

IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

NO. 20 OF 1976

O N A P P E A L
FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N :

INTERNATIONAL INVESTMENT LIMITED

Appellants

AND

THE COMPTROLLER-GENERAL OF
INLAND REVENUE

Respondent

In the matter of 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

RECORD OF PROCEEDINGS

MAXWELL BATLEY & CO.,
27 Chancery Lane,
London,
WC2A 1PA

STEPHENSON HARWOOD,
Saddlers' Hall,
Gutter Lane,
Cheapside,
London, EC2V 6BS

Solicitors for the Appellants

Solicitors for the Respondent

O N A P P E A L
FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N :

INTERNATIONAL INVESTMENTS LIMITED

APPELLANTS

AND

THE COMPTROLLER-GENERAL OF INLAND REVENUE

RESPONDENT

In the matter of 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.

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

No.	Description of Document	Date	Page
	<u>IN THE HIGH COURT IN MALAYA AT PENANG</u>		
1	CASE STATED WITH ANNEXURES:-	7th June 1969	1-35
	A. Facts found by the Special Commissioners of Income Tax		8-13
	B. Memorandum of Association of International Investment Limited		13-21
	C. Letter dated 27.4.1962 to the Secretary, International Investment Limited from Penolong Kanan Pengawal Hasil Dalam Negeri, Pulau Pinang		21-22
	D. Letter dated 16.8.1962 to Penolong Kanan Pengawal Hasil Dalam Negeri, Penang from Wong Fook Chew, A.A.S.A. Accountant, Auditor and Secretary		23-24
	E. Profit and Loss Account for the year ended 31st December 1962		25
	F. Profit and Loss Account for the year ended 31st December 1963		26

No.	Description of Document	Date	Page
	G. Profit and Loss Account for the year ended 31st December 1965		27
	H. Profit and Loss Account for the year ended 31st December 1966		28
	I. Deciding Order dated 19.9.1968		29
	J. Grounds of decision of Special Commissioners of Income Tax		30-35
2	Notes of Evidence and Submissions of Appellants and Respondents	24th March 1971	36-55
3	Judgment of The Honourable Mr. Justice H.S. Ong	15th March 1973	55-63
4	Order of the High Court IN THE FEDERAL COURT OF MALAYSIA (APPELLATE JURISDICTION) <u>CIVIL APPEAL NO. 50 OF 1973</u>	15th March 1973	64
5	Notice of Appeal	6th April 1973	65-66
6	Memorandum of Appeal	11th May 1973	67-68
7	Notes of Gill C.J.	29th October 1974	69-78
8	Notes of Raja Azlan Shah F.J.	29th October 1974	78-87
9	Notes of Wan Suleiman F.J.	29th October 1974	87-94
10	Judgment of Raja Azlan Shah F.J.	13th June 1975	94-108
11	Order of Federal Court	13th June 1975	108-110
12	Notice of Motion for Conditional Leave to Appeal to His Majesty the Yang di-Pertuan Agong	14th July 1975	110-111
13	Affidavit of Tung Yim Fong	14th July 1975	111-113
14	Affidavit of Chong Thian Fook	14th July 1975	113-114
15	Order granting Conditional Leave to Appeal to His Majesty the Yang di-Pertuan Agong	18th August 1975	115-116
16	Order granting Final Leave to Appeal to His Majesty the Yang di-Pertuan Agong	12th January 1976	117-118

IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

No. 20 of 1976

O N A P P E A L
FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N :

INTERNATIONAL INVESTMENT LIMITED

Appellants

- and -

THE COMPTROLLER-GENERAL OF INLAND REVENUE

Respondent

RECORD OF PROCEEDINGS

No. 1

Case Stated with Answers - 7th June 1969

In the High
Court in
Malaya at
Penang

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

No. 1
Case Stated
with
Annexures
7th June 1969

IN THE HIGH COURT IN MALAYA AT PENANG

ORIGINATING MOTION NO. 5 OF 1969

Between

International Investment Limited ... Appellant

And

The Comptroller-General of
Inland Revenue ... Respondent

I N D E X

<u>No.</u>	<u>Pages</u>
1. CASE and QUESTIONS	1- 7
2. ANNEXURE A (Facts found by the Special Commissioners of Income Tax)	8-13

In the High
Court in
Malaya at
Penang

No. 1

Case Stated
with
Annexures

7th June 1969
(continued)

<u>No.</u>		<u>Pages</u>
3.	ANNEXURE B (Memorandum of Association of International Investment Limited)	13-21
4.	ANNEXURE C (Letter dated 27.4.62 to the Secretary, International Investment Limited from Penolong Kanan Pengawal Hasil Dalam Negeri, Pulau Pinang.)	21-22
5.	ANNEXURE D (Letter dated 16.8.62 to Penolong Kanan Pengawal Hasil Dalam Negeri, Penang from Wong Fook Chew, A.A.S.A., Accountant, Auditor & Secretary.)	23-24
6.	ANNEXURE E (Profit and Loss Account for the year ended 31st December 1962.)	25
7.	ANNEXURE F (Profit and Loss Account for the year ended 31st December 1963.)	26
8.	ANNEXURE G (Profit and Loss Account for the year ended 31st December 1965.)	27
9.	ANNEXURE H (Profit and Loss Account for the year ended 31st December 1966.)	28
10.	ANNEXURE I (Deciding Order dated 19.9.68)	29
11.	ANNEXURE J (Grounds of decision of the Special Commissioners of Income Tax.)	30-35

IN THE HIGH COURT IN MALAYA AT PENANG
ORIGINATING MOTION NO. 5 of 1969

Between

International Investment Limited

Appellant

And

The Comptroller-General of Inland
Revenue

Respondent

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

In the High Court in Malaya at Penang

C A S E

No. 1

1. The Appellant Company, International Investment Limited, appealed to us, the Special Commissioners of Income Tax, in respect of the assessment of income tax raised on the Appellant Company for the year of assessment 1964 as per notice of assessment dated 25.5.67.

Case Stated with Annexures
7th June 1969
(continued)

2. We heard the said appeal on 18.7.68 and 19.7.68, and the facts which we found are stated in Annexure A hereto pursuant to paragraph 37(a) of Schedule 5 to the Income Tax Act 1967.

3. It was contended on behalf of the Appellant Company as follows:-

- (1) the Appellant Company was incorporated for the sole purpose of carrying on business as an investment company;
- (2) the Appellant Company is an investment company with the object of acquiring income from its investments. In carrying out this object the Appellant Company after incorporation proceeded to acquire land and to erect thereon a hotel building with arcade with a view to holding it as an investment. The building was finally completed in June, 1965, and the Appellant Company had rented out the arcade and commenced business as an investment company. This property was therefore a fixed asset of the Appellant Company and the profit arising from its realisation is a capital gain;
- (3) on 16.10.63 the Appellant Company at an extraordinary general meeting passed a resolution resolving that the Appellant Company be re-constructed and after such reconstruction to expand its business of investments in and the holdings of securities, and accordingly the Appellant Company exchanged its property for the shares of the Island Hotels and Properties (M) Limited because it intended to participate in the latter company;

In the High
Court in
Malaya at
Penang

—
No. 1

Case Stated
with
Annexures

7th June 1969
(continued)

- (4) the Appellant Company exchanged this fixed asset for 3,750,000 shares of \$1/- each at par in Island Hotels and Properties (M) Limited, and the Comptroller of Income Tax has wrongly assessed to income tax the surplus of the value of the 3,750,000 shares of \$1/- each at par over the cost of the said property treating the surplus as income of the Appellant Company. The Comptroller wrongly treated the transaction as an adventure in the nature of trade, as it was contrary to the intention of the Appellant Company to embark on any adventure in the nature of trade; 10
- (5) the Appellant Company had never commenced any trading or business as a land developer and its transactions did not show it as a land developer. The assessment of income tax by the Comptroller is therefore arbitrary; 20
- (6) the determination of the Comptroller that the surplus was trading profit is unfounded and unjustifiable, and therefore in facts and in law the assessment is bad;
- (7) the fact that Tan Sim Hoe, managing director of the Appellant Company negotiated with Low Cheh Seng for the renting of the hotel rooms in the International Building confirms the object of the Appellant Company to carry on business as an investment company rather than to trade in property; 30
- (8) even if the exchange of the property for the shares were treated as if it was a sale of the property, this was a single and solitary transaction in property as the Appellant Company has not built and sold other hotel buildings. Since there were no repeated sales of buildings or lands, it cannot be said that the Appellant was trading in or carrying on the business of dealings in buildings or lands. This single and solitary transaction in property was not even an adventure in the nature of trade on the ground that the conditions necessary to constitute an adventure in the nature of 40

trade were not satisfied. The International Building is not an asset which lends itself to commercial transactions;

In the High Court in Malaya at Penang

- (9) reliance should not be placed on the memorandum of association of the Appellant Company as showing an intention to trade in property, as the memorandum has not been written by a lawyer. Although memorandum and articles of association of companies should be drawn by lawyers, in Penang they have been written by persons who are not lawyers.

No. 1

Case Stated with Annexures

7th June 1969
(continued)

10

4. It was contended on behalf of the Respondent as follows:-

- (1) in exchanging its property, i.e. the International Building and the land on which it was built, for the share in the Island Hotels and Properties (M) Limited the Appellant Company was trading in the property, because the transaction was done in pursuance of its object of dealing in or turning to account land or immovable property as stated in paragraph 3(i) and (ii) of its memorandum of association;
- (2) that dealing in immovable property was a business of the Appellant Company is admitted by its accountant vide paragraph 1(c) of the letter Annexure D written by the accountant to the Inland Revenue Department. Since the letter was dated 16.8.62 i.e. before the dispute relating to the assessability arose, reliance should be placed on the statement in the letter;
- (3) the fact that the Appellant Company had very little fund of its own to finance the construction of the International Building and had taken large amounts of loans for the purpose showed that it had intended to speculate in the sale of the property, and if the Appellant Company had not intended to speculate but to hold the property as investment, it would take very many years for the Appellant Company to recover money from rentals sufficient to repay the large amounts of loans;

20

30

40

In the High
Court in
Malaya at
Penang

No.1

Case Stated
with
Annexures

7th June 1969
(continued)

(4) although at the extra-ordinary general meeting of the members of the Appellant Company held on 16.3.63 it was resolved to expand its business of investment in securities this resolution was never acted upon and the scheme of investment expansion was never carried out because all of the shares held by the Appellant Company in other companies as at 31.12.62 were disposed of in 1963 as its accounts (Annexure E and F) show and the shares in Island Hotels and Properties (M) Limited were also disposed of soon after they had been acquired, and this shows that investment was not the true object of the Appellant Company;

10

(5) the fact that the construction of the International Building was described as work-in-progress and put under current assets in the accounts of the Appellant Company (Annexure E) shows that the intention was to hold the building not as a fixed asset but as circulating capital or stock-in-trade;

20

(6) the name of the Appellant Company has been invented to include the word "Investment" so as to induce the belief that its activities were done with the object of investment whereas in truth they were not so, and the Appellant Company has been used as a cover to conceal the true activities of Tan Sim Hoe and Chew Ming Teck of dealing in properties.

30

5. We were referred to the following cases:-

- | | |
|---|-----------------|
| 1. D.E.F. v. C.I.T. | 1961 M.L.J. 55. |
| 2. Edwards (H.M. Inspector of Taxes) v. Bairstow and Harrison | 36 T.C. 207 |
| 3. Cooksey and Bibbey v. Rendall | 30 T.C. 514 |
| 4. J. & R.O Kane & Co. v. C.I.R. | 12 T.C. 303 |
| 5. Tebrau (Johore) Rubber Syndicate Ltd. v. Farmer | 5 T.C. 658 |
| 6. C.I.R. v. Westleigh Estates Co. Ltd, etc. | 12 T.C. 657 |

40

7. Scottish Investment Trust Co. v. Forbes (Surveyor of Taxes)	3 T.C. 231
8. California Copper Syndicate v. Harris	5 T.C. 159
9. Turner v. Lust	42 T.C. 517
10. Livingston and Others v. C.I.R.	11 T.C. 538
11. Balgownie Land Trust Ltd. v. C.I.R.	14 T.C. 684

In the High
Court in
Malaya at
Penang

No.1
Case Stated
with
Annexures
7th June 1969
(continued)

10 6. On 19.9.68 we made a Deciding Order a copy of which is annexed hereto as Annexure I. The grounds of our decision are stated in Annexure J hereto.

7. By letter dated 3.10.68 the Appellant Company gave us notice of appeal against the said Deciding Order, and made a requisition to us under paragraph 34 of Schedule 5 to the Income Tax Act 1967, to state a case for opinion of the High Court.

Q U E S T I O N S

20 8. The questions for the opinion of the High Court are:-

(a) whether on the facts which we found we were right in deciding that in transferring its property known as the International Building to Island Hotels and Properties (M) Limited in exchange for the shares in Island Hotels and Properties (M) Limited, the Appellant Company was carrying on the business of trafficking in immovable property; and

30 (b) whether on the facts which we found we were right in deciding that the profits obtained by the Appellant Company from the said transfer are assessable to income tax.

Dated this 7th day of June 1969.

Sd. Wan Hamzah bin Wan Mohd. Salleh
(Wan Hamzah bin Wan Mohd. Salleh)
Chairman,
Special Commissioners of Income Tax.

Sd. (Lee Kuan Yew)
Special Commissioners of Income Tax.

40 Sd. David Kuok Khoon Hin
(David Kuok Khoon Hin)
Special Commissioners of Income Tax.

In the High
Court in
Malaya at
Penang

No. 1

Case Stated
with
Annexures

7th June 1969
(continued)

Annexure A

ANNEXURE A

FACTS FOUND BY THE SPECIAL COMMISSIONERS OF INCOME TAX

1. On 16.1.62 International Investment Limited (the Appellant Company) was incorporated and registered in Malaya under the Companies Ordinances 1940 to 1946 with an authorised capital of \$500,000/- divided into 5,000 ordinary shares of \$100/- each. A copy of the Memorandum of Association of the Appellant Company is annexed hereto as Annexure B. Tan Sim Hoe and Tung Yin Fong, the wife of Chew Ming Teck, were the two subscribers to the Memorandum and Articles of Association of the Appellant Company. There were also the first directors of the Appellant Company, Tan Sim Hoe being the Managing Director. On the formation of the Appellant Company the following persons applied for shares in it as follows:-

Tan Sim Hoe	1,400 shares	
Chew Ming Teck	1,400 shares	
Tung Yin Fong	100 shares	20
Ong Siew Hong	100 shares	

2. As at 31.12.62 the issued share capital of the Appellant Company was \$300,000/- consisting of 3,000 ordinary shares of \$100/- each fully paid. In 1963 the authorised capital was increased to \$5,000,000/-, divided into 50,000 ordinary shares of \$100/- each. As at 31.12.63 the issued share capital was \$500,000/-, consisting of 5,000 ordinary shares fully paid, and there were also Application and Allotment monies of \$500,000/- received by the Company in respect of 5,000 ordinary shares applied for but not allotted yet. As at 31.12.65 the issued share capital was still \$500,000/- consisting of 5,000 ordinary shares fully paid, and there were also Application and Allotment monies of \$500,000/- received by the Company in respect of 5,000 ordinary shares applied for but not allotted yet. Eventually, Tan Sim Hoe and his wife held 50 per cent of the shares in the Appellant Company, and Chew Ming Teck and his wife held the other 50 per cent of the shares.

3. The Appellant Company acquired the following land on the following dates:-

- (a) Lot Nos. 14(1), 14(2), 15(2) and 16(2)
T.S. 16 N.E.D. Penang, on 9.2.62;

- (b) Lot No. 32 T.S. 16 N.E.D. Penang, on 10.2.62;
 (c) Lot No. 31 T.S. 16 N.E.D. Penang, on 12.11.62;
 (d) Lot 30 T.S. 16 N.E.D. Penang, some time in 1963.

In the High
 Court in
 Malaya at
 Penang

No. 1

Case Stated
 with
 Annexures
 7th June 1969

Annexure A
 (continued)

10 Lot No. 32 was purchased by the Appellant Company from Tan Sim Hoe and Chew Ming Teck while Lot Nos. 14(1), 14(2), 15(2), 16(2) and 31 were purchased by the Appellant Company from other persons. It is not clear from whom Lot No. 30 was acquired by the Appellant Company, or whether it was acquired by purchase. All these lots were situated in one area at Penang Road, Penang. The Appellant Company paid a total sum of \$8,300/- to 10 persons occupying old houses on the land Lot No. 32 as compensation for moving out of the land. The houses were demolished so that a building which later came to be known as the International Building could be erected on the land.

20 4. A written contract bearing a Stamp Office mark dated 31.3.62 was entered into between the Appellant Company and certain contractors whereby the latter contracted to carry out piling works for the purpose of the construction of the building on the land acquired by the Appellant Company. The contractors undertook to complete the piling works by 30.6.62. Tenders were received by the Appellant Company's architects from contractors, all dated 15.5.62, for the erection of the building, which was described in the tender documents as six-storey shopping arcade and hotel building, on
 30 Lot Nos. 14(1), 14(2), 15(2) and 16(2).

40 5. On 18.8.62 there was a news item published in a Penang Chinese newspaper referring to a building in respect of which construction works had started. According to the news item, part of the building would be used by the Malayan Banking for conducting its business and the rest of the building would be turned into a hotel consisting of 50 rooms all of which were likely to be air-conditioned, and that the hotel would include a night club, a bar and a restaurant.

6. On 4.3.63 the Appellant Company entered into an agreement with another company whereby the latter contracted to erect the said building on the said lots and to complete it by 30.10.63 at a cost of \$585,000/-.

In the High
Court in
Malaya at
Penang

—
No. 1

Case Stated
with
Annexures
7th June 1969
Annexure A
(continued)

7. On 5.6.63 there was another new item published in the same newspaper about the opening two days earlier of the Malayan Banking Penang Road sub-branch on the ground floor of the International Building which had an escalator which was the first of its kind in Penang.

8. In about June 1962, one Low Cheh Seng, a partner in Pathe Hotel in Penang, approached Tan Sim Hoe and offered to rent the hotel rooms in the International Building. But negotiation failed as there was no agreement reached on the rental amount. 10

9. The Inland Revenue Department sent a letter dated 27.4.62 (attached to this Case Stated as Annexure C) to the Secretary of the Appellant Company asking for certain information specified therein, and received a reply dated 16.8.62 (attached to this Case Stated as Annexure D) from its accountants.

10. In 1963 the Appellant Company received \$7,044/- as rents of the arcade in the International Building. 20

11. On 16.10.63 an extraordinary general meeting of the members of the Appellant Company was held, and at the meeting the following special resolutions were passed:-

"1. That the business and undertaking of the Company be reconstructed and after such reconstruction to expand its business of investments in and the holdings of securities.

2. That the Company do convey its property known as Lots Nos. 14(1), 14(2), 15(2), 16(1), 30, 31 & 32 T.S. 16 N.E.D. Penang, together with the building erected thereon to Island Hotels & Properties (Malaysia) Limited in consideration of the issue of 2,846,300 shares of \$1/- each in the said Island Hotels & Properties (Malaysia) Limited all credited as being fully paid. 30

3. That the Company execute a Deed of Guarantee with Island Hotels & Properties (Malaysia) Limited whereby the Company undertake to complete the erection of the building now under construction on Lots 14(1), 14(2), 15(2), 16(2), 30, 31 & 32 T.S. 16 N.E.D. Penang to construct a 40

driveway and car park and to undertake the fittings, fixtures, escalators, lifts, furnitures, telephone with P.A.B.X. equipment and all other things according to all the detailed plans and specifications a copy of which will be annexed to the Deed of Guarantee in consideration of the issue of 903,700 shares of \$1/- each in the said Island Hotels & Properties (Malaysia) Limited as being fully paid.

In the High Court in Malaya at Penang

No. 1

Case Stated with Annexures

7th June 1969

Annexure A (continued)

- 10
4. That the Common Seal of the Company be and is hereby authorised to be affixed to the Agreement, conveyances and all other documents evidencing or constituting such transaction or expedient therefor."

20

The Appellant Company transferred the International Building together with the land on which it was erected to the Island Hotels and Properties (Malaysia) Limited and made an undertaking to complete the building, and as a consideration for this the Appellant Company received \$3,750.00 shares of \$1/- each in the Island Hotels and Properties (Malaysia) Limited. The transfer included the arcade in the building. When the International Building was transferred to the Island Hotels and Properties (Malaysia) Limited, it was still under construction. The part of the building from the third floor to the top floor was not completed yet, but the ground, the first and the second floors had been completed and tenants were already occupying the ground and the first floors. Subsequently, all of these shares in the Island Hotels and Properties (Malaysia) Limited were transferred by the Appellant Company as follows:-

30

1,000,000 shares to Disco Limited on 2.12.63;
1,500,000 shares to Tan Sim Hoe on 4.1.64;
1,250,000 shares to Disco Limited on 4.1.64.

There was no resolution made by the Appellant Company that these shares be held by Disco Limited or by Tan Sim Hoe on trust for the Appellant Company.

12. In 1962 the Appellant Company held shares in the following companies as follows:-

In the High
Court in
Malaya at
Penang

Eng Hoe Chan Co. Ltd.	₹20,000/- shares
Miami Properties Ltd.	₹60,000/- shares
Chong Thai Realty Ltd.	₹75,000/- shares
Pan Malayan Distributors Ltd.	₹20,000/- shares

No. 1
Case Stated
with
Annexures
7th June 1969
Annexure A
(continued)

At the end of 1963 the Appellant Company had transferred away all these shares in other companies.

13. Other than the International Building the Appellant Company has not constructed any building of a similar nature. Chew Ming Teck was a principal shareholder in Disco Limited. Tan Sim Hoe did not have any share in it. 10

14. Audited profits and loss accounts of the Appellant Company for the years ended 31.12.62, 31.12.63, 31.12.65 and 31.12.66 are attached to this Case Stated as Annexure E, F, G and H respectively.

15. By notice of amended assessment dated 25.5.67, the Comptroller of Income Tax raised assessment of income tax on the Appellant Company for the year of assessment 1964 and included in the income on which this tax was assessed an amount of ₹1,704,061/- which the Comptroller alleged was the net profit derived by the Appellant Company from the transfer of the International Building together with the land on which it was erected in exchange for the shares in the Island Hotels and Properties (Malaysia) Limited, and which the Comptroller alleged was assessable to income tax as being income from business carried on by the Appellant Company. The Appellant Company appealed to us against the inclusion of this amount in the assessment. 20 30

16. In arriving at the net profits of ₹1,704,061/- the Comptroller of Income Tax made deductions under section 14 of the Income Tax Ordinance 1947 of certain expenses incurred in the production of the income, including interests incurred by the Appellant Company for 1962 and 1963 totalling ₹64,698 on overdrafts taken to finance the construction of the building.

17. The Comptroller of Income Tax also included in the assessment an income of ₹7,044/- being the gross amount of rentals accrued to the Appellant Company from the renting out of certain parts of the International Building. Thus the total amount of income assessed to income tax was ₹1,711,105/- 40

(i.e. \$1,704,061 + \$7,044). In arriving at the income of \$7,044 from rentals the Comptroller of Income Tax had not made any deduction from the gross amount of rentals in respect of interest on overdrafts taken to finance the construction of the building, on the ground that to allow such deduction would mean allowing more than once the deduction of the same expenses. Before us it was agreed on behalf of the Appellant Company and on behalf of the Respondent that if the decision in this appeal would be that the appeal be dismissed no change should be made in the deduction in respect of the interests, but that if the decision would be that the appeal be allowed the Appellant Company and the Respondent would try to agree on the adjustment of the amount of interests to be deducted from the total amount of rentals and that failing such agreement the amount to be deducted should be fixed by us.

In the High Court in Malaya at Penang

No. 1

Case Stated with Annexures

7th June 1969

Annexure A (continued)

10

20

18. Except as stated in paragraph 17 above the Appellant Company and the Respondent do not dispute the computation of profits.

Sd: Wan Hamzah bin Wan Mohd. Salleh
(Wan Hamzah bin Wan Mohd. Salleh)
Chairman,
Special Commissioners of Income Tax.

Sd: Lee Kuan Yew
(Lee Kuan Yew)
Special Commissioners of Income Tax.

Sd: David Kuok Khoon Hin
(David Kuok Khoon Hin)
Special Commissioners of Income Tax.

30

ANNEXURE B

Annexure B

THE COMPANIES ORDINANCE, 1940

COMPANY LIMITED BY SHARES

MEMORANDUM OF ASSOCIATION
OF
INTERNATIONAL INVESTMENT LIMITED

1. The name of the Company is INTERNATIONAL INVESTMENT LIMITED.

In the High Court in Malaya at Penang

No. 1

Case Stated with Annexures

7th June 1969

Annexure B (continued)

2. The registered office of the Company will be situate in the Federation of Malaya.

3. The objects for which the Company is established are:-

- | | | | |
|-------|--|-------------------------------|----------|
| (i) | To obtain options over purchase take on lease or otherwise howsoever acquire and to grant options over traffic and otherwise deal in or turn to account sell grant leases and tenancies of lands, houses, buildings, easements, rights, privileges, concessions and immovable property of any description or tenure whatsoever in any part of Malaya and every manner of right or interest therein. | To deal in immovable property | 10 |
| (ii) | To develop and turn to account any land acquired by or in which the Company is interested, and in particular by laying out and preparing the same for building purposes, constructing, decorating, maintaining; furnishing, fitting up improving altering pulling down and re-erecting or reconstructing buildings and by planting, paving, draining, farming, cultivating, letting on building lease or building agreement and by advancing money to and entering into contracts and arrangements of all kinds with builders, tenants and others. | To develop lands, etc. | 20
30 |
| (iii) | To underwrite obtain options over purchase or otherwise acquire hold and grant options over sell and otherwise traffic and deal in securities of all kinds, including shares, stocks, debentures, debenture stock bonds and other obligations issued or guaranteed by any Government, State, public body, company or corporation whatsoever in any part of Malaya and to exercise or enforce all rights and powers | To deal in securities | 40 |

conferred by or incident to the ownership or holding of any such securities.

In the High Court in Malaya at Penang

(iv) To carry on all or any of the business ordinarily carried on by financiers or capitalists except the business of banking. To carry on business as financiers, etc.

—
No. 1

Case Stated with Annexures
7th June 1969

10

(v) To carry on the business of planters and cultivators of and dealers in all kinds and descriptions of produce, including rubber gutta jelutong and other gums tea coffee cinchona pineapple coconuts sugar sago tapioca pepper gambier and any other product of the soil and to prepare, manufacture and render marketable any such produce, and to sell, dispose of and deal in any such produce either in its raw state or as prepared or manufactured and either by wholesale or retail.

Annexure B
(continued)

20

(vi) To carry on the business of importers and exporters of all kinds of merchandise including textiles, photographic goods, electrical goods, watches and yarns, and to prepare manufacture and render marketable any such commodities, and to sell dispose of and deal in any such commodities either in their raw state or as prepared or manufactured and either by wholesale or retail. To carry on business as importers & exporters

30

(vii) To obtain options over purchase or otherwise howsoever acquire and to improve, manage and develop and to grant options and licences over sell and otherwise deal in moveable property choses in action and rights of any kind whatsoever in any part of Malaya. To deal in immovable property

40

[sic]

(viii) To improve manage develop sell exchange lease demise hire mortgage charge enfranchise dispose of turn to account or otherwise To improve etc.

In the High
Court in
Malaya at
Penang

—
No. 1

Case Stated
with
Annexures

7th June 1969

Annexure B
(continued)

deal with all or any part of the
property assets and rights of the
Company.

- | | | | |
|--------|---|--|--------------|
| (ix) | To carry on the business of and act as factors, brokers, manufacturers' representatives commission insurance and general agents managing agents financial agents company promoters underwriters and dealers in options of every kind and to undertake any business commonly undertaken in connection with all or any of such businesses. | To carry on agency business | 10 |
| (x) | To undertake and execute any trust the undertaking whereof may seem desirable and either gratuitously or otherwise. | To act as trustees | |
| (xi) | To carry on any other business (whether similar to any of the above mentioned businesses or not) which may seem to the Company capable of being conveniently carried on in connection with the above mentioned business or any of them or calculated directly or indirectly to enhance the value of or render profitable or more profitable any of the Company's business property or rights. | To carry on other business etc. | 20

30 |
| (xii) | To establish agencies and branch business and to produce the Company to be registered and recognised in any part of the world and to regulate carry on or discontinue the same. | To establish agencies | |
| (xiii) | To acquire and undertake the whole or any part of the business property and liabilities of any person or persons firm or company carrying on any business which the Company is authorised to carry on or possessed of property suitable for the purposes of the Company. | To acquire any business which the Company can carry on | 40 |

- | | | | |
|----|---|-------------------------------------|--|
| 10 | (xiv) To amalgamate with any company having objects altogether or in part similar to those of the Company and to enter into partnership or into any arrangement for sharing profits union of interests co-operation joint adventure reciprocal concession or otherwise with any person or persons firm or company carrying on or engaged in or about to carry on or engage in any business or transaction capable of being conducted so as directly or indirectly to benefit the Company. | To amalga-
mate etc. | In the High
Court in
Malaya at
Penang

—
No. 1

Case Stated
with
Annexures

7th June 1969

Annexure B
(continued) |
| 20 | (xv) To pay for any property or rights to be acquired by the Company either in cash or by shares (with or without preferred or deferred rights) or any securities which the Company has power to issue and generally on such terms as may be thought fit. | To pay for
property
in shares | |
| 30 | (xvi) To take buy or otherwise acquire shares and securities issued by any company to invest upon or without moneys of the Company in such manner as may from time to time be determined and to hold any such shares securities or investments or at any time or times to sell realise and deal in and with the same and to re-invest the proceeds. | To invest | |
| 40 | (xvii) To draw make accept endorse discount and negotiate cheques promissory notes bills of exchange bills of lading charter-parties warrants debentures and other negotiable or transferable instruments. | To negotiate
cheques etc. | |
| | (xviii) To advance and lend money give credit to or subsidise any person or persons firm or company on such terms as may from time to time be considered expedient and with or without security. | To lend
money | |

In the High
Court in
Malaya at
Penang

—
No. 1

Case Stated
with
Annexures
7th June 1969
Annexure B
(continued)

- | | | | |
|---------|--|--|----|
| (xix) | To guarantee or become liable for the payment of money or for the performance of any contract duty or obligation by any person or persons firm or company. | To guarantee | |
| (xx) | To borrow or raise money with or without security and to secure the payment of money or the performance of any obligations in such manner and upon such terms as may seem expedient and in particular by the issue of bonds mortgage or other debentures or securities (perpetual or otherwise) or by mortgages charges bills of exchange or promissory notes or by any other instrument or in such other manner as may be determined and for any such purpose to charge all or any part of the undertaking and property of the Company both present and future including its uncalled capital and either with or without participation in profits and voting power. | To borrow mortgage, issue debentures, etc. | 10 |
| (xxi) | To sell or dispose of the undertaking of the Company or any part thereof at such time in such manner and for such consideration as may be thought fit. | To sell the undertaking | 30 |
| (xxii) | To promote any company or companies for the purpose of acquiring the business and undertaking or all or any of the property rights and liabilities of the Company or for any other purpose which may seem directly or indirectly calculated to benefit the Company. | To promise/sign companies | |
| (xxiii) | To accept payment for the undertaking or any property or rights sold or otherwise disposed of or dealt with by the Company either in cash or by instalments or otherwise or in shares credited as fully or partly paid up in any Company or companies with or without | To accept payment in shares or debentures | 40 |

deferred or preferential rights in respect of dividends or repayment of capital or otherwise or by means of mortgages or by debentures debenture stock (perpetual or otherwise) or obligations or securities of any company or companies or partly in one mode and partly in another and generally on such terms as the Company may determine.

In the High Court in Malaya at Penang

No. 1

Case Stated with Annexures

7th June 1969

Annexure B (continued)

10

(xxiv) To pay all or any part of the expenses or and preliminary and incidental to the promotion formation establishment and registration of the Company and all commission brokerage discount underwriting and other expenses lawfully payable which may be deemed expedient for taking place or underwriting all or any of the shares or debentures or other obligations of the Company.

To pay preliminary expenses

20

(xxv) To obtain or in any way assist in obtaining any ordinance or enactment of any legislative authority for enabling this or any other company to carry any of its objects into effect or for effecting any modification of this or any other company's constitution or for any other purpose and to oppose any legislation proposals proceedings schemes or applications whether indicated in this paragraph or not which may seem calculated directly or indirectly to prejudice this or any other company.

To obtain ordinance or legislative enactment

30

(xxvi) To enter into any arrangements with any Governments or authorities supreme municipal local or otherwise that may seem conducive to the Company's objects or any of them and to obtain from any such Government or authority any rights and privileges and concessions which the Company may think it desirable to obtain and to carry out exercise

To make arrangements with Governments and public bodies

40

In the High
Court in
Malaya at
Penang

No. 1

Case Stated
with
Annexures
7th June 1969

Annexure B
(continued)

- and comply with any such arrangements rights privileges and concessions.
- (xxvii) To remunerate any person firm or company rendering services to the Company either by cash payment or by the allotment to him or them of shares or securities of the Company credited as paid up in full or in part or otherwise as may be thought expedient. To remunerate persons rendering services to the Company 10
- (xxviii) To support and subscribe to any charitable or public object, and any institution society or club which may be for the benefit of the Company or its employees or may be connected with any town or place where the Company carries on business; to give pensions gratuities or charitable aid to any persons who may have been Directors of or may have served the Company or to the wives children or other relatives or dependents of such persons and to form and contribute to provident and benefit funds for the benefit of any of such persons or of their wives children or other relatives or dependants. To support charitable institutions 20
- (xxix) To distribute whether upon the winding up of the Company or otherwise all or any of the assets and property of the Company among the Members in specie or in kind or otherwise but so that no distribution amounting to a reduction of capital be made without the sanction of the Court where necessary. To distribute property among Members 30
- (xxx) To do all such other things as are or may be incidental or conducive to the attainment of the preceding objects or any of them. To do everything conducive to objects 40
4. The liability of the members is limited. Limited Company
5. The capital of the Company is \$500,000/- divided into 5,000 Ordinary Shares of \$100/- each. Capital

The shares in the original or any increased capital may be divided into several classes and there may be attached thereto respectively any preferential deferred or other special rights privileges conditions or restrictions as to capital dividends voting or otherwise.

In the High Court in Malaya at Penang

No. 1

Case Stated with Annexures
7th June 1969
Annexure B
(continued)

10 WE, the several persons whose names, addresses and descriptions are subscribed, are desirous of being formed into a Company in pursuance of this Memorandum of Association and we respectively agree to take the number of shares in the capital of the Company set opposite our respective names:-

NAMES, ADDRESSES AND DESCRIPTION OF SUBSCRIBERS	Number of Shares taken by each subscriber
TAN SIM HOE, 51, Beach Street, Penang.	Merchant One Share
TUNG YIN FONG (f), 8, Arratoon Road, Penang.	Housewife One Share

DATED the 30th day of December, 1961.

Witness to the above signatures:

30 WONG FOOK CHEW, A.A.S.A.,
ACCOUNTANT & AUDITOR,
15 CHURCH STREET,
PENANG.

ANNEXURE C

Annexure C

Ref. C.5454

PR.71

Pejabat Hasil Dalam Negeri,
Bangunan O.C.B.C.,
Beach Street,
Peti Surat No. 660,
Pulau Pinang.

27th April 1962

In the High
Court in
Malaya at
Penang

The Secretary,
International Investment Ltd.
51, Beach Street,
Penang.

No. 1

Tuan,

International Investment Ltd.

Case Stated
with
Annexures

Please furnish the following information:

7th June 1969

Annexure C
(continued)

- (a) The Date of Incorporation of the Company.
- (b) The Date of Commencement of Trading.
- (c) The nature of the business conducted by the Company. 10
- (d) The Date on which the Company proposes to close its accounts yearly.
- (e) Name and address of the Managing Director or Principal Officer of the Company, in the Federation. (This Department should be immediately notified of any change in the holder of that office.)
- (f) The name and address of the Agent, if any, who will be dealing with the Income Tax affairs of the Company. 20
- (g) Whether the Company is commencing an entirely new business or is taking over an existing business. If the latter, please furnish
- (i) full name and address of the business taken over,
- (ii) a copy of the opening statement of affairs,
- (iii) a copy of the Vending Agreement.
2. Please furnish a list of shareholders stating the names and addresses of the shareholders, the number of shares held by each and whether paid up in cash or otherwise. Please also indicate whether any of the shareholders is under the age of 21 years. 30
3. Would you also please let me have a copy of the Memorandum and Articles of Association for my file.

Yang benar,
Signed.

f. Penolong Kanan Pengawal
Hasil Dalam Negeri,
Pulau Pinang.

40

ANNEXURE D

WONG FOOK CHEW, A.A.S.A.
ACCOUNTANT, AUDITOR
& SECRETARY

15, CHURCH STREET,
PENANG.
Telephone: 64529

16th August, 1962.

10 Penolong Kanan Pengawal Hasil Dalam Negeri,
Jabatan Hasil Dalam Negeri,
Bangunan Overseas Chinese Bank,
Beach Street,
Peti Surat No. 660,
Penang.

Tuan,

International Investment Ltd. - C.5454

I thank you for your letter of 21st July, 1962 enclosing a copy of your letter dated 27th April, 1962 and I now furnish you with the following particulars from my abovenamed clients:-

- (a) The Company was incorporated on 16th January, 1962.
- 20 (b) Trading of the Company commenced on 19th January, 1962.
- (c) The nature of the business conducted by the Company is dealing in immovable property and land development.
- (d) The Company proposes to close its account on the 31st day of December each year.
- (e) The Managing Director of the Company is Mr. Tan Sim Hoe of 51 Beach Street, Penang.
- 30 (f) The Agent to deal with the Income Tax affairs of the Company has not yet been decided.
- (g) The Company is commencing an entirely new business.

2. I append a list of the application of shares:

In the High
Court in
Malaya at
Penang

No. 1

Case Stated
with
Annexures

7th June 1969

Annexure D

In the High
Court in
Malaya at
Penang

No. 1

Case Stated
with
Annexures
7th June 1969

Annexure D
(continued)

	<u>Number of shares of \$100/- each</u>	
Tan Sim Hoe of 51 Beach Street, Penang	1,400 shares	
Chew Ming Teck of 8, Arratoon Road, Penang	1,400 shares	
Tung Yim Fong (f) of 8, Arratoon Road, Penang	100 shares	
Ong Siew Hong (f) of 41, Beach Street, Penang	100 shares	10

3. I enclose a copy of the Memorandum and
Articles of Association of the Company for your
file.

Yang benar,

Sd. Wong Fook Chew.

ANNEXURE EINTERNATIONAL INVESTMENTS LIMITEDPROFIT & LOSS ACCOUNT FOR THE YEAR ENDED 31ST DECEMBER 1962

To Bank Interest	20,726.63	By Net Loss	32,410.34
Sundry Repairs to Neighbouring Houses Damaged during Construction	8,209.85		
Preliminary Expenses	1,710.00		
Quit Rent and Assessment	191.87		
Sundry Expenses & Wages	<u>1,571.99</u>		
	<u>₹32,410.34</u>		<u>₹32,410.34</u>

In the High
Court in
Malaya at
Penang

No. 1

Case Stated
with
Annexures
7th June 1969
Annexure EBalance Sheet as at 31st December 1962

<u>Liabilities</u>		<u>Assets</u>	
(I) <u>AUTHORISED SHARE CAPITAL</u> 5,000 Ordinary Shares of ₹100/- each	<u>₹500,000.00</u>	(I) <u>FIXED ASSETS</u> Land - Lots 14(I), 14(II), 15(II), 16(II), 31 & 32 T.S.16, N.E.D. Penang	337,273.71
(II) <u>ISSUED SHARE CAPITAL</u> 3,000 Ordinary Shares of ₹100/- fully paid	300,000.00	(II) <u>CURRENT ASSETS</u> International Building - Work-in-progress	
(III) <u>CURRENT LIABILITIES</u> Bank Overdraft - Malayan Banking Ltd. Pg.	491,355.44	Advances to Contractors	231,000
		Plan Fees	1,818
		Architect's & Engineers' Fees	<u>13,750</u> 246,568.00
		Investments -	
		Eng Hoe Chan Co. Ltd. 20 shs.	20,000.00
		Miami Properties Ltd. 600 "	60,000.00
		Chong Tai Realty Ltd. 75000 "	75,000.00
		Pan-Malayan Distributors Ltd. 200 "	<u>20,000.00</u> 421,568.00
		(III) <u>PROFIT & LOSS ACCOUNT</u> Deficit	32,410.34
		(IV) <u>LIQUID ASSETS</u> Cash in hand	103.39
	<u>₹791,355.44</u>		<u>₹791,355.44</u>

REPORT OF THE AUDITORS TO THE SHAREHOLDERS OF INTERNATIONAL INVESTMENT LIMITED

We have examined the above Balance Sheet with the books and vouchers of International Investment Limited, and have obtained all the information and explanations required by us. Subject to the following observations, we are of the opinion that the Balance Sheet is properly drawn up so as to exhibit a true and correct view of the state of the affairs of the Company according to the best of our information and explanations given to us and as shown by the books.

- (1) The title deeds relating to the land under Lots 14(I), 14(II), 15(II), 16(II), 31 & 32 T.S.16 N.E.D. Penang, are not available for our inspection, as they are deposited with the Malayan Banking Ltd., Penang, for overdraft taken.
- (2) We are informed that the 600 shares in Miami Properties Ltd. have since been sold. As such, the Share Certificates thereof are not available for inspection.
- (3) No provision has been made in the accounts for audit fees of ₹150.00.
- (4) Receipts for payments made to the Vendors totalling ₹337,273.71 for the purchase of the land comprised in Lots 14(I), 14(II), 15(II), 16(II), 31 & 32 T.S.16 N.E.D. Penang, are not produced for our inspection. We understand they are in the hands of the Company's solicitors, Messrs, G.H. Goh & Co. and Mr. Eugene Khoo Oon Jin.

31 China Street Ghaut,
Penang.
20 NOV. 1963.

Signed:
Auditors.
LOW BENG KOOI & CO.,
Public Accountants & Auditors.

ANNEXURE FINTERNATIONAL INVESTMENT LIMITEDProfit & Loss Account for the year ended 31st December 1963

To Bank Interest	43,972.81	By Rent Received	7,044.00
Sundry Expenses	675.68	Net Loss for the year	46,058.24
Water & Light	2,289.79		
Telephone Charges	131.86		
General Expenses	<u>6,032.10</u>		
	<u>₹53,102.24</u>		<u>₹53,102.24</u>

In the High
Court in
Malaya at
Penang

No. 1

Case Stated
with
Annexures
7th June 1969
Annexure FBalance Sheet as at 31st December 1963

<u>Liabilities</u>		<u>Assets</u>	
(I) <u>AUTHORISED SHARE CAPITAL</u> 50,000 Ordinary Shares of ₹100/- each	<u>₹5,000,000.00</u>	(I) <u>FIXED ASSETS</u> Investment in Island Hotels & Properties (Malaysia) Ltd. - 2,750,000 Shares of ₹1/- each	2,750,000.00
(II) <u>ISSUED SHARE CAPITAL</u> 5,000 Ordinary Shares, fully paid	500,000.00	Construction of Bowling Alley	31,953.90
(III) <u>APPLICATION & ALLOTMENT ACCOUNT</u> 5,000 Ordinary Shares, fully paid	500,000.00	(II) <u>CURRENT ASSETS</u> Debtor - Chew Ming Teck	1,000,000.00
(IV) <u>CURRENT LIABILITIES</u> Capital Profit on Sale of Land and Building	2,038,458.82	(III) <u>PROFIT & LOSS ACCOUNT</u> Balance, 1/1/63	32,410.34
Short Term Loans (Free of Interest) - Tan Sim Hoe	400,000.00	Add: Loss for the year	<u>46,058.24</u>
Disco Limited	<u>422,500.00</u>		78,468.58
	822,500.00	(IV) <u>LIQUID ASSETS</u> Cash in Hand	90.13
		Cash at Malayan Banking Ltd. Pg.	<u>466.21</u>
Signed	} DIRECTORS. <u>₹3,860,958.82</u>		536.34
Signed.....			<u>₹3,860,958.82</u>

REPORT OF THE AUDITORS TO THE SHAREHOLDERS OF INTERNATIONAL INVESTMENT LIMITED

We have examined the above Balance Sheet with the books and vouchers of International Investment Limited, and have obtained all the information and explanations required by us. Subject to the following observations, we are of the opinion that the Balance Sheet is properly drawn up so as to exhibit a true and correct view of the state of the affairs of the Company according to the best of our information and explanations given to us and as shown by the books:-

- (1) The certificates for 2,750,000 shares held in Island Hotels & Properties (Malaysia) Ltd. have not been produced for our inspection.
- (2) No provision has been made in the accounts for audit fees of ₹150/-.
- (3) We would point out that as at 31st December 1963, Mr. Chew Ming Teck had not paid for the 1,000,000 shares of ₹1/- each in Island Hotels & Properties (Malaysia) Ltd. which were sold to him at par, vide Balance Sheet above.

31, China Street Ghaut,
Penang.
19 DEC.1964.Signed:
Auditors
LOW BENG KOOI & CO.,
Public Accountants & Auditors.

ANNEXURE G

INTERNATIONAL INVESTMENT LIMITED

Profit & Loss Account for the year ended 31st December 1965

To Bank Interest	8,021.24	By Net Loss	10,056.80
Secretarial Fees	960.00		
Audit Fee (1963)	150.00		
Filing Fee	53.50		
Sundry Wages	650.00		
Sundry Expenses	222.06		
	<u>₹10,056.80</u>		

In the High Court in Malaya at Penang

No. 1

Case Stated with Annexures
7th June 1969
Annexure G

Balance Sheet as at 31st December 1965

<u>Liabilities</u>		<u>Assets</u>	
(I) <u>AUTHORISED SHARE CAPITAL</u> 50,000 Ordinary Shares of of ₹100/- each	<u>₹5,000,000.00</u>	(I) <u>FIXED ASSETS</u> Investment in Island Hotels & Properties (Malaysia) Ltd. - 3,750,000 Shares of ₹1/- each	3,750,000.00
(II) <u>ISSUED SHARE CAPITAL</u> 5,000 Ordinary Shares fully paid	500,000.00	(II) <u>PROFIT & LOSS ACCOUNT</u> Balance at 1.1.65	102,745.90
(III) <u>APPLICATION & ALLOTMENT ACCOUNT</u> 5,000 Ordinary Shares, fully paid	500,000.00	Add: Loss for the year	<u>10,056.80</u>
(IV) <u>RESERVES</u> Balance at 1.1.65	1,782,078.35	(III) <u>CURRENT ASSETS</u> Cash in Hand	85.90
Add: Capital profit on sale of Air Conditioners	<u>2,719.80</u>	Director's Joint Current Account (Tan Sim Hoe and Tung Yim Fong)	38,984.66
	1,784,798.15		
(V) <u>CURRENT LIABILITIES</u> Bank Overdraft (Directors' Personal Guarantee) Malayan Banking Ltd., Penang	101,575.11		
Short Term Loans: Tan Sim Hoe (Interest-free, repayable indefinitely)	523,250.00		
Disco Limited - do -	<u>492,250.00</u>		
	<u>1,015,500.00</u>		
	<u>₹3,901,873.26</u>		<u>₹3,901,873.26</u>

REPORT OF THE AUDITORS TO THE MEMBERS OF INTERNATIONAL INVESTMENT LIMITED

We report to the members of International Investment Limited, that we have examined the above Balance Sheet as at 31st December, 1965 and the above Profit & Loss Account for the year then ended.

In our opinion:-

- (1) The Directors' Report is so far as it is required by the Companies Act 1965 to deal with matters dealt with in the accounting and other records examined by us, gives a true and fair view of such matters;
- (2) The accounting and other records (including registers) examined by us are properly kept in accordance with the provisions of the said Act;
- (3) The Balance Sheet and Profit and Loss Account are properly drawn up in accordance with the provisions of the said Act so as to give a true and fair view of the state of the company's affairs, subject to the following observations:-

(I) DIRECTORS' JOINT CURRENT ACCOUNT ₹38,984.66

The above Directors' Joint Current Account amounting to ₹38,984.66 should be settled as early as possible.

(II) CREDITORS' BALANCE ₹1,015,500.00 - No confirmation has been received in respect of the above creditors' balance as at 31st December 1965

(III) The Share Certificates for ₹3,750,000 held in Island Hotel & Properties (Malaysia) Ltd. have not been produced for our inspection and we understand that 2,250,000 shares and 1,500,000 shares of the above said company are registered in the names of Mr. Chew Ming Teck, an attorney for Disco Ltd., and Mr. Tan Sim Hoe, respectively. We also understand that for registration of the shares in this manner M/s. Chew Ming Teck and Tan Sim Hoe have executed a Trust Deed which, however, has not been produced for our inspection.

(IV) No provision has been made in the accounts for audit fee of ₹150/-

31 China Street Ghaut,
Penang.
10 DEC.1966

Signed:
Auditors
LOW BENG KOOI & CO.
Public Accountants.

ANNEXURE HINTERNATIONAL INVESTMENT LIMITEDProfit and Loss Account for the Year ended 31st December 1966

<u>1965</u>		<u>1965</u>	<u>1965</u>	<u>1965</u>
8,021.24	To Bank Interest	6,866.92	10,056.80	By net Loss
960.00	Secretarial Fees	-		7,237.12
150.00	Audit Fee	300.00		
53.50	Filing Fee	-		
222.06	Sundry Expenses	-		
650.00	Sundry Wages	-		
-	Trunk Calls	70.20		
<u>10,056.80</u>		<u>7,237.12</u>	<u>10,056.80</u>	<u>7,237.12</u>

In the High
Court in
Malaya at
Penang

No. 1

Case Stated
with
Annexures
7th June 1969
Annexure HBalance Sheet as at 31st December 1966

<u>1965</u>	<u>Liabilities</u>	<u>1965</u>	<u>Assets</u>	<u>1965</u>
	<u>AUTHORISED SHARE CAPITAL</u>		<u>FIXED ASSETS</u>	
	50,000 Ordinary Shares of	3,750,000.00	Investment in Island Hotels & Properties (Malaysia)	
	\$100/- each <u>\$5,000,000.00</u>		Ltd. - 3,750,000 Shares of \$1/- each	3,750,000.00
	<u>ISSUED SHARE CAPITAL</u>		<u>PROFIT & LOSS ACCOUNT</u>	
500,000.00	5,000 Ordinary Shares fully paid	500,000.00	Net Loss to date	120,039.82
	<u>APPLICATION & ALLOTMENT A/C</u>		<u>CURRENT ASSETS</u>	
500,000.00	5,000 Ordinary Shares, fully paid	500,000.00	Cash in Hand	85.90
1,784,798.15	<u>RESERVES</u> as per last Balance Sheet	1,784,798.15	Directors' Joint Current Account	38,984.66
	<u>CURRENT LIABILITIES</u>		(Tan Sim Hoe & Tung Yim Fong)	
101,575.11	Bank Overdraft (Directors' Personal	32,708.59		
	Guarantee) Malayan Banking Ltd. Penang			
	Directors' Current Account -			
	Tan Sim Hoe 38,051.82	38,984.66		
	Tung Yim Fong 38,051.82	76,103.64		
	Short Term Loans:			
523,250.00	Tan Sim Hoe (Interest free -	523,250.00		
492,250.00	repayable indefinitely)	492,250.00		
	Disco Limited - do -	3,909,110.38		
<u>3,901,873.26</u>		<u>3,901,873.26</u>		<u>3,909,110.38</u>

REPORT OF THE AUDITORS TO THE MEMBERS OF INTERNATIONAL INVESTMENT LIMITED

We report to the members of International Investment Limited, that we have examined the above Balance Sheet as at 31st December, 1966, and the above Profit & Loss Accounts for the year then ended.

In our opinion:-

- (1) The Directors' Report in so far as it is required by the Companies Act 1965 to deal with matters dealt with in the accounting and other records examined by us, gives a true and fair view of such matters;
- (2) The accounting and other records (including Registers) examined by us are properly kept in accordance with the provisions of the said Act;
- (3) The Balance Sheet and Profit & Loss Account are properly drawn up in accordance with the provisions of the said Act so as to give a true and fair view of the state of the company's affairs, subject to the following observations:-

(i) SHORT TERM LOANS \$1,015,500.00 & DIRECTORS' CURRENT ACCOUNTS \$76,103.84

No confirmation has been received in respect of the above creditors' balances as at 31st December, 1966.

(ii) The Share Certificates for \$3,750,000/- held in Island Hotel & Properties (Malaysia) Ltd. have not been produced for our inspection and we understand that 2,250,000 shares and 1,500,000 shares of the above said company are registered in the names of Disco Ltd. whose attorney is Mr. Chew Ming Teck, and Mr. Tan Sim Hoe, respectively. We also understand that for registration of the shares in this manner Messrs. Disco Ltd. and Tan Sim Hoe have executed a Trust Deed which, however, has not been produced for our inspection.

(iii) No provision has been made in the accounts for audit fee of \$150/-

31 China Street Ghaut,
Penang.
14 JUN 1967.

Signed:
Auditors.
LOW BENG KOOI & CO.,
Public Accountants.

ANNEXURE I

ITBR. 535

Appeal by International Investment Limited
in respect of the assessment of income tax
for the year of assessment 1964

DECIDING ORDER

By the Special Commissioners of Income Tax

In the High
Court in
Malaya at
Penang

No. 1

Case Stated
with
Annexures

7th June 1969

Annexure I

10 1. We, the Special Commissioners of Income Tax, find that in transferring its property known as the International Building to the Island Hotel and Properties (M) Limited in exchange for the shares in the Island Hotel Properties (M) Ltd., the Appellant Company (International Investment Ltd.) was carrying on the business of trafficking in immovable property pursuant to its declared object stated in clause 3(i) of its Memorandum of Association, and that the profits obtained from the transfer of the property are profits from business assessable to income tax.

20 2. It is ordered that the assessment of income tax in respect of the Appellant Company for the year of assessment 1964 as per notice of amended assessment dated 25.5.1967 shall be and is hereby confirmed;

3. It is further ordered that the appeal shall be and is hereby dismissed.

Dated this 19th day of September, 1968.

30 Signed.
(Wan Hamzah bin Wan Mohd. Salleh)
Pengerusi,
Pesuruhjaya Khas Chukai Pendapatan.
Signed.
(Lee Kuan Yew)
Pesuruhjaya Khas Chukai Pendapatan.
(David Kuok Khoo Hin)
Pesuruhjaya Khas Chukai Pendapatan.

In the High
Court in
Malaya at
Penang

ANNEXURE J

GROUNDNS OF DECISION OF THE SPECIAL
COMMISSIONERS OF INCOME TAX

No. 1
Case Stated
with
Annexures
7th June 1969
Annexure J

1. The Appellant Company transferred its land together with the partly completed building erected on the land known as the International Building, to the Island Hotels and Properties (Malaysia) Limited with an undertaking to complete the said building, not in consideration of the payment of the price consisting of money but in consideration of the issue to it of certain shares in the Island Hotels and Properties (Malaysia) Limited. We feel that the first question which we have to determine is whether for income tax purposes the transfer of the property in exchange for shares can be treated as if it were a transaction of selling property for money and whether the excess of the value of the shares over the cost of the property can be taken as a profit chargeable to income tax in proper cases. We find that in law this is so, vide California Copper Syndicate v. Harris, 5 T.C. 159, in which Lord Justice Trayner said -

10
20

"But it was said that the profit - if it was profit - was not realised profit, and, therefore, not taxable. I think the profit was realised. A profit is realised when the seller gets the price he has bargained for. No doubt here the price took the form of fully paid shares in another company, but if there can be no realised profit, except when that is paid in cash, the shares were realisable and could have been turned into cash, if the Appellant had been pleased to do so. I cannot think that Income Tax is due or not according to the manner in which the person making the profit pleases to deal with it. Suppose, for example, a seller made a profit on a trade transaction but leaves the price (including the profit) in the hands of the buyer at so much per cent interest. That he so deals with it, rather than take the cash into his own pocket, would not affect the claim of the Revenue for the tax payable on the profit. No more, in my opinion, does it affect the liability for the tax that the Appellant left their profit in the hands of the Company they sold to and took the Company's shares as their voucher."

3~
4~
5~

2. After we have determined that question, the next one we have to consider is whether this case of the Appellant Company is a proper case in which the excess of the value of the shares received as consideration for the transfer of the property, over the cost of the property is to be taken as a profit chargeable to income tax. To be chargeable to income tax the excess or profit must be gain or profit from trade or business within the meaning of section 10(1)(a) of the Income Tax Ordinance 1947. It was contended on behalf of the Appellant Company that it cannot be gain or profit from trade or business on the ground that the Appellant Company was not carrying on the trade or business of buying and selling property but investment business. It was also contended on behalf of the Appellant Company that the transaction was not even an adventure or concern in the nature of trade. In our opinion if the transaction was an adventure or concern in the nature of trade merely and nothing more than that, the profits would not be chargeable to income tax because in our opinion the gains or profits under section 10(1)(a) do not include a profit from an adventure or concern in the nature of trade, and we are persuaded to come to this conclusion by the Judgments of Rose C.J. and Ambrose J. in *D.E.F. v. C.I.T.*, 1961 M.L.J.55, in which the Singapore Court of Appeal gave its interpretation of certain provisions in the Singapore Income Tax Ordinance which are identical to the provisions of section 10(1)(a) of the Income Tax Ordinance 1947 of West Malaysia. In his judgment in that case Rose C.J. said, "On the hypothetical point as to whether the transaction in question could properly be held to be 'an adventure in the nature of trade' within the meaning of the (English) Income Tax Act 1952, it would seem to be very much a borderline case... Were it necessary to decide the point, I myself incline to the opinion that the transaction in question would not be held in the English Courts to be an adventure in the nature of trade." By that we believe, Rose C.J. was implying that in the case before him it was not necessary to decide the point because "trade" in the relevant section of the Singapore Income Tax Ordinance does not include an adventure in the nature of trade and therefore the point was irrelevant. Ambrose J. made a finding that the transaction in question was an adventure in the nature of trade and yet he held that the profit arising from the transaction in question was not assessable to income tax. From

In the High Court in Malaya at Penang

—
No.1

Case Stated with Annexures

7th June 1969

Annexure J
(continued)

In the High
Court in
Malaya at
Penang

No. 1

Case Stated
with
Annexures

7th June 1969

Annexure J
(continued)

his judgment we understand that an adventure in the nature of trade is not trade within the meaning of the relevant section of the Singapore Income Tax Ordinance.

3. However, we feel that we should not ignore another part of Ambrose J.'s judgment where he said: "I must make it clear, however, that, in my opinion, if it is proved that a person intended to carry on a business and that he carried out one business transaction with that intention, then he has carried on a business." By that we understand that if it is proved that a person intended to carry on a particular type of business and that with that intention he carried out a business transaction of that particular type of business, it should be held that he has carried on that particular type of business. We find that the facts in the Appellant Company's case point to the conclusion that the Appellant Company has carried on the business of buying and selling property and that the profit in question has accrued to it from that business. One of the declared objects of the Appellant Company as stated in paragraph 3(i) and (ii) of its Memorandum of Association was to traffic and otherwise deal in or to turn to account immovable property, and we conclude that when the Appellant Company disposed of its land together with the International Building on it in exchange for the shares, it did so with this object of trafficking or dealing in or turning to account the property with a view to profit. Although there was only one such transaction it was a business transaction carried out with the intention of carrying on the business of dealing in property and therefore according to the principle stated by Ambrose J. the Appellant Company has carried on the business of dealing in property.

4. It was contended on behalf of the Appellant Company that in view of the resolution passed at the extraordinary general meeting of the members of the Appellant Company on 16.10.63 it cannot be said that the Appellant Company transferred its land and building with the object of carrying on the business of buying and selling property, and that the true intention was to expand its business of investments in securities as stated in the resolution. But in view of the fact that about six weeks after the resolution was passed one

10

20

30

40

million of the shares obtained in exchange for the property was transferred away by the Appellant Company and about one month later the rest of the shares so obtained were also transferred away, we find it difficult to accept that the true object of acquiring those shares was in order to expand its investment. That the true object was not to expand or to hold investment in shares is confirmed by the fact that all of the \$175,000 shares in four other companies held by the Appellant Company in 1962 were transferred away by the end of 1963.

In the High Court in Malaya at Penang

No. 1

Case Stated with Annexures

7th June 1969

Annexure J
(continued)

5. We agree with the Respondent's Counsel that the Appellant Company resorted to loans to finance the construction of the International Building. However, in our opinion, the fact that a company relies on loans to finance the construction of a building does not of itself indicate that the asset is intended by the Company to be dealt with as a stock-in-trade although it is not prudent for any part of a company's fixed assets to be financed by loans, simply because if the loan creditors were to recall from the company the outstanding loans to the company, it would probably be left with no alternative but to sell all its assets and wind-up its affairs. But we find that in the financial accounts of the Appellant Company the construction costs of the International Building were described on its balance sheet at 31.12.62 (Annexure E) as 'work in progress' and classified amongst its current assets, which Spicer and Pegler's "Book-keeping and Accounts" Fifteenth Edition, at page 3, explains are "assets in the various stages of conversion into cash" in the ordinary course of the company's business. As an alternative, if the building was intended to be a fixed asset, it ought to have been shown as such on its balance sheet and an appropriate description would probably have been 'construction in progress'. Since the financial accounts of the Appellant Company were reviewed by an independent auditor who holds a professional qualification we are of the opinion that the description and classification on the balance sheet could not have been a mistake; both the description and classification must have been deliberate. The importance of the distinction between fixed and current (floating) assets (referred to by the Courts as 'fixed capital' and 'circulating capital' respectively) was recognised by the Companies Ordinance 1940 - 1946 which made it obligatory under section 125 for companies to

.0

20

30

40

In the High Court in Malaya at Penang

—
No. 1

Case Stated with Annexures

7th June 1969

Annexure J (continued)

distinguish them on the balance sheet. In a series of recommendations on accounting principles the Council of the Institute of Chartered Accountants in England and Wales has deemed it necessary to issue Recommendation N18 (vide Members' Handbook Part 2) entitled "Presentation of balance sheet and profit and loss account" in which it is stated that "the fundamental characteristic of fixed assets is that they are held with the object of earning revenue, directly or indirectly, and not for the purpose of sale in the ordinary course of business." It is further noted in that recommendation that "items classified as current assets should include stock-in-trade and work in progress." Viscount Haldane in *John Smith and Son v. Moore*, 12 T.C. 266, observed:-

1

"Since Adam Smith drew the distinction in the Second Book of his "Wealth of Nations", which appears in the chapter on the Division of Stock, a distinction which has since become classical, economists have never been able to define more precisely what the line of demarcation is. Adam Smith described fixed capital as what the owner turns to profit by keeping it in his own possession, circulating capital as what he makes profits of by parting with it and letting it change masters. The latter capital circulates in this sense."

20

Romer L.J. in Golden Horse Shoe (New) Ltd. v. Thurgood, 18 T.C. 280 remarked:-

30

"Unfortunately, however, it is not always easy to determine whether a particular asset belongs to the one category or the other. It depends in no way upon what may be the nature of the asset in fact or in law. Land may in certain circumstances be circulating capital. A chattel or chose in action may be fixed capital. The determining factor must be the nature of the trade in which the asset is employed. The land upon which a manufacturer carries on his business is part of his fixed capital. The land with which a dealer in real estate carries on his business is part of his circulating capital."

4

6. Hence we find that the Appellant Company was not only empowered by clause 3(i) and (ii) of its

Memorandum of Association to traffic and deal in lands, houses and buildings but it had also the intention to traffic and deal in building which it did by the transfer of the land and building to Island Hotels and Properties (Malaysia) Limited in exchange for shares in that company. In other words the Appellant Company was empowered by its Memorandum of Association to carry on the business of trafficking in lands and buildings, it had that intention and it had carried out that intention. The classification of the construction costs as work in progress under current assets in the financial accounts seems to be consistent with the description by the Appellant Company's Secretaries (a firm of accountants holding professional qualification) in Annexure D, of the nature of its business as dealing in immovable property and land development, and we are further urged by this consideration to come to that conclusion.

10

20

7. We find that the Appellant Company has failed to discharge the onus placed upon it by paragraph 13 of Schedule 5 of the Income Tax Act 1967 and section 76(3) of the Income Tax Ordinance 1947, of proving that the assessment in question is excessive or erroneous.

Sd: Wan Hamzah bin Wan Mohd. Salleh
(Wan Hamzah bin Wan Mohd.Salleh)
Chairman.

Special Commissioners of Income Tax.

30

Sd. Lee Kuan Yew
(Lee Kuan Yew)

Special Commissioners of Income Tax.

Sd. David Kuok Khoon Hin
(David Kuak Khoon Hin)

Special Commissioners of Income Tax.

In the High
Court in
Malaya at
Penang

—
No. 1

Case Stated
with
Annexures

7th June 1969

Annexure J
(continued)

In the High
Court in
Malaya at
Penang

No. 2

Notes of Evidence

24th March, 1971Originating Motion No.5 of 1969

International Investment Ltd.

vs.

Compt.-General of Inland RevenueMr. C.O. Lim with Mr. Lim Ewe Hock for Appellants.Enche Nik Saghir for Respt.

Mr. C.O. Lim:

10

Refers to case stated in Bundle marked "A".

Questions for opinion of the High Court appear at pp. 7-8 of A.

Facts found by Special Commissioners appear in Annexure B.

E vs. Comptroller Gen. of Inland Revenue, 1970 2 MLJ 117 at 119 (quotation from Halsbury 3rd Edn. Vol.20 S1364, p.691).

Refers to para 15 of Annexure B at pp.18-19 "as being income from business carried on by the Appellant Company" - no finding as to nature of "business".

20

Annexure C - deciding order stated the Appellant's business was "trafficking in immovable property" and in the Grounds of Decision pp.22-29.

[sic] Reads para 1 of Annexure D and California Copper Syndicate vs. Harries 5 T.C. 159 at 167 - judgment of Lord Trayner.

Refers to appellant's written submission or S.10(1)(a) of the Income Tax Ordinance 1947.

30

Submit a solitary transaction cannot constitute "trade".

No. 2
Notes of
Evidence
24th March
1971

D.E.F. vs. The Comptroller of Income Tax 1961
27 MLJ 55 - approved and adopted in E vs. Comptroller-
General of Inland Revenue 1970 2 MLJ 117 at 129.

In the High
Court in
Malaya at
Penang

Edwards vs. Bairstow 36 T.C. 207.

—
No. 2

[sic] Commissions of Inland Revenue vs. Livingston
& Ors. 11 T.C. 538 at 542.

Notes of
Evidence

Ryall vs. Hoare 8 T.C. 521 at 525.

24th March
1971

Martin vs. Lowry 11 T.C. 309, 311.

(continued)

10 Pickford vs. Quirke 13 T.C. 263 - this is
distinguishable from present case.

Submit S'pore judgment of persuasive authority
and has been approved by our Federal Court.

Refers to Grounds of Decision pp. 24, 25 of D.

Objects of Co. as in para 3(i) & (ii) of
Memorandum of Association of Appt. Co.

Refers to E's case (cit) p. 127.

Refers to para 4 of Grounds of Decision.

20 Mr. Low Beng Kooi, accountant, gave evidence.
Admitted he had made a mistake in classifying the
International Building on balance sheet as at
31.12.62 (see p.26-27 (para 5 of Grounds of
Decision).)

p.128 of 1970 2 M.L.J. (E's case) "It is
trite law etc."

Para 6 of the Grounds of Decision.

Submit Special Commissioners misdirected
themselves by relying on dicta of Ambrose J
(p.25 of "A").

See 5 T.C. p.664 opinions: Lord Salween.

30 Submit (1) Appellant Co. has discharged onus
of proof

(2) Order of the Special Commissioners be set aside

(3) Assessment of Income Tax for the year of
assessment 1964 as per notice d. 25.5.67.

In the High
Court in
Malaya at
Penang

—
No. 2

Notes of
Evidence

24th March
1971
(continued)

Mr. Lim Ewe Hock: Q is whether one transaction by a limited Co. can be construed as sufficient to amount to carrying on a business or trade for the purpose of Section 10(1)(a) of the Income Tax Ord. 1947. E's case concerned an individual, also DEF's case. Gill, F.J. did not approve the dicta of Ambrose J.

Submit Special Commissioners failed to direct their minds as to the primary purpose of the formation of the Appellant Company. See (xxi), (xxiii) of Memo. 10

No finding by Special Commissioners whether sale of Hotel was under 3(i) or 3(xxi).

Special Commissioners did not consider a single transaction which disposed of the entire assets of the Company from one which did not. Was that not a realisation of assets? If the Special Commissioners had misdirected themselves in law, this Court cannot substitute a finding which the Commissioners ought to come to on the facts had they properly directed themselves. 20

12.25 p.m. Adj'd. to 2.30 p.m.

Enche Nik Saghir:

Submits written submission.

Appellants' Counsel had submitted that Special Commissioners had failed to make any express findings of fact. Not quite correct, as findings of fact at pp.13-20 of Annexure B. They are facts found proved or admitted on the evidence before them. Arising therefrom, the Commissioners arrived at their conclusions. See Annexures C & D. pp.25-26 and p.29 are the findings. They form part of the Case Stated. Different annexures are set out to avoid confusion and are modelled on how case is stated in U.K. This can be seen on examination of Tax Cases, e.g. the California Copper Syndicate Case, 5 T.C. 159. 30

In E's case, the Fed. Ct. only criticised because case stated was not supplied to other party. It had been in the case. Submit no merit in criticism of way case was stated. 40

Dealing with written submission:

Appeal on question of law - para 34 of
Schedule 5 to Income Tax Act 1967.

In the High
Court in
Malaya at
Penang

—
No. 2

Facts set out in Annexure B but written sub-
mission para 2(a) to (h) would try to pinpoint
the pertinent facts.

Notes of
Evidence

24th March
1971
(continued)

Q. Whether profits from sale of land are assessable
to income tax.

Special Commissioners found that the profits were
profits from "business" rather than "trade" within
meaning of S.10(1)(a) Income Tax Ord. 1947.

10

Para 5 of written submission deals with terms
"business" and "trade".

Para 6 - St. Aubyn Estates Ltd. 17 T.C. 412 at
419.

H. Co. Ltd.'s case (xeroxed copy supplied).

(para 7 of submission).

Para 8 - Isolated transaction will not fall within
S.10(1)(a) unless carried out with intention of
carrying on a business or as part of a business.

20

Submit present case not of buying or selling but
as part of business.

Refers to R17 by Co's Secretary, made bona fide
before dispute.

Submit appeal should be dismissed and assessment
confirmed.

Mr. C.O. Lim: Refer to para 5 of respondent's
written submission.

Refers to D.E.F.'s case 1961 p.59 (cit).

Adj'd. to date for judgment.

30

This 15th day of March, 1973

Originating Motion No. 5 of 1969

International Investment Ltd.

Appellant

v.

In the High
Court in
Malaya at
Penang

The Comptroller-General of
Inland Revenue

Respondent

No. 2

Notes of
Evidence

24th March
1971
(continued)

For Appellant: Mr. Lim Ewe Hock.

For Respondent: Mr. T.S. Nathan.

Mr. Lim Ewe Hock - Costs - Sch. 5 - Rule 42.

I read judgment.

Sgd. H.S. ONG

TRUE COPY

Sgd. Illegible

Secretary to the Judge,
High Court, Malaya, Penang.

Date: 27.4.73

10

Submission of Appellants

Submission of
Appellants

Submit.

Income Tax Ordinance 1947 S.10(1)(a) ie;

(a) "Gains and 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" is different materially from English Income Tax Act 1952.

20

In the English Act the word "trade" is defined to include "every trade, manufacture, adventure or concern in the nature of trade". This definition gives a wider meaning to the word "trade" in the English Act. A concern, even one solitary concern, in the nature of trade suffices. This explains the many English cases, Leeming v. Jones, Edwards v. Bairstow, etc. where what constitutes an adventure in the nature of trade is laid down. These cases are irrelevant to an interpretation of S.10(1)(a).

30

Under our Income Tax Ordinance 1947 S.10(1)(a) "business" "trade" etc. has a restricted meaning. It does not include an adventure in the nature of trade.

Firstly, the Shorter Oxford English Dictionary meaning of trade is "the practice of some occupation business or professions habitually carried on. Esp.

when practised as a means of livelihood or gain....
anything practised for a livelihood".

The dictionary meaning of "trade" "business"
"profession" "vocation" all have connotations of
habitual, systematic operation, of continuity of
acts.

Secondly "trade" business, profession or
vocation under S.10(1)(a) must "have been carried
on or exercised".

10 The words "carry on" connotes continuity for
a period of time. No doubt under S.10(1)(a)
"whatever period" such trade is carried on suffices.
But submit, a solitary transaction in buying and
selling cannot amount to carrying on a trade or
business within the meaning of S.10(1)(a).

Ref: 1961 27 M.L.J. 56 - D.E.F. v. The
Comptroller of Income Tax. Approved: E.v.C.G.I.R.
(1970) 2 M.L.J. 118 pg.130.

20 "It is not actually a trade because an isolated
transaction has not the character of carrying on a
trade" - Upjohn J., Edwards v. Bairstow 36 T.C.211.

"One isolated transaction does not make a
trade any more than one swallow makes a summer" -
Commissioners of Inland Revenue v. Livingstone 11
T.C. 538 at pg.542.

30 "That rules out, of course, the well known
case of a casual profit made upon an isolated
buying and selling of some article; that is a
capital accretion and unless it is merged with
other similar transactions in the carrying on of a
trade and the trade is taxed no tax"
Ryall v. Hoare 8 T.C. 521 at pg. 525.

Submit Martin v. Lowry is distinguishable on
grounds of large quantity bought, time taken to sell
the linen, the organisation set up to advance sales,
in short the purchase is in bulk but the sale in
numerous transactions.

See Martin v. Lawry 11 T.C. pg.309 and 311.

[sic]

40 Pickford v. Quirke 13 T.C. 263 is also
distinguishable see pg.263.

In the High
Court in
Malaya at
Penang

No. 2

Notes of
Evidence

Submission of
Appellants

24th March
1971

(continued)

In the High
Court in
Malaya at
Penang

No. 2

Notes of
Evidence
Submission of
Appellants

24th March
1971
(continued)

[sic]

Submit that solitary transaction does not amount to trade is the law in Singapore.

See. 1961 27 M.L.J. pg.56.

D.E.F. v. Comptroller of Income Tax.

Singapore Income Tax Ordinance S.10(1)(a) is in pari materia with out Income Tax Ordinance 1947 S.10(1)(a).

Submit Judgment of persuasive authority. But now E.v.C.G.I.R. (1970) 2 M.L.J. 118 at pg. 130.

In so far as an individual is concerned the law is clear: A solitary transaction cannot amount to carrying on a trade - unless it is really not a solitary transaction as in the cases of Martin v. Lawry & Pickford v. Quirke.

10

Submit: In so far as a company is concerned the difference is that a company is an association of a body of persons and its objects are spelled out in a Memorandum of Association.

Respectfully submit that a solitary transaction does not necessarily even in a company have to amount to carrying on a trade.

20

Submit Ambrose J. is incorrect in his dicta, at pg.61D.

Ref: M.L.J. 1961 pg.61D.

"I must make it clear, however, that, in my opinion, if it is proved that a person intended to carry on a business and that he carried out one business transaction with that intention, then he had carried on a business."

Submit that a generalisation such as Ambrose J. is dangerous. A company may have in its Memorandum of Association many objects; its intention, therefore, may be many fold. And carrying out one business transaction with an intention that is ancillary will not amount to carrying on a trade or business.

30

Buttrose J. is more careful.

See. 1961 M.L.J. at pg.59 D.

"Though as a general rule in the case of an individual one or two isolated transactions cannot be described as the carrying on of a business, in the case of a company the fact that there has only been one profit-making transaction is in no way decisive of the question whether the profit was made in the carrying on of the company's business or otherwise".

In the High Court in Malaya at Penang

No. 2

Notes of Evidence

Submission of Appellants

24th March 1971
(continued)

10 Lord Justice Clark in California Copper Syndicate v. Harris 5 T.C. at pg.166 is careful to distinguish between what is incidental and what is essential.

The problem he poses is

"the question to be determined being - Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit making."

20 The isolated transaction involves a scheme of profit making.

"This was that the turning of investment to account was not to be merely incidental, but was, as the Lord President put it in the case of the Scottish Investment Company, the essential feature of the business, speculation being among the appointed means of the Company's gains".

Dicta of Ambrose J. is relied on by Special Commissioners in their approach to the problem before them.

30 Ref: Grounds of decision Annexure D. pg.25

3. "However, we feel that we should not ignore another part of Ambrose J's judgment where he said "I must make it clear, however, that, in my opinion, if it is proved that a person intended to carry on a business and that he carried out one business transaction with that intention he has carried on a business".

40 Submit Special Commissioners has misdirected themselves in law in relying on this dicta by Ambrose J. and on this ground alone appeal must succeed.

See. Edwards v. Bairstow 36 T.C. 207.

In the High
Court in
Malaya at
Penang

No. 2

Notes of
Evidence

Submission of
Appellants

24th March
1971

(continued)

Submit that because of this misdirection in law Special Commissioners were quite happy and satisfied, once they found

(a) that buying and selling property was one of the declared objects (See. Grounds of Decision pg. 25 para 3)

And

(b) that the appellants had disposed of its land together with the International Building on it.

Submit Special Commissioners failed to direct themselves as to 10

(a) whether buying and selling property was the "essential" feature of the business or was it ancillary or remedial.

(b) whether the only object of the formation of the Company was to buy this land, build this hotel and sell, i.e. whether the selling involve a scheme of profit making.

Submit that these 2 considerations were paramount in the Copper Syndicate case. 20

Ref: California Copper Syndicate v. Harris 5 T.C. 166 and 167.

Ref. Lord Trayner's judgment at pg. 167.

"I am satisfied that the Appellant Company was formed in order to acquire certain mineral fields or workings - not to work the same themselves for the benefit of the Company, but solely with the view and purpose of reselling the same at a profit etc."

In the California Copper Syndicate case the Learned Judges as well as the Commissioners after careful consideration of the Essential intention of the Company came to the conclusion that it was to buy and sell and not to work a mine for profits. 30

The converse conclusion was reached in Tebrau Rubber Syndicate v. Farmer 5 T.C. 658.

Ref. Judgment of Lord Salween: at pg. 664 and 665 and 666.

"In any event I cannot find sufficient evidence from this single transaction, which at the same time brought the Syndicate to an end, that the profits so made are to be treated as income and gains made by trade, and I should hesitate to extend the decision in the California Copper Syndicate beyond the facts of that case".

Ref:

Lord Johnston pg. 666

0 "The transaction here involved the winding up of the Company its property being realised and each shareholder having his investment in the Company realised and at a profit, although only on paper, I have a difficulty in seeing how a company that is wound up, can be assessed on income tax."

Submit failure to direct on these material points is fatal to the Special Commissioners finding.

20 Especially is this so when His Honourable Court has not seen the witnesses, and do not have the recorded notes of evidence. This Honourable Court is therefore in no position to come to any conclusion as to what conclusion the Commissioners would have reached had they directed themselves properly in law.

30 For the same reason as this Court will not go into any finding of fact if Special Commissioners had not misdirected themselves in law so also this Court would not substitute its finding of fact for the Special Commissioner's where there has been a misdirection.

ORIGINATING MOTION NO. 5 OF 1969

International Investment Ltd.

v.

Comptroller-General of Inland Revenue

Summary of Respondent's Submission

1. The appeal is against the decision of the Special Commissioners of Income Tax confirming the amended assessment for the year of assessment

In the High Court in Malaya at Penang

No. 2

Notes of Evidence

Submission of Appellants

24th March 1971

(continued)

Submission of Respondents

In the High
Court in
Malaya at
Penang

No. 2

Notes of
Evidence

Submission of
Respondents

24th March
1971
(continued)

1964 dated 25.5.1967. The appeal is by way of case stated (see para. 34 of Schedule 5 to the Income Tax Act, 1967).

2. The facts as found by the Special Commissioners are as at Annexure B (pages 13 to 20 of Record). The following should be noted -

- (a) The appellant company was incorporated on 16.1.1962.
- (b) One of the objects for which the company was formed was to acquire, traffic and otherwise deal in lands and buildings (see clause 3(i) of the Memorandum of Association - Exhibit R.8) 10
- (c) 50% of the shares of the company were held by Tan Sim Hoe and his wife while the other 50% were held by Chew Ming Teck and his wife.
- (d) Soon after incorporation the company bought 7 lots of land along Penang Road. 6 of the lots were bought in 1962 while the other lot was bought in 1963.
- (e) The Company entered into contracts for the construction of a building which was later known as "International Building". According to the contract, the building was to be completed by 30.10.63. 20
- (f) However, the building even before completion was sold together with the lands to Island Hotels and Properties (Malaysia) Ltd. in exchange for \$3,750,000/- worth of shares in that Company.
- (g) In December 1963, the appellant company started to transfer its shares in the Island Hotels & Properties (Malaysia) Ltd. and by 4.1.64 all its shares in that company have been transferred to either Tan Sim Hoe or Disco Ltd. 30
- (h) By the end of 1963 it had also transferred away all its shares in other companies.

3. The point of issue in this appeal is whether on the facts as found by the Special Commissioners, the profits arising from the sale of the lands and the building were assessable to income tax. 4

4. It should be noted that the Special Commissioners did not decide that the profits in the case were profits from trade but profits from "business" (see Record O page 21). Therefore, what we are concerned here is not whether the transaction amounted to trade but whether it amounted to "business" within the meaning of section 10(1)(a) of the Income Tax Ordinance, 1947.

In the High Court in Malaya at Penang

No. 2

Notes of Evidence

Submission of Respondents

24th March 1971
(continued)

Meaning of "business" and "trade"

10 5. Neither the word "trade" nor the word "business" is defined in the Ordinance.

As to "trade" refer to the following passages in the following cases -

(a) Fry v. Burma Corporation Ltd. 15 T.C. 144

Per Lord Atkin - "Trade" refers to various activities of commerce - the winning and using the product of the earth the purchase and sale of commodities or the offering of services for a reward, such as conveyance and the like."

20

(b) C.I.R. v. Forth Conservancy Board, 16 T.C. 103

Page 116 - "Trade involves something in the nature of a commercial undertaking of which buying and selling are the most obvious characteristic."

(c) Smith Barry v. Cordy, 28 T.C. 250

Scott L.J. at page 258-9 observed that "trade" must be used in its ordinary sense to include "anything practised for livelihood."

30 On the word "business" -

(a) Jessel M.R. said in Smith v. Anderson 15 Ch. D. 258 at page "Anything which occupies the time, attention and labour of a man for the purpose of profit is business".

(b) Hesketh Estates v. Craddock, 25 T.C. 7

Wrottesley J. said -

"people engaged in trade are commonly said to be engaged in business".

In the High Court in Malaya at Penang

(c) C.I.R. v. Korean Syndicate, 12 T.C. 196

"Business is a very wide word. it may mean merely an occupation or function".

No. 2

It is clear from the above that "business" is a word of very wide import.

Notes of Evidence

6. It is submitted that "business" is wide enough to include the expression "adventure or concern in the nature of trade" found in the English Income Tax Act, 1952. As was said by Finlay J. in St. Aubyn Estates Ltd. v. Strick, 17 T.C. 412 at page 419 -

10

Submission of Respondents

24th March 1971

(continued)

"I think that the use of the word "business" came into their (Commissioners') finding just as it has come apparently into the judgment of a good many judges, as a convenient way of expressing a trade, manufacture, adventure or concern in the nature of trade -".

[Note; This argument has already been rejected by the Federal Court in E. v. C.I.R. (1970) 2 M.L.J.118. It is raised here so that the Department will not be precluded from raising it again should this appeal go further.]

20

Scope of Section 10(1)(a)

7. The scope of section 10(1)(a) of the Income Tax Ordinance, 1947 has been examined in the case of E. v. C.G.I.R. (1970) 2 M.L.J.118 where it was decided that an isolated transaction would not constitute trade.

Refer to the case of D.E.F. v. C.I.T. (1961) M.L.J. 55 on the basis of which E's case was decided.

30

It is contended that those two cases did not decide that profits from an isolated transaction can never be assessable to income tax. What D.E.F.'s case decided was that an isolated transaction without more would not come within section 10(1)(a). Ambrose J. in that case said at page 61 -

" I must make it clear, however, that, in my opinion, if it is proved that a person intended to carry on a business and that he

40

carried out one business transaction with that intention, then he has carried on a business. Thus, in the Kenya case which I have referred to, although I disagree with Windham J.'s interpretation of the word "business", I think the decision was right on the facts. In that case, the appellant company was a holding company with power under its memorandum of association to acquire, sell and dispose of any property and any business, and to carry on any business so acquired. It purchased an estate with a view to resale. The estate was divided into four parts and sold to four different purchasers in the course of 18 months. Its intention to carry on the business of buying and selling land was clear from the memorandum. In my opinion, considering the clear intention, the carrying out of the isolated business transaction was clearly the carrying on of a business: and it would have made no difference if the land had been sold to one purchaser without any sub-division."

Gill F.J. in E's case (1970) 2 M.L.J. 118 said at page 130 -

"In the absence of a definition of "trade" extending that term to an adventure in the nature of trade this single transaction did not constitute a trade of the appellant within the meaning of section 10(1)(a) of the Income Tax Ordinance, 1947. As it is but a single business transaction carried out by the appellant and not part of a business carried on by him, it did not constitute a business of the appellant either within the meaning of the same section."

Buttross J. in D.E.F.'s case said at page 58 -

"After a careful examination of the authorities I have been unable to find a single instance of an isolated transaction of sale and purchase and nothing more being held to be an adventure or concern in the nature of trade.

In all the cases where it has been so held, there have been additional or attendant circumstances as illustrated in the authorities to which I have briefly referred which render the transaction an adventure or concern in the

In the High Court of Malaya at Penang

No. 2

Notes of Evidence

Submission of Respondents

24th March 1971

(continued)

In the High
Court in
Malaya at
Penang

No. 2

Notes of
Evidence

Submission of
Respondents

24th March
1971

(continued)

nature of trade. This isolated transaction of the taxpayer without more is not in my opinion an adventure in the nature of trade under the English Act."

8. From the above quoted passages, a principle can be derived that where there is an isolated transaction, such a transaction by a person will not fall under section 10(1)(a) unless the transaction was carried out with the intention of carrying on a business or it is carried out by him as part of his business. 10

9. The present case is not a case of mere buying and selling without more. It is a case of buying and selling lands and building as part of the business carried on by the appellant.

That the transaction was carried out with the intention of carrying on business is clear from the following -

(a) The appellant is a limited company. Unlike in the case of an individual, there is a presumption that a company is formed with the intention of carrying on business. 20

Refer to C.I.R. v. Eccentric Club, 12 T.C. at page 691 -

Per Pollock M.R. - "..... as a general rule in cases of a company registered with the appendix Ltd. there would be a strong presumption that it was intended to and did carry on a trade or business."

In California Copper Syndicate v. Harris
5 T.C. 159 30

Clerk L.J. said at page 166 - "The simplest case is that of a person or association of persons buying and selling lands speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by realisation, the gain they make is liable to be assessed for income tax." 40

(b) The main purpose for which the company was formed was to carry on business including the business of dealing in lands or building.

In the High Court in Malaya at Penang

Refer to clauses 3(i), 3(ii) and 3(viii) of the Memorandum of Association (Exhibit R.8).

No. 2

(c) It is submitted that dealings in lands and buildings are not contemplated merely as incidental objects. Even if it is contended by the appellant that the purpose of the transactions was to vary the investments, such transactions are amongst the appointed means by which the company hoped to carry on business. Profits arising therefrom are therefore taxable.

Notes of Evidence
Submission of Respondents
24th March 1971
(continued)

10

Refer to Scottish Investment Ltd. v. Forbes, 3 T.C. 23 at page 234 -

20

"But from the structure of the Memorandum it appears that the varying of the investments and turning to account are not contemplated merely as proceedings incidentally necessary for they take their place among what are the essential features of the business

30

.....
My view of the company is, therefore, that its position in the present question is entirely distinguished from that of a private individual or ordinary trader. Accordingly, I think that it is wrong in its contention that increases in realisation of stocks of the company are capital sums, and therefore not liable to assessment for income tax."

40

(d) Refer to letter dated 16.8.62 (Exhibit R.17) in which the company's Secretary admitted that the company was dealing in immovable property. This admission is fatal to the appellant's case. Great weight must be attached to it as it was made in good faith before any dispute as to the nature of the transaction arose.

(e) From the accounts, it is apparent that the appellant company was in poor financial position. The company had to resort to large overdraft and loan soon after incorporation. The overdraft or

In the High Court in Malaya at Penang

No. 2

Notes of Evidence

Submission of Respondents

24th March 1971

(continued)

loan position was as follows:-

1962 - overdraft \$491,355.44
 1963 - loan \$422,500.00
 1965 - overdraft \$101,575.11

loans \$1,015,500.00

(f) The lands were held by the company only for a short period and the building was sold even before it was completed. This coupled with the poor financial position of the company is indicative of the intention that the company never intended to keep the lands and the building as investment but to trade in them. The company wanted to recover the cost of purchase as soon as possible. Refer to Turner v. Last, 42 T.C. 517 (particularly last 2 paragraphs at page 523).

10

10. The facts stated in paragraph 9 above clearly distinguish the present case from E's case and D.E.F.'s case. In the present case there is ample evidence of intention to carry on business. Such evidence was not available in those two cases.

20

11. The lands and the building must be regarded as stock in trade of the company so that when they were sold, the profits are assessable to tax. Even if it is found that the lands were bought for the purpose of investment, i.e. to build hotel for rental purposes, it is submitted that the intention to invest must have changed when the resolution of 16.10.63 was passed. Since that date the lands and building became stock in trade. For cases as to change of intention, see -

30

James Hobson v. Newall, 37 T.C. 617
The Gloucester Railway etc. v. C.I.R. 12 T.C. 720
Sharpless v. Rees, 23 T.C. 361
Iswera v. I.R.C. (1965) 1 W.L.R. 663.

Special Commissioners' conclusions

12. The Special Commissioners in their grounds of decision came to the following conclusions -

(a) "We find that the facts in the Appellant Company's case point to the conclusion that the Appellant Company has carried on the

40

business of buying and selling property and that the profit in question has accrued to it from that business."

- (b) "..... we conclude that when the Appellant Company disposed of its land together with the International Building on it in exchange for the shares, it did so with this object of trafficking or dealing in or turning to account the property with a view to profit. Although there was only one such transaction it was a business transaction carried out with the intention of carrying on the business of dealing in property"

On the question whether the true intention of the appellant company was to expand its business of investments in securities as stated in the resolution, the Special Commissioners concluded at page 26 -

"..... we find it difficult to accept that the true object of acquiring those shares was in order to expand its investment. That the true object was not to expand or to hold investment in shares is confirmed by the fact that all of the \$175,000 shares in four other companies held by the Appellant Company in 1962 were transferred away by the end of 1963."

At page 29, the Special Commissioners further found -

" Hence we find that the Appellant Company was not only empowered by clause 3(i) and (ii) of its Memorandum of Association to traffic and deal in lands, houses and buildings but it had also the intention to traffic and deal in building which it did by the transfer of the land and building to Island Hotels and Properties (Malaysia) Limited in exchange for shares in that company. In other words the Appellant Company was empowered by its Memorandum of Association to carry on the business of trafficking in lands and buildings, it had that intention and it had carried out that intention. The classification of the construction costs as work in progress under current assets in the financial accounts seem to be consistent with the description by the Appellant Company's

In the High Court in Malaya at Penang

No. 2

Notes of Evidence

Special Commissioners' Conclusions

24th March 1971

(continued)

In the High
Court in
Malaya at
Penang

—
No. 2

Notes of
Evidence

Special
Commissioners'
Conclusions

24th March
1971
(continued)

Secretaries (a firm of accountants holding professional qualification) in Exhibit R.17, of the nature of its business as dealing in immovable property and land development, and we are further urged by this consideration to come to that conclusion."

13. It is submitted that these conclusions are conclusions of fact -

See Copper v. Stubbs, 10 T.C. 29
Page 30 "Held (by Warrington & Atkin L.J.J.), 10
that the finding of the Commissioners
that the transaction in question did
not constitute the carrying on of a
trade was entirely one of fact with
which the Court could not interfere..."

See also Edwards v. Bairstow (1956) A.C. 14, 36
T.C. 207.

14. The findings of the Special Commissioners should be disturbed only if the reasonable conclusion from the evidence contradicts the determination made by them: see Edwards v. Bairstow. 20

15. In view of the circumstances referred to in paragraph 9 above, and the way the lands and the building in question are dealt with in the company's accounts, it is submitted that there is more than sufficient evidence to justify the findings of the Special Commissioners.

The assessment should be confirmed even if, on the facts, it is felt that the decision could go either way, or that the evidence is inconclusive. 30

See The Geologists' Association v. C.I.R. 14
T.C. 271 -

Per Grees L.J. at page 282 -

"But there may be cases in which an inference of fact may go one way or the other, and if that is the case, then the matter is entirely one for the Commissioners, and no Court can disturb their finding."

See also Shadford v. H. Fairweather, 43 T.C.
291. 40

Rellim Ltd. v. Vise, 32 T.C. 254.

Per Wynn-Parry J. at page 258 -

"A discussion took place as to whether the onus of proof lay before the Commissioners, but I do not propose to go into that matter, I have to bear in mind (for this has been laid down in many cases) that not merely is the question one of fact, but in deciding whether or not there is evidence to support the Commissioners' finding, it is not for the Court to consider how the Court itself would have viewed the matter had it been res integra. If left free I might well have come to a different conclusion from that to which the Commissioners have come; but unless I can be satisfied that there was no evidence to support their finding, then I am bound to give effect to it."

In the High Court in Malaya at Penang

No. 2

Notes of Evidence
Special Commissioners' Conclusions

24th March 1971
(continued)

10

20

16. In view of the foregoing the Respondent contends that there is ample evidence to support the decision of the Special Commissioners and as such the appeal ought to be dismissed.

Senior Federal Counsel

No. 3

Judgment of The Honourable Mr. Justice H.S. Ong

IN THE HIGH COURT IN MALAYA AT PENANG

ORIGINATING MOTION NO. 5 OF 1969

30

Between

International Investment Limited

APPELLANT

And

The Comptroller-General of Inland Revenue RESPONDENT

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.

JUDGMENT

In the High
Court in
Malaya at
Penang

—
No. 3

Judgment of
The Honour-
able Mr.
Justice
H.S. Ong

15th March
1973

(continued)

This is an appeal by way of case stated against the decision of the Special Commissioners made September 19, 1968 that in transferring its property known as the International Building to Island Hotels and Properties (M) Limited in exchange for the shares in Island and Properties (M) Limited, the Appellant Company was carrying on the business of trafficking in immoveable property and that the profits obtained thereby by the Appellant Company were assessable under Section 10(1)(a) of the Income Tax Ordinance, 1947 to tax. 10

The facts as found by the Commissioners are as follows:

1. The Appellant Company, the International Investment Limited, was incorporated and registered in Malaya under the Companies Ordinance 1940 to 1946 on January 16, 1962, with an authorised capital of \$500,000/- divided into 5,000 ordinary shares of \$100/- each. The two subscribers to the Memorandum and Articles of Association were Tan Sim Hoe and Tung Yin Fong (f), wife of Chew Ming Teck, who were also the first directors of the Appellant Company. On its formation, the following persons applied for shares in it as follows:- 20

Tan Sim Hoe	1,400 shares
Chew Ming Teck	1,400 shares
Tung Yin Fong (f)	100 shares
Ong Siew Hong (f)	100 shares

30

2. As at December 31, 1962, the issued capital of the Appellant Company was \$300,000/- consisting of 3,000 ordinary shares of \$100/- each fully paid. In 1963, the authorised capital was increased to \$5,000,000/- divided into 50,000 ordinary shares of \$100/- each. As at December 31, 1963, the issued share capital was \$500,000/- consisting of 5,000 ordinary shares fully paid, and there was also Application and Allotment monies of \$500,000 received by the Company in respect of 5,000 ordinary shares applied for but not yet allotted. As at December 31, 1965, the financial position was still as it was at December 31, 1963, with Tan Sim Hoe and 40

his wife holding 50% of the shares and Chew Ming Teck and his wife the other 50%.

3. The Appellant Company acquired the lands on the dates stated below:
- (a) Lot Nos. 14(1), 14(2), 15(2) and 16(2) T.S. 16 N.E.D. Penang, on February 2, 1962;
 - (b) Lot No. 32, T.S. 16 N.E.D. Penang, on February 10, 1962;
 - (c) Lot No. 31, T.S. 16 N.E.D. Penang, on November 11, 1962;
 - (d) Lot No. 30, T.S. 16 N.E.D. Penang, some time in 1963.

In the High Court in Malaya at Penang

No. 3

Judgment of The Honourable Mr. Justice H.S. Ong

15th March 1973

(continued)

10

Lot No. 32 was purchased by the Appellant Company from Tan Sim Hoe and Chew Ming Teck while Lot Nos. 14(1), 14(2), 15(2), 16(2) and 31 were purchased from other persons. It is not clear from whom Lot No. 30 was acquired or whether by purchase. All these lots were situated in one area at Penang Road, Penang. The Appellant Company paid a total sum of \$8,300/- to 10 persons occupying old houses on the land Lot No. 32 as compensation for moving out of the land. The houses were demolished so that a building, later known as the International Building, could be erected thereon.

20

30

4. A written contract bearing a Stamp Office mark dated 31.3.62 was entered into between the Appellant Company and certain contractors whereby the latter contracted to carry out piling works for the purpose of the construction of the building on the land acquired by the Appellant Company. The contractors undertook to complete the piling works by 30.6.62. Tenders were received by the Appellant Company's architects from contractors, all dated May 15, 1962, for the erection of the building, which was described in the tender documents as six-storey shopping arcade and hotel building, on Lot Nos. 14(1), 14(2), 15(2) and 16(2).

40

5. On August 18, 1962, there was a news item published in a Penang Chinese newspaper

In the High
Court in
Malaya at
Penang

—
No. 3

Judgment of
The Honour-
able Mr.

Justice
H.S. Ong

15th March
1973
(continued)

referring to a building in respect of which construction works had started. According to the news item, part of the building would be used by the Malayan Banking for conducting its business and the rest of the building would be turned into a hotel consisting of 50 rooms all of which were likely to be air-conditioned, and that the hotel would include a night club, a bar and a restaurant.

6. On March 4, 1963, the Appellant Company entered into an agreement with another company whereby the latter contracted to erect the said building on the said lots and to complete it by October 30, 1963 at a cost of \$585,000/-. 10
7. On June 5, 1963 there was another news item published in the same newspaper about the opening two days earlier of the Malayan Banking Penang Road sub-branch on the ground floor of the International Building which had an escalator which was the first of its kind in Penang. 20
8. In about June 1962, one Low Cheh Seng, a partner in Pathe Hotel in Penang, approached Tan Sim Hoe and offered to rent the hotel rooms in the International Building. But negotiation failed as there was no agreement reached on the rental amount.
9. The Inland Revenue Department sent a letter dated April 27, 1962 (attached to this Case Stated as Annexure C) to the Secretary of the Appellant Company asking for certain information specified therein, and received a reply dated August 16, 1962 (attached to this Case Stated as Annexure D) from its accountants. 30
10. In 1963 the Appellant Company received \$7,044/- as rents of the arcade in the International Building.
11. On October 16, 1963, an extraordinary general meeting of the members of the Appellant Company was held, and at the meeting the following special resolutions were passed:- 40

- "1. That the business and undertaking of the Company be reconstructed and after such reconstruction to expand its business of investments in and the holdings of securities.
2. That the Company do convey its property known as Lots Nos. 14(1), 14(2), 15(2), 16(2), 30, 31 & 32 T.S. 16, N.E.D. Penang, together with the building erected thereon to Island Hotels & Properties (Malaysia) Limited in consideration of the issue of 2,846,300 shares of \$1/- each in the said Island Hotels & Properties (Malaysia) Limited all credited as being fully paid.
3. That the Company execute a Deed of Guarantee with Island Hotels & Properties (Malaysia) Limited whereby the Company undertake to complete the erection of the building now under construction on Lots 14(1), 14(2), 15(2), 16(2), 30, 31 & 32 T.S. 16 N.E.D. Penang to construct a driveway and car park and to undertake the fittings, fixtures, escalators, lifts, furnitures, telephone with P.A.B.X. equipment and all other things according to all the detailed plans and specifications, a copy of which will be annexed to the Deed of Guarantee in consideration of the issue of 903,700 shares of \$1/- each in the said Island Hotels & Properties (Malaysia) Limited as being fully paid.
4. That the Common Seal of the Company be and is hereby authorised to be affixed to the Agreement, conveyances and all other documents evidencing or constituting such transaction or expedient therefor."

In the High Court in Malaya at Penang

No. 3

Judgment of The Honourable Mr. Justice H.S. Ong

15th March 1973
(continued)

The Appellant Company transferred the International Building together with the land on which it was erected to the Island Hotels and Properties (Malaysia) Limited and made an undertaking to complete the building, and as a consideration for this the Appellant Company received \$3,750,000 shares of \$1/- each to the Island Hotels and Properties (Malaysia) Limited. The transfer included

In the High
Court in
Malaya at
Penang

No. 3

Judgment of
The Honour-
able Mr.
Justice
H.S. Ong

15th March
1973

(continued)

the arcade in the building. When the International Building was transferred to the Island Hotels and Properties (Malaysia) Limited, it was still under construction. The part of the building from the third floor to the top floor was not completed yet, but the ground, the first and the second floors had been completed and tenants were already occupying the ground and the first floors. Subsequently, all of these shares in the Island Hotels and Properties (Malaysia) Limited were transferred by the Appellant Company as follows:-

10

1,000,000 shares to Disco Limited on
2.12.63;
1,500,000 shares to Tan Sim Hoe on
4.1.64;
1,250,000 shares to Disco Limited on
4.1.64.

There was no resolution made by the Appellant Company that these shares be held by Disco Limited or by Tan Sim Hoe on trust for the Appellant Company.

20

12. In 1962 the Appellant Company held shares in the following companies as follows:-

Eng Hoe Chan Co. Ltd. - \$20,000 shares
Miami Properties Ltd. - \$60,000 shares
Chong Thai Realty Ltd. - \$75,000 shares
Pan Malayan Distributors - \$20,000 shares
Ltd.

30

At the end of 1963 the Appellant Company had transferred away all these shares in other companies.

13. Other than the International Building the Appellant Company has not constructed any building of a similar nature. Chew Ming Teck was a principal shareholder in Disco Limited. Tan Sim Hoe did not have any share in it.

There is no doubt on the authority of California Copper Syndicate v. Harris 5 T.C. 159, the excess of the value of the shares over the cost of the property can be treated as a profit chargeable to tax in proper cases.

40

10 For the Appellant Company, it was contended that to be chargeable, this excess of profit must be gain or profit from trade or business within the meaning of section 10(1)(a) of the Income Tax Ordinance. On behalf of the Company, it was urged that the Company was not carrying on the trade or business of buying and selling property but investment business. Support for this contention, it was pointed out, was to be found in the resolution passed at the extraordinary general meeting of the Appellant Company on October 16, 1963 to expand its business of investments in securities. It was contended further that this was an isolated transaction and was not even an adventure or concern in the nature of trade. Even if it were, it was not a profit assessable to income tax as under our law, unlike English Statutes, "trade" is not defined to include an adventure in the nature of trade. The Special Commissioners agree that if the transaction was an adventure in the nature of trade merely and nothing more, the profits would not be chargeable to income tax because such profits would not fall within section 10(1)(a).

20

30 For the respondent, however, it was contended that on the facts the transaction here was clearly a case of trafficking in lands and buildings. The declared objects of the Appellant Company as stated in paragraph 3(i) and (ii) of its Memorandum of Association was to traffic and otherwise deal in or to turn to account immoveable property. Although there was only one transaction, the Special Commissioners were of the view that it was a transaction carried out with the intention of dealing in property. The various matters connected with the erection of the building as set out in the Statement of Facts found by the Special Commissioners and the undertaking to complete the erection and to construct in accordance with detailed plans and specifications would support the conclusion of the Commissioners that the Appellant Company was in the business of dealing in land.

40

As Lord President Clyde said in Commissioner of Inland Revenue v. Livingston and Others 11 T.C. 358 at pages 542 and 543:

"If the venture was one consisting simply in an isolated purchase of some article against an expected rise in price and a subsequent

In the High Court in Malaya at Penang

—
No. 3

Judgment of The Honourable Mr. Justice H.S. Ong

15th March 1973
(continued)

In the High
Court in
Malaya at
Penang

No. 3

Judgment of
The Honour-
able Mr.
Justice
H.S. Ong

15th March
1973
(continued)

sale it might be impossible to say that the venture was 'in the nature of trade'; because the only trade in the nature of which it could participate would be the trade of a dealer in such articles, and a single transaction falls as far short of constituting a dealer's trade, as the appearance of a single swallow does of making a summer. The trade of a dealer necessarily consists of a course of dealing, either actually engaged in or at any rate contemplated and intended to continue. But this principle is difficult to apply to ventures of a more complex character such as that with which the present case is concerned. I think the test, which must be used to determine whether a venture such as we are now considering is, or is not, 'in the nature of trade', is whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made. If they are, I do not see why the venture should not be regarded as 'in the nature of trade', merely because it was a single venture which took only three months to complete. The respondents began by getting together a capital stock sufficient (1) to buy a second-hand vessel, and (2) to convert her into a marketable drifter. They bought the vessel and caused it to be converted at their expense with that object in view, and they successfully put her on the market. From beginning to end, these operations seem to me to be the same as those which characterise the trade of converting and refitting secondhand articles for sale. It may be that, in commercial practice relative to ships, this kind of business is not usually followed separately from the general business of ship-builders and ship-repairers. But, even so, I think it is none the less 'in the nature of trade'. The profit made by the venture arose, not from the mere appreciation of the capital value of an isolated purchase for resale, but from the expenditure on the subject purchased of money laid out upon it for the purpose of making it marketable at a profit. That seems to me of the very essence of trade."

The letter of August 16, 1962 (Annexure D)

stated under (c), that the nature of the business conducted by the Company is dealing in immoveable property and land development. The financial accounts of the Appellant Company described the construction costs as "work in progress" under current assets and is consistent with the description of the Company's business as stated by its Secretaries.

In the High Court in Malaya at Penang

No. 3

Judgment of The Honourable Mr. Justice H.S. Ong

15th March 1973
(continued)

10 I have had my attention drawn to the decision of the Federal Court in E. v. C.I.R. (1970) 2 M.L.J. 118. In my view, the facts of this case are distinguishable. Here we are dealing not with an individual but with a company formed with the declared object of trafficking and dealing in land and buildings.

20 Contrary to its resolution passed on October 16, 1963 for expansion of its investment business some one million shares obtained in exchange for the property were transferred away by the Appellant Company and about one month later, the rest of the shares so obtained were similarly dealt with. By the end of 1963, its holding of shares in four other Companies were also transferred away.

As Lord Carmont said in C.I.R. v. Reinhold 34 T.C. at 392:

30 "certain transactions show inherently that they are not investments but incursions into the realm of trade or adventure of that nature This means that although in certain cases it is important to know whether a venture is isolated or not, that information is really superfluous in many cases where the commodity itself stamps the transaction as a trading venture and the profits and gains are plainly income liable to tax."

I therefore hold that the facts of this case justify the decision of the Special Commissioners. The appeal is dismissed with costs.

40 Dated at Penang this 15th day of March, 1973.

TRUE COPY

Sgd; illegible
Secretary to the Judge
High Court, Malaya,
Penang.

Date: 3.4.73

Sgd: H.S. ONG
(TAN SRI H.S. ONG)
JUDGE,
HIGH COURT, MALAYA.

In the High Court in Malaya at Penang.

No. 4

Order of the High Court

15th March 1973

No. 4

Order of the High Court

IN THE HIGH COURT AT PENANG
ORIGINATING MOTION NO. 5 OF 1969

Between

International Investment Sendirian Berhad

Appellant

And

Comptroller-General of Inland Revenue

Respondent

O R D E R

Before The Honourable Mr. Justice H.S. Ong

10

This 15th day of March, 1973

In Open Court

WHEREAS pursuant to paragraph 34 of Schedule 5 to 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 come on to be heard on the 24th day of March, 1971;

AND UPON READING the same and UPON HEARING Mr. C.O. Lim and Mr. Lim Ewe Hock of Counsel for the Appellant and Encik Nik Saghir b. Mohd. Noor, Senior Federal Counsel for the Respondent IT WAS ORDERED that this case do stand adjourned for judgment AND the same coming on for judgment this 15th day of March, 1973;

20

THIS COURT IS OF OPINION that the decision of the said Special Commissioner of Income Tax is correct AND IT IS ALSO ORDERED that the Appeal be and is hereby dismissed and the Deciding Order of the Special Commissioners of Income Tax dated the 19th day of September, 1968 be and is hereby confirmed;

30

AND IT IS LASTLY 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 15th day of March, 1973.

(L.S.) Sgd: Nadiah bte. Haji Salleh
Senior Assistant Registrar,
High Court, Penang.

65.

No. 5

Notice of Appeal

IN THE FEDERAL COURT OF MALAYSIA (APPELLATE
JURISDICTION)

CIVIL APPEAL NO. 50 OF 1973

Between

International Investment Limited Appellants

And

10 The Comptroller-General of Inland Respondent
Revenue

In the matter of 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

(In the matter of Penang High Court
Originating Motion No. 5 of 1969)

Between

International Investment Appellants
Limited

20 And

The Comptroller-General of Respondent
Inland Revenue

In the matter of Appeal No. ITBR 535

Between

International Investment Limited Appellants

And

The Comptroller-General of Respondent
Inland Revenue

NOTICE OF APPEAL

30 TAKE NOTICE that International Investment
Limited the Appellants herein being dissatisfied
with the decision of the Honourable Tan Sri H.S.
Ong given at the High Court at Penang on the 15th

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

No. 5

Notice of
Appeal

6th April
1973

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

day of March, 1973 appeal to the Federal Court
against the whole of the said decision.

Dated this 6th day of April, 1972.

Sgd: Lim Ewe Hock

Solicitor for the Appellants

No. 5
Notice of
Appeal
6th April
1973
(continued)

To:

The Registrar,
Federal Court of Malaysia,
Kuala Lumpur

And to:

The Senior Assistant Registrar,
High Court,
Penang

10

And to:

The Comptroller-General of Inland Revenue,
c/o The Senior Federal Counsel,
Inland Revenue Department,
Kuala Lumpur.

The Address for service of the Appellants is
at the office of their Solicitor, Mr. Lim Ewe Hock,
No. 13, Church Street (Top Floor) Penang.

20

Received this 6th day of April, 1973.

Deposit of \$500.00 lodged in Court this
6th day of April 1973.

Entered in the List of Civil Appeals this
6th day of April 1973.

(L.S.) Sd: NADIAH BTE. HAJI SALLEH

Senior Assistant Registrar
High Court,
Penang.

30

67.

No. 6

Memorandum of Appeal

IN THE FEDERAL COURT OF MALAYSIA (APPELLATE
JURISDICTION)

CIVIL APPEAL NO. 50 OF 1973

Between

International Investment Limited

Appellants

And

The Comptroller-General of Inland
Revenue

Respondent

10

In the matter of 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

(In the matter of Penang High Court
Originating Motion No. 5 of 1969)

Between

International Investments Limited

Appellants

And

The Comptroller-General of Inland
Revenue

Respondent

20

In the matter of Appeal No. ITBR 555

Between

International Investment Limited

Appellants

And

The Comptroller-General of Inland
Revenue

Respondent

MEMORANDUM OF APPEAL

30

International Investment Limited the Appellants
abovenamed appeal to the Federal Court against the
whole of the decision of the Special Commissioners
dated the 19th day of September, 1968 and of the
Honourable Mr. Justice H.S.Ong given on the 15th

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

No. 6

Memorandum
of Appeal

11th May 1973

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

—
No. 6

Memorandum
of Appeal
11th May 1973
(continued)

day of March, 1973, on the following ground:

1. That the Special Commissioners and the Judge erred in law in holding that the facts were sufficient to constitute the carrying on of a business within Section 10(1)(a) of the Income Tax Ordinance 1947.

2. For the above ground, the Appellants say that the Judge should not have confirmed the deciding Order of the Special Commissioners of Income Tax for the Respondent against them with costs and the Appellants therefore pray that the said decision of the Special Commissioners and the Judge be set aside accordingly.

10

Dated this 11th day of May, 1973.

LIM EWE HOCK

Appellants' Solicitor.

To:

The Registrar,
Federal Court,
Kuala Lumpur.

20

and to:

The Senior Assistant Registrar,
The High Court in Malaya
at Penang

and to:

The Comptroller-General of Inland Revenue,
c/o the Senior Federal Counsel,
Inland Revenue Department,
Kuala Lumpur.

The address for service of the Appellants is at the office of their Solicitor Mr. Lim Ewe Hock of No.13, Church Street (Top Floor), Penang.

30

No. 7

Notes of Argument recorded by Gill C.J.

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA
LUMPUR (APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO. 50 OF 1973

Between

International Investment Limited Appellants

And

The Comptroller-General of Respondent
Inland Revenue

10

(In the matter of CASE STATED by the Special
Commissioners of Income Tax for the opinion
of the High Court pursuant to paragraph 34
of the Schedule 5 to the Income Tax Act 1967
In the matter of Penang High Court
Originating Motion No. 5 of 1969

Between

International Investment Limited Appellants

And

The Comptroller-General of Respondent
Inland Revenue

20

In the matter of Appeal No. ITBR 535

Between

International Investment Limited Appellants

And

The Comptroller-General of Respondent)
Inland Revenue

30

Coram: Gill, Chief Justice, Malaya,
Raja Azlan, Judge, Federal Court,
Wan Suleiman, Judge, Federal Court.

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

No. 7

Notes of
Argument
recorded by
Gill C.J.

29th October
1974

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

No. 7

Notes of
Gill C.J.

29th October
1974
(continued)

NOTES OF ARGUMENT RECORDED BY GILL C.J.

Kuala Lumpur,
29th October 1974.

Mr. Barry Pinson with Mr. Lim Ewe Hock and Miss
Goh Kooi Choo for Appellants.

Encik Mohamed Nizar bin Idris for Respondent.

Barry Pinson:

This is a tax appeal from a decision of H.S.
Ong F.J. affirming the decision of the Special
Commissioners. Income Tax was claimed for the
year 1964. Refer to section 10 of the Income
Tax Ordinance. 10

The relevant provision is in section 10(1)(a).

The material question is whether the appellant
company carried on business during the relevant
year.

Three conditions have to be satisfied before
tax is payable. (1) Person assessed must carry on
trade. (2) Profit which is sought to be taxed must
accrue from the trade or business, and (3) Profit
must be income profit and not capital profit. The
appellant Company contends that none of the
conditions was satisfied this year. 20

In the United Kingdom "trade" is defined as
an adventure of concern in the nature of trade.
Refer to E. v. Comptroller General of Inland Revenue
(1970) 2 M.L.J. 117. Read the headnote.

Salient facts of the case. Appellant Company
incorporated in January 1963 with a capital of
\$300,000 later increased to \$500,000. The
memorandum of Association gave the Company very
wide powers including dealing in land and shares,
investing in land and share and to carry on a
number of kinds of business ranging from rubber
planting to importing and exporting cameras and
watches. 30

Refer to resolution at page 17 and continued
at page 18. This was an exchange of one investment
for another investment. This was an expansion of
the business as contemplated by the resolution. 40

Refer to profit and loss accounts and balance sheets at pages 38, 39, 40, 41. The Company had expanded its investments. Profits (capital) shown at page 39 under current liabilities, transferred to Reserve at page 40.

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

No. 7

Notes of
Gill C.J.

29th October
1974

(continued)

10 Refer to deciding order at page 42 from which there was an appeal of case stated. We say that the profit was a capital profit and not a profit derived from trafficking in immoveable property. Had this been a transaction by an individual then the case of E. v. Controller of Income Tax. The Company had as one of its objects investment in property. The Company itself was an investment company. One has to look at what a company does. The accounts are only consistent with investment. There is no question of trafficking in land.

20 Read the case starting at page 6. Come to facts found starting at page 14. The deciding order is at page 42. Come to the grounds of judgment starting at page 43. No evidence in this case that the Company embarked on a trade. The Commissioners misinterpreted the words of Ambrose J. in the D.E.F. Case (see page 47). It is not correct, as the Commissioners say in their judgment, that the appellant company did not retain beneficial ownership of the 3,750,000 shares, except that it is correct that 1,000,000 of such shares were transferred to and subsequently reacquired from Mr. Chew Ming Teck. Refer to the accounts again. There were no facts on which the Commissioners could say that the appellant Company was trading in the sale of land, classification of shares as assets belonging to the Company.

30 The Commissioners were wrong in saying that the resolution was not relied on. Land was capital asset. Profit on exchange was capital profit. Refer to annexures C and D.

Court adjourned and resumed after 15 minutes.

Pinson (continuing)

40 Come to the judgment of H₂S. Ong J. starting at page 78. Read from page 84. Refer to Copper Syndicate v. Harris 5 T.C. 159, 166, 167. No evidence that Hotel Shares were acquired for sale. In the Copper Syndicate there was evidence the Company had no intention to mine the land. That

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

—
No. 7

Notes of
Gill C.J.

29th October
1974

(continued)

case therefore is not material in this case. In the present case it was not even an adventure in the nature of trade. Assuming it is so even then it was not liable to tax. The object of the Company was to develop land and to hold it as an investment.

Read on the judgment where the learned Judge refers to Commissioner of Inland Revenue v. Livingston and others 11 T.C. 358, 542 and 543 (per Lord President). In any event, in that case the transaction was held to be an adventure in the nature of a trade. In that case, the boat was not bought for investment. Mere realisation of money by sale of land does not indicate intention to traffic. There was only one transaction. Dealing is clearly distinguishable from investment. There is nothing to suggest that the accounts are not proper.

10

The question is whether there are sufficient facts on which the Special Commissioners could come to their finding.

20

Read from page 89 where the learned Judge refers to a passage from Lord Carmont in C.I.R. v. Reinhold 34 T.C. 392. Read headnote of the case, Read the whole of paragraph 3 at page 392. Distinction between non-profit yielding investments. Toilet paper and whiskey could only be bought for the purpose of sale. Read para. 2 at page 395 (Lord Russell's judgment). Read para. 4 at page 396 (Lord Keith's case).

30

Questions for the decision of this Court are as set out at page 12. Commissioners relied on four points for their decision. First, one of the declared objects of the Company was dealing in land; therefore when the Company when it disposed of its land for shares it was trafficking in property, although this was an isolated transaction. Secondly, they say the resolution of 16.10.1963 by which the Company purported to expand its holdings of investment cannot be relied on to show that the Company was not trading but merely substituting one investment for another because the Company did not retain ownership of the Island Hotel shares. Thirdly, the treatment of the construction costs in the 1962 balance sheet as "work in progress" and as current assets shows that the land was stock in trade. Fourthly, that the reply by the

40

Secretary to the Revenue's letter in annexure C indicates that the Company intended to trade.

10 The first question is what weight to attach to the Memorandum of Association. I submit on authorities that very little weight can be attached to the objects clause. On the second point it is clear that the Company did expand its investment. I say nothing turns on what is said in the account as current assets and not fixed assets. I don't think that the Commissioners or the Judge attached any importance to the fourth question.

The main question is what weight is to be attached to the objects clause. The Commissioners relied on what Ambrose J. said in the D.E.F. Case (See grounds of judgment at page 46). There is no trafficking here. There must be evidence outside the objects clause to show that the land was bought with the object of resale.

20 Refer to E. v. Comptroller General of Inland Revenue (1970) 2 M.L.J. 117.

Sd. S.S. Gill

Adjourned to 2.30 p.m.

Resumed at 2.30 p.m.

Pinson (continuing)

Refer to Memorandum of Association.

30 Refer to Balgownie Land Trust Ltd. v. The Commissioners of Inland Revenue, 14 T.C. 684. Case of sale of not only what they had but the lands which they subsequently purchased. Read last para. from Lord President's judgment at page 691 continued at page 692. Refer to the Commissioners of Inland Revenue v. The Hyndland Investment Company Limited 14 T.C. 694, 699. Both cases are authorities for the proposition that you cannot rely too much on the objects clauses.

40 Refer to Lewis Emanuel & Son Ltd. v. White (H.M. Inspector of Taxes) 42 T.C. 369, 377. You must look to see what the Company does. It matters not whether what it does is ultra vires.

Refer to Cotman v. Brougham (1918) A.C. 514,

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

No. 7

Notes of
Gill C.J.

29th October
1974

(continued)

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

No. 7

Notes of
Gill F.J.

29th October
1974

(continued)

521. Here the name of the Company is an Investment Company. I say that the Commissioners were wrong in saying that because one of the objects of the Company was dealing in land, therefore the transaction was trafficking in land.

The second point is that the accounts show clearly that the Company expanded its investments. Refer to E's case at page 129 (last para.). That is what happened here.

The third point is that the mention of "construction of building" under current assets was indicative of trafficking. But that was not so. To that extent the account is wrong. Accounts point in one direction namely, investment. This is a case of one investment being substituted for another.

10

Is there any evidence of trafficking here. Refer to D's case at page 126 starting from bottom para. of left column.

There are 8 factors which point to the fact of investment and not trafficking in immoveable property. (1) Name of the Company, (2) the Company has the powers of an investment company, (3) the asset is capable of being held as an investment, (4) as early as 1962 there were negotiations for the renting of the Hotel (see page 17A of record), (5) the arcade was rented (page 16C) also the ground and first floors (page 19A), (6) there is no evidence that the property was pre-destined to be sold, (7) the resolution of 1963 refers to the expansion of the Investment business (P.17D) and the Company in fact did expand its business, and (8) accounts of the Company are not those of a trading Company but those of an investment Company. (a) There was no stock of land which was circulating (b) The profit on the transfer of the land was carried to Reserve as a Capital Profit as would normally be the case with an investment Company. The very most that could be said in this case is that the transaction here was an adventure in the nature of trade.

20

30

40

Refer to Taylor v. Good (Inspector of Taxes) (1974) 1 W.L.R. 556, 559. The mere act of developing land is completely neutral.

These are not facts on which the Commissioners could have decided that the transaction constituted

trafficking in land. Refer to Edwards v. Bairstow 36 T.C. 207, 229. Appeal should be allowed.

Nizar:

My submission will be divided into two parts. But before that I would mention a few points made by Mr. Pinson.

Nowhere in the case stated is there any mention of the accountant giving evidence, nor was there any specific finding of fact.

10 The second point is about the sale of the land and shares. What is said by Mr. Pinson about the accounts is not supported by the case stated. Refer to page 19 of record.

Refer to Edwards v. Bairstow 36 T.C. 207, 229. The Commissioners found the facts correctly and the learned judge was right in accepting.

20 In a case of this nature it is difficult to ascertain the intention of the Company. I agree that what is contained in the memorandum of association is never decisive of the point.

30 Refer to Emanuel & Son Ltd. v. White 142 T.C. 369, 377. If there are a number of objects it is possible to consider them together in relation to any transaction. Refer to clauses 3(i), (ii) (vii) and (viii) of Memorandum of Association. If there was only one object, namely, investment, one could say it was essentially an investment Company. But that is not so. It is my submission that dealings in land are not mentioned as incidental to investment. Refer to Scottish Investment Trust Company v. Forbes 3 T.C. 231, 234.

Apart from the memorandum there is general presumption that a Company is formed with the intention of carrying on business. Refer to C.I.R. v. Eccentric Club 12 T.C. 689, 691.

40 I now refer to facts. Strong piece of evidence to show the intention of the Company. Refer to the letter at page 36 (annexure D). This was long before any dispute arose. This admission at para 1(c) was made by the Company's Secretary. Refer to H.L. Bolton (Engineering) Co. Ltd. v. T.J. Graham & Sons Ltd. (1956) 3 All E.R.

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

—
No. 7

Notes of
Gill F.J.

29th October
1974
(continued)

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

624, 630. Intention of the Company was made clear by the letter. Refer to page 88 line B 2. It is my submission that more weight should be attached to this letter. It was a letter in good faith.

No. 7

Notes of
Gill F.J.
29th October
1974
(continued)

May I turn now to the accounts. In the earlier years the Company was not in a strong financial position. I do not know why the accounts for 1964 were not put in. In 1962 they had an overdraft of \$491,355.44. In 1963 they had loans to the extent of \$822,500. In 1965 they had a Bank overdraft of \$101,575.11. The rental income would be insufficient to pay off the overdrafts and the loans. Sale of the property must have therefore been in their minds.

10

Adjourned until 11 a.m.

Sd. S.S. Gill.

30th October
1974

30th October 1974

Hearing continued. Counsel as before.

Nizar: (continuing)

20

Yesterday I submitted about the lapse of time between the date of purchase of the land and its sale to the Islands Hotel. The building was sold before it was completed. Refer to Turner v. Last 42 T.C. 517, 522 (last para.), 223 (last two paras. from judgment of Cross J.). There was a quick sale here.

Refer to the accounts. In the 1962 accounts the building was shown as "work in progress" and it was classified as its "current assets". This is relevant to determine the intention of the Company. It was not described as a fixed asset. Refer to Spicer & Pegler's Book-keeping and Accounts, page 3 as to what is meant by fixed assets and current assets. The Company must classify its assets as required by section 125 of the Companies Ordinance 49/40.

30

The Commissioners made reference to two cases at page 49 of the record.

To summarise the facts on which the Special Commissioners founded their decision. First, the

memorandum of association of the Company showing the main and primary objects of the Company. Secondly, the appellant in this case is a Company and the presumption that a Company is formed for the purposes of carrying on a business. Thirdly, the admission of the secretary in the letter to the Department at page 36 of the record. Fourthly, the financial position of the Company. Fifthly, the method of drawing up the accounts. Sixthly, the accounts were audited by an independent auditor. Seventhly, the land and building was held only for a short period of time. Lastly, the building was sold before it was completed.

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

No. 7

Notes of
Gill F.J.

30th October
1974
(continued)

The next thing to consider is whether the profits from the transaction are caught by section 10(1)(a) of the Income Tax Ordinance, 1947. Refer to California Copper Syndicate v. Harris 5 T.C. 159, the case relied on by the Special Commissioners and the learned Judge. Read judgment at page 165.

Refer to Western Gold Mines No Liability v. Commissioner of Taxation, Vol. 1 Australian Income Tax Report 248, 253 (judgment of Lathan C.J. 11th line).

Even if this was an isolated transaction, as a business it is caught by section 10(1)(a) of Income Tax Ordinance 1947. The Commissioner in this case used the word "traffic" but they used it in connection with business. They borrowed the word "trafficking" from the memorandum of association. Both the Commissioner and the Judge found it to be a business. The question is whether there is any distinction between trade and business. Refer to C.I.R. v. The Forth Conservancy Board 16 T.C. 103, 116; C.I.R. v. The Korean Syndicate Ltd. 12 T.C. 195, 196; St. Aubyn Estates Ltd. v. Strick 17 T.C. 412, 419. The Ordinance uses both words. In the absence of any definition, one must consider the ordinary meaning of the word. Refer to the judgment of this Court in Civil Appeal 152/73 - D.I.R. v. Chin Kok Keong. The 1967 Act is not an amending Act, as stated in that case. The question is whether an adventure in the nature of trade is caught by the word "business".

There was sufficient evidence for the conclusion at which the Special Commissioner arrived. The appellant Company in this case was carrying on a business. The profits made therefore are taxable.

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

No. 7

Notes of
Gill F.J.

30th October
1974
(continued)

Pinson (in reply)

The accounts were in evidence. There is no evidence that the Commissioners did not accept them as a correct record of the income and capital position of the Company. The accounts show that the share certificates were not in the possession of the Company. The beneficial ownership remained in the Company.

The Company was not trafficking in land. It was an investment company. Too much weight has been given to the reply by the Secretary as to the objects of the case.

The land is described in the accounts as fixed assets. There is nothing in the Commissioners' order that they relied on the facts mentioned by counsel by the respondent. This case is similar to D's case.

C.A.V.

Sd. S.S. Gill

True Copy
Sgd. G.E. Tan
.....

Secretary to Chief Justice
High Court
Malaya
16/9/75

No. 8

Notes of
Raja Azlan
Shah F.J.

29th October
1973

No. 8

Notes of Raja Azlan Shah F.J.

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA
LUMPUR (Appellate Jurisdiction)

FEDERAL COURT CIVIL APPEAL NO. 50 OF 1973

Between

International Investment Limited

Appellants

And

The Comptroller-General of
Inland Revenue

Respondent

10

20

30

(In the matter of CASE STATED by the Special Commissioners of Income Tax for the opinion of the High Court pursuant to paragraph 34 of the Schedule 5 to the Income Tax Act 1967 In the matter of Penang High Court Originating Motion No. 5 of 1969

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 8

Between

International Investment Limited Appellants

And

10 The Comptroller-General of Inland Revenue Respondent

Notes of Raja Azlan Sah F.J.

29th October 1973 (continued)

In the matter of Appeal No. ITBR 535

Between

International Investment Limited Appellants

And

The Comptroller-General of Inland Revenue Respondent)

20 Coram: Gill, C.J., Malaya
Raja Azlan Shah, F.J.,
Wan Suleiman, F.J.

NOTES OF ARGUMENT RECORDED BY RAJA AZLAN
SHAH, F.J.

KUALA LUMPUR,
TUESDAY, 29TH OCTOBER, 1974

Barry Pinson with Lim Ewe Hock and Goh Kooi Choo for Appellants.

Mohd. Nizar Idris for Respondent.

Pinson:-

Section 10(1)(a) Income Tax Ordinance, 1947.

30 Material question whether or not appellant company carried on business in relevant year, and whether profits accrued were income from that business.

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

No. 8

Notes of
Raja Azlan
Shah, F.J.

29th October
1973
(continued)

Three conditions to be satisfied:-

- (1) trade or business
- (2) profits must accrue to the person from the business
- (3) profit must be income and not capital profit.

In U.K. trade defines as adventure or concern in nature of trade.

E. v. Comptroller-General of Inland Revenue
(1970) 2 M.L.J. 117.

Director-General of Inland Revenue v. Chin Kok Keong F.C.C.A. 152/73.

10

Incorporated in 1963 with issued capital of \$300,000/- and increased to \$500,000/-.

Memorandum of Association gave company very wide powers including dealing in land and shares, to invest.

In 1962, 63.

Building not completed until 1965.

Company had bought land, but constructed building. While in this process it exchanged for shares in another company.

20

Submitted this was an investment.

"reconstructed".

An extension of the investment business as shown in the company's accounts.

page 38 "work in progress"

page 39 "investment in Island Hotel and Properties"

page 40

Commissioners decision at page 42.

30

Question for opinion of Court is
page 12.

Submitted profit was capital profit and not profit derived from trafficking in immovable property.

Facts found by Special Commissioners - page 14.

Deciding Order -page 42.

Grounds of Decision of Special Commissioners - page 43.

If land held as trading stock, then we have no defence.

Judgment/page 78.

California Copper Syndicate v. Harris 5 T.C. 159, 166, 167, 165.

Property in question constructed as an investment.

Distinguished.

L/J missed point in Livingston's case and applied it to present case.

Distinguished - (1) in nature of trade.

Commissioners of Inland Revenue v. Reinhold 34 T.C. 392 - if land is purchased with intention of reselling at a profit, it is still not in the nature of trade.

Questions for opinion of Court - page 12.

Special Commissioners relied on 4 points:-

- (1) one of declared objects of company was dealing in land. Therefore when company disposed of its land for shares it was trafficking in property although this was an isolated transaction.
- (2) resolution of 16.10.'63 by which company purported to expand its holding of investment cannot be relied on to show that company was not trading but merely substituting one investment for another because company did not retain ownership of the Island Hotel shares.

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

No. 8

Notes of
Raja Azlan
Shah, F.J.

29th October
1973
(continued)

10

20

30

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

—
No. 8

Notes of
Raja Azlan
Shah, F.J.

29th October
1974
(continued)

(3) The treatment of the construction clause in 1962 balance sheet as "work in progress" and as current assets shows that the land was stock-in-trade.

(4) that the reply by Secretary to Questionnaire from I.R.C. in Annexure C indicates that the company intended to trade.

(1) what weight to attach on the object clause where there are several object clauses. Submit very little weight to be attached. 10

(2) Clear from the accounts that company did in fact expand its business in investments.

(3) Submit no weight to be attached to that clause. It was a mistake.

(4)

(1) The most important is:-

What weight to be attached to the object clause of the company?

page 46 para. 3.

D.E.F. case page 68. 20

E's case at page 127.

Balgownie Land Trust Ltd. 14 T.C. 684, 691, 693.

Main object clause is not indication of what a company does.

The Commissioners of Inland Revenue v. The Hyndland Investment Company, Limited 14 T.C. 694, 699.

Lewis Emanuel & Son Ltd. v. White 42 T.C. 369. Relevance of the object clause. 30

page 377.

Cotman v. Brougham (1918) A.C. at page 521. Name of company is material.

Special Commissioners quite wrong in assessing that

No mention of investment clause

- (2) Accounts showed clearly company spent monies on investment.

E's case at page 129 applicable in present case.

- (3) Auditor admitted was an error. Submitted one investment substituted for another.

- (4) Nothing - in view of nature of questionnaire.

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

—
No. 8

Notes of
Raja Azlan
Shah, F.J.

29th October
1974
(continued)

10 If all 4 factors are wrong, any other facts on which Special Commissioners could rely.

E's case at page 126.

A trade involves repetition of business.

Eight factors which point to investment and not trafficking in property

- (1) Name of company - Cotman v. Brougham.
- (2) company has the powers of an investment company.
- 20 (3) Asset is capable of being held as an investment. Cites Reinhold's case.
- (4) as early as 1962 there were negotiations for renting of hotel - page 17A of record.
- (5) arcade was rented - page 17C of record, also ground and 1st floors - page 19A.
- (6) no evidence that property was pre-destined to be sold.
- (7) resolution of 1963 refers to expansion of investment business - page 17D and the company did in fact expand its investment.
- 30 (8) accounts of company are not consistent with that of trading company as that of investment company
- (a) no stock of land circulating

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

No. 8

Notes of
Raja Azlan
Shah, F.J.

29th October
1974
(continued)

(b) profit on transfer of land was carried to reserve as a capital profit as would normally be the case with an investment company.

Cites Hyndland case and Balgownie case.

Material time of a trading company.

Cites Taylor v. Good (1974) 1 W.L.R. 556, 559.

Cites Edwards v. Bairstow 36 T.C. 207, 229.

Appeal from case stated.

Nizar:-

10

Findings of fact. First relates to the accounts. Special Commissioners made no reference to evidence of the accountants. Neither was there a finding by them.

Second, evidence of subsequent sale. Observations of auditors, page 19A of record.

Edwards v. Bairstow at page 229.

Commissioners have made specific findings of fact.

Lewis Emanuel v. White 42 T.C. 369, 377, 378.

20

"On the other hand

Clauses 3(i) (ii) & (viii) (vii) of Memorandum of Association.

Material objects -

Scottish Investment Trust Company v. C.I.R.
3 T.C. 231 at page 234.

C.I.R. v. Westleigh Estate Co. 12 T.C. 689,
691.

Presumption that a company is formed to do business.

30

Annexure D at page 36 of record. This was made long before any dispute arose by a person who is knowledgeable in the affairs of the company. Secretary of the company.

Board of Directors are the mind of the company - H.L.Bolton Co. v. T.J.Graham & Sons - (1956) 3 All E.R. 624, 630.

Page 88B

Accounts - page 38.

Company not in sound financial position in early years. Bank overdraft in 1962 of 491,355.44. It had a loan in 1963 of 822,500.00. In 1965, overdraft of 101,575.11.

To 30.10.74 at 11.00 a.m.

WEDNESDAY, 30TH OCTOBER, 1974

Contd.

Nizar:-

Lapse of time between date of purchase of land in 1962 and the sale to Island Hotel on 16.10.63.

Building sold before completion.

Turner v. Last - 42 T.C. 517, 522, 523.

There were facts before the Commissioners that they did not intend to hold the land for long.

Another fact before the Commissioners - Balance Sheet in page 38. "Work-in-progress" building described as current assets.

page 3 Spicer & Pegler - Book-keeping & Accounts.

Distinction between fixed assets and current assets.

Section 125 Companies Ordinance 49/40.

Grounds of Special Commissioners - pages 49-50 Cases cited.

Summarising of the facts before Special Commissioners:-

(1) Memorandum of Association.

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

No. 8

Notes of
Raja Azlan
Shah, F.J.
29th October
1974
(continued)

10

20

30

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

No. 8

Notes of
Raja Azlan
Shah, F.J.

30th October
1974
(continued)

- (2) Appellant is Company Limited.
- (3) Admission by company's secretary -
Annexure D (page 36).
- (4) Financial position of company.
- (5) Methods of drawing out the accounts.
- (6) Accounts audited by independent auditor.
- (7) Land and building was held for short period
of time.
- (8) Building sold before completed.

On these facts whether profits derived from
this transaction is caught within Income Tax
Ordinance section 10(1)(a).

Case relied on by Special Commissioners and
trial judge.

California Copper Syndicate v. Harris 5 T.C.
159, 165.

Western Gold Mines No Liability v.
Commissioners of Taxation - 1 A.I.T.R 248, 250.

Special Commissioners found that company was
carrying on business although word "trafficking"
was used. They borrowed that word from Memorandum
of Association. 20

Also did the trial judge.

The Commissioners of Inland Revenue v. The
Forth Conservancy Board - 16 T.C. 103, 116. Definition
of "trade".

Definition of "business", -

The Commissioners of Inland Revenue v. The
Korean Syndicate Ltd. - 12 T.C. 195, 196.

St. Aubyn Estates Ltd. v. Strick - 17 T.C.
412, 419. 30

D/G.I.R. v. Chin Kok Keong - F.C.C.A. 152/73.

Reply:-

Accounts is in evidence. Beneficial ownership still remain with appellant company.

Lewis Emanuel - no relevance to this appeal.

Business must be that of buying and selling land, i.e. trafficking in land, if tax is attracted.

Must see what the company "actually" does - E's case.

Financial position of company.

10 Whether there were facts before the Special Commissioners that the company was "trafficking" in land.

C.A.V.

Inltd.

RAJA AZLAN SHAH, F.J.

No. 9

Notes of Wan Suleiman F.J.

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR (Appellate Jurisdiction)

20 FEDERAL COURT CIVIL APPEAL NO. 50 OF 1973

Between

International Investment Limited Appellants

And

The Comptroller-General of Inland Revenue Respondent

In the matter of 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.

30 (In the matter of Penang High Court Originating Motion No. 5 of 1969)

In the Federal Court of Malaysia (Appellate Jurisdiction)

No. 8

Notes of Raja Azlan Shah, F.J.

30th October 1974 (continued)

No. 9

Notes of Wan Suleiman F.J.

29th October 1974

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

Between

International Investment Limited Appellants

And

The Comptroller-General of Inland Revenue Respondent

In the matter of Appeal No. ITBR 535

Between

International Investment Limited Appellants

And

The Comptroller-General of Inland Revenue Respondent 10

Coram: Gill, C.J. Malaya
Raja Azlan Shah, F.J.
Wan Suleiman, F.J.

NOTES OF ARGUMENT RECORDED BY WAN SULEIMAN, F.J.

29th October, 1974

Barry Pinson, Q.C. (Lim Ewe Hock and Miss Goh Kooi Choo with him) for Appellants.

Mohd. Nizar Idris, Senior Federal Counsel, for Respondent. 20

Pinson:

Assessment under Income Tax Ordinance - Section 10(1)(a).

3 conditions to be satisfied before tax payable.

E. v. Comptroller-General of Inland Revenue (1970) 2 M.L.J. 117.

Appellant company incorporated in 1963 - issued capital \$300,000 - later increased to \$500,000 - Memorandum of Association included powers to deal in land and shares, to invest in land and shares and a number of other businesses (see Annexure A - from page 14). 30

No. 9
Notes of Wan
Suleiman F.J.
29th October
1974
(continued)

Page 17 C/D O (1) to (4) is in fact an investment exchanged for another.

Deciding order - page 42.

Appellant contends the profit a capital profit.

The accounts show that the profit was capital profit by the company.

Annexure A - page 14 - asset capable of being held by investment - para 5.

Shares not held as "trading stock".

10 Commissioners misinterpreted words of Ambrose J. - page 47.

Commissioners erred in saying in judgment that appellant company did not retain beneficial ownership of the 3 $\frac{1}{2}$ million shares except that it is correct that 1,000,000 of such shares were transferred to and subsequently reacquired from Chew Ming Teck.

Page 53 - accountant made a mistake.

Page 38 - "Fixed and Current Assets".

20 All the evidence points to investment - none to trading.

Page 34 - Annexure C.

Not much weight to be given to the answers to leading questions.

Ong F.J.'s Judgment - page 78.

159. Californian Copper Syndicate v. Harris 5 T.C.

Commissioners of Inland Revenue v. Reinhold (1953) S.L.J. 94; (1953) S.C. 49.

30 Commissioners relied on 4 points for decision:

1. One of declared objects of company was dealing in land. Therefore when company disposed of its land for shares, it was trafficking in property although this was an isolated transaction.

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

—
No. 9

Notes of Wan
Suleiman F.J.

29th October
1974
(continued)

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

—
No. 9

Notes of Wan
Suleiman F.J.
29th October
1974
(continued)

2. The resolution of 16th October by which the company purported to expand its holding of investments can't be relied on to show that the company was not trading but merely substituting one investment for another because the company did not retain ownership of the Island Hotel shares.
3. Treatment of construction costs in 1962 Balance sheet shows as work in progress - and as current assets shows land as stock-in-trade. 10
4. Reply by Secretary to Revenue's letter in Annexure C indicates that the company intended to trade.

(1) Very little weight to be attached to object clause.

(2) Clear from accounts that company did not transfer shares.

(3) No weight to be attached to para (3).
Fixed and Current Assets.

(4)

20

What weight to attach to object clause

Balgownie Land Trust Ltd. v. The Commissioners of Inland Revenue, 14 T.C. 684.

Commissioners of Inland Revenue v. The Hyndland Investment Company Limited 14 T.C. 694.

Lewis Emanuel & Son Ltd. v. White (1965)
42 T.C. 369.

Clause is not as important as what the company does.

Cotman v. Brougham (1918) A.C. 520 - function of memorandum of association. 30

8 factors which point to fact of investment and not trafficking:

1. Name of company;
2. Powers of investment;

3. Asset capable of being held as investment;
4. As early as 1962 negotiations for renting of hotel;
5. The arcade was rented, also the ground and first floors;
6. There is no evidence that property pre-destined to be sold;
7. Resolution of 1963 refers to expansion of investment business and company did in fact expand its investment; AND
8. Accounts of company are not those of a trading company but those of an investment company - (a) no stock of land circulating, and (b) the profit on the transfer of the land was carried to reserve as capital profit as would normally be the case in an investment company.

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

No. 9

Notes of Wan
Suleiman F.J.
29th October
1974
(continued)

10

At the very most the transaction was one "in the nature of trade".

20

Taylor v. Good (1974) 1 W.L.R. 556 - Case stated.

Edwards v. Bairstow & Harrison 36 T.C. 207 per Lord Radcliffe at 229.

Nizar:-

No reference in case stated - did Commissioners refer to evidence of accountant - only in submissions before Ong F.J.

Page 19 - re the transfer of the shares by appellants - paras 11, 12, 13.

30

Edwards v. Bairstow - 229 - "If the Case contains anything ex facie

The Commissioners found the facts correctly regarding transfer of shares - Ong F.J. confirms that.

Lewis Emanuel & Son Ltd. v. White 42 T.C. 369 at 377, 378.

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

No. 9

Notes of Wan
Suleiman F.J.

29th October
1974
(continued)

"On the other hand

"incidental objects

Scottish Investment Trust Company v. Forbes
3 T.C. 231.

General presumption that company is formed
primarily to do business.

C.I.R. v. Eccentric Club 12 T.C. 689 per
Pollock M.R. at 691 ... "as a general rule....."

Intention of appellant - Exhibit R page 36 -
admission by company long before dispute, (by
Secretary who sits on the Board).

10

Board of Directors form the mind of the
company.

H.L. Bolton (Engineering) Co. Ltd. v. T.J.
Graham & Sons Ltd. (1956) 3 A.E.R. 624 at 630.

The accounts.

Page 38 - Large overdraft - insecure
financial position.

The overdrafts and loans could not be
services by mere receipts of rentals - Business
not viable.

20

30th October, 1974

Nizar: (Submission continues):-

Lapse of time between purchase of land and
sale of incomplete building - fact of quick resale.

Turner v. Last 42 T.C. 517.

Financial position of appellant company.

The manner of keeping accounts.

Page 38 - "Current Assets" - Significant -

assets in various stages of conversion into ... 30

Spicer & Pegler's Book-keeping & Accounts
Page 3.

Section 125 of the Companies Ordinance 49/40 -
law at material times.

What balance sheet should contain.

John Smith & Son v. Moore 12 T.C. 266.

The Memorandum of Association as a source of
guidance - from the objects one could extract
primary object.

The use of word "Ltd." - diction of Pollock
M.R.

10 Accounts audited by an Independent Auditor.

Building sold before completion.

Are the profits taxable under section 10(1)(a)
of the Income Tax Act?

California Copper Syndicate v. Harris 5 T.C.
159 at 165.

Case relied upon by the Special Commissioners
and the trial Judge.

20 Western Gold Mines No Liability v. Commissioner
of Taxation 1 A.I.T.R. 248, 250 - a business can start
in one transaction - Lathan J.

Even if this amounts to a venture in the
nature of trade, submits that tax is still payable
despite E. v. C.I.R. (1970) 2 M.L.J. 118.

Commissioners used the word "trafficking" -
borrowing from Memorandum.

Any distinction between "trade" and "business".

Commissioners of Inland Revenue v. The Forth
Conservancy Board 16 T.C. 103.

Per Lord Buckmaster J - at page 116.

30 Commissioners of Inland Revenue v. The Korean
Syndicate Ltd. 12 T.C. 195 at 196 - definition of
business - can also be an occupation or function.

St. Aubyn Estates Ltd. v. Strick - 17 T.C.412.

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

—
No. 9

Notes of Wan
Suleiman F.J.

30th October
1974
(continued)

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

No. 9

Notes of Wan
Suleiman F.J.

30th October
1974
(continued)

The Director-General of Inland Revenue v.
Chin Kok Keong - Civil Appeal No. 152/73.

Submission: The 1967 Act is not an amending Act.

Pinson replies:

Accounts in evidence - no evidence that
Commissioners did not accept them as correct
record.

The transfers - at all times the beneficial
ownership remained in appellant company.

Lewis Emanuel's case has no relevance.

10

Reply by Secretary is of little importance.

Contradiction - Land "F.A." - Page 39

Building "C.A.".

"Business"

Trade in U.K. defined to include adventure
in the nature of trade. Hence in U.K. business
has slightly different flavour.

Intd. W.S.

C.A.V.

Certified true copy
Azman
Secretary to Judge
Federal Court,
Malaysia,
Kuala Lumpur.

2

No.10

Judgment of
Raja Azlan
Shah F.J.

13th June
1975

No. 10

Judgment of Raja Azlan Shah, F.J.

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA
LUMPUR (Appellate Jurisdiction)

FEDERAL COURT CIVIL APPEAL NO. 50 OF 1973

30

Between

International Investment Limited

Appellants

And

The Comptroller-General of
Inland Revenue

Respondent

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

(In the matter of 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

(In the matter of Penang High Court
Originating Motion No. 5 of 1969)

No.10

Judgment of
Raja Azlan
Shah F.J.

13th June
1975
(continued)

10 Coram: Gill, C.J. Malaya
Raja Azlan Shah, F.J.
Wan Suleiman, F.J.

JUDGMENT OF RAJA AZLAN SHAH, F.J.

The facts of this case are fully set out in the report of it in the Court below, (1973) 2 M.L.J. 10. I need only hereinafter set out the salient points.

20 The question which arose in this appeal is the perfectly familiar question of whether the Appellant Company carried on business of trafficking in immovable property, i.e. buying and selling, within the meaning of section 10(1)(a) of the Income Tax Ordinance, 1947, so that the profits made would be profits assessable to income tax. This, in my view, is a question of law. The facts are found. Indeed, they were not at any time in dispute. The Memorandum of Association, the letter of 27th April, 1962 sent by the Inland Revenue Department to the secretary of the Appellant Company and the reply thereto dated 16th August, 1962, the balance sheets for the years 1962, 1963, 1965, 1966, the Deciding Order and Grounds of Decision, are part of the Case Stated. I observe that the Articles of Association are not made part of the case. It is now for the Court to consider the various documents and the established facts and then to decide as to their legal nature and effect.

40 Now what is the business of the Appellant Company? I think it is important first to look at the nature and purpose of the company as expressed in the Memorandum of Association and have regard to them as an item of evidence when answering this question.

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

—
No.10

Judgment of
Raja Azlan
Shah, F.J.

13th June
1975
(continued)

It seems to me that it is contemplated that the essential nature of its business is a business of doing what is necessary to carry out the objects which it elects to carry out. That is what it speaks of itself as its business. Indeed, "dealing in immovable property and land development" was the business of the Appellant Company as admitted by its secretary in his reply to the query raised by the respondent. This admission, which was mentioned in the Grounds of Decision as a matter of importance, is evidence against the Appellant Company and it must be noted that this admission was made long before the dispute relating to the new assessment arose. The relative weight to be attached to this piece of evidence was no doubt a matter essentially for the Special Commissioners.

10

There are in all 30 objects incorporated in the Memorandum of Association, inter alia, power to traffic and otherwise deal in or turn to account buildings and immovable property of any description (cl.3(i)), to develop and turn to account any land acquired and preparing same for building purposes (cl.3(ii)), and to invest and to hold shares securities or investments or to sell realise and deal the same and to re-invest the proceeds (cl.3(xvi)). It also has power to carry on various kinds of business ranging from rubber planting to importing and exporting of watches and photographic goods (cl.3(v)).

20

Now I agree that those are only objects, and although the Appellant Company may do those things, it is not obliged to do them; and, in fact, reading the Memorandum of Association, it would be impossible for it to carry out all the objects which it is empowered to carry out by the Memorandum of Association.

30

What happened was this. The Appellant Company was formed in January 1962, intending to do business on a very wide scale. Its financial position was not that sound, so it took a large bank overdraft of \$491,365.44 from Malayan Banking. It paid \$337,273.71 to purchase lands at Penang Road, on which it entered into contracts to put up a six-storey building with a shopping arcade and hotel ("the property"). The said building was to be completed by 30.10.1963 at a cost of \$585,000.00. When the ground, first and second floors were completed, they were leased out to

40

tenants. In June, 1962, there was an offer to rent out the hotel rooms, but the negotiation fell through. In October, 1963, the business and undertaking of the company was reconstructed with a view, it was alleged, to expand its business of investment in securities. In pursuance of these new objects, it transferred the property, which was still in the process of completion, to Island Hotels and Properties (Malaysia) Ltd. and undertook to complete the building in exchange for $3\frac{3}{4}$ million shares of \$1.00 each in the latter company all credited as being fully paid.

The Appellant Company acquired no other land. But in 1962 it held shares worth \$175,000.00 in four other companies. In 1963 it received \$7,044.00 by way of rent of the arcade. In that year also it incurred a loan of \$422,500.00 from Disco Ltd. By December, 1963 and January, 1964 it had not only transferred away all the shares in the four companies to other person or persons unknown, but also all the Island Hotels shares to Disco Ltd. ($2\frac{1}{4}$ million shares) and Tan Sim Hoe ($1\frac{1}{2}$ million shares), two district legal persona. The Appellant Company was still a going concern. In 1965 there was a large bank overdraft of \$101,575.11 cts.

From the exchange, the Appellant Company made a profit of \$1,704,061.00 worth of shares. The respondent considered this amount as income from business carried on by the Appellant Company and therefore made an additional assessment on that amount. The respondent also assessed the sum of \$7,044.00 as being the gross amount of rentals received from the arcade. In arriving at the income of \$7,044.00 the respondent had not made any deduction from the gross amount of rentals in respect of interests on overdrafts taken to finance the construction of the said building, on the ground that to allow such deduction would mean allowing more than one deduction of the said expense.

The Special Commissioners determined that the Appellant Company was carrying on the business of trafficking in immovable property pursuant to its declared object stated in clause 3(i) of its Memorandum of Association, and that the profits obtained from the transfer of the said property were profits from business assessable to income tax.

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

—
No.10

Judgment of
Raja Azlan
Shah, F.J.

13th June
1975

(continued)

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

—
No.10

Judgment of
Raja Azlan
Shah, F.J.

13th June
1975
(continued)

Both parties conceded before the Special Commissioners that if they (the Special Commissioners) decided to dismiss the appeal, no change should be made in the deduction in respect of interests, but if they allowed the appeal, both parties would try to agree on the adjustments on the amount of interests to be deducted from the total amount of rentals and failing such agreement the amount to be deducted should be fixed by the Special Commissioners.

10

The Appellant Company was not satisfied with the decision of the Special Commissioners and a case was stated for the High Court.

The High Court held, following The Commissioners of Inland Revenue v. Reinhold 34 T.C. 389, 392 that the transfer of a half-completed building, or putting it accurately, the transfer of a building in the process of completion, with all its attendant obligations, in exchange for shares in a realty company was an incursion into the realm of trade and therefore the profits and gains therefrom were plainly liable to tax.

20

The question to be asked and answered is whether the facts reveal a realisation of income from business of trafficking in immovable property carried on by the Appellant Company? As in most cases of this kind a wealth of authorities was cited, ranging from the familiar case of California Copper Syndicate v. Harris 5 T.C. 159 down to the local case of D.E.F. v. The Comptroller of Income Tax (1961) M.L.J.55 and the recent case of E. v. Comptroller-General of Inland Revenue (1970) 2 M.L.J. 117.

30

I think it right to emphasise what has already been treated judicially that cases on income tax depend so much on their peculiar facts that excessive reliance on precedents may be dangerous. Whether the Appellant Company was carrying on business of trafficking in immovable property must, in the last analysis, depend on all the surrounding circumstances, so that no single criterion can be formulated.

40

The argument addressed to us by Mr. Pinson on behalf of the Appellant Company took several shapes. He listed a number of factors which, he

said, pointed to investment rather than trafficking in immovable property, namely:-

- 10 (a) The company was an International Investment Company and investment was one of its objects as authorised by the Memorandum of Association;
- (b) The assets, i.e. the shares, in the single transaction was of a kind normally used for investment but not for trading;
- (c) As early as 1962 there were negotiations to rent the hotel rooms;
- (d) The three floors were rented out to tenants;
- (e) There was no evidence that the property was pre-destined to be sold;
- (f) The 1963 resolution referred to the expansion of the investment business and the company did in fact expand its investments, i.e. substituting one investment for another;
- 20 (g) The intention of the company could be gauged from the Memorandum of Association and what business it actually carried on. And the latter could be seen from the statement of accounts which pointed to investment, for example, there was no stock of land which was circulated, and the profit from the transfer of the property was carried to reserve as capital profit as would normally be the case with a capital investment.

30 The pith and substance of Mr. Pinson's argument may be summarised as follows. There were no facts on which the Special Commissioners could properly have concluded that the Appellant Company was trafficking in immovable property. He submitted that buying and selling is implicit in trafficking; an isolated transaction was not trafficking; and therefore the Special Commissioners' decision was plainly wrong. At its highest it was argued that the isolated transaction was an adventure in the nature of trade and this was not caught by the net of section 10(1)(a) of the Income Tax Ordinance, 1947, as trade in the Ordinance does not include
40 an adventure in the nature of trade.

Counsel relied at great length on Gill F.J.'s

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

—
No.10

Judgment of
Raja Azlan
Shah, F.J.

13th June
1975
(continued)

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

No.10

Judgment of
Raja Azlan
Shah, F.J.

13th June
1975
(continued)

(as he then was) judgment in E. v. Comptroller-General of Inland Revenue (supra) which he said should be followed.

In my view E. v. Comptroller-General of Inland Revenue provides a very helpful glossary and collection of references to the cases concerning the definition of the word 'business' in the context of section 10(1)(a) of the Income Tax Ordinance, 1947. That case is the latest in a series of (local) cases that have ventilated, rather than solved, the difficulties of giving a sharp definition of the word "business". However, I find it unnecessary to review the case in any detail for I find it is clearly distinguishable on certain material respects and decided on its own special facts. It is sufficient to say that that case involved an individual dealing in an isolated transaction which was not part of the business carried on by him. It is here that it is important to bear in mind the fundamental distinction between an individual and a limited company as the test to be applied in each case is not quite the same. In this connection, it is well to quote a passage from the judgment of Buttrose J. in D.E.F. v. The Comptroller of Income Tax (page 59):

10

20

"the test to be applied in the case of an individual is not quite the same as the test in the case of a trading company. Though as a general rule in the case of an individual one or two isolated transactions cannot be described as the carrying on of a business, in the case of a company the fact that there has only been one profit-making transaction is in no way decisive of the question whether the profit was made in the carrying on of the company's business or otherwise."

30

Lord Sterndale, M.R. too recognised this distinction as a criterion in determining whether a company is carrying on business or not in The Commissioners of Inland Revenue v. The Korean Syndicate, Ltd. 12 T.C. 181 at 202:

40

"I do not assent, either, that there can be no difference between an individual and a company. If you once get the individual and the company spending exactly on the same basis, then there would be no difference

10 between them at all. But the fact that the limited company comes into existence in a different way is a matter to be considered. An individual comes into existence for many purposes, or perhaps sometimes for none, whereas a limited company comes into existence for some particular purpose, and if it comes into existence for the particular purpose of carrying out a transaction by getting possession of concessions and turning them to account, then that is a matter to be considered when you come to decide whether doing that is carrying on a business or not."

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

No.10

Judgment of
Raja Azlan
Shah, F.J.

13th June
1975

(continued)

Encik Nizar for the respondent submitted that in order to answer the question in issue we must look at the Memorandum of Association which might lend a helping hand in ascertaining the main object and also all the facts in the Case Stated. He also listed certain items of evidence in aid of his case:

- 20 (a) The Appellant Company was a limited company and the use of the word "Ltd." raised a strong presumption that it was intended to carry on business;
- (b) The admission by the Appellant Company's secretary that the nature of its business was "dealing in immovable property and land development" came from a person who had knowledge in the company's affair;
- 30 (c) In view of its financial standing, the Appellant Company was in no position to develop the property and hence could not hold it for long and that was fortified by the quick sale and before completion;
- (d) The accounts were drawn up and audited by a firm of independent professional auditors.

40 With regard to item (a), Mr. Pinson stressed the point that there was no reference of it in the Special Commissioner's decision. That might be so, but the Memorandum of Association which was part of the Case Stated shows that the Appellant Company was a limited company. That disposes of counsel's submission.

Item (b) was traversed in this way. Counsel contended that very little weight should be attached

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

—
No.10

Judgment of
Raja Azlan
Shah, F.J.

13th June
1975
(continued)

to it. I think that this point can be answered very shortly by saying that that was a matter essentially within the province of the tribunal of primary fact.

Item (c) requires amplification. It was said by Mr. Pinson that the Special Commissioners commented that nothing turned on this point, and so they rejected it. Encik Nizar on the other hand submitted that in view of the large bank overdraft, the Appellant Company was not in a position to develop the property and that all along its intention was to speculate in the sale of the property. If it had not intended to speculate but to hold it as an investment it would take very many years for it to recover the money from rentals sufficient to repay the large bank overdraft. I find that the Special Commissioners had adequately dealt with this point viz: "Although it is not prudent for any part of a company's fixed assets to be financed by loans, simply because if the loan creditors were to recall from the company the outstanding loans of the company, it would probably be left with no alternative but to sell all its assets and wind-up its affairs". Although it could be said, as indeed was said by Mr. Pinson, that it depended on the terms of the loan, I find there is a total lack of information as to the terms of the loan between the bank and Appellant Company. Lack of evidence on this point was a factor which no doubt had influenced the all along the Appellant Company had intended to develop and sell the property.

With regard to item (d) the Special Commissioners stressed the importance of section 125 of the Companies Ordinance, 1940-1946 which made it obligatory for companies to distinguish between its fixed assets and floating or current assets in their balance sheets. They also stressed the importance that the financial accounts of the Appellant Company had been reviewed by a firm of independent professional auditors. They concluded that the costs of construction described as "work in progress" under current assets appearing in the balance sheet of 1962 aptly described "assets in the various stages of conversion into cash" in the ordinary course of business and that "items classified as current assets include stock-in-trade and work in progress". They held that if the property was intended to be a fixed asset, it ought to have

10

20

30

40

10 been shown as such in the balance sheet and an appropriate description would probably have been "construction in progress". They strongly relied on a passage from Spicer and Pegler's Book-keeping and Accounts, 15th Edition, page 3, and the Recommendation of the Council of the Institute of Chartered Accountants in England and Wales entitled "The Presentation of balance sheet and profit and loss account" in which it was stated that "the fundamental characteristic of fixed assets is that they are held with the object of earning revenue, directly or indirectly, and not for the purposes of sale in the ordinary course of business". They also referred to a passage of Viscount Haldane's speech in John Smith and Son v. Moore 12 T.C. 266, 282 and of Romer L.J. in Golden Horse Shoe (New), Ltd. v. Thurgood 18 T.C. 280, 300.

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

—
No.10

Judgment of
Raja Azlan
Shah, F.J.

13th June
1975
(continued)

20 The Special Commissioners therefore took the view that the description and classification of the property by the auditors in the balance sheet was deliberate and could not have been a mistake as alleged by Mr. Pinson. They obviously rejected the submission of mistake. We are in no position to differ from them that being a matter of credibility. In the matter of appreciating oral evidence, we attach great value to the opinion formed by the tribunal of primary fact.

30 This leads me to another point taken by Mr. Pinson. He contended that the ownership of the property never changed hands; the persons who constituted the Appellant Company continued to own it through another company, i.e. Island Hotels and Properties (Malaysia) Limited. But, in my opinion, the quick transfer of Island Hotels shares to 2 distinct legal persons let the cat out of the bag. Mr. Pinson then said may be those shares were held as security for those short term interest free loans taken from Tan Sim Hoe and Disco Limited who, it was alleged, held those shares on trust for the Appellant Company. Counsel reinforced this contention by referring to the remarks of the auditors in the balance sheet for 1965 which stated that the said shares were registered in the names of Tan Sim Hoe and Chew Ming Teck, attorneys for Disco Limited, who had executed a trust deed. I cannot subscribe to Mr. Pinson's argument for the simple reason that what was said in the report of the auditors was all based on hearsay which cannot take the place of legal proof. The shares were never produced for

40

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

—
No.10

Judgment of
Raja Azlan
Shah, F.J.

13th June
1975
(continued)

the inspection of the auditors, nor was the alleged trust deed. Apart from this tenuous piece of evidence, none exists to support Mr. Pinson's contention. Perhaps it is pertinent to be reminded of a passage from the judgment of Lord Denning in Heather v. P-F Consulting Group Ltd. 48 T.C. 293 at 322:

"The Courts have always been assisted greatly by the evidence of accountants. Their practice should be given due weight: but the Courts have never regarded themselves as being bound by it. It would be wrong to do so. The question of what is capital and what is revenue is a question of law for the Courts. They are not to be deflected from their true course by the evidence of accountants, however eminent."

10

In my opinion, the form which a company takes is no criterion in determining the question whether it was carrying on business. To ascertain the business of a limited company, one must look at what business it actually carries on and not what business it professes to carry on. The Memorandum of Association affords information as to the object of the company. The acid test is to look at the nature and purpose and the substance of the transaction in question as expressed in its Memorandum of Association and, in doing so, one may go behind technicalities. As a general rule, the mere setting up of a company points to its business intention because of its implied continuity. That would be a strong presumption that it intends to do business.

20

30

It is necessary to recapitulate the facts. Tan Sim Hoe and Chew Ming Teck's wife floated a limited company to carry on a very extensive business. The essential features of the business was dealing in movable property and land development. That was the admission of the company's secretary in answer to the respondent's questionnaire. It then negotiated a large bank overdraft. It bought 6 pieces of land, all at the same area, and then started developing them. First, the squatters had to be removed and their illegal structures demolished. Then the Appellant Company entered into separate contracts to do the piling work and the six-storey building. When the building was half completed, it negotiated to lease

40

the hotel rooms but the negotiation fell through. The arcade was rented out to tenants and it collected \$7,044/- as rentals in 1963. In October, 1963 it transferred the land and building which was still half completed to Island Hotels and Properties (Malaysia) Limited in exchange for 3 $\frac{3}{4}$ million shares. It made a profit of \$1,704,061.00. It was said for the Appellant Company that this was capital profit arising from the restructuring of the object of the Appellant Company with a view to expand its business of investment in securities. What did the Special Commissioners have to say on this point? They said that in view of the quick transfer of the Island Hotels shares, "they found it difficult to accept that the true object of acquiring those shares was in order to expand its investment; that the true object was not to expand or to hold investment in the shares is confirmed by the fact that all of the \$175,000.00 shares in four other companies held by the Appellant Company in 1962 were transferred away by the end of 1963". I concur with the Special Commissioners' conclusion. When we look at the transaction itself and its effect, it is not possible to describe what was done as an ordinary business of expanding capital investment. We cannot escape the conclusion that the principal purpose and effect of the transaction was the realisation of income from carrying on business in immovable property.

It has been said more than once that when we come to deal with income tax cases we must look at all the surrounding circumstances, not for the purpose of considering what one's own conclusion might be, but for the purpose of seeing, in fact, whether there is evidence both ways - whether there is evidence upon which the Special Commissioners could arrive at their conclusion. Keeping in view what the Appellant Company in fact did, the purpose for which it came into existence and the objects which were prescribed in the Memorandum of Association and the whole of the other circumstances which I have briefly summarised, it seems to me that those were extensive series of dealings in immovable property over a period, and using for the purpose an organisation and methods such as are ordinarily adopted by property developers. When we look at all those circumstances, it is not possible to say that they do not constitute evidence upon which a tribunal of primary fact might arrive at a conclusion that it was carrying on business in

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

—
No.10

Judgment of
Raja Azlan
Shah, F.J.

13th June
1975
(continued)

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

—
No.10

Judgment of
Raja Azlan
Shah, F.J.

13th June
1975

(continued)

immovable property. There are considerations, no doubt, the other way, and Mr. Pinson strongly called my attention to them, to which, if I were a judge of fact, I should certainly have given active consideration, but it is also important that I shall not slip into it. The question is of course a question of circumstances and degree, and there is no justification for reversing the determination of the Special Commissioners unless they had misdirected themselves in law, or proceeded without sufficient evidence in law to justify their conclusion.

It is true that the transaction of transferring the property in exchange for shares was an isolated one. But that, in my opinion, was the essential nature of its business for which it came into existence. If it purchased immovable property and turned it to account in pursuance of its declared object as expressed in the Memorandum of Association, even for the first time only, then that is a matter to be considered when we come to decide whether doing that was carrying on business or not.

It seems to me that Mr. Pinson had attached undue importance to the fact that the actual operations of the Appellant Company had been an isolated one. If a company was formed to carry on business, and in fact it carried it on, I think, it cannot matter that its activities had been an isolated one. "Business is not confined to being busy; in many businesses long intervals of inactivity occur." (per Lord Sumner in The Commissioners of Inland Revenue v. The South Behar Railway Co. Ltd. 12 T.C. 712.) A company's business may have been quiescent for a number of reasons. For example, following a business set-back, consolidating its business, waiting for the ripe opportunity to occur. But there may also come a time when it will resume a more active business. Now when circumstances of that sort arise, it may be, I am not saying it would be one way or the other, the right conclusion in fact is that there is really a business of the company expanding over quite a period of time, which is not interrupted by its period of inactivity. If the company still carries it on, then I think the company is carrying on business.

The Appellant Company is still a going concern

although it had not embarked on another project of dealing in immovable property as yet. Big projects or schemes such as the one in question which involve very large sums of money and are possibly carried on with the assistance of large bank overdrafts cannot be carried on in successive dealings and for obvious reasons.

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

—
No.10

10

In my view, the overwhelming material of the evidence is, to my mind, consistent with "carrying on business in immovable property" and that "the true and only reasonable conclusion" does not contradict the Special Commissioners' determination. They could reasonably decide, and were entitled to decide, as they did.

Judgment of
Raja Azlan
Shah, F.J.

13th June
1975
(continued)

I would dismiss the appeal with costs.

(RAJA AZLAN SHAH)
JUDGE,
FEDERAL COURT MALAYSIA.

20

Kuala Lumpur,
13th June, 1975.

Gill, C.J. Malaya and Wan Sulaiman, F.J. concurred.

Counsel:

Mr. Barry Pinson, Q.C. (Mr. Lim Ewe Hock and Miss Goh Kooi Choo with him) for Appellants.

Encik Mohd. Nizar bin Idris, Senior Federal Counsel,
for Respondent.

CASES ALSO CITED

30

1. Director-General of Inland Revenue v. C.K.K.
(1974) 2 M.L.J. 104.
2. The Commissioners of Inland Revenue v.
Livingston And Others - 11 T.C. 538.
3. The Balgownie Land Trust, Ltd. v. The Commissioners
of Inland Revenue - 14 T.C. 684.
4. The Commissioners of Inland Revenue v. The Hyndland
Investment Company, Limited - 14 T.C. 694.
5. Lewis Emanuel & Son Ltd. v. White (H.M.Inspector
of Taxes) - 42 T.C. 369.
6. Pickford v. Quirke (H.M.Inspector of Taxes)
13 T.C. 251.

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

No.10

Judgment of
Raja Azlan
Shah, F.J.

13th June
1975
(continued)

7. Taylor v. Good (INSpector of Taxes) (1974)
1 W.L.R. 556.
8. Edwards (H.M.Inspector of Taxes) v. Bairstow
& Anor. - 36 T.C. 207.
9. Scottish Investment Trust Co. v. Forbes
(Surveyor of Taxes) - 3 T.C. 231.
10. The Commissioners of Inland Revenue v.
The Eccentric Club, Ltd. - 12 T.C. 689.
11. H.L. Bolton (Engineering) Co. Ltd. v. T.J.
Graham & Sons, Ltd. - 3 All E.R. 624. 10
12. Turner v. Last (H.M.Inspector of Taxes)
42 T.C. 517.
13. Western Gold Mines No Liability v. Commissioners
of Taxation (W.A.) (1938) 1 A.I.TR 255.
14. The Commissioners of Inland Revenue v. The
Forth Conservancy Board - 16 T.C. 103.
15. St. Aubyn Estates Ltd. v. Strick (H.M.
Inspector of Taxes) - 17 T.C. 412.

No. 11

Order of
Federal Court

13th June
1975

No. 11

Order of Federal Court

20

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA
LUMPUR (APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO. 50 OF 1973

Between

International Investment Limited

Appellants

And

The Comptroller-General of
Inland Revenue

Respondents

In the matter of 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

30

In the matter of Originating Motion No. 5
of 1969 in the High Court in Malaya at
Penang

Between
INTERNATIONAL INVESTMENT LIMITED Appellants
And
THE COMPTROLLER-GENERAL OF Respondents
INLAND REVENUE

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

In the matter of Appeal No. ITBR 535

No.11
Order of
Federal Court
13th June
1975
(continued)

Between
INTERNATIONAL INVESTMENT LIMITED Appellants
And
THE COMPTROLLER-GENERAL OF Respondents
INLAND REVENUE

10

CORAM: GILL, CHIEF JUSTICE, HIGH COURT IN MALAYA;
ALI, JUDGE, FEDERAL COURT, MALAYSIA
RAJA AZLAN SHAH, JUDGE, FEDERAL COURT MALAYSIA

IN OPEN COURT
THIS 13TH DAY OF JUNE, 1975

O R D E R

20

30

THIS APPEAL coming on for hearing on 29th and 30th days of October, 1974 in the presence of Mr. Barry Pinson Q.C. (Mr. Lim Ewe Hock and Miss Goh Kooi Choo with him) of Counsel for the above named Appellants and Encik Mohd. Nizar bin Idris, Senior Federal Counsel, for the Respondent abovenamed AND UPON READING the Record of Appeal filed 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 at Kuala Lumpur in the presence of Mr. Tee Keng Hoon of Counsel for the Appellants and Encik Zulkifli bin Mahmood, Senior Federal Counsel for the Respondents IT IS ORDERED that this Appeal be and is hereby dismissed with costs AND IT IS ORDERED that the costs of this Appeal be taxed by the proper officer of the Court and be paid by the Appellants to the Respondent AND IT IS FURTHER ORDERED that the sum of \$500.00 (Ringgit Five hundred Only) deposited into Court by the Appellants as security for costs of this Appeal be paid to the Respondent towards taxed costs.

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

No.11

Order of
Federal Court
13th June
1975
(continued)

GIVEN under my hand and the seal of the
Court this 13th day of June, 1975.

Sgd:
DEPUTY REGISTRAR,
FEDERAL COURT,
MALAYSIA

This Order is filed by the SENIOR FEDERAL
COUNSEL, INLAND REVENUE DEPARTMENT for the
Respondent whose address for service is Jabatan
Hasil Dalam Negeri, Bangunan Suleiman, Kuala
Lumpur.

10

No.12

Notice of
Motion

14th July
1975

No. 12

Notice of Motion

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA
LUMPUR (Appellant Jurisdiction)

FEDERAL COURT CIVIL APPEAL NO. 50 OF 1973

Between

International Investment Limited Appellants

And

The Comptroller-General of Respondent
Inland Revenue

2.

(In the matter of 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)

(In the matter of Penang High Court
Originating Motion No. 5 of 1969)

NOTICE OF MOTION

Take Notice that the Court will be moved on
Monday the 18th day of August, 1975 at 9.30 o'clock
in the forenoon or as soon thereafter as Counsel
can be heard by Mr. Chong Thian Fook of Counsel
for the abovenamed Appellant for an order that:-

3

1. Conditional leave be granted to the Appellant
to appeal to His Majesty the Yang Di-Pertuan Agong

against the decision of this Honourable Court given on 13th day of June, 1975.

In the Federal Court of Malaysia (Appellate Jurisdiction)

[sic] 2. The costs of an incidental to this application be costs in the cause.

No.12

Dated this 14th day of July, 1975.

Sgd: Messrs. Lim Cheng Poh & Co. Appellant's Solicitors

Notice of Motion

14th July 1975 (continued)

Sgd: E.E. Sim Chief Registrar, Federal Court, Kuala Lumpur.

10

This Notice of Motion was taken out by Messrs. Lim Cheng Poh & Co., Solicitors for the Appellant of No. 707, 7th Floor, Lee Yan Lian Building, Jalan Tun Perak, Kuala Lumpur.

This Application will be supported by the Affidavit Tung Yim Fong sworn to on the 14th day of July, 1975.

20

To:

Federal Counsel, for and on behalf of the Defendants whose address for service is c/o the Attorney-General's Chambers, Kuala Lumpur.

No. 13

No.13

Affidavit of Tung Yim Fong

Affidavit of Tung Yim Fong

IN THE FEDERAL COURT OF MALAYSIA (APPELLATE JURISDICTION)

14th July 1975

30

CIVIL APPEAL NO. 50 OF 1973

Between

International Investment Limited

Appellants

And

The Comptroller-General of Inland Revenue

Respondent

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

—
No.13

Affidavit of
Tung Yim Fong

14th July
1975
(continued)

(In the matter of 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)

(In the Matter of Penang High Court Originating Motion No. 5 of 1969).

A F F I D A V I T

I. TUNG YIM FONG (m.w.) (I.C. No.1838899) of No.28 Beach Street, Penang do hereby solemnly and sincerely affirm and say as follows:-

10

1. I am a Director of the Appellants' Company.

2. On the 19th day of September 1968 the Special Commissioners of Income Tax ordered that the assessment of income tax of the Appellants' Company for the year of assessment 1964 be \$1,711,105/- and the Income Tax payable by the Appellants' Company be \$684,442/-.

3. The Appellants appealed to the High Court at Penang vide Originating Motion No. 5 of 1969 by way of 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 on the 7th day of June, 1969.

20

4. On the 15th day of March, 1973 the Honourable Justice H.S. Ong upheld the decision of the Special Commissioners of Income Tax and dismissed the Appellants' appeal with costs.

5. On the 6th day of April, 1973 the Appellants being dissatisfied with the decision of the Honourable Justice H.S. Ong appealed to the Court of Appeal in Federal Appeal No. 50 of 1973. The appeal was heard and on the 13th June, 1975 the Federal Court of Malaysia gave judgment dismissing the Appellants' appeal with costs and confirming the decision of the Special Commissioners of Income Tax and of the Honourable Justice H.S. Ong.

30

6. The Appellants are dissatisfied with the said Judgment of the Federal Court of Malaysia confirming the decisions in favour of the Respondent of the Special Commissioners of Income Tax and the High Court Penang and are desirous of appealing to His Majesty the Yang di-Pertuan Agong against the said Judgment of the Federal Court of Malaysia.

40

7. The said Judgment is a final Judgment or Order in a Civil matter where the matter in dispute amounts to more than \$25,000/-. The total income tax payable by the Appellants for the year of assessment 1964 is \$684,442.00 as per the Judgments of the Special Commissioners of Income Tax, the High Court at Penang and the Federal Court of Appeal.

In the Federal Court of Malaysia (Appellate Jurisdiction)

No.13

Affidavit of Tung Yim Fong

14th July 1975

(continued)

10 8. The Appellants herein are willing to enter into good and sufficient security for the prosecution of this appeal to His Majesty the Yang di-Pertuan Agong.

9. I pray that this Honourable Court will be pleased to grant the Appellants leave to appeal to His Majesty the Yang di-Pertuan Agong.

Affirmed by the said Tung Yim Fong at Penang this 14th day of July, 1975 at 2.30 p.m.

Sgd: TUNG YIM FONG

20 Before me,
Sgd:
Commissioner for Oaths

No. 14

Affidavit of Chong Thian Fook

IN THE FEDERAL COURT OF MALAYSIA (APPELLATE JURISDICTION)

CIVIL APPEAL NO. 50 OF 1973

Between

International Investment Limited

Appellants

And

30 The Comptroller-General of Inland Revenue

Respondents

(In the Matter of CASE STATED by the Special Commissioners of Income Tax for the opinion of the High Court pursuant to paragraph 34 of Schedule 5 of the Income Tax Act 1967)

(In the Matter of Penang High Court, Originating Motion No. 5 of 1969)

No.14

Affidavit of Chong Thian Fook

14th July 1975

A F F I D A V I T

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

No.14

Affidavit of
Chong Thian
Fook

14th July
1975
(continued)

I, CHONG THIAN FOOK, (NRIC NO. 0483031) of
M/s Lim Cheng Poh & Co., Room 707, 7th Floor,
Lee Yan Lian Building, Jalan Tun Perak, Kuala
Lumpur do hereby solemnly and sincerely affirm
and say as follows:-

1. I am the Solicitor now in charge of this
matter since 15th July, 1975.

2. I have taken over from M/s Lim Ewe Hock & Co.,
who was then the Solicitor in charge of this matter
and appear for the Company International Investment
Ltd. in the High Court as well as the Federal Court.

10

3. On the 19th day of September, 1968 the Special
Commission of Income Tax ordered that the assessment
of Income Tax of the Appellant's Company for the
year of 1964 be \$1,711,105/- and the Income Tax
payable by the Appellant's Company be \$684,442/-.

4. The Appellants appealed to the High Court at
Penang Honourable Justice H.S. Ong uphold the
decision of the Special Commissioner of Income Tax
and dismissed any clients appeal with costs.

20

5. The Defendant, International Investment Ltd.,
filed an appeal to the Federal Court against the
decision of the High Court and his appeal was
allowed.

6. I have gone through the grounds of Judgment of
the Federal Court very carefully and am of the
opinion that there are grounds for appealing to
H.M. the Yang Di-Pertuan Agong and there is a very
reasonable chance of success.

3

7. This is a fit and proper case for Appeal and
I support my client's application.

Affirmed by the said)
CHONG THIAN FOOK at)
Kuala Lumpur this)
17th day of July, 1975)
at 9.30 a.m.)

Sgd: CHONG THIAN FOOK

Before me,
Sgd: SAR CHIEW LIM
.....
Persurohjaya Sumpah
Commissioner for Oaths

4

No. 15

Order granting conditional leave to
appeal to H.M. the Yang di-Pertuan Agong

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA
LUMPUR (APPELLATE JURISDICTION)

No.15

FEDERAL COURT CIVIL APPEAL NO. 50 OF 1973

Between

International Investment Limited Appellants

And

The Comptroller-General of Respondent
Inland Revenue

Order granting
Conditional
Leave to
appeal to H.M.
the Yang di-
Pertuan Agong

18th August
1975

(In the matter of Originating Motion No. 5
of 1969 in the High Court in Penang)

Between

International Investment Limited

And

The Comptroller-General of Inland Revenue

CORAM: GILL, CHIEF JUSTICE, HIGH COURT, MALAYA;
ALI, JUDGE, FEDERAL COURT, MALAYSIA;
RAJA AZLAN SHAH, JUDGE, FEDERAL COURT,
MALAYSIA.

IN OPEN COURT

THIS 18TH DAY OF AUGUST, 1975

O R D E R

UPON MOTION made unto Court this day by Mr.
Chong Thian Fook of Counsel for the Appellants
abovenamed in the presence of Encik Mohd Nizar bin
Idris, Senior Federal Counsel, for and on behalf of
the Respondent abovenamed AND UPON READING the Notice
of Motion dated the 14th day of July, 1975, the
Affidavit of TUNG YIM FONG affirmed on the 14th day
of July, 1975 and filed herein, the Affidavit of
CHONG THIAN FOOK affirmed on the 14th day of July,
1975 and filed herein AND UPON HEARING Counsel as
aforesaid IT IS ORDERED that leave be and is hereby

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

granted to the Appellants abovenamed to appeal to His Majesty the Yang di-Pertuan Agong against the decision of this Honourable Court given on the 13th day of June, 1975 upon the following conditions:-

No.15
Order granting
conditional
leave to
appeal to H.M.
the Yang di-
Pertuan Agong
18th August
1975
(continued)

(a) that the Appellants 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/- (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 Appellants abovenamed not obtaining an Order granting them final leave to appeal or of the Appeal being dismissed for non-prosecution or of His Majesty the Yang di-Pertuan Agong ordering the Appellants to pay the Respondent costs of the Appeal, as the case may be; and

10

(b) that the Appellants 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 that the costs of and incidental to this application be costs in the cause.

20

Given under my hand and the Seal of the Court
this 18th day of August, 1975.

Sgd. Abdul Hamed
Deputy Registrar,
Federal Court,
Malaysia.

30

This Order is filed by M/s Lim Cheng Poh & Co., Advocates & Solicitors, whose address for service is at Room 707, 7th Floor, Lee Yan Lian Building, Jalan Tun Perak, Kuala Lumpur, Solicitors for the Appellants abovenamed.

No. 16

Order granting final leave to appeal to
H.M. the Yang di-Pertuan Agong

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA
LUMPUR (APPELLATE JURISDICTION)

No.16

FEDERAL COURT CIVIL APPEAL NO. 50 OF 1973

Order
granting
final leave
to appeal to
H.M. the Yang
di-Pertuan
Agong

Between

International Investment Limited Appellants

And

The Comptroller-General of Respondent
Inland Revenue

12th January
1976

(In the matter of Originating Motion No. 5
of 1969 in the High Court in Penang)

Between

International Investment Limited

And

The Comptroller-General of
Inland Revenue

CORAM: SUFFIAN, LORD PRESIDENT, FEDERAL COURT, MALAYSIA;
LEE HUN HOE, CHIEF JUSTICE, HIGH COURT IN BORNEO;
WAN SULEIMAN, JUDGE, FEDERAL COURT, MALAYSIA.

IN OPEN COURT
THIS 12TH DAY OF JANUARY, 1976

O R D E R

UPON MOTION made unto Court this day by Mr.
Chong Thian Fook of Counsel for the Appellants in
the presence of Tuan Haji Mohd. Nizar bin Idris,
Senior Federal Counsel, for and on behalf of the
Respondent AND UPON READING the Notice of Motion
dated 23rd day of December, 1975, the Affidavit of
Encik Tung Yim Fong affirmed on the 10th day of
November, 1975 and filed herein AND UPON HEARING
Counsel as aforesaid IT IS ORDERED that final leave
be and is hereby granted to the Appellants to
appeal to His Majesty the Yang di-Pertuan Agong
against the Order of the Federal Court of Malaysia
dated 13th day of June, 1975 AND IT IS ORDERED that
the costs of and incidental to this Application be
costs in the cause.

In the
Federal Court
of Malaysia
(Appellate
Jurisdiction)

—
No.16

Order
granting
final leave
to appeal to
H.M. the Yang
di-Pertuan
Agong

12th January
1976
(continued)

Given under my hand and the Seal of the Court
this 12th day of January, 1976.

Sgd. Haji Abdullah Ghazli
CHIEF REGISTRAR,
FEDERAL COURT,
MALAYSIA.

This Order is filed by M/s Lim Cheng Poh &
Co. whose address for service is at Room 707,
7th Floor, Lee Yan Lian Building, Jalan Tun Perak,
Kuala Lumpur, solicitors for the abovenamed
Appellants.

O N A P P E A L
FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N :

INTERNATIONAL INVESTMENT LIMITED

Appellants

AND

THE COMPTROLLER-GENERAL OF
INLAND REVENUE

Respondent

In the matter of 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

RECORD OF PROCEEDINGS

MAXWELL BATLEY & CO.,
27 Chancery Lane,
London,
WC2A 1PA

Solicitors for the Appellants

STEPHENSON HARWOOD,
Saddlers' Hall,
Gutter Lane,
Cheapside,
London, EC2V 6BS

Solicitors for the Respondent