

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

RECORD OF PROCEEDINGS

Slaughter and May
35 Basinghall Street
London EC2V 5DB

Solicitors for the
Appellant

Stephenson Harwood
Saddler's Hall
Gutter Lane
London EC2V 6BS

Solicitors for the
Respondent

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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

RECORD OF PROCEEDINGS

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No. 1

CASE STATED

by the Special Commissioners of Income Tax
for the opinion of the High Court pursuant to
paragraph 34 of Schedule 5 to the Income Tax
Act, 1967

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1. The appellant appealed to us, the Special Commissioners of Income Tax, in respect of his assessment of income tax for the year of assessment 1967 as contained in the notice of additional assessment dated 11th March 1972.

2. The ground of appeal as set out in the appellant's notice of appeal in Form Q dated 7th April, 1972, reads as follows :-

"That the profit of \$176,774.00 made by the appellant in respect of the transfer of the country land in C.L.10845 is capital appreciation and not a profit chargeable to tax."

There is no dispute over the figure.

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3. We heard the appeal on 27th, 28th and 29th May, 1974, and gave our decision on 14th June, 1974.

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4. Encik Chong Thain Vun of Messrs. Chong Thain Vun & Co., Advocates and Solicitors, appeared for the appellant, while Tuan Haji Hassan bin Ishak, Senior Federal Counsel (Inland Revenue), appeared for the respondent, with Encik C.L. Marriott, Investigation Officer, Inland Revenue Department, Sabah, assisting him.

5. Encik Chong Thain Vun called the appellant to give evidence at the hearing while the respondent called Encik Tan Kim Ting, Managing Director, Kim Hong Ltd., Sandakan, and Encik Richard Ong Guan Seng, partner of Messrs. Peat, Marwick & Co., a firm of Chartered Accountants.

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6. The following documents were agreed and produced before us at the hearing :-

(a) Agreed Statement of Facts and Agreed Bundle of Documents (Exhibit A1).

(b) Agreed Bundle of Documents No. 2 (Exhibit A2).

(c) Agreement dated 22.4.1964 (Exhibit A3).

(d) Profit & Loss Account for the year ended 30.6.66 (Exhibit R4).

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(e) Profit & Loss Account for the year ended 30.6.65 (Exhibit R5).

(f) Profit & Loss Account for the year ended 30.6.64 (Exhibit R6).

(g) Agreement dated 25.10.1966 between Chin Yin Kee and Kim Hong Company Limited (Exhibit R7).

7. At the outset of the hearing, Counsel for respondent raised preliminary objections on points of law. He submitted that this appeal was in respect of assessment of income tax for the year of assessment 1967 and as such it should be governed by the Sabah Income Tax Ordinance, 1956. Although the said Ordinance was repealed with effect from 1st January 1968 by section 155 and under Schedule 8 of the Income Tax Act 1967, yet the said repealed law remained in force for all purposes in relation to the year of assessment of 1967 under the law in question and to previous years of assessment under that law by virtue of paragraph 3(1) of Schedule 9 to the Income Tax

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Act, 1967, relating to the transitional and savings provisions. He contended that failure to comply with the provisions of the Sabah Income Tax Ordinance, 1956 was vital for purposes of this appeal, particularly section 65(1) which reads as follows :-

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10 "Any person who, being aggrieved by an assessment made upon him, has failed to agree with the Commissioner in the manner provided in subsection (4) of Section 61 may appeal to the Board by lodging with the clerk, within thirty days from the date of the refusal of the Commissioner to amend an assessment as described on receipt of written notice of such decision a written notice of appeal in duplicate setting out the grounds of appeal."

Since the appellant did not lodge a written notice of appeal under the above provisions, it was the respondent's opinion that this appeal could not be proceeded with and should be dismissed.

20 The second question raised by Counsel for respondent was whether the appellant had complied with the time limit of thirty days or not in lodging a notice of appeal. If it was filed out of time then the Special Commissioners had the power to dismiss the appeal. According to the records, the appellant had not complied with the procedure at all. No notice of appeal was filed. Counsel contended that the Special Commissioners were the only authority to consider a petition of appeal. Since no appeal was submitted, it was not necessary for
30 the Special Commissioners to go into the question of whether the notice of appeal was submitted in due time.

In reply, Counsel for appellant stated that the preliminary objections on the points of law were never indicated to him earlier so that he could refer to the correspondence which passed between him and the Income Tax Department. However, the appellant, on receipt of the additional notice of assessment dated 11th March, 1972, lodged a notice of appeal with the Comptroller of Inland Revenue, Sabah, on 7th April 1972 (Exhibit A2 folio 1 and 2).
40 It was duly acknowledged. The notice of appeal was filed in due time. He would not be in a position to know when the respondent submitted copy of same to the Special Commissioners. If there was any delay on the part of the respondent it is merely a technical point. In fact, Counsel for appellant stressed that the most important points were whether the notice of appeal was lodged in time

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and whether any party was prejudiced by the delay, if
any. Moreover, section 65(5) of the Sabah Income Tax
Ordinance, 1956 reads:-

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"The Board may, in its discretion and on such
terms as it may see fit, permit any person to
proceed with an appeal notwithstanding that the
notice of appeal or petition of appeal was not
lodged within the time limited therefor by this
section, if it be shown to the satisfaction of the
Board that such person was prevented from
lodging such notice or petition in due time owing
to absence from Sabah, sickness or other reason-
able cause and that there has been no unreason-
able delay on the part of such person."

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Under the circumstances, Counsel for appellant
said that the preliminary objection raised by Counsel for
respondent was not justified and in the interests of
justice any technical point should not be taken into
account to stop the proceedings and dismiss the appeal.

Counsel for respondent pointed out that non-
compliance of the law was vital to this appeal. Since
the appellant did not lodge a written notice of appeal
under the provisions of section 65(1) of the Sabah Income
Tax Ordinance, 1956, the Clerk was not in a position to
forward a copy of same to the Commissioner under
section 66(1) therein. Consequently, an appeal did not
arise. So far appellant filed only a copy of Form Q,
which is a notice of appeal to the Special Commissioners
of Income Tax, prescribed under section 152 of the
Income Tax Act, 1967.

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Meanwhile, Counsel for respondent withdrew his
objection.

The Special Commissioners, having considered the
submissions of both Counsel on the preliminary objec-
tions, gave leave for the hearing of the appeal to proceed.

8. The following facts were admitted or proved :-

(a) The appellant has business interests in cattle
farming, rubber and coconut estates, besides being a
contractor for timber hauling, road construction and
supply of rubber seedlings. He is also Director of
Sandakan Enterprise Co. Ltd. and Membalak Kayu Chu
Lip Kong Sdn. Berhad.

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(b) In 1958, he purchased jointly with his five brothers 150 acres of coconut plantation at Tanjong Pisau, District of Sandakan, at a Government auction of enemy properties.

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10 (c) In 1959, Government granted to the appellant an area of 814 acres in Gum Gum Kecil, District of Sandakan, adjacent to the Tanjong Pisau coconut plantation. It was prelogged land as its timber had already been removed by a previous licensee. The appellant worked this property in stages and developed it into a cattle farm. At the beginning, he put in 50 head of cattle. In 1965 the number was increased to 200. Initial capital was between \$70,000.00 to \$80,000.00. He laid two miles of rail and had 14 to 15 trucks and a locally built locomotive. As there were several fresh water streams running across the land which was quite dry, the land was considered ideal for cattle-farming. Appellant extracted some timber and sold it. It was the first time he extracted
20 timber.

(d) Again in 1959, Government granted to the appellant another piece of pre-logged land fully planted with rubber also situated in Gum Gum Kecil. The area was approximately 468 acres.

(e) The three properties mentioned in paragraphs (b), (c) and (d) above are still owned or jointly owned by the appellant.

30 (f) In 1962, when Mr. Holland, Asst. Director of Agriculture (Veterinary section), visited the appellant's Gum Gum Kecil cattle farm, appellant heard that a piece of land, comprising in Lease No. 10845, District of Kinabatangan, with an area of 6666 acres (hereinafter called the Kinabatangan property), was for sale. As he did not have sufficient funds, he did not pursue the matter further.

40 (g) Then, in June 1963, appellant met a Mr. McPherson, a representative of the owner of the Kinabatangan property. Together they did an aerial survey of 1½ hours of the said land. Appellant saw a few thousand acres of flat land, with trees scattered and pools of fresh water. He decided that this property was suitable for cattle farming. He could use the timber for fencing, building light trucks and railway sleepers, cattle sheds and paddock fencing for his rubber estate and the other cattle farm. Besides, he

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had lost a lot of cattle from the Gum Gum Kecil farm due to constant thefts because of its close proximity to town. However, the Kinabatangan property was quite a distance from the town. Moreover, the price was only \$45.00 to \$50.00 per acre which was considered cheap for such a vast area of 6666 acres. It was by no means easy to obtain such a huge area.

(h) The Kinabatangan property is situated in the District of Sandakan and can be approached upstream by boat from Gum Gum Kecil or Sandakan along the Kinabatangan River. There were no other means of transport from 1964 to 1967. From the jetty one has to go across the State land before reaching the Kinabatangan property.

10

(i) In September 1963, appellant made enquiries regarding the source of cattle supply for breeding purposes. (Exhibit A1 folio 19 and 21).

(j) In the same year, appellant was successful in raising a loan of \$320,000.00 from the Hongkong and Shanghai Bank, Sandakan, for the sole purpose of purchasing the Kinabatangan property.

20

(k) On 22nd April 1964, a sale agreement in respect of the Kinabatangan property was entered into with the vendor, the Sabah Timber Co. Ltd. and the appellant. The consideration was \$320,000.00 (Exhibit A3).

Memorandum of Transfer was duly registered on 7th October 1964 (Exhibit A1 folio 23).

(l) In June 1964, the appellant sent the first group of ten workers to the Kinabatangan land to look for the boundary stones and also to fence the area. A sum of \$21,444.58 was expended for transportation from time of purchase to date of sale (Exhibit A1 folio 1 paragraph 5).

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A small gauge railway line of $3\frac{1}{2}$ miles was laid from the jetty to the higher part where the headquarters was to be established. 2 to 3 chains of it passed through state land. A motor car engine was used to build a locomotive for transportation of workers, materials and goods. 20 wooden trucks measuring $2\frac{1}{2}' \times 3\frac{1}{2}'$ each were constructed and fitted with trolley wheels. 4 to 5 workers could sit or stand on each of them. The cost was \$150 each. The entire area is about 10 square miles and the

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longest distance from one boundary to the next is about 10 miles. It was not economical to build a road because some parts of the land were low lying, muddy and swampy. Maintenance would therefore be expensive.

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Appellant visited the land 12 to 14 times from date of purchase to time of sale. On each occasion he stayed there for 4 to 5 days, directing and supervising the workers.

10 (m) Appellant planned to develop the Kinabatangan property in five stages, working on about 1000 acres at a time. He intended to plant grass, put up fencing and divide the areas into paddocks. As the trees would provide shade, he did not think it was necessary to clear them. However, during the 2 years he extracted 6000 to 7000 cubic feet of timber (6" diameter and 4' long) for railway sleepers.

20 (n) In the first year of ownership, appellant did not notice that the Kinabatangan property was subject to flooding. But at the end of 1964 he had a better and closer look and found many parts of the low lying areas flooded. Similarly, at the end of 1965 he found the land to be in the same condition. The water was chest high and remained so for 3 to 4 weeks. At the same time the Kinabatangan River was flooded due to the annual rainy season from October to January.

Between June to July 1966, not being the rainy season, he checked the low lying areas again but found them to be still flooded.

30 After all these visits, appellant felt very frustrated and decided to sell the property, which he concluded would not be suitable for cattle farming.

40 (o) The Forestry Department issued a timber licence under the Forest Rules 1954 to the appellant on 15th March 1966 in respect of the Kinabatangan property. On the licensee's request the licence was cancelled on 26th October, 1966 (Exhibit A1 folio 41). The Department's timber production record shows that there was no timber extracted during the currency of the timber licence.

(p) On 25th October 1966, appellant sold the Kinabatangan property to Chin Yin Khee for \$580,000.00 and the second-hand equipment thereon for \$20,000.00

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(Exhibit A1 folio 31 to 37).

Mode of payment. Purchaser paid to Vendor \$380,000.00 on signing the agreement and the balance of \$200,000.00 was to be paid on 24th April 1967. To secure this payment the Purchaser shall hand over to the Vendor the Chartered Bank cash cheque No. 592538 post-dated 24th April 1967 drawn by Kim Hong Co. Ltd. for the sum of \$200,000.00 and the said sum was to be guaranteed jointly and severally by Tan Kim Ting and Liew Tze Nyen.

10

Memorandum of Transfer was signed by the parties on 26th October 1966 and registered on 23rd December 1966 (Exhibit A1 folio 25). Apparently Chin Yin Khee had some knowledge of the property as he also went on the aerial survey with the appellant.

(q) On the same day, i. e. 25th October 1966, another agreement was entered into between Chin Yin Khee (hereinafter called "the Vendor") and Kim Hong Co. Ltd., a company incorporated in the State of Sabah and having its registered office in Sandakan (hereinafter called "the Purchaser"), whereby the Vendor agreed to sell and the Purchaser to buy all the commercial timber in the Vendor's timber land (Kinabatangan property) for the sum of \$595,000.00 and the second-hand equipment such as 4 miles of rails (laid and unlaid), 1 locomotive, 20 trucks etc. for \$20,000.00 (Exhibit R7).

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Mode of Payment: Purchaser paid to Vendor \$395,000.00 on signing the agreement and the balance was to be paid on 24th April 1967 by a Chartered Bank cheque No. 592538 post-dated 24th April 1967 for \$200,000.00.

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At this stage, Counsel for appellant objected to Exhibit R7 being tendered by the respondent, but the objection was overruled by the Special Commissioners.

(r) In his evidence, Encik Tan Kim Ting, Managing Director of Kim Hong Co. Ltd., admitted that he knew Chin Yin Khee. He signed the agreement dated 25th October 1966 (Exhibit R7) on behalf of the Company, which deals with timber and oil palm estates. However, when the Company's personnel moved into the Kinabatangan property, it was found that the rails were not in good condition as they were not properly laid by the appellant (Exhibit A1 folio 27). They were unsuitable for transportation of logs. Nearly 4 miles of rail had

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to be taken out and re-laid before timber extracting operations could commence. As the locomotive could only be used for transportat ion of workers and stores, the Company had to buy three more engines. Even with the help of the labourers, the distance of 4 miles was too long. The Company had to modify the trucks and change the woodwork.

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10 Kim Hong Co. Ltd. carried out timber operation on this property for 5 years from end of 1966 to 1971. A timber camp was set up there under the charge of a manager and a supervisor.

Encik Tan Kim Ting gave the following production figures prepared in the Company's office in Sandakan :-

1967	..	455,315.00 cubic feet
1968	..	388,544.09 cubic feet
1969	..	433,874.06 cubic feet
1970	..	271,055.01 cubic feet
1971	..	24,611.00 cubic feet
		<hr/>
		1,573,400.06 cubic feet
		<hr/>

20 He affirmed that most of the timber was taken from one area around the hilly part close to the State land. There was also some timber in the low lying areas which were not flooded. The removal of timber was covered by a permit issued by the Forest Department. Also proper records had to be kept for the Registrar of Companies. There was no mixing-up of timber stocks from any other concessions.

30 (s) In response to a request from the Inland Revenue Department, the Forestry Department on 19th July 1972, had given the following estimated production figures based on aerial photographs of the Kinabatangan property :-

(i) approximately 1000 acres had a timber stand of about 600 cu.ft./acre. This area has been worked out now;

(ii) 200 acres (approximately) had a timber stand of between 0-200 cu.ft./acre. Very poor forest;

40 (iii) the remaining area of about 5466 was swampy, flat and non-productive (Exhibit A1 folio 41).

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(t) On 9th September 1969, Tan Kim Ting bought the Kinabatangan property from Chin Yin Khee for \$8,000.00. Memorandum of Transfer was registered on 21st March 1970 (Exhibit A1 folio 39).

9. It was contended on behalf of the appellant that :-

(a) the sum of \$176,774.00 realised by the appellant in respect of the sale of the Kinabatangan property was not a gain or profit from any trade, business, profession or vocation, within the meaning of section 9(1)(a) of the Sabah Income Tax Ordinance, 1956;

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(b) purchase of the said property and its subsequent re-sale did not constitute a trade or business carried on by the appellant. The question of profession or vocation did not come into this picture;

(c) the said sum of \$176,774.00 realised by the appellant was capital appreciation and not a profit chargeable to tax;

(d) the words "trade" or "business" are not defined in the Sabah Income Tax Ordinance, 1956. Neither is "adventure" nor "concern in the nature of trade" mentioned therein;

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(e) to determine whether an isolated transaction constitutes a trade or business and its profits to be capital gain or income, it is necessary to apply three tests, namely :-

(i) is business operation habitual or systematic in nature;

(ii) repetition of similar acts;

(iii) business was carried on and not carried out by him.

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The following authorities were cited in support of the appellant's case :-

(i) DEF v CIT (1961) 2 MLJ. p. 55

(ii) E v CGIR (1970) 2 MLJ. p. 117

(iii) L v CGIR (1973) 2 MLJ. p. 14;

(f) it is not disputed that appellant's purchase

and sale of the Kinabatangan property was the first transaction of this nature carried out by him. But the respondent contended that because the appellant had other business operations, this purchase and sale of the Kinabatangan property should be regarded as his business. There was no evidence that the appellant had never dealt with timber lands before.

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10 The purchase and sale of the Kinabatangan property was not an activity of the appellant's business. It cannot be considered as a continuous and repetitive act. It was an isolated transaction, the appellant carried out and not carried on as a business.

Under the circumstances, this purchase and sale of the Kinabatangan property was not a trade or business carried out by the appellant within the meaning of section 9(1)(a) of the Sabah Income Tax Ordinance, 1956;

20 (g) if the profit of \$176,774.00 was not derived from trade or business, there can only be two alternatives :-

(i) it is a capital appreciation, or

(ii) it may be a profit from an adventure or concern in the nature of trade.

In support of sub-para. (i) above, the authority cited is Californian Copper Syndicate (Ltd. & Reduced) v. Harris (Surveyor of Taxes) 5 T.C. 159.

30 (h) appellant's main object in purchasing the Kinabatangan property was to develop it into a cattle farm. Having operated his own cattle farm in Gum Gum Kecil for many years, he had acquired sufficient experience in this line of business. He knew the basic requirements. In addition, the Kinabatangan property had large areas of flat low lying grounds and a plentiful supply of fresh water. The timber requirements for the farm would not only be met easily from the standing trees, but his other estates could benefit from it as well;

40 Gum Gum Kecil cattle farm was subject to thefts due to its close proximity to town. So far around 100 head had already been stolen. Since Kinabatangan property is far from the town, cattle thieves would find it hard to remove them.

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For such a large area and size, the cost of the Kinabatangan land worked out to \$45.00 to \$50.00 per acre (6666 acres) which was considered quite cheap. Large areas of land such as this were difficult to come by.

(i) appellant did not remain idle after buying the property. He carried out considerable preliminary work for starting a cattle farm. He employed workers, checked and marked boundary stones, constructed temporary labourers' quarters, jetty, stores and trucks and laid $3\frac{1}{2}$ miles of railway and sleepers for transporting men and materials;

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(j) a transaction must be looked at in its entirety. In this case, the appellant sold the Kinabatangan property in the same condition and entirety as had bought it, except that he incurred some preliminary expenditure. The property in question was bought and sold as a piece of land. It was not a sale of the timber on the said land;

(k) Counsel for respondent referred to the preamble and paragraph 1 of the agreement dated 25th October 1966 (Exhibit A1 folio 31 to 37) in which the Kinabatangan property has been described as "timber land". Arising out of this, he put it to the appellant that he had sold the said property solely as timber land. But the words were a form of description used by the solicitors who drafted the agreement. The appellant got the price he bargained for without any thought for the description of the land;

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(l) although appellant had sufficient knowledge and experience in timber logging and extraction, he did not make any attempt to carry out timber operation on the Kinabatangan property. He had the property for $2\frac{1}{2}$ years during which period he could have extracted half the timber thereon. There was nothing to prevent him from doing so. But his intention was to develop it into a cattle farm. He assembled a locomotive, built 20 wooden trucks which could carry only 4 to 5 persons and provisions and laid about $3\frac{1}{2}$ miles of railway, all of which cost him \$85,000.00. No logs could be transported by rail because they were too heavy. Tan Kim Ting in his evidence confirmed this fact. He added that he had to change the rails and bring in 3 bigger and more powerful locomotives for conveying the logs;

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(m) Kim Hong Co. Ltd. bought the Kinabatangan property for double the cost price. Appellant's margin

of profit could have been much greater if he had carried out timber operations in view of his knowledge of the industry;

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(n) it is conceded that the appellant's conduct was consistent in that he obtained a timber licence, which enabled him to extract timber for the use of the jetty, trucks, sleepers, fencing, etc. for the Kinabatangan property and his other estates. In other words, the operation was geared to developing the cattle farm;

10 (o) appellant had to dispose of the Kinabatangan property after holding it for $2\frac{1}{2}$ years because he found it to be unsuitable for a cattle farm as the low lying areas were subject to floods. He could not afford to incur further expenses on the project;

(p) even after abandoning the cattle farm scheme, appellant could have carried out timber operation on the Kinabatangan property but he decided to sell it;

20 (q) appellant dealt regularly with the Hongkong & Shanghai Bank. He had obtained overdraft facilities previously, so there was no necessity for him to put up feasibility study of the project to the Bank;

(r) although more than 90% of appellant's income came from log deliveries and sales, yet he never spent 90% of his time on timber extraction. He had other businesses as well;

30 (s) the agreement dated 25th October 1966 (Exhibit R7) is not relevant to this case, as it was executed after the sale of the Kinabatangan property by appellant to Chin Yin Khee. In other words, ownership of the said land had been transferred by the appellant. There was, therefore, no privity of contract.

10. It was contended on behalf of the respondent that :-

(a) the profit of \$176,774.00 which was obtained by the appellant as his income in the ordinary course of a business transaction, is subject to tax under the provisions of section 9(1)(a) of the Sabah Income Tax Ordinance, 1956;

40 (b) the burden of proof is on the appellant. If he fails to prove that the profit of \$176,774.00 is capital appreciation, the appeal should be dismissed;

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(c) the appellant bought the Kinabatangan property with a bank loan of \$320,000.00 so that he could expand his cattle farming business in Gum Gum Kecil. The whole project would have cost him about \$720,000.00. But according to the appellant's profit and loss account for the year ended 30th June 1966, the item in respect of sales of livestock in Gum Gum Kecil farm amounted to only \$4,250.00. There were no sales recorded in the 1964 and 1965 accounts. However, since the size of Kinabatangan property is 8 times that of Gum Gum Kecil, and basing the livestock income in 1966 on \$4,250.00, then the appellant would obtain \$34,000.00 a year when the project was fully operational. The appellant would take about 30 years to get back his capital. In addition, more expenses by way of operation charges would have to be incurred. Under the circumstances, it is very doubtful whether the appellant had any intention of developing the Kinabatangan property as a cattle farm. It cannot be considered a profitable and genuine business proposition if it would take as much as 30 years to realise the return of his capital;

(d) appellant said that he wanted to use the timber from Kinabatangan property for railway sleepers, jetty, perimeter fencing, post and wagons for all his estates as well as the proposed cattle farm. But he did not know the quantity required. Actually the quantity was negligible as compared to the 1,573,400.00 cubic feet extracted by Kim Hong Co. Ltd. So did the appellant really genuinely require the timber on Kinabatangan property for his alleged purposes? It is rather doubtful;

(e) with all the early preparations, appellant had the intention of starting timber operation. He even applied for a timber licence in March, 1966 from the Forestry Department. But the preliminary work was not carried out properly. Tan Kim Ting in his evidence said that in order to carry out full scale timber operations, he had to re-lay about 4 miles of rail, reconstruct the trucks and purchase three more locomotives.

Appellant had already spent about \$100,000.00. He did not want to incur further expenditure as he was short of funds. The more profits he wished to make, the more risks he had to undertake. To be on the safe side, he chose to sell the land for a quick return;

(f) appellant had been in the timber business since 1956, nearly 10 years before buying the Kinabatangan property. The basis of fixing the price of the land was the presence of timber on it.

Appellant did not object to the words "timber land" being inserted in the two agreements (Exhibit A1 folio 31 and Exhibit R7). He knew the contents when he signed the agreement;

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(g) the mere fact that the words "timber land" were used was to induce prospective purchasers to pay an enhanced price for the presence of timber on the land;

10 (h) as there appears to be no money consideration passing between the appellant and Chin Kin Khee in respect of the sale of the Kinabatangan property (Exhibit A1 folio 29 to 37), it is relevant for the respondent to tender agreement dated 25th October 1966 (Exhibit R7) in order to prove the point.

20 On 25th October 1966, an agreement was entered into between the appellant (the vendor) and Chin Yin Khee (the purchaser) for the sale of the Kinabatangan property for the sum of \$580,000.00 (Exhibit A1 folio 29 to 37). Paragraph 2 therein states that on the signing of the agreement, the purchaser shall pay the vendor \$380,000.00 and the balance of the purchase money of \$200,000.00 was to be paid on the 24th April 1967. To secure the payment of the said sum of \$200,000.00 the purchaser shall hand over to the vendor the Chartered Bank cash cheque No. 592538, post-dated 24th April 1967 and drawn by Kim Hong Co. Ltd. for the said sum of \$200,000.00, which said sum is to be guaranteed jointly and severally by Tan Kim Teng and Liew Tze Nyem.

30 On the same day, i. e. 25th October 1966, another agreement was executed between Chin Yin Khee (the vendor) and Kim Hong Co. Ltd. (the purchaser) concerning the sale of all the commercial timber in the Kinabatangan property for the sum of \$595,000.00 (Exhibit R7). Paragraph 2 therein states that on the signing of this agreement the purchaser shall pay the vendor the sum of \$395,000.00 and the balance of \$200,000.00 to be paid on the 24th April, 1967, of which a Chartered Bank cash cheque No. 592538, post-dated 24th April 1967 for the said \$200,000.00 shall be handed over by the purchaser to
40 the vendor.

The first sale agreement between appellant and Chin Yin Khee cannot be regarded as valid because there was no consideration. Therefore, the sale of the Kinabatangan property has not been legally carried out. Under the circumstances, the appellant is still the beneficial owner

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of the Kinabatangan property. For all his trouble, Chin Yin Khee received only \$15,000.00, whereas the appellant made a profit of \$176,774.00;

(i) appellant is a very experienced timber contractor and the major part of his income is derived from timber business as may be seen from his accounts prepared by Messrs. Peat, Marwick, Mitchell & Co., Chartered Accountants (Exhibits R4 to 6). He had every intention of purchasing the Kinabatangan property for its timber and not for the development of a cattle farm. The appellant should realise that it would be stupid of him as a business man to spend all his time on a project which would give him a small return.

10

(a) Profit & Loss Account for the year ended 30/6/66.
(Exhibit R4)

Gross income \$1,101,250.34
Logs delivered \$1,034,119.23 (approx. 90% of
gross income)
Sale of livestock \$4,250.00.

(b) Profit & Loss Account for the year ended 30/6/65.
(Exhibit R5)

Gross income \$760,247.56
Logs delivered \$720,999.27 (more than 90% of
gross income)
Shipments \$10,673.19
No sale of livestock.

20

(c) Profit & Loss Account for the year ended 30/6/64.
(Exhibit R6)

Gross income \$958,917.78
Logs delivered \$856,909.67 (80% to 90% of gross
income)
Logs sold \$7,242.11
No sale of livestock.

30

(j) appellant in cross-examination admitted that he had done the land transaction in the course of his business. Again, when he was examined by his Counsel, he confirmed it;

(k) as no two cases would be on all fours, regard must be had to the surrounding circumstances and the particular facts of each case.

40

In this case, what was the appellant dealing with? Was it his intention to extract the timber from the land or to sell the land at a profit, in the course of his business? If it is the latter, then section 9(1)(a) of the Sabah Income Tax Ordinance, 1956, is applicable. Alternatively, if the amount of \$176,774.00 is considered as income not within subsections 9(a) to (f), then it comes within sub-section (g) thereof;

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10 (1) appellant carried out an aerial survey of the Kinabatangan property only once. No ground survey was undertaken. Therefore, there was actually no feasibility study for cattle farming on the property;

(m) no project paper or feasibility study for cattle farming was presented to the Hongkong & Shanghai Bank, Sandakan, for the loan of \$320,000.00. As collateral security the appellant handed over the documents of title relating to the Kinabatangan property and that of a shop-house.

20 11. The following authorities were cited to us by the parties :-

- (i) D.E.F. v. C.I.T. (1961) 2 M.L.J. p.55.
- (ii) E v. CGIR (1970) 2 M.L.J. p.117.
- (iii) L v. CGIR (1973) 2 M.L.J. p.14.
- (iv) Californian Copper Syndicate (Limited and Reduced) v. Harris (Surveyor of Taxes) 5 T.C. 159.

30 12. We, the Special Commissioners of Income Tax, who heard the appeal, after giving due consideration to the evidence and submissions made to us by the parties, arrived at the following conclusions :-

(a) appellant was very experienced in the timber business as he was a logging and hauling contractor for many years before acquiring the Kinabatangan property. His profit and loss accounts for the years 1964 to 1966 showed that about 90% of his income was derived from timber operations (Exhibits R4, R5 and R6);

40 (b) appellant had no intention whatsoever of developing the Kinabatangan property as a cattle farm, because during his 2 years of ownership, there was no visible sign of any preparatory work done thereon. He did not clear the standing timber, neither did he transfer any cattle from his Gum Gum Kecil farm in spite of cattle thefts. He was awaiting for an opportune moment

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to dispose of the timber;

(c) on 15th March, 1966, the appellant was issued a timber licence by the Forest Department in respect of the Kinabatangan property. Again, at his request, the same was cancelled on 26th October, 1966, when he sold the said land. According to the records of the Forest Department, no timber was extracted during the currency of the timber licence. We were not convinced by the evidence of the appellant that he had extracted 6000 to 7000 cubic feet of timber for fencing or other purposes;

10

(d) appellant had the basic knowledge and experience of conducting a cattle farm. He knew the ideal physical features and topography upon which such a farm should be located. Therefore, we regard it as an extremely unsound investment for the appellant to have spent \$320,000.00 purchasing 6666 acres of land, of which 5466 acres were swampy, flat and non-productive, and trying to develop the property as a cattle farm. But he was aware what profit he could expect from the timber on the remaining 1200 acres. Kim Hong & Co. Ltd. paid \$595,000.00 for the commercial timber (Exhibit R7). The Managing Director, Tan Kim Ting, gave us the production figure of 1,573,400.06 cubic feet for 5 years. He informed us that timber was extracted from the hilly region and even from the low lying areas which were not flooded. The results far exceeded the estimate based on aerial photographs provided by the Forest Department (Exhibit A1 folio 41). Surely, the appellant could not have made a profit of \$176,774.00 despite his bad error of judgment;

20

30

(e) the appellant took 2 years to make up his mind to abandon the idea of developing the Kinabatangan property as a cattle farm. In fact, the records in the Forest Department which were available to him at any time, could have assisted him to do so within a short time. He was procrastinating due to a want of a purchaser of the timber;

(f) in actual fact, the Kinabatangan property itself, after the timber had been extracted, was worth only \$8,000.00 vide Memorandum of Transfer registered on 20th March, 1970 (Exhibit A1 folio 39). It is apparent, therefore, that the appellant based the sale price of the Kinabatangan property on the timber standing thereon;

40

(g) (i) appellant deliberately devised a scheme to evade the payment of income tax by personally arranging

a fictitious sale of the Kinabatangan property by him to Chin Yin Khee on 25th October, 1966 (Exhibit A1 folio 29 to 37). There did not appear to be any money consideration passing between the vendor and purchaser;

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10 (ii) meanwhile, we questioned the appellant on paragraph 3 of the said exhibit and asked him whether he knew the guarantors, namely Tan Kim Ting and Liew Tze Nyen, of the Chartered Bank cash cheque No. 592538 and post-dated 24th April 1967 drawn by Kim Hong Co. Ltd. for \$200,000.00. In reply, he said he had never met them before as they had no business dealings between them. He knew Tan Kim Ting by name only;

20 (iii) the appellant was not truthful. We did not believe that he was willing to receive a post-dated cheque for such a huge sum of money without knowing the guarantors and their financial standing. Although he trusted what the lawyer told him about the two guarantors, yet he could not sue the lawyer if the cheque was dishonoured. He could only take action against the guarantors;

30 (iv) on the other hand, Tan Kim Ting in his evidence confirmed that he knew the appellant for more than 10 years as both of them lived in Sandakan and were in the timber business. As a result of this statement, appellant changed his mind during the re-examination by his Counsel and admitted that he would know Tan Kim Ting when he met him. He also admitted that he knew Kim Hong Co. Ltd. had an office and operated their business in Sandakan for a long time;

40 (v) despite Counsel for appellant's objection, we decided to allow respondent to tender the sale agreement (Exhibit R7) which is of vital importance to this case. Counsel for the appellant contended that this document had no significance as the Kinabatangan property had already been transferred by the appellant to Chin Yin Khee. Chin Yin Khee was the owner of the property. On the same day, i.e. 25th October, 1966, Chin Yin Khee entered into agreement with Kim Hong Co. Ltd. in respect of the sale of commercial timber only. There was no privity of contract between the appellant and Kim Hong & Co. Ltd.;

(vi) but the entire position was very clear to us. Out of the sum of \$595,000.00 received by Chin Yin Khee, he had to hand over to the appellant the sum

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of \$580,000.00, thus keeping \$15,000.00 as his commis-
sion for the work done in respect of the two transactions;

(vii) paragraph 2 of this document (Exhibit
R7) reads :-

"On the signing of this agreement the Purchaser shall pay to the Vendor the sum of Dollars Three hundred and Ninety-five thousand only (\$395,000.00) (of which sum the Vendor hereby acknowledges receipt thereof) and the balance of Dollars Two hundred thousand only is to be paid on the 24th April 1967 of which a Chartered Bank Cash Cheque No. 592538 post-dated 24th April 1967 for the said \$200,000.00 shall be handed by the Purchaser to the Vendor (of which cheque the Vendor hereby acknowledge receipt thereof)."

10

The same cheque was used in both the transactions.

13. In view of the above, we decided that :-

(i) the profit of \$176,774.00 made by the appellant in respect of the sale of the timber land, comprised in Lease No. 10845, in the District of Kinabatangan, Sabah, consisting of 6666 acres, on 25th October 1966, was not a capital appreciation but was a profit from trading in timber and, therefore, chargeable to tax under the provisions of section 9(1)(a) of the Income Tax Ordinance, 1956 (Sabah Ordinance No.29 of 1956);

20

(ii) the sale of the said timber land to Chin Yin Khee on 25th October, 1966, was not a bona fide transfer of the timber land;

(iii) the sale of the said land to the said Chin Yin Khee was a fictitious sale and that the appellant on 25th October, 1966, did, in fact, sell the timber obtaining in the said land to Kim Hong & Company Ltd.;

30

(iv) the appellant, being a timber merchant and contractor, made the said profit from the sale of the timber obtaining in the said timber land to the said Kim Hong & Co. Ltd.;

(v) the sum of \$23,703.00 made up of

Commission	..	\$11,600.00
Legal fees	..	\$ 500.00
Transfer fees	..	\$11,603.00

40

being expenses incurred by the appellant in connection with the sale and transfer of the Kinabatangan property, be added back because they were capital expenditure and not outgoings or expenses wholly and exclusively incurred by the appellant in the production of income under the provisions of section 12(1) of the Sabah Income Tax Ordinance, 1956 (Exhibit A1 folio 3).

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10 14. We accordingly ordered that the assessment of income tax in respect of the appellant for the year of assessment 1967, as per notice of additional assessment dated 11th March, 1972, be amended to include the further sum of \$23,703.00.

15. The appellant, by notice dated 3rd July, 1974, required us to state a Case for the opinion of the High Court, pursuant to paragraph 34 of Schedule 5 to the Income Tax Act, 1967, which Case we have stated and do sign accordingly.

20 16. The question of law for the opinion of the High Court is whether, on the facts found by us, there is evidence to support our decision.

Dated this 7th day of January, 1975.

Sgd: M.C. Schubert

(M.C. Schubert)

Presiding Special Commissioner of Income
Tax

Sgd: Lee Kuan Yew

(Lee Kuan Yew)

Special Commissioner of Income Tax

30 Sgd: Tan Sri Hj. Wan Hamzah bin
Hj. Wan Mohd.

(Tan Sri Hj. Wan Hamzah bin Hj. Wan Mohd.)
Special Commissioner of Income Tax.

DECIDING ORDER

No. 2
Deciding Order
14th June 1974

We, the Special Commissioners of Income Tax, find
and decide that :-

- (a) the profit of \$176,774.00 made by the appellant in respect of the sale of the timber land, comprised in Lease No. 10845, in the District of Kinabatangan, Sabah, consisting of 6666 acres, on 25th October, 1966, was not a capital appreciation but was a profit from trading in timber and, therefore, chargeable to tax under the provisions of section 9(1)(a) of the Income Tax Ordinance, 1956 (Sabah Ordinance No. 29 of 1956); 10
- (b) the sale of the said timber land to Chin Yin Khee on 25th October, 1966, was not a bona fide transfer of the said timber land;
- (c) the sale of the said timber land to the said Chin Yin Khee was a fictitious sale and that the appellant on 25th October, 1966, did, in fact, sell the timber obtaining in the said timber land to Kim Hong Company Limited; 20
- (d) the appellant, being a timber merchant and contractor, made the said profit from the sale of the timber obtaining in the said timber land to the said Kim Hong Company Limited;
- (e) the alleged "expenses", amounting to \$23,703.00, were not bona fide expenses legitimately incurred in the alleged sale of the timber land to the said Chin Yin Khee and were, therefore, not outgoings or expenses wholly and exclusively incurred by the appellant in the production of income, under the provisions of section 12(1) of the said Income Tax Ordinance, 1956, and should, therefore, be disallowed. 30

2. We hereby order that the assessment of income tax in respect of the appellant for the year of assessment 1967, as per notice of additional assessment dated 11th March, 1972, be amended to include the further sum of \$23,703.00.

Dated this 14th day of June, 1974.

Sgd: M. C. SCHUBERT

Presiding
Special Commissioner of Income
Tax

Sgd: LEE KUAN YEW

Special Commissioner of Income
Tax

Sgd: TAN SRI HJ. WAN HAMZAH
B. HJ. W. MOHD

Special Commissioner of Income
Tax

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No. 3

LIST OF EXHIBITS

No. 3

List of Exhibits

Exhibit
No.

Particulars

A1	Agreed Statement of Facts and Agreed Bundle of Documents.
A2	Agreed Bundle of Documents No. 2.
20 A3	Agreement dated 22.4.1964.
R4	Profit & Loss Account for the year ended 30.6.66.
R5	Profit & Loss Account for the year ended 30.6.65.
R6	Profit & Loss Account for the year ended 30.6.64.
R7	Agreement dated 25.10.1966 between Chin Yin Kee and Kim Hong Company Limited.

J U D G M E N T

No. 4

Judgment of
B.T.H. Lee, J.

9th February 1977

This is an appeal from a decision of the Board of Review by which certain assessment of income tax for the year of assessment 1967 as contained in the notice of additional assessment dated 11th March, 1972 namely that the profit of \$176,774.00 made by the Appellant in respect of the transfer of the country land in C.L.10845 is capital appreciation and not a profit chargeable to tax.

The facts, as to which there is no dispute, are these: 10

The Appellant in this case has business interests in cattle farming, rubber and coconut estates, besides being a contractor for timber hauling, road construction and supply of rubber seedling. He is also Director of Sandakan Enterprise Co. Ltd. and Membalak Kayu Chu Lip Kong Sdn. Berhad.

In 1958 he purchased jointly with his five brothers 150 acres of coconut plantation at Tanjong Pisau, District of Sandakan, at a Government auction of enemy properties.

In 1959, Government granted him an area of 814 acres 20 in Gum Gum Kecil, District of Sandakan, adjacent to the Tanjong Pisau coconut plantation. It was prelogged land as its timber had already been removed by a previous licensee. The Appellant worked this property in stages and developed it into a cattle farm. At the beginning he put in 50 heads of cattle.

In 1965 the number was increased to 200. Initial capital was between \$70,000.00 to \$80,000.00. He laid out two miles of rail and had 14 to 15 trucks and a locally built locomotive. 30

As there were several fresh water streams running across the land which was quite dry, the land was considered ideal for cattle-farming. The Appellant extracted some timber and sold it. It was the first time he extracted timber.

The Government granted him in 1959 another piece of prelogged land about 468 acres fully planted with rubber also situated in Gum Gum Kecil.

The three properties namely, the 150 acres of coconut plantation, 814 acres in Gum Gum Kecil, and 468 acres 40

also in Gum Gum Kecil are still owned or jointly owned by the Appellant.

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10 In 1962, Appellant had knowledge that 6666 acres of Kinabatangan land (hereinafter called the "KB" property) was for sale, but not having sufficient funds nothing was done about it. However in June 1963 Appellant met Mr. McPherson, a representative of the owner of the KB property. An aerial survey of 1½ hours of the area was made. He decided that this property was suitable for cattle farming. The timber on the land could be used for fencing, building light trucks, railway sleepers, cattle sheds and paddock fencing for his rubber estate and the other cattle farm. He had lost a considerable number of cattle from Gum Gum Kecil because of its close proximity to the town.

KB property on the other hand was quite a distance from the town. He bought the property at a price of \$45.00 to \$50.00 per acre which was considered cheap for an area of 6666 acres.

20 In September 1963 Appellant made enquiries regarding the source of cattle supply for breeding purpose. (Folio 19 and 21 of Exhibit A1). In the same year Appellant obtained a loan of \$320,000.00 from Hong Kong and Shanghai Bank, Sandakan, for the purpose of purchasing the KB property.

30 On 22nd April, 1964 an agreement in respect of the KB property was entered into between the vendor, the Sabah Timber Co. Ltd. and the Appellant, the consideration of which was \$320,000.00 (Exhibit A3), and the Memorandum of Transfer in respect of which was duly registered on 7th October, 1964 (page 23, Exhibit A1).

In June 1964 the Appellant sent the first group of ten workers to the KB property to ascertain the boundary stones and to fence the area. A sum of \$21,444.58 was expended for the transportation from time of purchase to the date of sale (page 1, paragraph 5 of Exhibit A1).

40 A small gauge railway line of 3½ miles was laid from the jetty to the higher part where the headquarters was to be established. A motor car engine was used to build a locomotive for the transportation of workers, materials and goods. 20 wooden trucks measuring 2½ft. x 3½ft. each were constructed and fitted with trolley wheels. 4 to 5 workers could sit or stand on each of them. The cost was \$150.00 each. The entire area is

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about 10 sq. miles and the longest distance from one boundary to the next is about 10 miles. It was not economical to build a road because some parts of the land were low-lying, muddy and swampy, and cost of maintenance would be expensive.

Appellant visited the land 12 to 14 times from date of purchase to time of sale.

Appellant planned to develop the KB property in five stages, working on about 1000 acres at a time. He had intended to plant grass, put up fencing and divide the areas into paddocks. As the trees would provide shade he did not think it was necessary to clear them. However, during the two years he extracted 6000 to 7000 cubic feet of timber (6" diameter and 4 ft. long) for railway sleepers.

10

In the first year of ownership Appellant did not notice that the KB property was subject to flooding. But towards the end of 1964 he found many parts of the low-lying areas flooded.

Similarly at the end of 1965 he found that the water was chest high and remained so for 3-4 weeks. The Kinabatangan River was flooded due to the annual rainy season from October to January.

20

He checked the low-lying areas again between June to July, 1966 which is not the rainy season, but found them to be still flooded.

Appellant was frustrated and decided to dispose of the property since the area is not suitable for cattle farming.

The Forestry Department issued a timber licence under the Forest Rules 1954 to the Appellant on 15 March, 1966 in respect of the KB property. The licence was cancelled on 26th October, 1966 upon the request of the licensee. (Page 41 of Exhibit A1).

30

No timber was extracted during the currency of the timber licence.

On 25 October, 1966 Appellant sold the KB property to Chin Yin Khee (allegedly fictitious whom I will call "CYK") for \$580,000.00 and the equipment thereof for \$20,000.00 (Page 31 to 37 of Exhibit A1).

40

The purchaser paid to the vendor \$380,000.00 upon signing the agreement and the balance of \$200,000.00 to be paid on 24th April, 1967. For the better securing of this payment the purchaser handed over to the vendor Chartered Bank cash cheque No. 592538 post-dated to 24th April, 1967 drawn by Kim Hong Co. Ltd. for the sum of \$200,000.00 and the said sum was guaranteed jointly and severally by Tan Kim Ting and Liew Tze Nyan.

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10 A Memorandum of Transfer was signed by the parties on 26th October, 1966 and registered on 23rd December, 1966. (Exhibit A1, page 25).

CYK had apparently some knowledge of the property as he also accompanied the Appellant on the aerial survey of the land.

20 On the same day, that is October 25th, 1966, another agreement was entered into between CYK (hereinafter called "the Vendor") and Kim Hong Co. Ltd., a company incorporated in the State of Sabah and having its registered office in Sandakan (hereinafter called "the Purchaser"), in which the Vendor agreed to sell and the Purchaser to buy all the commercial timber in the Vendor's timber land (the KB property) for the sum of \$595,000.00 and the equipment such as 4 miles of rails (laid and un-laid), one locomotive, 20 trucks etc., for \$20,000.00 (Exhibit R7).

30 The Purchaser, that is Kim Hong & Co. Ltd., paid to the Vendor, that is CYK, \$395,000.00 on signing the agreement and the balance was to be paid on 24th April, 1967 by a Chartered Bank cheque No. 592538 post-dated to 24th April, 1967 for \$200,000.00.

Tan Kim Ting, Managing Director of Kim Hong Co. Ltd., in his evidence admitted that he knew CYK. He signed the agreement dated 25th October, 1966 (Exhibit R7) on behalf of the Company which deals with timber and oil palm estates. Upon examination by the Company they discovered that the rails were unsuitable for transportation of logs and were not in good condition as they were not properly laid by the Appellant (page 27 of Exhibit A1).

40 Nearly 4 miles of rail had to be taken out and relaid before timber extractions could commence. The locomotive could only be used for transportation of workers and stores, the Company had therefore to buy three more engines. Even with the help of the labourers, the distance of 4 miles was too long. The Company had to modify the

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trucks and to change the woodwork.

Kim Hong Co. Ltd., carried out timber operations on this property for 5 years from end of 1966 to 1971. A timber camp was set up under the charge of a manager and a Supervisor.

Tan Kim Ting gave the following production figures prepared in the Company's office in Sandakan :

1967	..	455,315 cu.ft.	
1968	..	388,544.09 cu.ft.	
1969	..	433,874.06 cu.ft.	10
1970	..	271,055.01 cu.ft.	
1971	..	<u>24,611.00 cu.ft.</u>	
Total	..	<u>1,573,400.06 cu.ft.</u>	

He has affirmed that most of the timber was taken from one area round the hilly part close to the State land. There was also some timber in the low-lying areas.

The removal of timber was covered by a permit issued by the Forest Department, proper records being kept for the Registrar of Companies. Timber stocks from other concessions were kept separately and there was no mixing up of timber extracted from this area.

In response to a request from the Inland Revenue Department, the Forestry Department on 19th July, 1972 gave the following estimated production figures based on aerial photographs of the Kinabatangan property :

- (i) approximately 1000 acres had a timber stand of about 600 cu.ft./acre. This area has been worked out now;
- (ii) 200 acres (approximately) had a timber stand of between 0-200 cu.ft./acre. Very poor forest; 30
- (iii) the remaining area of about 5466 was swampy, flat and non-productive (Exhibit A1 folio 41).

On 9th September, 1969 Tan Kim Ting bought the KB property from CYK for \$8,000.00 and a Memorandum of Transfer in respect of which was registered on 20th March, 1970 (page 39 of Exhibit A1).

On behalf of the Respondent it was contended that -

The profit of \$176,774.00 obtained by the Appellant is subject to tax under Section 9(1)(a) of the Sabah Income Tax Ordinance, 1956, the burden of proof of which lies on the Appellant to prove that \$176,774.00 is capital appreciation.

10 The KB property was bought with a bank loan of \$320,000.00 in order to expand his cattle farming in Gum Gum Kecil. The whole project would have cost him about \$720,000.00. However, according to Appellant's profit and loss account for the year ended 30th June, 1966 the item in respect of sale of livestock in Gum Gum Kecil farm amounted to only \$4,250.00. No sales were recorded in 1964 and 1965 accounts.

20 The size of KB property is eight times that of Gum Gum Kecil and basing the livestock income in 1966 on \$4,250.00 the Appellant would obtain \$34,000.00 a year when the project was fully operational. That being so the Appellant would take about 30 years to get a return of his capital without taking into consideration the attendant expenses to be incurred. It seems wholly uneconomical and one in which it is doubtful the Appellant had any intention in developing as a cattle farm.

30 Appellant said he wanted the timber from KB property for use of railway sleepers, jetty, perimeter fencing, posts and wagons for all his estates as well as the proposed cattle farm. But he does not know the quantity required. Actually the quantity was negligible compared with the 1,573,400 cu. ft. extracted by Kim Hong Co. Ltd. Whether the Appellant really requires the timber on KB property for the alleged purposes is rather doubtful.

That the Appellant applied for a timber licence in March 1966 from the Forest Department shows his intention of starting timber operations.

40 Preliminary work was not carried out properly. Tan Kim Ting in his evidence said that in order to carry out full scale timber operations, he had to relay about 4 miles of rail, reconstruct the trucks and purchase three more locomotives.

Appellant had already spent about \$100,000.00.

In the High Court
in Malaysia at
Kuala Lumpur

—
No. 4

Judgment of
B.T.H. Lee, J.

9th February 1977
continued

In the High Court
in Malaysia at
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—
No. 4

Judgment of
B.T.H. Lee, J.
9th February 1977
continued

Being in want of funds, he did not want to incur further expenditure. The more profit he wished to make, the more risks he had to undertake. The obvious and safe course which Appellant chose was to sell the land for a quick return.

Appellant had been in the timber business for nearly 10 years having started in 1956, before he bought the KB property. The fixing of the price of the land has for its basis the presence of timber on the land.

10

No objection was raised by Appellant to the use of the words "timber land" in the two agreements (Exhibit A1 folio 31 and Exhibit R7). That he knew the contents of the agreements when he signed them is clear. The clear advantage in the use of the words "timber land" is the payment of enhanced price for the presence of timber on the land.

There being no consideration in respect of the first sale agreement between appellant and CYK it cannot be regarded as valid. There was therefore no legal sale of the KB property. In the circumstances, the Appellant is still the beneficial owner of the KB property. For such an exercise CYK received only \$15,000.00 whereas the Appellant made a profit of \$176,774.00.

20

Appellant is a very experienced timber contractor the major part of his income being derived from timber business as is evidenced from his accounts prepared by Messrs. Peat, Marwick, Mitchell & Co. Chartered Accountants (Exhibit R4-6). His intention of purchasing the KB property is for its timber rather than for the development of a cattle farm.

30

- (a) Profit & Loss Account for the year ended 30.6.66 (Exhibit R4).

Gross income \$1,101,250.34
Logs delivered \$1,034,119.23 (approximately 90% of gross income).
Sale of livestock \$4,250.00.

- (b) Profit & Loss Account for the year ended 30.6.65 (Exhibit R5).

Gross income \$760,247.56
Logs delivered \$720,999.27 (more than 90% of gross income).
Shipments \$10,673.19.
No sale of livestock.

40

(c) Profit & Loss Account for the year ended 30.6.64 (Exhibit R6).

Gross income \$958,917.78
Logs delivered \$856,909.67 (80% to 90%
of gross income).
Logs sold \$7,242.11.
No sale of livestock.

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Judgment of
B.T.H. Lee, J.

9th February 1977
continued

10

Appellant had in cross-examination by the Respondent admitted and again when he was examined by his Counsel confirmed that he had done the land transaction in the course of his business.

Was the Appellant's intention to extract timber from the land or to sell the land at a profit, in the course of his business? If it is the latter, then he is caught by Section 9(1)(a) of the Ordinance. If the amount of \$176,774.00 is considered as income not within subsections 9(a) to (f), then it is within the ambit of subsection (g) thereof.

20

Appellant had undertaken no feasibility study in respect of cattle farming on the property. What he had done was an aerial survey of KB property only once. No ground survey was undertaken.

Further, no project paper nor feasibility study for cattle farming was presented to the Hongkong and Shanghai Bank, Sandakan, for the loan of \$320,000.00. For collateral security, the Appellant handed over the documents of title relating to the KB property and that of a shophouse.

30

In support of his case, the following authorities were cited :

- (i) DEF v. CIT (1961) 2 MLJ p. 55
- (ii) E v. CGIR (1970) 2 MLJ 117
- (iii) L v. CGIR (1973) 2 MLJ 14
- (iv) Californian Copper Syndicate (Limited and Reduced) v. Harris (Surveyor of Taxes) 5 TC 159.

40

The Special Commissioners of Income Tax (whom I shall call the "Board") finding reached the following conclusions upon the evidence :

In the High Court
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Judgment of
B.T.H. Lee, J.

9th February 1977
continued

(a) The Appellant has been a logging and hauling contractor very experienced in the timber business. His profit and loss accounts for the years 1964 to 1966 showed that about 90% of his income was derived from timber operations (Exhibits R4, R5 and R6). This showed that his intention of purchasing KB property is for its timber rather than for the development of a cattle farm. In so far as the KB property was concerned no visible sign of preparatory work was done. He did not transfer any cattle from his Gum Gum Kecil farm in spite of cattle thefts. He was waiting for an opportune moment to dispose of the timber. They were not convinced by the evidence that he had extracted 6000 to 7000 cubic feet of timber for fencing or other purposes.

10

(b) Appellant possessed the knowledge and experience of conducting a cattle farm. He knew the ideal physical features and topography where such a farm should be located. The Board find that it was an extremely unsound investment for the Appellant to have spent \$320,000.00 purchasing 6666 acres of land, of which 5466 acres were swampy, flat and non-productive, and was trying to develop the place as a cattle farm. He knew what profit he could expect from the timber on the remaining 1200 acres. Kim Hong & Co. Ltd. paid \$595,000.00 for the commercial timber (Exhibit R7). Tan Kim Ting, the managing director, gave the production figure of 1,573,400.06 cubic feet for 5 years, the timber being extracted from the hilly region and from the low lying area which were not flooded. The results far exceeded the estimates based on aerial photographs provided by the Forest Department (Exhibit A1 folio 41). The Appellant took two years before he abandoned the idea of developing the KB property as a cattle farm. The records in the Forest Department were available to him at any time and he could have found the position at any time. He was playing for time and stood by all this while in order to find a purchaser of the timber. In fact KB property itself after the timber had been extracted was worth only \$8,000.00 (see Exhibit A1 folio 39). It is apparent that the Appellant based the sale price of the KB property on the timber standing thereon.

20

30

40

(c) Appellant deliberately devised a plan to evade the payment of income tax by arranging a fictitious sale of the KB property by him to CYK on 25th October, 1966 (Exhibit A1 folio 29 to 37). No money consideration seems to have passed between the vendor and purchaser.

Appellant in his evidence said he never met the guarantors Tan Kim Ting and Liew Tze Nyen of the Chartered Bank cash cheque No. 592538 and post-dated 24th April, 1967 drawn by Kim Hong Co. Ltd. for \$200,000.00 as he had no business dealings between them. He knew Tan Kim Ting by name only.

In the High Court
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Judgment of
B.T.H. Lee, J.

9th February 1977
continued

10 Tan Kim Ting on the other hand in his evidence confirmed that he knew the Appellant for more than 10 years as both of them lived in Sandakan and were in the timber business.

The Board did not believe that Appellant was willing to receive a post-dated cheque for such a large sum of money without knowing the guarantors and their financial standing.

20 The sale agreement (Exhibit R7) showed that on the same day, that is 25th October, 1966 CYK entered into an agreement with Kim Hong Co. Ltd. in respect of the sale of commercial timber only. It is to be observed that there was no privity of contract between the Appellant and Kim Hong & Co. Ltd.

The Board were of the view that out of the sum of \$595,000.00 received by CYK he had to hand over to the Appellant the sum of \$580,000.00 and CYK kept \$15,000.00 as his commission for the part he took in respect of the two transactions.

Paragraph 2 of Exhibit R7 is in these terms :

30 "On the signing of this agreement the purchaser shall pay to the vendor the sum of Dollars Three Hundred and Ninety-five Thousand only (\$395,000.00) (of which sum the vendor hereby acknowledges receipt thereof) and the balance of Dollars Two Hundred Thousand only is to be paid on the 24th April, 1967 of which a Chartered Bank Cash Cheque No. 593538 post-dated 24th April, 1967 for the said \$200,000.00 shall be handed by the purchaser to the vendor (of which cheque the vendor hereby acknowledges receipt therein)."

40 The same cheque was used in both transactions. The Board have reached the following decision :

(i) That the profit of \$176,774.00 made by the Appellant in respect of the sale of timber land in

In the High Court
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No. 4

Judgment of
B.T.H. Lee, J.

9th February 1977
continued

KB property was not a capital appreciation but was a profit from trading in timber and therefore chargeable to tax under section 9(1)(a) of the Ordinance.

(ii) That the sale of the said timber land to CYK on 25th October, 1966 was not a bona fide transfer of the timber land.

(iii) That the sale of the said land to CYK was a fictitious sale and that the Appellant on 25th October, 1966 in fact sold the timber of the land to Kim Hong & Co. Ltd.

10

(iv) Being a timber merchant and contractor, Appellant made the said profit of \$23,703.00 from the sale of timber obtaining in the said timber land to Kim Hong & Co. Ltd.

(v) The sum of \$23,703.00 being expenses incurred by the Appellant in the sale and transfer of the KB property be added back because they were capital expenditure and not outgoings or expenses wholly or exclusively incurred by the Appellant in the production of income under section 12(1) of the Ordinance (Exhibit A1 folio 3).

20

The Board thereupon ordered that the assessment of income tax in respect of the appellant for the year of assessment 1967 as per notice of additional assessment dated 11th March, 1972 be amended to include the further sum of \$23,703.00.

The question for determination is whether \$176,774.00 is chargeable for income tax under section 9(1)(a) of the Ordinance (1956) Sabah which reads as follows :

30

"Charge of Income Tax

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."

40

It is here to be observed that the wording of the above section is identical with section 10(1)(a) of Singapore Income Tax Ordinance and section 10(1)(a) of the Malayan Income Tax Ordinance, 1947, in respect of which reference have been made both before the Commissioners and before this Court.

In the High Court
in Malaysia at
Kuala Lumpur

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No. 4

Judgment of
B.T.H. Lee, J.

9th February 1977
continued

10 Counsel for Appellant referred to the case in DEF v. THE COMPTROLLER OF INCOME TAX (1961) 27 MLJ 55 in support of his proposition that isolated trans-
action is not caught by the law - meaning of trade or
business.

It was held in DEF case that -

- (1) the purchase and sale of the estate did not constitute a trade or business and accordingly the profit arising therefrom was not income subject to tax under section 10(1)(a) of the Income Tax Ordinance;
- 20 (2) the words "trade", "business", "profession", or "vocation" in section 10(1)(a) of the Income Tax Ordinance all involve the continuous exercise of an activity;
- (3) the term "business" in Section 10(1)(a) does not apply to one isolated act, or business transaction;
- 30 (4) whether or not the Appellant is carrying on a trade or business is a question of mixed fact and law. If the Board of Review did not err in law, its decision on the issue of fact involved must stand unless it cannot be regarded as a reasonable decision.

Counsel for Appellant referred the Court to E v. COMPTROLLER-GENERAL OF INLAND REVENUE (1970) 2 MLJ 117 which followed and adopted DEF case. It was held in "E" case that an "isolated dealing" does not come within the definition of trade or business, and the observation of the Court on "buying and selling", and held that the other sales are not irrelevant not being in close proximity with the sale and purchase in which profit was made.

40 The same principle is applicable to LKC v. COMPTROLLER-GENERAL OF INLAND REVENUE (1973) 2 MLJ 17.

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No. 4

Judgment of
B.T.H. Lee, J.
9th February 1977
continued

Counsel for the Respondent referred to E v. COMPTROLLER-GENERAL OF INLAND REVENUE (1970) 2 MLJ 117 cited by Counsel for Appellant. That case dealt with land transaction whereas in the present case the Board found that Appellant was trading in timber, and has no application to the present case.

"E" case was an isolated transaction and there was no dealing with any land transaction before. In this case it was the finding of the Board and was admitted by Appellant that he was a timber merchant.

10

See page 21 (f) of Case Stated :

"Appellant had been in the timber business since 1956, nearly 10 years before buying the KB property. The basis of fixing the price of the land was the presence of timber on it."

Appellant did not object to the words "timber land" being inserted in the two agreements (Exhibit A1 folio 31 and Exhibit R7). He knew the contents when he signed the agreement.

On page 2 of the Agreed Statement of Facts, paragraph 7 is as follows :

20

"The Appellant incurred the following expenses in connection with the sale and transfer of the land :

(1)	Commission	\$11,600.00
(2)	Legal fee	\$ 500.00
(3)	Transfer fee	<u>\$11,603.00</u>
		<u>\$23,703.00</u>

It is true the Board has agreed to the figures produced by the Appellant.

30

Whether or not the expenses so produced are allowable under section 12(1) of the Ordinance (which is identical to Section 33 of the Income Tax Act, 1967). To qualify for the deductions the onus is on the Appellant to satisfy the Court that the expenses were outgoings or expenses wholly and exclusively incurred by the Appellant in the production of income. The production of income here is the production of income from the timber proceeds.

If the expenses incurred here were in respect of a

fictitious transfer of land, that is \$23,703.00, the sum will not be allowable. Further, the Appellant has not shown whether the expenses amounting to \$11,600.00 was really expended by the Appellant. If so, the question arises was it legally made and if so, to whom was it made? Was it for the two guarantors who allowed the Appellant the use of their names as guarantors? The Appellant's trade here was not for the land transaction but for timber trade. (See STRONG & CO. v. WOODIFIEDL (1906) 5 TC 215 and BENTLEYS, STOKES & LOWLESS v. BEESON (1952) 33 TC 491).

10

In the High Court
in Malaysia at
Kuala Lumpur

—
No. 4

Judgment of
B.T.H. Lee, J.

9th February 1977
continued

The Court agrees with the Board that the object of these strange manoeuvres by the Appellant was to mislead the rating authorities so as to avoid the provisions of the income tax legislation.

The question which the Board had to determine was what was the object in mind of the Appellant in entering into the transactions in question, and this is essentially a matter of fact and of inference for the Board with which I wholly agree.

20

The Court can see no good reason why the decision of the Board should be disturbed. They arrived at clear and definite findings on the questions of fact and there was ample evidence to support these findings.

The appeal is accordingly dismissed with costs.

(B.T.H. LEE)
Judge
High Court in Borneo

Dated this 9th day of February, 1977.
KOTA KINABALU,

30

For Plaintiffs: Mr. Joseph Lee

For Respondent: Mr. Mokhtar bin Haji Sidin

CERTIFIED TRUE COPY

Signed

Secretary to the Judge
High Court in Borneo.

In the High Court
in Malaysia at
Kuala Lumpur

No. 5

ORDER

No. 5

Order of High
Court

9th February 1977

WHEREAS pursuant to paragraph 34 of Schedule 5 of the Income Tax Act, 1967, a case had been stated at the request of the Appellant by the Special Commissioners of Income Tax for the opinion of this Court.

AND WHEREAS the said case came on for hearing on the 1st day of July, 1976.

AND UPON READING the same and UPON HEARING Mr. Joseph Lee of Counsel for the Appellant and Inche Mokhtar bin Maji Sidin, Federal Counsel for the Respondent IT WAS ORDERED that this case do stand adjourned for Judgment AND the same coming on for judgment this 9th day of February, 1977; 10

THIS COURT IS OF OPINION that the determination of the said Special Commissioners of Income Tax is correct AND IT IS ORDERED that the Appeal be and is hereby dismissed and the Deciding Order of the Special Commissioners of Income Tax dated the 14th day of June, 1974 be and is hereby confirmed; 20

AND IT IS ALSO ORDERED that the costs of the Respondent be taxed by the proper officer of the Court and be paid by the Appellant to the Respondent.

GIVEN under my hand and the SEAL of the Court this 9th day of February, 1977.

By the Court,

SENIOR ASSISTANT REGISTRAR,
HIGH COURT,
KOTA KINABALU.

No. 6

Statement of
Agreed Facts

17th May 1974

No. 6

STATEMENTS OF AGREED FACTS

30

1. The Appellant, Encik Chu Lip Kong purchased all the land (6666 acres) comprised in Lease No. 10845 from Sabah Timber Co. Ltd., the original lessee.
2. The Appellant paid the following sums for the land:

(a)	consideration for the land	\$ 320,000.00
(b)	stamp duty	\$ 6,403.00
(c)	other expenses - transfer and legal fees	<u>\$ 2,403.00</u>
		<u>\$ 328,806.00</u>

In the High Court
in Malaysia at
Kuala Lumpur

No. 6

Statement of
Agreed Facts

17th May 1974
continued

3. The land was transferred to and registered in the name of the Appellant on the 7.10.1964 vide Memorial No. 81137.

10 4. The land is situated in the District of Kinabatangan. A proportionately large area of the land is low lying with swamps. There are some timber trees in scattered areas of about 1200 acres.

5. Since the purchase of the land the Appellant had incurred the following expenses :

	(1)	Transportation	\$ 21,444.58
	(2)	Land Cess	\$ 6,742.00
	(3)	Rails (Small Gauge)	\$ 36,716.70
	(4)	Yamar engine	\$ 1,370.85
	(5)	Stores	\$ 7,662.04
20	(6)	Sundries expenses	\$ 10,780.86
	(7)	Survey fee	<u>\$ 1,000.00</u>
			<u>\$ 85,717.03</u>

6. By a transfer dated the 26.10.1966 and registered on the 23.12.1966 vide Memorial No. 88107 the entire area of the land in Lease - No. 10845 subject to the same terms and conditions as endorsed on the title when acquired was sold and conveyed to the purchaser Encik Chin Yin Khee for the sum of \$615,000.00 made up as follows :

30	(1)	For the land	\$ 580,000.00
	(2)	For the second hand equipments on the land (consisting: 4 miles of laid and unladen rails, one locomotive, 20 old trucks, one winch and the labour lines)	\$ 20,000.00
	(3)	Refund for part expenses in- curred in connection with the sale and transfer of the land	<u>\$ 15,000.00</u>
			<u>\$ 615,000.00</u>

In the High Court
in Malaysia at
Kuala Lumpur

—————
No. 6

Statement of
Agreed Facts

17th May 1974
continued

7. The Appellant incurred the following expenses in connection with the sale and transfer of the land :

(1) commission	\$ 11,600.00
(2) legal fee	\$ 500.00
(3) transfer fee	<u>\$ 11,603.00</u>
	<u>\$ 23,703.00</u>

8. The difference realised by the Appellant in the sale of the land is as follows :

Land sold as per para. 6		\$615,000.00	
Less cost of land as per para. 2	\$328,806.00		10
Less expenses as per para. 5	\$ 85,717.03		
Less expenses as per para. 7	\$ 23,703.03	<u>\$438,226.03</u>	
		<u>\$176,773.97</u>	

Dated the 17th day of May, 1974.

Sgd. C.L. MARRIOTT

For Director of Inland Revenue

CHONG THAIN VUN & CO.

Advocates for the Appellant

20

In the Federal
Court of Malaysia

—————
No. 7

Memorandum of
Appeal

31st March 1977

No. 7

MEMORANDUM OF APPEAL

Chu Lip Kong, the Appellant abovenamed appeals to the Federal Court against the whole of the decision of the Honourable Justice B.T.H. Lee given on the 9th day of February, 1977 on the following grounds :-

1. The Learned Judge had failed to appreciate that the primary issue under appeal was whether the proceeds of the sale of land should be placed on capital or revenue account.

30

2. The Learned Judge had erred in failing to recognise that in determining the quality of the receipt in the hands of the Appellant upon the sale of land it was essential to ascertain whether the property sold was a disposal

of a capital asset or the stock-in-trade of the Appellant.

In the Federal
Court of Malaysia

—————
No. 7

Memorandum of
Appeal

31st March 1977
continued

3. The Learned Judge had erred in seeking to relate the proceeds from the sale of land to the nature of business activity generally carried out by the Appellant and to establish a nexus of trade unfounded in law and extraneous to the considerations of income tax exigibility.

10

4. The Learned Judge had misdirected himself in importing details concerning the transaction of sale in determining the nature and effect of the sale itself for the purposes of tax liability.

5. The Learned Judge had distrubed the findings of fact of the Special Commissioners when there were no legal grounds upon which this could be done.

6. The Learned Judge in concurring with the decision of the Special Commissioners failed to appreciate that the inference from the facts as found by the Special Commissioners were not germane to the question of the Appellant's chargeability to tax.

20

7. The inference of the Learned Judge were contrary to, inconsistent with and unsupported by the evidence and facts as found.

8. The gain of \$176,774 made by the Appellant is not specifically charged to tax under the Income Tax Ordinance (Sabah) 1956.

Dated this 31st day of March 1977.

.....
SOLICITORS FOR THE APPELLANT

To:

The Chief Registrar,
Federal Court,
Kuala Lumpur

30

And to:

- | | |
|---|--|
| 1. The Registrar,
High Court,
Kota Kinabalu | 2. The Director-General of Inland
Revenue,
Malaysia. |
|---|--|

JUDGMENT OF THE COURT

No. 8

Judgment of the
Court

19th June 1978

The appellant tax-payer bought on October 7, 1964, 6,666 acres (the Kinabatangan property) in Sandakan for \$320,000.00. The price was at the very cheap one of about \$50/- an acre. The tax-payer was a man of many parts. Among his many roles, he was a cattle farmer as well as an extractor of timber. He said he bought the land for cattle rearing. He had another cattle farm somewhere which was subject to cattle thefts and he intended to transfer his cattle or some of them to this new property. He did nothing of that sort, because he found out that over 5,000 acres were subject to flooding and therefore unsuitable for cattle rearing. But this he found out more than a year after his purchase. However, on March 15, 1966 he secured a timber licence to work this property as a timber-land. He however caused it to be cancelled on October 26, 1966. There were no records of his ever having extracted any timber. On October 25, 1966, i.e. a day previous, he sold the property for \$580,000.00 to Chin Yin Kee. \$380,000.00 was paid on the same day. The balance of \$200,000.00 was guaranteed by two persons, namely Tan Kim Ting and Liew Tze Nyen, by a cheque drawn by Kim Hong Co. Ltd. On the same day, Chin Yin Kee sold the land to Kim Hong Co. Ltd. for \$595,000.00. Thereafter Kim Hong Co. Ltd. worked the land as a timber concession with the necessary licence and from 1967 to 1971 extracted a total of 1,573,400 cubic feet, mainly from the areas that were not subject to flooding.

The Special Commissioners disbelieved the sale of the property to Chin Yin Kee. They did so because there was an admission that the cheque of \$200,000.00 used by Chin Yin Kee to pay the balance of the purchase price was the one issued by Kim Hong Co. Ltd. who was the eventual purchaser of the commercial timber on the property.

Revenue determined that the appellant had made a profit of \$176,774.00 from the transaction and charged the tax-payer to tax on this sum as income derived from trading in timber. The tax-payer appealed to the Special Commissioners and the High Court on the ground that this sum represented capital appreciation and not income and was therefore not chargeable to tax.

Learned Counsel for the appellant did not seriously

10 contend against the findings of fact by the Special
Commissioners but contended that these facts estab-
lished clearly a case of capital appreciation. But on
the evidence the tax-payer was more a timber man
than he was of any of his other occupations. From his
own accounts for the years 1964 to 1966, 90% of his
income was derived from timber operations. What-
ever his stated reasons for the purchase of the property
might be, there was no evidence that he carried out in
any way his projected cattle rearing on the property.
From the figures supplied by Kim Hong Co. Ltd.,
there could be no doubt of the suitability of the property
as a logging concession. There was also some timber
in the parts subject to flooding. The tax-payer had
applied and obtained a timber licence. His surrender
of it was in conformity with the law, since under the
Forest Ordinance 1954 and the Forest Rules 1954, such
a licence was not transferable and the only way Kim
Hong Co. Ltd. could work the land for its timber would
20 be to apply for a licence in its own name and he could
only do that after the tax-payer had surrendered his
licence. On the evidence it was a possible conclusion
that the sale to Chin Yin Kee was a colourable device
and that the sale was one to a logging firm. There
was ample evidence before the Special Commissioners
to come to the finding that the difference in the consi-
deration was not a capital appreciation but a profit
arising from the tax-payer's trade and therefore charge-
able to tax. The learned Judge also accepted this and
30 it will be wrong for this Court to come to any other con-
clusion.

The last question concerned the sum of \$23,703/-
made up of \$11,600/- commission, \$500/- Legal fees
and \$11,603/- transfer fees. Because of the inter-
vention of Chin Yin Kee, the Special Commissioners were
not satisfied that the sum was wholly and exclusively
incurred in the production of the income: Section 12(1)
Sabah Income Tax Ordinance 1956, to qualify for deduction.
We agree.

40 The appeal is dismissed with costs.

(Sgd.) H. S. ONG,
Judge
(TAN SRI DATUK ONG HOCK SIM)
JUDGE
FEDERAL COURT,
MALAYSIA.

In the Federal
Court of Malaysia

No. 8

Judgment of the
Court

19th June 1978
continued

Judgment delivered in Kota Kinabalu
by Charles Ho, J. on June 19, 1978.

Notes

(1) Hearing in Kota Kinabalu on Monday, 3rd October
1977.

(2) Counsel

Mr. S. Woodhull with Mr. Thomas Cheah for
Appellant.

Solicitors: Chong Thain Vun & Co.

Datuk Eusoff Chin, Senior Federal Counsel
for Respondent.

10

No. 9

Order of Federal
Court

19th June 1978

No. 9

ORDER

THIS APPEAL coming on for hearing on the 3rd
day of October, 1977 in the presence of Datuk Haji Eusoff
bin Chin, Senior Federal Counsel on behalf of the Respon-
dent and Encik S. Woodhull (Encik Thomas Chia with him)
of Counsel for the Appellant AND UPON READING the
Record of Appeal herein AND UPON HEARING Counsel
as aforesaid IT WAS ORDERED that this Appeal do stand
adjourned for Judgment AND the same coming on for
Judgment this day in the presence of Counsel for the
Appellant and Counsel for the Respondent. IT IS
ORDERED that this Appeal be and is hereby dismissed.
AND IT IS ORDERED that the Appellant do pay to the
Respondent the costs of this Appeal as taxed by the proper
officer of the Court.

20

AND IT IS LASTLY ORDERED that the Deposit of
\$500/- (Ringgit Five Hundred) paid into Court by the
Appellant as security for costs of this appeal be paid to
the Respondent on account of taxed costs.

30

GIVEN under my hand and the seal of the Court
this 29th day of December, 1977.

Sgd.

CHIEF REGISTRAR,
FEDERAL COURT,
MALAYSIA.

No. 10
A F F I D A V I T

In the Federal
Court of Malaysia

No. 10

Affidavit of
Sandrasegaran
Woodhull

12th July 1978

I, SANDRASEGARAN WOODHULL, of full age, of No. 27, Jalan 17/1, Petaling Jaya, do solemnly affirm and state as follows :-

1. I am a partner of Messrs. Shearn, Delamore & Co. and am authorised by the Appellant, Chu Lip Kong, to act in this matter.

10 2. On the 31st day of March 1977 the abovenamed Appellant appealed to the Federal Court against the decision of the Honourable Justice B.T.H. Lee given at the High Court in Borneo, Kota Kinabalu on 9th February 1977.

3. The said appeal which is Federal Court Civil Appeal No. 56 of 1977 was duly heard by this Honourable Court on the 3rd October, 1977 and the reserved judgment was delivered on the 19th June, 1978 whereby the appeal of the Appellant was dismissed with costs.

20 4. The Appellant is now desirous to appeal to His Majesty the Yang Di-Pertuan Agung against the said Judgment of this Honourable Court as it is advised and verily believes that this case is from its nature a fit and proper case for appeal.

30 5. The Appellant is willing to undertake a condition for leave to appeal to enter into good and sufficient securities as to the satisfaction of the Court in such sum as the Court may prescribe and to conform to any other conditions that may be imposed under the Rule (7) of the Federal Court (Appeals from the Federal Court) (Transitional) Rules 1963. In the circumstances, I pray that this Honourable Court will be pleased to grant the Appellant leave to appeal to His Majesty the Yang Di-Pertuan Agung.

Affirmed by the abovenamed)
SANDRASEGARAN WOODHULL)
at Kuala Lumpur this 12th day)
of July 1978 at 12.00 p. m.)

Before me,

Sgd. W. P. Sarathy

Commissioner for Oaths,
Kuala Lumpur.

40

Filed this 12th day of July 1978.

Deputy Registrar,
Federal Court, Malaysia at
Kuala Lumpur.

NOTICE OF MOTION

No. 11

Notice of Motion
for Conditional
Leave to Appeal
20th July 1978

TAKE NOTICE that on Monday the 7th day of August 1978 at 9.30 o'clock in the forenoon, or as soon thereafter as can be heard, Solicitors for the abovenamed Appellant will move the Court for an Order :-

- (a) that conditional leave be granted to the Appellant to appeal to His Majesty the Yang Dipertuan Agung against the judgment or order of this Honourable Court given on the 19th June, 1978 in the above Federal Court Civil Appeal No. 56 of 1977, and
- (b) that the costs of and incidental to this application be costs in the cause.

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Dated this 12th day of July 1978.

.....
Messrs. Shearn Delamore & Co.
for and on behalf of the Appellant
abovenamed

Dated at Kuala Lumpur this 20th day of July 1978.

20

.....
Chief Registrar,
Federal Court,
Kuala Lumpur.

To: Senior Federal Counsel,
Department of Inland Revenue,
Malaysia.

This application will be supported by the Affidavit of Mr. S. Woodhull affirmed on the 12th day of July 1978. This application is taken out by Messrs. Shearn Delamore & Company for and on behalf of the Appellant whose address for service is No. 2 Benteng, Kuala Lumpur.

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No.12
O R D E R

In the Federal
Court of Malaysia

No.12

Order granting
Conditional
Leave to Appeal

7th August 1978

UPON MOTION made unto this Court this day by Encik C. Abraham of Counsel for the Appellant in the presence of Encik Jaafar bin Mat Saman, Federal Counsel for the Respondent AND UPON READING the Notice of Motion dated the 12th day of July, 1978, the Affidavit of S. Woodhull affirmed on the 12th day of July, 1978 and filed herein AND UPON HEARING Counsel
10 as aforesaid IT IS ORDERED that leave be and is hereby granted to the Appellant abovenamed to appeal to His Majesty the Yang Di Pertuan Agong against the decision of the Federal Court given on the 19th day of June, 1978 upon the following conditions :-

(a) that the Appellant abovenamed do within three (3) months from the date hereof enter into good and sufficient security to the satisfaction of the Chief Registrar, Federal Court, Malaysia in the sum of \$5,000/-
20 (Ringgit Five thousand only) for the due prosecution of the Appeal, and the payment of all such costs as may become payable to the Respondent abovenamed in the event of the Appellant abovenamed not obtaining an Order granting him final leave to appeal or of the Appeal being dismissed for non-prosecution, or of His Majesty the Yang Di Pertuan Agong ordering the Appellant to pay the Respondent costs of the Appeal, as the
30 case may be; and

(b) that the Appellant abovenamed do within three (3) months from the date hereof take the necessary steps for the purpose of procuring the preparation of the Record and the despatch thereof to England.

AND IT IS ORDERED the costs of and incidental to this Application be costs in the cause.

GIVEN under my hand and the Seal of the Court this 7th day of August, 1978.

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Sgd.

CHIEF REGISTRAR
FEDERAL COURT
MALAYSIA.

In the Federal
Court of Malaysia

No. 10

O R D E R

No. 13

Order granting
Final Leave to
Appeal

14th December
1978

UPON MOTION made unto Court this day by Encik S. Achan of Counsel for the Appellant in the presence of Encik Tee Ah Sing, Federal Counsel for the Respondent AND UPON READING the Notice of Motion dated the 14th day of November 1978 and the Affidavit of Encik S. Woodhull affirmed on the 14th day of November 1978 and filed herein AND UPON HEARING Counsel as aforesaid IT IS ORDERED that final leave be and is hereby granted to the Appellant abovenamed to appeal to His Majesty the Yang Dipertuan Agung from the decision of this Court given on the 19th day of June 1978.

10

AND IT IS ORDERED that the costs of and incidental to this application be costs in the cause.

GIVEN under my hand and the seal of the Court this 14th day of December 1978.

Sgd.

CHIEF REGISTRAR,
FEDERAL COURT,
MALAYSIA.

20

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

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

RECORD OF PROCEEDINGS

Slaughter and May
35 Basinghall Street
London EC2V 5DB
Solicitors for the Appellant

Stephenson Harwood
Saddler's Hall
Gutter Lane
London EC2V 6BS
Solicitors for the Respondent