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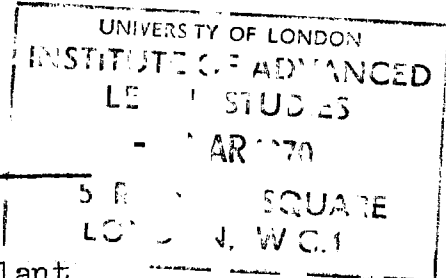
No.18 of 1968

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA
(Appellate Jurisdiction)

FEDERAL COURT CIVIL APPEAL No.X93 of 1966



B E T W E E N :-

BORNEO AIRWAYS LIMITED, KUCHING Appellant
(In Voluntary Liquidation)

B - and -

THE COMMISSIONER OF INLAND REVENUE Respondent
KUCHING

AND BETWEEN

HARPER, GILFILLAN (BORNEO) LTD. Appellant
C KUCHING

- and -

THE COMMISSIONER OF INLAND REVENUE Respondent
KUCHING

(In the matter of Civil Appeals Nos.K.5, K.6
D and K.7 of 1966 in the High Court of Borneo
in Kuching

Civil Appeal No.K.5 of 1966

BETWEEN

BORNEO AIRWAYS LIMITED, KUCHING Appellant
E (In Voluntary Liquidation)

- and -

THE COMMISSIONER OF INLAND REVENUE Respondent
KUCHING

Civil Appeals Nos. K.6 and K.7 of 1966

F BETWEEN

HARPER, GILFILLAN (BORNEO) LTD. Appellant
KUCHING

- and -

THE COMMISSIONER OF INLAND REVENUE Respondent

G (Consolidated by Order dated the 11th day of
November, 1966)

C A S E F O R T H E A P P E L L A N T

RECORD

p.97

p.96

p.59

pp.17,27,
33

p.1

pp. 4 &
34

pp.4 &
34

1. This is an appeal by leave of the Federal Court of Malaysia at Kuala Lumpur from an Order dated the 1st December, 1967, of the said Federal Court (Syed Sheh Barakbah, Lord President, and Azmi C.J., Ong F.J.dissenting) dismissing an appeal by the appellant companies from a Judgment of the High Court in Borneo at Kuching (Harley J.) dismissing two consolidated appeals by the Appellant companies against decisions dated the 24th February, 1966, 4th August, 1966, and 2nd March, 1966, of the Commissioner of Inland Revenue of Sarawak dismissing appeals against assessments to Corporation Profits Tax for the years of assessment 1963, 1964 and 1965 under the provisions of the Sarawak Inland Revenue Ordinance 1960.

2. The relevant facts are not in dispute. At all material times both the appellant companies were incorporated in and resident in Sarawak. Both carried on a single trade controlled and managed in Sarawak. Both maintained and operated branches in Sabah and Brunei. In the relevant accounting periods both incurred certain trading losses which for tax purposes were computed as shown in the Statements of Facts.

3. The relevant figures are not in dispute and are set out in the Record.

4. The relevant parts of the Inland Revenue Ordinance of Sarawak (Ordinance 13 of 1960), hereinafter called "the Ordinance" are set out in an annexure to this Case, as are the relevant parts of the Modification of Laws (Income Tax) Order 1964.

5. It is not disputed that under Section 43 of the Ordinance, 1960, Sabah and Brunei profits up to and including the year of assessment 1963 are properly included in the

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Sarawak assessment to Corporation Profits Tax, and that as from the year of assessment 1964 following the promulgation of the Modification of Laws (Income Tax) Order, 1964, Sabah profits are properly excluded from such assessment.

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6. The assessments for the years in issue raised by the Assessor and confirmed in his decisions by the Commissioner of Inland Revenue include for all years of assessment up to and including 1963 profits from Sarawak, Sabah and Brunei and for years of assessment 1964 onwards profits from Sarawak and Brunei. For none of the relevant years of assessment, however, has the Assessor allowed Sabah and Brunei losses in the basis period relevant to the year of assessment in question nor in years subsequent to the incurring of such losses have they been allowed as available for set off against profits in future years.

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7. At the hearing before the Commissioner of Inland Revenue no evidence was called, the matter proceeding on the basis of an agreed statement of facts. The full grounds of the Commissioner of Inland Revenue are given in his decision dated the 24th February, 1966. The Commissioner held that having regard to the terms of Section 28 of the Ordinance the appellant company concerned had failed to discharge the burden of proof laid upon it that the losses incurred in the Sabah and Brunei branches were attributable to activities in Sarawak. The Commissioner subsequently delivered similar decisions in respect of the other years of assessment under appeal.

p. 7

P. 17

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pp. 27 & 33

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8. From the said decisions the appellant companies appealed to the High Court of Borneo in Kuching on the grounds set out in the Statements of Grounds of Appeal.

pp. 41, 45
& 49

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9. At the hearing before the said High Court (Harley J.) it was agreed by both Counsel that all three appeals could be decided by the answers to two questions as

p. 51

follows:-

- "(i) Does Section 43 permit the Commissioner of Inland Revenue to include in his assessment on a company carrying on a trade which is controlled or managed in Sarawak any profits arising in branches outside Sarawak without setting off any losses incurred in other branches outside Sarawak in the same basis period (see year of assessment 1963)? A B
- (ii) Assuming that the answer to (i) is in the negative, does Section 28 nevertheless restrict relief in respect of past losses brought forward to the losses incurred in the Sarawak branch even though the profits of other branches with past losses are included in the assessment (see years of assessment 1964 and 1965)?" C D

p. 51

And at the commencement of the hearing the learned Judge ordered that all three appeals be consolidated.

pp. 51-53
& 53-54

10. It was argued for the appellant companies that, as is not in dispute, there is only one trade in each case, that the whole of the income of the appellant companies is by reason of the provisions of Section 43 of the Ordinance deemed to accrue in Sarawak and therefore that the whole of the appellant companies' activities must be deemed to take place in Sarawak, that Section 29 expressly provides that losses are to be computed in the same way as profits and that losses should therefore involve a single calculation covering all the activities of the trade controlled and managed in Sarawak in the same way as profits, that activities within the meaning of that term in Section 28 of the Ordinance must take into account the deeming provisions of Section 43 and must in any event include the activities of control and E F G H

- management which bring into operation the provisions of Section 43 in the first place. On behalf of the Respondent it was argued that by reason of the provisions of Section 28 which require losses to be referable to activities in Sarawak losses incurred by branches outside Sarawak do not qualify for any allowance. p. 53
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11. In his Judgment dated the 11th November, 1966, Harley J. after setting out the relevant provisions of the Ordinance and making reference to the authorities cited, dismissed the appeal relying on the express provisions of Section 28 of the Ordinance and adopting without elaboration the summary of the law contained in the decision of the Commissioner dated the 24th February 1966. p. 14
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12. From the said Judgment of Harley J. the appellant companies appealed to the Federal Court of Malaysia on the grounds set out in the Memorandum of Appeal. pp. 63-4
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13. At the hearing before the said Federal Court (Syed Sheh Barakbah L.P., Azmi C.J. and Ong F.J.), the arguments for the appellant companies and for the Respondent were in terms similar to those submitted before Harley J. pp. 65-77
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14. On the 1st December, 1967, the Federal Court (Syed Sheh Barakbah L.P., Azmi C.J. and Ong F.J.) delivered Judgment (Ong F.J. dissenting) dismissing the appellant companies' appeal. The Judgments of the Lord President and the Chief Justice are based on the wording of Section 28 and decide that the Ordinance intends to disallow the assessment of losses due to activities outside Sarawak which losses include the branch losses the subject of this appeal. Ong F.J. dissenting held that the provisions of Section 28 are governed by the provisions of Section 29 and that the words "activities in Sarawak" can only mean activities of control and management because this interpretation gives effect pp. 79-84
85-90
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equally to the provisions of Sections 28, 29 and 43.

15. After hearing Counsel the Federal Court ordered that the taxed costs of the appeal be paid by the appellant companies to the respondent.

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16. The appellant companies submit that the Judgment of the Federal Court should not be allowed to stand.

17. The appellant companies were granted final leave to appeal to his Majesty the Yang di-Pertuan Agong by Order of the Federal Court of Malaysia dated the 6th day of May 1968.

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p. 97

18. The scheme of the Ordinance in relation to corporation profits tax so far as relevant to the appellant companies is as follows. The tax is charged under Section 18(1) on every company carrying on trade in Sarawak in respect of its profits accruing in, derived from or received in Sarawak from such trade. Thus the scope of the tax is primarily territorial: to attract tax profits must have a Sarawak source or be received in Sarawak. Under Section 18(2) the tax is to be charged for each year of assessment (coincident with the calendar year) on a company's assessable profits. And under Section 18(3) any sum accruing in, derived from or received in Sarawak, other than a sum from the sale of capital assets, received by or credited to a company carrying on a trade in Sarawak is to be deemed to accrue from the trade carried on. Prima facie this provision extends the scope of corporation profits tax to cover income other than trading profits.

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Under Section 22 (1) the assessable profits for any year of assessment from any trade carried on in Sarawak are to be computed on the full amount of the profits accruing in, derived from or received in Sarawak during the preceding year. Section 25 contains provisions which enable a basis period other than the

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preceding year to be taken if a company does not normally make up its accounts to 31st December each year.

- A Section 29 provides that the amount of any loss incurred by a person chargeable is to be computed in like manner as assessable profits are computed. Section 28(1) provides that where a loss is incurred in the basis period for any year of assessment, the amount of such loss attributable to activities in Sarawak is to be set off against what would otherwise have been the assessable profits for that year of assessment. It is not immediately clear how if a company has a loss in a basis period, there can be any assessable profits for the year of assessment. Possibly what is intended to be indicated by the subsection is that a loss incurred in a trade controlled and managed in Sarawak can be set off against income received in the same basis period from outside Sarawak but that a loss incurred in a trade controlled and managed outside Sarawak cannot be set off against a company's trading profits or other income accruing in, derived from or received in Sarawak in the same basis period. This would be consistent with the proposition sought to be established by the appellant companies that a loss incurred in relation to a source any profits from which would attract tax is such a loss as is intended to be available for relief.
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- G The relief for losses provided by Section 28(1) is supplemented by the provisions of Section 28(2) which permit a loss to be carried forward and set off against profits for future years if the amount of loss is such that it cannot be wholly set off against profits of the same basis period.

- H Section 42 supplements the charge on profits derived from sources in Sarawak by providing that "profits accruing in, derived from or received in Sarawak" shall include all profits from business transacted in Sarawak.

Section 43 extends the territorial scope of the tax by providing that if the control or management of a trade is exercised in Sarawak the whole of the income derived from such trade is to be treated as if it had accrued in, was derived from or had been received in Sarawak.

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19. It is submitted on behalf of the appellant companies that the construction of the reference in Section 28 of the Ordinance to a loss attributable to activities in Sarawak adopted by the Commissioner of Inland Revenue and approved by the learned Judge and the majority in the Federal Court is erroneous because it fails to interpret the words used in the context in which they are found. There can, it is submitted, having regard to the general scheme of the Ordinance in relation to corporation profits tax, be no justification for excluding from relief a loss incurred in a trade carried on in Sarawak and controlled and managed there.

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20. The appellant companies humbly submit that the appeal should be allowed, that the Judgments of the Lord President and the Chief Justice and the Order of the Federal Court of Malaysia should be set aside, that the assessments under appeal should be amended to the extent necessary to allow a set off of any losses incurred in branches of the appellant companies outside Sarawak and that the respondent be ordered to pay to the appellant companies their costs of this appeal, of the appeal in the Federal Court and of the proceedings in the High Court, for the following among other

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pp.79,85
& 97

R E A S O N S

(1) BECAUSE the appellant companies incurred losses which were available to be carried forward and set off against the profits assessed pursuant to Section 28 (2) of the Ordinance.

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(2) BECAUSE the losses incurred by the appellant companies were as to the whole amount thereof attributable to activities in Sarawak within the meaning of Section 28 (1)

A (3) BECAUSE the reasoning adopted by the Commissioner of Inland Revenue, by Mr. Justice Harley and by the Lord President and by the Chief Justice in the Federal Court was erroneous.

B (4) BECAUSE the judgment of Mr. Justice Ong was right.

H.H. MONROE ✓

G. STARFORTH HILL ✓

A N N E X U R E

Inland Revenue Ordinance, 1960 (No.13 of 1960)

A And Ordinance to impose a tax on property, earnings and profits and for other matters incidental thereto and connected therewith.

[1st January, 1961]

Enacted by the legislature of Sarawak

PART IV.

PROFITS TAX

Charge and rate of corporation profits tax

B 18. (1) Corporation profits tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every corporation carrying on any trade, profession or business in Sarawak in respect of the profits of the corporation accruing in, derived from or received in Sarawak from such trade, profession or business.

D (2) Corporation profits tax shall be charged for each year of assessment at the rate specified in Part A of the Second Schedule on the assessable profits of a corporation ascertained in accordance with the provisions of this Part.

E (3) Any sum accruing in, derived from or received in Sarawak, other than a sum from the sale of capital assets, received by or credited to a corporation carrying on a trade profession or business in Sarawak shall be deemed to accrue from the trade, profession or business carried on:

G Provided that notwithstanding this section, subsection (1) of section 42 and section 43 corporation profits tax shall not be charged on any profits of any such corporation which are derived from the States of Malaya or Sabah.

Basis for computing and ascertaining assessable profits	22. (1) The assessable profits for any year of assessment from any trade, profession or business carried on in Sarawak shall be computed on the full amount of the profits accruing in, derived from or received in Sarawak during the year preceding the year of assessment.	A
Treatment of losses	28. (1) Subject to the provisions of subsection (3), where a loss is incurred in the basis period for any year of assessment by a person chargeable to tax under this Part, the amount of such loss attributable to activities in Sarawak shall be set off against what would otherwise have been the assessable profits of such person for that year of assessment.	B
	(2) Where the amount of loss which may be set off under subsection (1) is such that it cannot be wholly set off against the assessable profits for the year of assessment in the basis period for which the loss occurred, the amount not so set off shall be carried forward and shall be set off against which would otherwise have been assessable profits for the future years in succession:	C
	Provided that the amount of any such loss allowed to be set off in computing the assessable profits for any year of assessment shall not be set off in computing the assessable profits for any other year of assessment.	D
Computation of losses	29. For the purposes of section 28, the amount of any loss incurred by a person chargeable to tax under this Part, shall be computed in like manner as assessable profits are computed.	E
Provision in regard to doubt as to whether a profit is a profit accruing in, derived from or received in Sarawak.	42. (1) In this Part the expression "profits accruing in, derived from or received in Sarawak" shall, without prejudice to the generality of its meaning, include all profits from business transacted in Sarawak, whether directly or through an agent.	F
	(2) In the case of any doubt as to whether a profit is for the purposes of this Part a profit accruing in, derived from or received in Sarawak the onus of proving that such profit is not such a	G
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profit shall be on the person charged to tax in respect of such profit.

Profits deemed to accrue where control or management is exercised.

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43. Notwithstanding anything contained in section 42, for the purposes of assessment under this Part the whole of the income derived by any person from any trade, profession or business shall be deemed to accrue in, be derived from or be received in Sarawak if the control or management of such trade, profession or business is exercised in Sarawak.

Hearing and disposal of Appeals

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84. (5) The High Court may confirm, reduce, increase or annul the assessment or may order a re-hearing of the appeal or remit the case to the Commissioner with the opinion of the High Court thereon. Where a re-hearing is ordered or the case is so remitted by the High Court, the Commissioner shall re-hear the appeal or revise the assessment as the opinion of the High Court may require.

MALAYSIA ACT

MODIFICATION OF LAWS (INCOME TAX) ORDER, 1964

Citation and date of commencement

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1. This Order may be cited as the Modification of Laws (Income Tax) Order, 1964.

Modification of Sarawak No.13 of 1960

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4. The Inland Revenue Ordinance, 1960, of Sarawak and the subsidiary legislation specified in the Third Schedule to this Order shall have effect in Sarawak with the modifications set out in that Schedule.

Consequential amendments

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8. Where by this Order any modifications have been made, all consequential modifications necessary for giving full effect thereto shall be deemed to have been made by this Order to the Ordinances hereby modified and to all subsidiary legislation made thereunder as if they had been included herein.

THIRD SCHEDULE

MODIFICATIONS TO THE INLAND REVENUE ORDINANCE,
1960 OF SARAWAK
(Sarawak No.13 of 1960)

Specific Modifications:

Section

18 ... Substitute a colon for the full stop
at the end of sub-section (3) and add
the following proviso:

"Provided that notwithstanding this
section sub-section (1) of section
42 and section 43 corporation profits
tax shall not be charged on any
profits of any such corporation
which are derived from the States of
Malaya, Singapore or Sabah."

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No.18 of 1968

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PRIVY COUNCIL

O N A P P E A L
FROM THE FEDERAL COURT OF MALAYSIA
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B E T W E E N :-

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(In Voluntary Liquidation)

- and -

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REVENUE KUCHING

AND BETWEEN

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LTD. KUCHING

- and -

THE COMMISSIONER OF INLAND Respondent
REVENUE KUCHING

C A S E F O R T H E A P P E L L A N T

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