

36/83

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 :

THE RIVER ESTATES Sdn. Bhd. Appellant

- and -

THE DIRECTOR GENERAL OF INLAND REVENUE Respondent

CASE FOR THE APPELLANT

RECORD

10

1. This is an appeal from the judgment of the Federal Court of Malaysia (Lee Hun Hoe, C J, Borneo, Syed Othman, F J, Abdul Hamid F J) dated 8th September, 1980 dismissing an appeal by the Appellant from the judgment of the High Court in Borneo (B.T.H. Lee, J) dated the 18th January, 1980 dismissing an appeal by the Appellant from an Order of the Special Commissioners of Income Tax dated the 28th August, 1976 which dismissed the Appellant's appeal against Notices of Additional Assessment dated 15th December, 1973 in respect of five years of assessment as follows:-

p.66

p.30

p.9

20

<u>Year of Assessment</u>	<u>Additional Assessment</u>
1968	\$ 431,112
1969	\$ 356,253
1970	\$1,019,229
1971	\$ 90,790
1972	\$ 67,202

30

2. The question raised by the appeal is whether the trading activities of the Appellant in each of the basis periods of the years of assessment constituted:

- (a) One single business being one single source of income (as the Appellant claims), or
- (b) Three separate businesses of which one business contains three sources of income,

while the second and third businesses each contain one source of income (as the Special Commissioners of Income Tax held on appeal and as B T H Lee, J seems to have held in the High Court), or

- (c) Two separate businesses of which one consists of three sources of income, the other of two sources of income (as the Federal Court of Malaysia held), or
- (d) Two separate businesses and so, it seems, two sources of income (as the Respondent has claimed). 10

The question is of practical importance because if there is only one single business being a single source of income certain capital allowances and plantation allowances are able to be deducted from the entire income, producing a lower figure of chargeable income, than if there were two or more separate businesses so that capital allowances and plantation allowances could be deducted from only one (or at any rate less than all of the incomes of such businesses, producing a greater amount of chargeable income). 20

3. The following is a brief summary of the relevant provisions of the Income Tax Act 1967.

- (a) Section 3 imposes income tax, and Section 4 sets out four categories of income upon which tax is chargeable, one which is "income in respect of -
 - (a) gains or profits from a business, for whatever period of time carried on." 30A "business" is defined by Section 2(1) as "including profession, vocation and trade and every manufacture, adventure or concern in the nature of trade, but excludes employment". It is common ground that all the activities of the Appellant under review are a business or businesses.
- (b) As far as income tax is charged on "chargeable income" of a person, the Act lays it down how chargeable income of the person is to be arrived at. The first step is to ascertain a person's "gross income from each source". Section 5(1)(b) and Sections 22-32 inclusive. It is submitted (and may be common ground in the appeal) that a single business is a single source. 40

(c) From gross income, deductions such as interest, rent, expenses, may be made, producing the "adjusted income from each source": Section 5(1)(b) and Sections 33-41 inclusive.

10 (d) Statutory income of a person from a source consists of adjusted income after deducting certain allowances in the nature of capital allowances as specified in Schedule 3: Section 5(1)(b) and Section 42.

20 (e) The statutory incomes of a person from each of his sources are then aggregated, provision being able to be made for losses, so as to form the "aggregate income of a person for a year of assessment": Section 5(1)(e) and Sections 43 and 44. After further deductions from aggregate income the total income of a person for a year of assessment is arrived at: Section 5(1)(e) and Section 44.

(f) The chargeable income of a person for a year of assessment (that is the income upon which tax is finally charged) is his total income after deducting certain statutory allowances: Section 5(1)(f) and Sections 45-51 inclusive.

30 (g) Schedule 3, which makes provision for capital allowances as hereinbefore mentioned, provides by paragraph 75 that if full effect cannot be given to any allowance because adjusted income of a person from a relevant business is inadequate, then that part of the allowance that cannot be given effect to is carried forward to the next relevant period, in relation to adjusted income from that business, and so-on for
40 subsequent years of assessment; in other words, capital allowances can be absorbed by being carried forward against the income of the business in question, but cannot be absorbed by contemporaneous or later income of a separate business of the taxpayer.

50 4. The relevant facts are set out in an Agreed Statement of Facts, in the Deciding Order dated 28th August 1976 of the Special Commissioners and in the Case Stated, dated 20th October 1976, of the Special Commissioners. The

p.1
p.9

p.12

RECORD

while the second and third businesses each contain one source of income (as the Special Commissioners of Income Tax held on appeal and as B T H Lee, J seems to have held in the High Court), or

- (c) Two separate businesses of which one consists of three sources of income, the other of two sources of income (as the Federal Court of Malaysia held), or
- (d) Two separate businesses and so, it seems, two sources of income (as the Respondent has claimed). 10

The question is of practical importance because if there is only one single business being a single source of income certain capital allowances and plantation allowances are able to be deducted from the entire income, producing a lower figure of chargeable income, than if there were two or more separate businesses so that capital allowances and plantation allowances could be deducted from only one (or at any rate less than all of the incomes of such businesses, producing a greater amount of chargeable income). 20

3. The following is a brief summary of the relevant provisions of the Income Tax Act 1967.

- (a) Section 3 imposes income tax, and Section 4 sets out four categories of income upon which tax is chargeable, one which is "income in respect of -
 - (a) gains or profits from a business, for whatever period of time carried on." 30
A "business" is defined by Section 2(1) as "including profession, vocation and trade and every manufacture, adventure or concern in the nature of trade, but excludes employment". It is common ground that all the activities of the Appellant under review are a business or businesses.
- (b) As far as income tax is charged on "chargeable income" of a person, the Act lays it down how chargeable income of the person is to be arrived at. The first step is to ascertain a person's "gross income from each source". Section 5(1)(b) and Sections 22-32 inclusive. It is submitted (and may be common ground in the appeal) that a single business is a single source. 40

(h) The Appellant contracted to log (i.e. clear) the Tenggara area, adjoining the Litang estate, and continued clearing until 1969.

The overall management and control of the Appellant's activities were exercised centrally at its head office at Sandakan. This point is set out more fully in the next paragraph.

10 5. The Case Stated contains the following findings of fact which are so important that they are set out in full.

The Appellant's head office was at Sandakan from where the overall management and control of its activities including marketing, determination of sales, policies and purchases were exercised by the Managing Director. All senior executives, such as the estate and camps managers of logging operations, were planters. The estate and camp managers and other subordinate staff were moved from estate duties to timber operations and vice-versa. Items of the plant and machinery usable both in planting and in logging operations were also moved from one location to another. The stores requirements for all the Appellant's activities were purchased centrally at Sandakan. Cash or disbursement of wages at camps and estates and of petty cash was provided from head office. The estate and camp managers kept detailed records of the expenses incurred by them in their operations and monthly returns of these were made to the head office, where a working account was maintained for each estate and camp. The balances in these accounts were transferred to the head office accounts at the end of each year. A general profit and loss account and a balance sheet were prepared at the head office.

p.18

40 6. The question of law, which, pursuant to Income Tax Act 1967 Schedule 5 Paragraphs 34-38, was raised by the case stated, was "whether on the facts found and stated by us above, our decision was correct in law". It is expressly stated in the judgment of B T H Lee, J, and clearly implied in the judgment of the Federal Court, and indeed not really contested, that, although the finding of the Special Commissioners, that they were three separate businesses and five sources, is a finding of fact, that finding is open to review on the principles set out by the House of Lords in the English appeal, Edwards v. Bairstow and Harrison /1956/ A.C. 14; 36 Tax Cas. 207,220.

50 The learned judge in the High Court expressed the rule as follows:-

" It is an accepted principle and on the authorities that this Court can only disturb the findings of the Special Commissioners if they are without basis or without any evidence. The burden is on the Appellant to prove to the satisfaction of this Court that the evidence of the Special Commissioners are against the weight of evidence. One such authority is Edwards v. Bairstow and Harrison 36 Tax Cas. 207. The Appellant has not however discharged the onus so cast upon him. The Court can see no good reason why the decision of the Special Commissioners should be disturbed. They arrive at clear and definite findings on the question of fact and there was ample evidence to support these findings. "

It is respectfully submitted that, while over many years different judges have expressed the test in different languages, the most helpful expression is that of Lord Radcliffe in /1956/ A.C. at page 36:-

" I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determinations or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur. "

7. It must be doubtful whether the judgment of the Federal Court took full account of the test in Edwards v. Bairstow and Harrison, since the Federal Court in disagreement with the Special Commissioners and B T H Lee, J, decided that there were two, not three, separate businesses. The Federal Court thus accepted the submissions of the Respondent.

p.68

8. It is submitted that, for present purposes, a person may at any one time carry on

more than one business. However, a business is a source of income, and it cannot really be said that a business (being a trade) can consist of more than one source. That indeed is clear from the wording of the Income Tax Act 1967, in particular from Sections 4 and 5. Section 4 does not refer to any "source", but clearly lists sources of income, while Section 5 refers to "each of his sources" and indeed goes on to refer to "any source or sources consisting of a business". There can be no legal justification for the view that one source can consist of more than one business, or that one business may consist of more than one source. There are other indications that "business" and "source" are in a relevant context identical, for example the definition of "stock in trade" in Section 2(1). Indeed, the definition of "business" is itself in Section 2(1) indicates that a separate business is a separate entity, and thus a source. The question of law in this case may be therefore stated in terms of the Appellant's contention, namely that there is only one reasonable conclusion from the facts found by the Special Commissioners, namely that the Appellant at all relevant times, had only one business, being one agricultural trade, one source of income.

9. The reported authorities do not give very much guidance on the distinction between one business or two businesses. The Federal Court rightly referred to the English appeal in Scales v. George Thompson & Co. Ltd [1927] 83 Tax Cas. where Rowlatt J. refused to upset a finding that the activity of carrying on the business of underwriting and also running a fleet of steamers constituted two separate businesses. Rowlatt J said at page 89:-

" I think the real question is what there is any interconnection, any interlacing, any interdependence, any unity at all embracing those two businesses; and I should have thought, if it was a question for me, that there was none. "

The Federal Court distinguished the Scottish decision in Howden Boiler and Armaments Co. Ltd v. Stewart (H.M.I.T.) [1925] S.C. 110; 9 Tax Cas. 205. But that case is helpful to the Appellant, having regard to the clear evidence of separation of the two manufactures, see 9 Tax Cas., page 208 (7) and (8). The court of session was not prepared to assert that "there was not ample ground to warrant the conclusion that the company

RECORD

carried on one business, notwithstanding the sharp distinction between the two departments of which it consisted": page 215. Other cases, giving peripheral guidance are Commissioner of Inland Revenue v. William Ransom & Sons Ltd. /1918/ 2 K.B. 709, 12 Tax Cas. 21, Commissioner of Inland Revenue v. Maxse /1919/ 1 K.B. 647, 12 Tax Cas. 41 (Court of Appeal in England) and Commissioner of Inland Revenue v. Turnbull Scott & Co. (1924) 12 Tax Cas. 749 (Court of Appeal in England). This last case is perhaps more important than the others, in that the Court of Appeal reversed the findings of the Special Commissioners. In particular, Pollock MR said at page 763 that:-

" It is clear there must be something in the nature of a wholly different business, seperable and severed, in order to apply the doctrine...."

In Spiers & Son Ltd v. Ogden (H.M.I.T.) (1932) 17 T.C. 117, an English appeal, activities of the company in both building under contract, and dealing in properties, were held to constitute a single trade.

10. Apart from the guidance to be gained from the foregoing and other authorities, your Lordships may take notice of the type of facts that often occur in commercial and professional practice. A trader may well, as a single business, run a chain of retail shops over a large area; the unity of administration necessitates the finding that there is one trade only. Or a firm whose business consists of buying land, building houses and selling off the houses, may from time to time carry on contract buildings or contract repairs; neither the taxpayer nor the tax authorities could claim that there is a separate business, if there is not a clear division of administration. With these considerations in mind, your Lordships should, it is submitted, have regard to the clear evidence of unity set out in paragraph 7(x) and (xi) of the Case Stated, which is hereinbefore set out. There was unity of management at managing director level, unity of senior executives, of estate and camp managers and other subordinate staff. There was also unity of plant and machinery, of purchase of stores requirements and of cash disbursements. While records of expenditure were kept separately for each estate and camp, there was a single general profit and loss

account and balance sheet. The evidence of separation is either that the areas were separate or that some part of the activities related to logging, that is clearing of jungle, while the other part related to planting, or the part of the activities related to logging or planting on land owned by the company, while another part related to "contract logging". However, these matters of separation are minimal, compared with the overwhelming evidence of unity. This is not a question of fact and degree only. Admittedly, in very many reported cases before the House of Lords made the ruling in Edwards v. Bairstow and Harrison, the Court in England or Scotland refused to disturb a finding of fact by Special Commissioners. However, since the House of Lords ruling, there is clear shift of emphasis. It is respectfully submitted that the evidence of unity is so strong as to justify only one conclusion, namely that the Appellant carries on one trade, one business, which was one source.

11. The Decision of the Privy Council in American Leaf Blending Co. Sdn. Bhd. v. Director General of Inland Revenue /1979/ A.C. 676; /1979/ M.L.J. 1 is consistent with, and lends support to, the proposition that in case of a company "business" has a wider meaning than trade; consequently even if the activities of the Appellant could be regarded as perhaps more than one trade, they constituted one business. Activities of a company may constitute a single business (and thus a single source) where the evidence of unity is perhaps not enough to require the conclusion that they constitute a single trade.

12. The Appellant therefore submits that the judgment of the Federal Court should be reversed, and this appeal allowed with costs (including all costs in the Courts below); and that your Lordships should remit this matter to the Special Commissioners with a direction to adjust the determinations for the years of assessment under appeal on the footing that the Appellant at all relevant times carried on a single business, constituting a single source of income. The Appellant makes this submission for the following among other

R E A S O N S

(1) BECAUSE there is only one true and reasonable conclusion from the facts found by the Special Commissioners, namely, that at all material times the activities

RECORD

of the Appellant considered in these proceedings constituted one business and one source.

(2) BECAUSE the decision of the Special Commissioners, and the judgment of the High Court and of the Federal Court, are contradictory of and inconsistent with the true and only reasonable conclusion.

(3) BECAUSE capital allowances available to the Appellant under Income Tax Act 1967 Schedule 3, are to be deducted from the adjusted income of the Appellant from the Appellant's only source namely its single business, in order to arrive at the Appellant's statutory income from that source.

10

D. C. POTTER Q.C.

S. WOODHULL

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 :

THE RIVER ESTATES
Sdn. Bhd. Appellan

- and -

THE DIRECTOR GENERAL
OF INLAND REVENUE Defendan

CASE FOR THE APPELLANT

SLAUGHTER AND MAY,
35 Basinghall Street,
London EC2V 5DB.

Tel: 01-600 1200

Ref: PMJ/LIT/PJR/PCM

Solicitors for the Appellant