

34/81

O N A P P E A L
FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

CHU LIP KONG Appellant

- and -

THE DIRECTOR GENERAL OF
INLAND REVENUE Respondent

CASE FOR THE RESPONDENT

		<u>Record</u>
10	1. This is an Appeal from a decision of the Federal Court of Malaysia given on the 19th June 1978 whereby the Federal Court dismissed the Appellant's appeal from the decision of the Honourable Acting Chief Justice Lee in the High Court in Borneo given on the 9th February 1977 which had itself dismissed the Appellant's appeal from the decision of the Special Commissioners of Income Tax given on the 14th June 1974. On 14th December 1978 the Federal Court of Malaysia granted leave to the Appellant to appeal to His Majesty the Yang Dipertuan Agung from the decision of the Federal Court given on the 19th June 1978.	p. 44 p. 24 p. 22 p. 48

20 2. The question in this Appeal is whether the Appellant is liable to income tax under the Income Tax Ordinance 1956 (No. 29 of 1956) Section 9(1)(a) in respect of a profit of \$176,774 made by the Appellant on the acquisition and disposal of an estate known as the Kinabatangan Property. Section 9(1) of the Income Tax Ordinance 1956 provides (inter alia) as follows :-

30 "9. (1) Income tax shall, subject to the provisions of this Ordinance, be payable at the rate or rates specified hereinafter for each year of assessment upon the income of any person accruing in or derived from the Colony or received in the Colony from outside the Colony in respect of -

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

The Appellant contends that the said profit of \$176,774 is a capital appreciation not liable to income tax. The Respondent contends that the profit is a gain or profit from a trade or business which is liable to income tax under the said Section 9(1)(a).

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3. The Appellant purchased the Kinabatangan property by a sale agreement entered into on 22nd April 1964. The vendor was the Sabah Timber Company Limited and the price paid was \$320,000. The transfer of the property was registered on the 7th October 1964. The purchase of the property was financed by a loan of \$320,000 to the Appellant from the Hong Kong and Shanghai Bank, Sandakan. The Appellant sent workers to the Kinabatangan property and he himself visited the property on 12 to 14 occasions between the date of purchase and the date of sale. He also caused to be constructed a small gauge railway line of 3½ miles. He acquired a timber licence on 15th March 1966 in respect of the property, but caused this licence to be cancelled on 26th October 1966. By a written agreement made on 25th October 1966 the Appellant purported to agree to sell the Kinabatangan property to one Chin Yin Khee for \$580,000. Also on 25th October 1966 the said Chin Yin Khee agreed to sell all the commercial timber on the Kinabatangan property to Kim Hong Company Limited for \$595,000. On 9th September 1969 the said Chin Yin Khee sold the Kinabatangan property to Tan Kim Ting for \$8000 and the transfer was registered on the 20th March 1970.

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4. The Special Commissioners found that the Appellant's profit on the purchase and sale of the Kinabatangan property was a profit made on the sale of timber and not a profit made on the sale of land. The Appellant had been engaged for many years in the timber business and the Special Commissioners regarded the Kinabatangan transaction as part of that timber business and the profit as a profit of that business. The Respondent respectfully submits that there was ample evidence upon which the Special Commissioners could reach these conclusions, and also ample evidence upon which the findings of fact set out at paragraph 12 of the Case Stated could be based.

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The Respondent further contends that the conclusion of the Special Commissioners that the Appellant's profit was a trading profit was the only reasonable conclusion on the basis of the facts as found.

10 5. The decision of the Special Commissioners can only be impeached if it is erroneous in point of law. No error of law is disclosed by the reasoning set out in the Case Stated. Nor can it be said that the facts found are such that no person acting judicially and properly instructed as to the law could have come to the determination under appeal. The principles to be applied are set out by Lord Radcliffe in Edwards v. Bairstow & Harrison [1956] A.C. 14 at page 36 :-

20 "If the Case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene ... I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase

30 propounds the same test".

Applying those principles to the present case, the Special Commissioners' findings are amply supported by the evidence before them. The Appellant was in the timber trade. He had been engaged in that trade for many years. The Appellant acquired the Kinabatangan property for the value of its timber and acquired it in order to dispose of that timber as is found by paragraph 12 (b) of the Case Stated. The Appellant's contention that he intended to develop the property as a cattle-farm was clearly and justifiably rejected by the Special Commissioners in their finding of fact at paragraph 12 (b) of the Case Stated. On the basis of those facts the only reasonable conclusion in law is that the Appellant's profit on the Kinabatangan property was a profit made in the Appellant's timber business and was a trading profit of that business.

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6. The Respondent does not accept that an isolated transaction is incapable of constituting a trade or business within the meaning of Section 9(1)(a) of the 1956 Income Tax Ordinance. The Appellant's transaction in the Kinabatangan property was not, however, an isolated transaction. It was, as the Special Commissioners found, a sale of timber by a person engaged in the timber business. Such a sale falls to be treated as a sale in the course of trade. This proposition is supported by the judgment of the Lord President (Cooper) in Murray v. Commissioners of Inland Revenue (1951) 32 Tax Cas. 238 at pages 242, 243. The fact that the Appellant disguised the sale as a sale of land does not affect the conclusion that he was trading. Indeed it is submitted that the proper inference from the disguise is that it was an effort to conceal the trading. It was found as a fact by the Special Commissioners at paragraph 12 (g)(i) of the Case Stated that the purported sale of the land was a fictitious sale. There was no evidence that any money was paid by the purported purchaser Chin Yin Khee to the Appellant. Chin Yin Khee merely accounted to the Appellant for the sum of \$580,000 received from the ultimate purchaser, namely Kim Hong Co. Ltd. Kim Hong Co. Ltd. was the only true purchaser and it purchased commercial timber only, and not land. This is shown by the sale agreement of 25th October 1966. Chin Yin Khee received a fee of \$15,000 for his services; it may also be that he retained the \$8000 for which the land was sold after removal of the timber.

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7. The Respondent submits that the findings of the Special Commissioners at paragraph 12 (g) and paragraph 13 of the Case Stated amount to findings that the purported sale of the property by the Appellant to Chin Yin Khee was unreal. It was a sham within the meaning of that word as explained by Lord Justice Diplock (as he then was) in Snook v. London and West Riding Investments Ltd. [1967] 2 Q.B. 786 at page 802. After the purported sale Chin Yin Khee acted upon the directions of the Appellant. The sale of commercial timber by Chin Yin Khee to Kim Hong Co. Ltd. under the agreement of 25th October 1966 was in reality a sale of timber by the Appellant.

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p. 20

8. The Appellant incurred expenses of \$23,703 in connection with the sale and transfer of the Kinabatangan property. The Special Commissioners held at paragraph 13 (v) of the Case Stated that this sum should not be regarded as deductible in computing the Appellant's trading profit. These expenses were incurred by the Appellant in disguising the sale of the timber. As such

they were not expenses incurred "wholly and exclusively ... in the production of the income" within the meaning of Section 12(1) of the Income Tax Ordinance 1956.

9. And the Respondent respectfully submits that the Appeal herein should be dismissed for the following (among other)

R E A S O N S

- 10 (1) BECAUSE there was ample evidence before the Special Commissioners upon which they could make the findings of fact set out in paragraph 12 of the Case Stated. p. 17
- (2) BECAUSE the decision of the Special Commissioners set out at paragraph 13 of the Case Stated is the only reasonable decision on the basis of the facts found. p. 20
- 20 (3) BECAUSE on the facts found by the Special Commissioners it cannot be said that no person acting judicially could have come to the determination under appeal and therefore the decision of the Special Commissioners cannot be overturned.
- (4) BECAUSE the Case Stated by the Special Commissioners discloses no error of law. p. 1
- (5) BECAUSE the profit made by the Appellant on the sale of the Kinabatangan property was a profit on the sale of timber and not a profit on the sale of land.
- (6) BECAUSE the profit made by the Appellant was the profit of a trade within the meaning of Section 9(1)(a) of the Income Tax Ordinance 1956.
- 30 (7) BECAUSE the decision of the Federal Court of Malaysia was correct and ought to be upheld.

STEWART BATES

S.J. ALLCOCK

No. 21 of 1979

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THE PRIVY COUNCIL

ON APPEAL
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B E T W E E N :

CHU LIP KONG Appellant

- and -

THE DIRECTOR GENERAL
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CASE FOR THE RESPONDENT

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