RECORD.

in 1943, and had failed to complete it, and further forms had been posted on the 26th May, 1953, and had not yet been returned; the assessments were not premature or unjustifiable; no allowances had been given because no returns had been received; finally, £2,000 was the bare minimum as a measure of the tax not in dispute under Section 81 of the Act, "and I ask that this sum be paid at once".

The Commissioner did not confirm or deny the Appellant's statement that communications with Mr. Holden had been on the basis of no penalty.

P.37. P.39. 22. After further letters to the Appellant dated the 1st and 16th September, 1953, respectively, requesting payment of the £2,000, the Appellant by letter "J" dated the 9th October, 1953, gave formal notice pursuant to Section 59 of the Act that he was chargeable with income tax for 1952. He said he had sent for his books of account and would forward proper balance sheets with returns if he were sent the requisite forms. He added that he would have to ask for adjustment of the tax in view of the loss he was likely to suffer during the current and the next years.

P.40. 23. On the 27th October, 1953, by letter "K", the Acting Regional Commissioner threatened to appoint agents to collect the £2,000 under Section 54 of the Income Tax (Management) Act, 1951, if it was not received by the 1st December, 1953.

P.41. The Appellant replied on the 27th November, 1953 - letter "L". He explained that after the previous 14th July letters had not been forwarded. With regard to the allegation in letter "G" that he had taken "no further action" after 1943, he stated that he had handed the matter of his partnership account with Mr. Khanna to Messrs. Daly & Figgis, Advocates of Nairobi, and that he had understood from Mr. Deadman of the Income Tax Department that his return had to be of total income and not an incomplete income account. "Eventually, Mr. Holden agreed to my submitting such accounts as I could of my individual income only after I had seen Mr. Fisher about it, and Mr. Holden should confirm that at that time no penalty was to be charged. The only question was about agreeing a percentage for bad debts etc., and I supplied to Mr. Holden particulars of my claim for Personal

RECORD.

allowances. I did not hear further from him until Mr. Martin wrote to me after I came to this country temporarily in connection with my case, and I do not see any valid ground for penalty cropping up meantime". He reiterated his objections to "the fantastic sums assessed" and the manner of assessment and said that while he was prepared to pay the accurate amount of tax due, he did not find the demand for a payment on account justifiable; if the Department would "agree to stand by the original agreement of not charging the penalty", an amicable settlement of the whole dispute could be reached.

On the 5th December, 1953, the Acting Regional Commissioner stated that the £2,000 was much less than the total sum not under dispute excluding penalties, that the Department had shown the utmost leniency, and that he proposed to implement the provisions of Section 54 of the Income Tax Act, 1952, forthwith - letter "M". Once again, there was no denial of the Appellant's assertion that Mr. Holden had agreed to charge no penalty. P.42.

24. On the 11th January, 1954, (letter "O") the Appellant stated in reply to a letter "N" dated the 8th January, 1954, that he had returned to Dar-es-Salaam where he was licensed to practice as an Advocate. Owing to his engagements, he did not know when he would be able to visit Nairobi as requested but would call at the local office if necessary. He added, "I take it that you do not base your claim on the assessments you previously sent me, and that you will make fresh assessments on the basis of figures from my books after you have given me a proper amount of time for completing the returns from the stage of accounts I was asked to deliver to Mr. Holden". PP.43-4.

By letter "P" dated the following day, the Appellant was informed that the requirements of the Department were as set out in the letter dated the 26th May, 1953, together with certain further information with regard to the properties. The writer was "prepared to accept that preparation of the necessary accounts and completion of the returns ..... may take some little time". The request for the payment of £2,000 on account at once was repeated. P.45. P.28.

RECORD.

P.46. The Appellant was informed by letter "Q" dated the 8th April, 1954, that unless the £2,000 was remitted immediately, consideration would have to be given to commencement of proceedings for recovery of duty on the basis of the assessments already made.

P.47. 25. On the 5th May, 1954, notices of refusal of the Appellant's request to amend the assessments for the years 1943 - 1951 inclusive were sent to the Appellant.

P.18. On the 14th July, 1954, the Appellant duly gave written notice of appeal against the refusals to amend.

P.84 L.21 to P.85 L.22 Exhibit "A" P. 208. 26. Various negotiations took place during October and November, 1954, between the Appellant, an Advocate named Bechgaard who was acting in the Appellant's interests if not on his direct authority, and Mr. Martin. The negotiations finally broke down at a meeting between the Appellant and Mr. Martin at Dar-es-Salaam on the 9th December, 1954.

P.85 LL.5-22. Mr. Martin's account of this interview was that the Appellant said he might be able to find a deposit but that he would not be in a position to submit accounts and balance sheets by the 31st December, 1954. Before doing anything he wanted an assurance that no charge for penalties would be imposed. Mr. Martin said he might agree to an even further extension of time for submitting the accounts and balance sheets provided a deposit of £1,500 were made. "I asked him once more for a direct answer about the £1,500. He said he was not prepared to do so unless he had a clear statement as to what we proposed to do with regard to penalties. I repeated I could give him no undertaking on that matter".

P.78 L.24-47. The Appellant's account is not dissimilar. He said Mr. Martin asked for the accounts, statements, etc., though Mr. Martin knew that until he went to Nairobi he could not give him details. The Appellant asked about penalties and Mr. Martin replied that he was more interested in getting a deposit of £2,000 to £1,500. This was being asked as an amount not in dispute. "I disputed it as part of whole claim. I wanted to pay but I had to get a

RECORD.

loan. I thought they would get my £2,000 and further difficulty ahead. He said penalty would depend on wishes of the Commissioner and assessment. I did not want to bleed white and have a further danger hanging over my head". The Appellant's proposal was that he would pay £2,000, that the Appeal should be withdrawn and the assessments agreed; he was given no assurance to enable him to do this.

27. The hearing of the Appeal in the Supreme Court of Kenya took place from the 19th to the 23rd December, 1955. On the 6th January, 1956, Judgment was given by the Honourable Mr.Acting Justice Cram. P.114.

28. The learned Acting Judge first considered the evidence with regard to the period before 1951. He said inter alia that Mr. Holden could find no trace of any record of an earlier visit and could not recollect when the Appellant referred to Mr. Deadman, and that it was in cross-examination that the Appellant first became doubtful if he had seen Mr. Deadman. PP.114-117. P.115 L.16. P.115 L.25. P.115 L.27.

In his view, the allegations made of visits were quite unacceptable in the complete absence of a scrap of corroboration taken with his rather transparent volte face on the topic of Mr.Deadman; it might well be that the same "friend" who told the Appellant about the appearance of the officials concerned warned him of Mr. Deadman's absence from Kenya in 1943. In the result it might be that the Appellant in some circuitous manner less than resulting in opening a file or amounting to notice as required by the Act, got hold of a form of return or even had some circumspect and casual conversation with an official of the Department but this, in the learned Acting Judge's view, even if it happened, which he doubted, could not and did not amount to notice as contemplated by the Act and moreover was not intended to do so. P.116 L.32. P.116 L.48.

29. The learned Acting Judge next dealt with the period from 1951 until Mr. Martin took over. He formed the view that there was no proof that Mr. Holden handed return forms to the Appellant since Mr. Holden did not recollect doing so. It was perfectly apparent that Mr. Holden got nowhere in his negotiations and in his view the Appellant did not mean to get anywhere except at bargain basement rates. He considered it a wholly specious argument P.117 L.14. P.119 L.11. P.119 L.42 to P.120 L.2.

RECORD.

that it would be unsafe to sign a declaration of total income pending settlement of the disputes and thought no conviction could reasonably have proceeded upon a return containing a rough estimate accompanied by an explanation. In his opinion, Mr. Holden allowed himself to be skilfully led from taking any action by the Appellant smothering him with reasons why, though anxious to pay, he was frustrated from doing so.

P.121 LL.5-16. Mr. Holden, in the learned Acting Judge's view, dillied and dallied and allowed himself to become enmeshed in disputes until he was so well enwebbed that he did not seem to know what to do next. Mr. Martin, on the other hand, knew that the principles tendered by the Appellant were invalid.

PP.121-126. 30. The learned Acting Judge then turned to consider the United Kingdom tax position and, in particular, Section 107 of the Income Tax Act, 1918, the Tenth Schedule to the Finance Act, 1942, and the remarks of Lord Loreburn, L.C., in A. - G. v. Till (1910) A.C.50 at page 53. He came to the conclusion that in the United Kingdom it was the taxpayer's duty to inform the Revenue of his chargeability rather than the reverse and this suggested to him that a search should be made for a similar scheme in the Ordinance and the Act.

He stated that it is Section 7 of the Ordinance and Section 8 of the Act which actually charge the income; the Commissioner merely computes what the charge ought to be. Thus, the tax materialises ex lege and legislation helps the Commissioner by laying down the basis of assessment. He ought then to look for a time of payment and a time for making a return or giving notice, and these duties he would expect to lie on the taxpayer.

With regard to payment, the duty was clearly the taxpayer's; as to date, disjunctive times of payment were laid down by Sections 66 of the Ordinance and 82 of the Act. Finally, Section 43(2) of the Ordinance and Section 59(3) of the Act imposed a duty on the person chargeable to take action by filing a return, but at the same time gave him a second chance, since he could also avoid the peril of treble tax under Section 28 of the Ordinance and Section 40 of the Act by giving notice of chargeability by the 15th October.

RECORD.

31. Thus, by neglecting his plain statutory duty of either making a return or giving notice, the Appellant incurred ex lege treble tax in every year except 1951. P.126 LL.6-25.

The learned Acting Judge pointed out that it is not mandatory upon the Commissioner to issue a notice requiring a return, and while he would normally do so it was not a condition precedent to assessment that a notice be sent out. P.126 L.26 - P.127 L.21.

In his view at least two different times were allowed for delivery of returns, namely, the time of delay after notice is issued by the Commissioner, and after the nine month period allowed by Sections 43(2) and 59(3); the Commissioner may conceivably proceed to assess once either of these periods has elapsed.

32. In his opinion, the Appellant was liable to tax and he saw no reason why he could not be assessed under Section 72. Mr. Martin said that was the Section he employed and he believed him. P.127 L.22 - P.128 L.8.

The Appellant had advanced the audacious and dangerous argument that the assessments were made under Sections 55 or 71, and not Sections 56 or 72, and on this basis, in an argument hardly brooking description, had impudently and fallaciously contended that in view of Section 28(3) of the Ordinance and Section 40(3) of the Act treble tax could not be charged if no returns were made. The learned Acting Judge could only assume that in not making returns the Appellant was founding on a loophole he thought he had discovered and trying to turn his breach of duty to advantage. This was a pathetic revelation of an immature mind as to social duty. P.128 L.9 - P.131 L.25.

He considered the case cited with regard to this argument on Section 40(3) distinguishable, and observed that the learned Judge was dubitante of his own decision, "which he arrived at by process of construction. He appeared to think there might be two constructions and selected one but from my point of view, however humble, it seems clear that there is one construction only and that the subsections are merely there for clarity and other construction runs contrary to the whole scheme of taxing statutes and in particular to that of the

RECORD.

Ordinance and Act and to the clear intent of the Sections themselves". (N.B. The case in question was a decision by Windham J., Kenya Civil Appeals 22-31/54, to the effect that penalties cannot be charged under Section 71(3) this being a casus omissus).

The learned Acting Judge did not see how the Appellant could show that the assessments were in fact made under Section 71, and in any case he did not agree that the Commissioner was estopped from proceeding under Sections 56 and 72 merely because returns had been sent out; Section 45 of the Ordinance and Section 61 of the Act give power to the Revenue to call for returns either after assessment or for the purposes of assessment.

P.131 L.25 to P.132 L.30. The learned Acting Judge accepted the evidence that the practice was to post-date notices of assessment in order to afford the taxpayer more time to object and that Mr. Martin intended to assess under Section 72 since Section 71, the routine Section, was inappropriate in the circumstances.

P.132 L.31 to P.134 L.16. The learned Acting Judge considered that the assessments ex lege contained charges of treble tax. He would, however, give the Appellant the benefit of his voluntary act in giving notice of liability by 19th September, 1951, and remit the treble tax for the year of assessment 1951.

P.134 L.16 to P.135 L.19. 33. The learned Acting Judge then turned his attention to the Appellant's state of mind and concluded that the argument he had advanced showed he had reached the classic stage of psychosis of imagining himself the aggrieved and innocent victim of a pernicious system and he posed but did not attempt to answer the question: "Who can minister to a mind diseased?"

P.135 L.20 - P.140 L.24. 34. The learned Acting Judge then reviewed the correspondence between the parties. He said that the Appellant did not supply the information necessary to support his application for review of the assessments. He considered it subversive of truth for the Appellant on the 27th November, 1953 (in letter "L") to have requested the Department to take a more reasonable attitude and outrageous of truth to have abjured it to stand by its original agreement to charge no penalty.

RECORD.

In his opinion, it would have been contrary to the public interest for the Revenue Officials to have agreed to a settlement on the lines suggested by or on behalf of the Appellant in the latter part of 1954, even if it had been lawful for them to do so.

35. At the time of the hearing no audited accounts or proper books of account were put in evidence, and no returns had been made, and, in the learned Acting Judge's view, the Appellant had wholly failed to discharge the onus laid on him by Section 78(5) of the Act of proving that the assessments complained of were excessive. P.140 L.25 to P.141 L.13.

36. Finally, the learned Acting Judge considered that having regard to the Appellant's conduct and state of mind there was nothing to justify any remission of the penalty for any of the years other than 1951, and he dismissed the appeal with costs. P.141 L.14 - P.143 L.11.

37. Notice of appeal to the Court of Appeal for Eastern Africa against the whole of the Supreme Court's decision other than that part of it which remitted treble tax for 1951 was given by the Appellant on the 20th January, 1956, and the Memorandum of Appeal was duly filed on the 16th April, 1956. Subsequently, additional grounds of appeal were filed - see pages 148 - 149 of the Record. P.143 P.145.

38. The appeal was heard by the Court of Appeal for Eastern Africa, (Worley, P., Sinclair V-P., and Briggs, J.A.) on the 17th and 18th September, 1956. On the 28th September, 1956, judgment with which Worley, P., and Sinclair V-P., agreed was delivered by Briggs, J.A.

39. In the view of the learned Justice of Appeal, the Appellant did not until 1951 make any return or give notice to the Commissioner that he was chargeable to tax and he was thus repeatedly and gravely in default over a period of several years. P.160 L.12.

In 1951, Mr. Holden asked the Appellant for various accounts and other materials relevant for the purpose of ascertaining his liability and received some, but by no means all, of what he asked, or what was reasonably necessary. P.160 L.27.

The learned Justice of Appeal referred to

RECORD.

letter "B" dated 26th May, 1953, and said that the £2,000 demanded was admittedly much less than the amount due by the Appellant even if he were given credit for all possible allowances and not charged with any treble tax.

P.162 L.15. 40. In his view, there was a genuine misunderstanding between the parties since the taxpayer believed he had been assessed under Section 71, and the Commissioner had intended to assess him under Section 72, and he pointed out that though the Appellant had at once referred to the assessments as "premature" he had not in fact referred to Section 71. He thought it came as a genuine surprise to Mr. Martin when it was suggested to him that he had acted under Section 71.

P.163 L.44. The learned Justice of Appeal came to the conclusion that Mr. Martin intended to act under Section 72 and he saw no reason whatever why he should be deemed to have acted under Section 71.

P.164 L.4-22. He agreed with the Appellant's argument that Section 71 as a whole only operates after notice requiring a return has been served. This, however, was not seriously contested by the Commissioner because his case was that the assessments were made under Section 72.

P.166 L.7. In the view of the learned Justice of Appeal the learned Acting Judge was wrong in thinking
P.167 L.13. (a) that tax could be due and payable in the absence of assessment (b) that every person chargeable with tax is automatically under a duty to make
P.167 L.36. a return of income within nine months of the tax becoming chargeable, and (c) that liability to assessment under Section 72 might spring from failure to make a return notwithstanding that no notice requiring a return had been served.

P.167 L.1. He did not consider that the words "liable to tax" in Section 72 indicated that the Section only applied to a person who had made a return and he
P.169 L.13. thought that the terms of Section 40(3) were a very serious obstacle to such a contention.

P.169 L.41. With regard to the alternative submission that the Commissioner may use either Section 71 or Section 72 but not both at once, he accepted the principle that if a statutory authority expresses

RECORD.

an intention to apply one method of pressure to a subject this may preclude it from changing its mind and applying the other; he did not. however, think that that principle was applicable here.

In the learned Justice of Appeal's opinion, however, the real answer to the main submissions on behalf of the Appellant was that it involved an unnatural construction of Section 72 because if it had been intended to restrict use of the Section to cases where a return had been made it would have been perfectly simple to say so. He rejected the historical argument on the point because it was always unwise to expect one set of statutory provisions to have the same effect as an earlier set in another jurisdiction, and because it was no means unreasonable that the Income Tax Department in Kenya or East Africa should have been given wider powers than the Revenue had in England; in the third place, there were slight indications that Section 72 had been deliberately widened in scope after its initial drafting. In his view, the principal purpose of Section 72 was to deal with cases where collection for tax had not "run smooth" for whatever reason. P.170 L.3. P.170 L.28. P.171 L.8.

He did not consider it at all absurd that there should be a mandatory duty to assess under Section 71 notwithstanding that an assessment might already have been made under Section 72. P.171 L.39.

In his view, the principle of Gould v. Bacup should only be applied if a switch from one Section to another could be shown to be unfair in practice to the taxpayer. In his opinion, in a case of long-standing default it could not be unfair to assess the taxpayer under Section 72 and at the same time or before or after call for returns. P.172 L.6.

For these reasons, he was of the opinion that the assessments were lawfully made under Section 72; he further had no doubt that there was such wilful default as entitled the Commissioner to go back beyond the seven-year period. P.172 L.29.

41. The learned Justice of Appeal considered this a very bad case of wilful default. He thought it permissible to look at the Appellant's conduct after 1951 as an indication of his motives and frame of mind before he gave notice of chargeability. P.172 L.35.

RECORD.

Judging from the facts as a whole he was satisfied that this was not a case of mere negligence but of deliberate and wilful evasion.

It was, however, necessary to examine the basis on which the learned Judge below approached the question of penalties and consider whether it were correct. It did not matter that the language in which he described the taxpayer and his conduct verged on the immoderate at times. However,
P.173 L.31. he misdirected himself in blaming the taxpayer for the delay from 1951 - 1953 and his decision regarding penalties might also have been affected by his
P.173 L.43. erroneous view regarding the obligation to make returns without demand and to pay tax before assessment.

P.174 L.3. 42. In consequence, the refusal to remit or reduce penalties for the years 1943 - 1950 inclusive must be set aside. On the other hand, he could not consider that it would be proper to remit all the penalties and the taxpayer should be made to pay some of them at once. He would, therefore, confirm the assessments for 1943 - 1951 as regards the basic tax and confirm that part of the assessments for 1943 - 1950 which levied a penalty equal to the amount of basic tax for each year. He would remit the remainder of the assessments for 1943 - 1950 to the Supreme Court for retrial by another Judge as to whether the whole or any and what part thereof should be remitted. He would add a direction that before the re-hearing the Commissioner might, if he so desired, require all such returns to be made and accounts and information submitted, including a claim for allowances, as would enable him to assess the taxpayer's true basic liability to tax for the years in issue; if the Commissioner had the true figures it would clearly be much easier for him to reconsider his claim for penalties and, if so advised, modify it. This course might even result in agreement and obviate retrial. He would order the taxpayer to pay two-thirds of the Commissioner's costs of the appeal. The order of the Court below as to costs should stand and the costs of the retrial be in the discretion of the Judge.

P.175. 43. An Order in the form suggested by the learned Justice of Appeal was duly made.

RECORD.

44. On the 5th December, 1956, the Appellant gave Notice of Motion for an Order suspending execution of the said Order pending the hearing of this appeal, conditional leave to make which had been granted on the 30th November, 1956. Amongst other grounds in the Appellant's Affidavit in support, the Appellant said that if execution of the Order were not suspended there would have to be a forced sale at short notice of landed properties encumbered in connection with the appeal thereby causing irreparable loss for which the Appellant would have no redress in the event of his appeal succeeding. P.177

45. On the 4th January, 1957, the Court of Appeal (Worley, P., Briggs and Bacon JJ.A.) refused to order a stay on the ground that there was no jurisdiction to do so. The Court expressed no opinion on the merits of the Appellant's application. P.184.

46. The Appellant respectfully submits that this appeal should be allowed and that he should be permitted to furnish such accounts and information including claims for allowances as would enable the Commissioner of Income Tax to compute his liability for the years 1945 to 1951 inclusive for the following amongst other

R E A S O N S

(1) BECAUSE the Court of Appeal erred in holding that the Commissioner was entitled to assess the Appellant under Section 72 of the East African Tax (Management) Act, 1952, or Section 56 of the Income Tax Ordinance (Cap.254 of Laws of Kenya, Revised 1948 Edition).

(2) BECAUSE the Court of Appeal erred in holding that with the single exception of the year of assessment 1951 the Appellant was in wilful default.

(3) BECAUSE the Court of Appeal did not judicially consider whether the Respondent had discharged the onus upon him of proving that the Appellant had committed fraud or wilful default in respect of the years of assessment 1943 and 1944 and in fact such onus was not discharged.

(4) BECAUSE the assessments were invalid in so far as they included treble tax for the years 1943 to 1946 inclusive.

RECORD.

(5) BECAUSE the Court of Appeal erred in stating that the Appellant did not give Mr. Holden by any means all of what he asked or what was reasonably necessary.

(6) BECAUSE the Court of Appeal erred in holding that the £2,000 claimed in the Respondent's letter of the 26th May, 1953 was admittedly much less than the sum due by him if he were given credit for all possible allowances and not charged with any treble tax.

(7) BECAUSE in considering the Appellant's conduct before 1951 the Court of Appeal did not take into account his evidence that he was told that a return must contain a declaration as to his total income.

(8) BECAUSE in considering the Appellant's conduct after receipt of the assessments the Court of Appeal did not take sufficiently into account his not unreasonable belief that the assessments were premature and invalid.

(9) BECAUSE in considering the Appellant's conduct the Court of Appeal failed to take into account the fact that the Respondent's action in raising the assessments on the 15th June, 1953, was unreasonable and provocative in that -

(a) the assessments treated the Appellant as in wilful default notwithstanding a clear understanding with the Income Tax Department that he was not to be treated as a defaulter;

(b) that the assessments were made without warning before the Appellant had any reasonable opportunity to complete the returns which had just been forwarded to him;

(c) the assessments immediately followed a long period during which the Income Tax Department itself had been admittedly unco-operative and in gross default;

(d) the assessments were made immediately after receipt of a letter from the Appellant couched in the most reasonable and co-operative terms;

(e) the assessments were unreasonably and unjustifiably made under Section 72 instead of Section 71 of the Act;

(f) the assessments did not take into account provisionally the allowances due to the Appellant although full details of such allowances had been given to the Department at the Department's express request nearly two years before with a view to the Department making provisional assessments.

(10) BECAUSE in considering the Appellant's conduct both in the period up to 1951 and in 1953 and afterwards the Court of Appeal did not take into account the evidence that he was anxious to pay the whole of his liability to tax in 1951 and 1952.

DINGLE FOOT.

PETER ROWLAND.

IN THE PRIVY COUNCIL

No. 7 of 1957

ON APPEAL FROM THE COURT OF APPEAL
FOR EASTERN AFRICA

B E T W E E N:

GOKULDAS RATANJI MANDAVIA Appellant

- and -

THE COMMISSIONER OF INCOME TAX
(Eastern Africa) Respondent

CASE for the APPELLANT

A. L. BRYDEN & WILLIAMS,
53, Victoria Street,
London, S.W.1.

Solicitors and Agents for
the Appellant.