Judgment 18 of 1972

18

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL No. 49 of 1970

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN :

THE COMPTROLLER GENERAL OF INLAND REVENUE, MALAYSIA — Appellant

- and -

ALAN RICHARD KNIGHT — Respondent

RECORD OF PROCEEDINGS

STEPHENSON HARWOOD & TATHAM
Saddler's Hall, Gutter Lane,
Cheapside, London, EC2V 6BS.

Solicitors for the Appellant

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

Solicitors for the Respondent

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL No. 49 of 1970

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No. 49 of 1970

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- and -

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RECORD OF PROCEEDINGS

In the High Court in Malaya at Kuala Lumpur

No. 1

Case Stated by Special Commissioners of Income Tax with Annexures A-E

25th March 1969

No. 1

CASE STATED BY SPECIAL COMMISSIONERS OF INCOME TAX WITH ANNEXURES A-E

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

ORIGINATING MOTION NO. 9/69

Between

Alan Richard Knight . . . 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.

C A S E

1. The Appellant appealed to us, the Special Commissioners of Income Tax, against the assessment

In the High Court in Malaya at Kuala Lumpur

No. 1

Case Stated by Special Commissioners of Income Tax with Annexures A-E

25th March 1969 (continued)

of income tax raised by the Comptroller-General of Inland Revenue on the Appellant for the year of assessment 1966 vide notice of amended assessment dated 30.11.65.

2. We heard the said appeal on 26.8.68, 3.9.68, 26.9.68 and 29.10.68.

3. The facts which we found in this case are stated in Annexure A hereto.

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

(a) the Agreement of 1954 was the only contractual document between the Appellant and Malaya Borneo Building Society Limited binding the parties;

(b) the Society was under no legal obligation to make payment of compensation;

(c) the Appellant was under a continuing contract of service with the Society;

(d) the said contract was abrogated and compensation paid in consideration of such abrogation;

(e) the said compensation for a loss of a source of income or right to remuneration was a capital payment not assessable to tax;

(f) the payment of the said compensation is not specifically charged as income under the Income Tax Ordinance 1947;

(g) if the said sum be regarded as a voluntary payment to the Appellant it did not accrue to him by virtue of his employment, or by way of remuneration for his services;

(h) if the said sum be regarded as a gratuity it is income exempt from tax by virtue of Section 13(1)(i) of the Ordinance;

(i) the Society released itself from a contingent liability under the contract to give the requisite 3 months' notice thereunder, and the payment of the said sum was thereby not from the contract of employment.

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

(a) the sum of $28,050 paid by Malaya Borneo Building Society Limited to the Appellant and called redundancy pay was remuneration or salary of the Appellant in respect of his employment;

(b) alternatively, it was a gratuity or bonus in respect of his employment and therefore it was income from employment under Section 10 (2)(a);

(c) in the Memorandum of Association of Malaya Borneo Building Society Limited there was provision for the payment of gratuities to its employees or ex-employees, and this provision should be regarded as implied term of the employment agreement;

(d) payment of redundancy pay should be taken as additional term of the employment agreement or a variation of it;

(e) the payment was not a compensation for loss of office;

(f) retiring gratuity under section 13(1)(i) is gratuity for permanent retirement, not in respect of retirement from one employment after which there is a new employment again, and since there is no evidence that the Appellant has retired permanently the payment was not a retiring gratuity;

(g) there is no evidence to show that there was an agreement to abrogate the employment agreement.

6. We were referred to the following cases:-

Chibbett v. Joseph Robinsons & Sons, 9 T.C. 48.
Duff v. Barlow, 23 T.C. 633.
Henley v. Murray, 31 T.C. 351.
Barr Crombie & Co. Ltd. v. C.I.R., 26 T.C. 406.
Duke of Westminster v. C.I.R., 19 T.C. 490.
C.I.R. v. Wesleyan & General Assurance Society, 30 T.C. 11.
Russell v. Scott, (1948) 2 A.E.R. 1.

In the High Court in Malaya at Kuala Lumpur

No. 1

Case Stated by Special Commissioners of Income Tax with Annexures A-E

25th March 1969 (continued)

Coltness Iron Company v. Black (1881) 6 App. C. 330.
Greenwood v. F.L. Smidth & Co. (1922) 1 A.C.417.
Ormond Investment Co. v. Betts (1928) A.C. 143.
Kirkness v. John Hudson & Co. Ltd. (1955) 2 A.E.R. 345.
Duncan's Executors v. Farmer, 5 T.C. 417.
Beynon v. Thorpe, 14 T.C. 1.
Holloway v. Poplar Corpn., 1940. 1 K.B. 173.
In Re Ward, 1897 1 Q.B. 266.
Hunter v. Dewhurst, 16 T.C. 605.
Dale v. de Soissons, 32 T.C. 118.
Hunry v. Foster, 16 T.C. 605.
Allen & Another v. Trehearne, 22 T.C. 15.
Moorhouse v. Dooland, 36 T.C. 1.
Wales v. Tilley, 25 T.C. 136.

7. Taking into consideration all the facts which we found in this case we have come to the conclusions and have made findings as stated in the Deciding Order annexed hereto as Annexure D. The grounds of our decision are stated in Annexure E hereto.

8. The Appellant by letter dated 31.10.68 requires us to state a case for the opinion of the High Court pursuant to paragraph 34 of Schedule 5 to the Income Tax Act 1967.

QUESTIONS

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

(a) whether on the facts which we found in this case we rightly decided that the sum of $28,050 paid by Malaya Borneo Building Society Limited to the Appellant and called redundancy pay was in his hand income in respect of gains or profits from employment chargeable to income tax under section 10(1)(b) of the Income Tax Ordinance, 1947; and

(b) whether on the facts which we found in this case we rightly decided that the said sum was not received by way of retiring gratuity within the meaning of section 13(1)(i) of the Ordinance.

Dated this 25th day of March, 1969.

Chairman,
Special Commissioners of Income Tax

Special Commissioners of Income Tax

Special Commissioners of Income Tax

In the High Court in Malaya at Kuala Lumpur

No. 1

Case Stated by Special Commissioners of Income Tax with Annexures A-E

25th March 1969 (continued)

E X H I B I T S

Exhibits

ANNEXURE A

Annexure A

Facts Found by Special Commissioners of Income Tax

FACTS FOUND BY THE SPECIAL COMMISSIONERS OF INCOME TAX

1. On 23.8.54 the Appellant, Alan Richard Knight, entered into a written agreement, a copy of which is annexed hereto as Annexure B, with the Federal and Colonial Building Society Limited, whereby the parties agreed that the Appellant be employed by the Federal and Colonial Building Society Limited as a Staff Surveyor subject to the terms and conditions contained therein.

2. In 1956 the name of the Federal and Colonial Building Society Limited was changed to the Malaya Borneo Building Society Limited (hereafter in Annexure A referred to as "the Company"), and the Appellant continued to be employed by the Company as a Staff Surveyor and then Chief Staff Surveyor. A letter dated 6.2.60, a copy of which is annexed hereto as Annexure C, was sent by the Company's Deputy General Manager to the Company's Staff Surveyors including the Appellant. There is no evidence before us to show that the Appellant after receiving the letter marked as Annexure C made any protest or raised any objection to the Company on the subject of redundancy and redundancy pay which was dealt with in that letter.

Exhibits

Annexure A

Facts Found by Special Commissioners of Income Tax (continued)

3. On 2.11.65 the Board of Directors of the Company passed a resolution thus:-

"That -

(a) The Society's Chief Staff Surveyor, Mr. A.R. Knight be declared redundant as from 1st December, 1965.

(b) Mr. A.R. Knight be given redundancy pay at the rate of one month's basic salary for every completed year's service subject to a maximum of 12 months' pay."

4. In accordance with the resolution of the Board of Directors made on 2.11.65 the Appellant was paid what is called redundancy pay in the sum of $28,050.

5. The Company did not give the Appellant three months' notice, as stipulated by clause 11 (a) of the agreement marked as Annexure B, to terminate the employment. Nor did the Appellant apply to the Company for retirement.

6. The Appellant ceased to work with the Company on 30.11.65, and on the same date he left Malaya for London. He was paid salary up to 30.11.65. The Company paid the cost of the passage of the Appellant, of his wife and of his children for leaving Malaya to the United Kingdom on the termination of the Appellant's employment. At the time of the termination of the Appellant's employment there were 87 days' leave due to him, in lieu of which the Company paid to him a sum of $8,120.

7. Soon after the Appellant left Malaya he took up employment in Trinidad.

8. The Appellant has not taken any legal action against the Company for failure to give three months' notice to terminate his employment. Nor has the Appellant been contemplating such legal action.

9. The Comptroller-General of Inland Revenue raised an assessment on the amount of $28,050 which the Appellant received from the Company as redundancy pay, and the Appellant appealed to us against the assessment of income tax on this amount.

Exhibits

Annexure A

Facts Found by Special Commissioners of Income Tax (continued)

10. Previous to the resolution declaring the Appellant redundant, two other Staff Surveyors of the Company had been declared redundant, one in April 1963 and the other in June 1965. They were also paid redundancy pay. Similar payments were also made to local staff who were declared redundant by the Company. It is also customary practice for commercial companies to pay redundancy pay.

11. The Company's Memorandum of Association expressly empowers the Company to grant gratuities to its employees or ex-employees.

Chairman,
Special Commissioners of Income Tax

Special Commissioners of Income Tax

Special Commissioners of Income Tax

Annexure B

Agreement dated 23rd August 1954

ANNEXURE B

AGREEMENT DATED 23rd AUGUST 1954

THIS AGREEMENT is made the Twenty Third day of August One thousand nine hundred and fifty-four (1954) BETWEEN FEDERAL & COLONIAL BUILDING SOCIETY LIMITED a company incorporated and having its Registered Office in Singapore (hereinafter referred to as "the Society") of the one part and Alan Richard KNIGHT (hereinafter referred to as "the Employee") of the other part.

WHEREBY IT IS AGREED as follows:-

1. The Society will employee the Employee and the Employee will serve the Society as Staff Surveyor for the period and upon and subject to the terms and conditions hereinafter contained.

2. The Employee will devote the whole of his time attention and skill to the affairs of the Society and will use his best endeavours to further its interests in every way and (but without prejudice

Exhibits

Annexure B

Agreement dated 23rd August 1954 (continued)

to the generality of the foregoing) will:-

(a) At all times diligently faithfully and to best of his ability perform the duties for which he is hereby employed and such other and additional duties as may reasonably be requested of him and generally serve and promote the interests of the Society and its subsidiary or associated companies and all projects schemes and enterprises in which it or they or any of them may from time to time be engaged interested or concerned.

(b) Not (without the previous written consent of the Society) in any way (either directly or indirectly) engage in any other remunerated profession or occupation whatsoever.

(c) Perform all lawful orders and instructions given to him by the Society or its authorised agents and observe all Standing and other Rules and/or Regulations now in force or from time to time published or laid down by the Society.

(d) Keep the business secrets of the Society and its subsidiary and associated companies and not publish or disclose (directly or indirectly) to any person whomsoever (unless with the previous written permission of the Society) any information rumour or report relating to the Society or any of its subsidiary or associated companies or any project scheme or enterprise in which it or they or any of them may from time to time be interested, engaged or concerned.

(e) Assign to the Society (for such consideration and on such terms as the Society shall consider reasonable) the sole and exclusive benefit of any invention he may make or acquire which may be of use to the Society.

(f) Take all reasonable precautions to safeguard his health and keep himself fit to perform his duties under this Agreement and submit (and cause his wife and family to submit) to such medical inspection and/or treatment as the Society's medical advisers may from time to time consider necessary or advisable.

(g) Not promote encourage or take part in any public tumult or disorder nor do or permit his wife

or children to do anything which might cause public scandal or bring the Society or any of its subsidiary or associated companies into disrepute.

(h) Not (without the written authorisation of the Society) enter into any contract or incur any commitment or obligation or make any purchase or place any order for purchase or give or allow any credit on behalf of the Society and, notwithstanding anything to the contrary herein contained, the Employee shall remain liable to the Society for any action in violation of this Clause.

3. Inasmuch as the activities of the Society are presently confined to the Colony of Singapore and the Federation of Malaya the Employee will carry out his duties hereunder in those territories but the Society reserves the right (which the Employee concedes) to require him to fulfil such duties in any other territory or territories and in general to require him to visit or reside in such place or places as the Society may from time to time consider necessary or advisable.

4. This Agreement and all the provisions herein contained (either expressly or by implication) shall come into force on the date when in accordance with the Society's instructions the Employee first leaves the United Kingdom after the signing of this Agreement to take up his duties in Malaya and shall continue until determined in manner hereinafter mentioned.

5. (i) The Society will pay to the Employee as remuneration for his services under this Agreement Straits $1395 per mensem to be apportioned as follows:-

(a) A Basic Salary of not less than $860

(b) An Overseas Allowance of $430

(c) A Marriage Allowance of $150

(ii) The above payments (subject to such deductions as are hereinafter mentioned) will be made to the Employee by the Society at the end of each calendar month in respect of the month then ending. The said monthly Overseas and Marriage Allowances shall each be subject to alteration by the Society at its discretion without assigning

Exhibits

Annexure B

Agreement dated 23rd August 1954 (continued)

any reasons and the said Marriage Allowance (subject to such alterations as aforesaid) shall continue only so long as the Employee shall be responsible for the maintenance of a wife or a former wife and/or (being a widower or living apart from his wife) he shall have in his custody and be legally responsible for the maintenance of a dependant child or children.

6. The following deductions shall be made from the remuneration payable to the Employee under the provisions of the preceding Paragraph hereof:-

(a) Such sum as the Society shall from time to time consider reasonable by way of rent for any housing accommodation, furniture etc. that may be provided by the Society.

(b) Such contributions to the Colonial Development Corporation's Overseas Superannuation Fund as are from time to time made payable by the Rules governing that Fund.

7. Upon being instructed to proceed to Malaya the Employee will be paid an Outfit Allowance of £50 which will be repayable to the Society if (either by the Employee's own action or under the provisions of Paragraph 11 (b) hereof) this Agreement is determined within twelve calendar months from the date of its commencement.

8. (1) The Society will pay the cost of the Employee's passage and his travelling expenses to Malaya and (subject to the provisions hereinafter contained) will pay the cost of his passage and travelling expenses back to the United Kingdom on the termination of his employment hereunder.

(2) In so far as it shall be willing for them to join and upon being provided with satisfactory medical evidence as to their state of health the Society will also pay the cost of the passage and the travelling expenses to Malaya of the Employee's wife and such of his children who (at the date of departure from the United Kingdom) are under twelve years of age. Subject to the provisions hereinafter contained the Society will also pay the cost of the return passages and travelling expenses of such wife and children back to the United Kingdom on the termination of his employment hereunder by death or otherwise.

Exhibits

Annexure B

Agreement dated 23rd August 1954 (continued)

(3) Should this Agreement at any time be summarily terminated by the Society under Paragraph 11(b) of this Agreement or should it be terminated within a period of 33 calendar months from the date of its commencement by the Employee giving to the Society notice in writing to that effect as hereinafter provided the Society shall not be liable to pay the cost of the passages or travelling expenses back to the United Kingdom of either the Employee himself or of his wife or children.

(4) Should this Agreement be terminated within a period of 18 calendar months from its commencement either summarily by the Society under Paragraph 11 (b) of this Agreement or by the Employee giving to the Society notice in writing to that effect as aforesaid the Employee shall repay to the Society such proportion of the cost of the outward passages and of the outward travelling expenses of himself and his wife and children as shall be commensurate with the proportion borne to the whole of this period by the part thereof then unexpired.

(5) The Society shall not be liable to pay the whole or any part of the return passages or travelling expenses of the Employee or of his wife or children unless within two calendar months from the date of the termination of this Agreement he shall notify the Society of his intention to return to the United Kingdom and within the same period (or as soon thereafter as shall be practicable) he shall together with his wife and children depart from Malaya or such other territory in which he shall have been employed at the date of the termination of his employment hereunder and shall return to the United Kingdom without unreasonable delay or break of journey.

(6) The Employee his wife and children shall travel on such dates and by such routes and methods of transport (including air transport) as the Society shall prescribe and the class of passages and the scale of travelling expenses to which he and they shall be entitled shall be decided by the Directors of the Society.

9. At the expiration of six calendar months from the commencement of this Agreement the Employee shall become a member of the Colonial Development Corporation's Overseas Superannuation Fund and (subject to the Rules thereof for the time being in

Exhibits

Annexure B

Agreement dated 23rd August 1954 (continued)

force) he shall continue to be a member of such Fund during such period as he shall remain in the employment of the Society. The Employee's contributions to such Fund shall be deducted from his monthly remuneration as hereinbefore provided the Society also making such contributions as the said Rules shall from time to time provide.

10. (a) The Employee will be entitled to Home leave at the rate of one days leave for every six days service in Malaya or elsewhere under the provisions of this Agreement. Such leave shall be taken at a time convenient to the Society and as soon as shall be practicable after the expiration of three years from the commencement of this Agreement.

(b) Subject to the other provisions of this Agreement the Society will pay the passages and travelling expenses of the Employee his Wife and children on their journeys for the purpose of such leave to the United Kingdom in accordance with the provisions of Paragraph 8 hereof.

(c) The Employee shall not be entitled to any leave whatsoever should he resign from his employment or be summarily dismissed by the Society as hereinafter mentioned. Provided that in the event of his so resigning the Directors of the Society may,,in their sole discretion, grant some period of leave.

11. This agreement may be determined:-

(a) By either party hereto giving to the other not less than three calendar months notice in writing to expire at any time.

(b) By the Society summarily without notice or payment of compensation if the Employee:-

(i) is guilty of dishonesty or misconduct or commits any act or is guilty of such neglect as in the opinion of the Society is likely to bring the Society or any of its subsidiary or associated companies or any of its or their official or employees into disrepute whether such dishonesty misconduct act or neglect is or is not directly related to the affairs of the Society;

(ii) becomes unfit to fulfill the duties or obligations of his employment through wilful neglect of reasonable health precautions or otherwise through his own fault;

(iii) is adjudged bankrupt or if he borrows money from any other employee of the Society or from any customer of or person associated with the Society or any of its subsidiary or associated companies;

(iv) commits any material breach of any of his duties or obligations under this Agreement;

(v) is discovered to have made or given any false statement or document testifying to his ability or competence or relating to his state of health knowing that such statement or document is false;

(vi) is found to have made any illegal monetary profit or received any gratuities or other rewards (whether in cash or kind) out of any of the Society's affairs.

12. The exercise by the Society of its right of summary dismissal under the preceding Paragraph hereof shall not debar it from exercising such other rights or remedies as may be available to it by law or otherwise by reason of any of the matters aforesaid.

13. This Agreement and all the provisions herein contained shall be construed and have effect under and in accordance with the laws for the time being in force in the Colony of Singapore Provided that in the event of the Society or the Employee suing upon this Agreement in the Courts of England then English law shall apply.

AS WITNESS the hands of the parties hereto the day and year first above written.

SIGNED on behalf of FEDERAL AND COLONIAL BUILDING SOCIETY in the presence of:-

Name Sgd

Address 33 Hill Street, London, W.1.

Occupation Assistant

Sgd.

Exhibits

Annexure B

Agreement dated 23rd August 1954 (continued)

SIGNED by the Employee in the presence of:-)

Name Sgd.)

Address Northam Reservoir Road, Elburton, Plymouth,) A.R. Knight

Occupation Chartered Surveyor.)

Annexure C

Letter

6th February 1960

ANNEXURE C

LETTER

A.R. Knight Esq.,
Penang.

6th February, 1960

DGM/60/103

1) The conditions of service of technical staff were reviewed at a Management Meeting held on 3rd February.

The salary scale for Staff Surveyors has been considered and it is felt that the current scale, a copy of which is attached, is satisfactory.

2) Education Allowance

To assist Expatriate Staff, some of whose chiodren are approaching school age, Management is recommended to the Society's Board of Directors that an education allowance up to £100 per annum for each child of an expatriate officer between the ages of 8 and 18 receiving full-time education in the United Kingdom or Australia (or exceptionally in other countries other than Malaya or Singapore) be approved, subject to a limit of two such allowances at any one time. The recommendation will be placed before the Society's Directors for consideration in late March 1960 and I shall let you know the Board's decision by 25th March, 1960.

3) Redundancy Pay

The subject of redundancy was discussed and it was agreed that should a Staff Surveyor become

redundant, Management would consider the payment of redundancy pay to the Surveyor concerned, the maximum benefit payable being limited to one month's pay (based on salary at date of redundancy) for every completed year's service subject to:-

a) minimum compensation of 3 months' pay
b) maximum compensation of 12 months' pay

4) Loss of Office

The Society is a commercial company and as such need not have a Malayanisation policy. Should it eventually become the policy of the Society's Board that expatriate staff should be replaced by suitably qualified local staff, Management would at that time draw up for the Board's consideration a scheme for compensation for loss of office. Management cannot, however, anticipate what the scheme will be neither can it anticipate Board's approval. However, it can safely be assumed that should compulsory replacement be introduced, Staff Surveyors would be granted compensation for loss of office on terms not less generous than those that apply to redundancy.

Sgd.
Dy. GENERAL MANAGER

Exhibits

Annexure C

Letter

6th February 1960 (continued)

No. 2

SUPPLEMENTARY CASE STATED

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

ORIGINATING MOTION NO. 9/69

Between

Alan Richard Knight . . . Appellant

And

The Comptroller-General of Inland Revenue . . . Respondent

SUPPLEMENTARY CASE STATED by the Special Commissioners of Income Tax under paragraph 40(b) of Schedule 5 to the Income Tax Act 1967, pursuant to the order of the High Court.

In the High Court in Malaya at Kuala Lumpur

No. 2

Supplementary Case Stated

7th May 1969

In the High Court in Malaya at Kuala Lumpur

No. 2

Supplementary Case Stated

7th May 1969 (continued)

1. We, the Special Commissioners of Income Tax, have been required by the order of the High Court dated 4th April, 1969, to state furhter facts as to how the sum of $28,050 paid to the Appellant was arrived at.

2. Accordingly we held a hearing on 6th May, 1969, to receive evidence, and we found further facts as follows, which we hereby state in pursuance of the said order:-

On 1.12.1965, as from which date the Appellant was declared redundant, he had completed 11 years' service, and immediately before that date his basic salary was $2,550 per month. The sum of $28,050 paid to the Appellant was arrived at by multiplying $2,550 (basic salary) by 11 (completed years' service).

Dated this 7th day of May, 1969.

Sgd. (Wan Hamzah bin Wan Mohd. Salleh
Chairman.
Special Commissioners of Income Tax

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

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

Exhibits

Annexure D

Deciding Order

29th October 1968

E X H I B I T S

ANNEXURE D

Deciding Order

PKR 16

Appeal by Alan Richard Knight in respect of the assessment of income tax for the year of assessment 1966.

DECIDING ORDER

By the Special Commissioners of Income Tax

Exhibits

Annexure D

Deciding Order

29th October 1968 (continued)

1. We, the Special Commissioners of Income Tax, find as follows:-

(a) that there has been a stipulation agreed between the Appellant, Alan Richard Knight and Malaya Borneo Building Society Limited that Malaya Borneo Building Society Limited may at any time declare his post redundant;

(b) that there has also been a stipulation agreed between the Appellant and Malaya Borneo Building Society Limited that Malaya Borneo Building Society Limited should pay the Appellant a sum called "redundancy pay" calculated at one month's pay for every completed year's service subject to a minimum amount equivalent to 3 months' pay and to a maximum amount equivalent to 12 months' pay, in the event of Malaya Borneo Building Society Limited declaring his post redundant;

(c) that the said stipulations modify clause 11(a) of the employment agreement Exhibit R4, so that Malaya Borneo Building Society Limited may determine the Appellant's employment either by giving him not less than three months' notice in writing or by declaring his post redundant and paying him the redundancy pay, and such declaration may be made at any time, which may be less than three months before the date on which his employment is to terminate;

(d) that the redundancy pay is gratuity within the meaning of section 10(2)(a) of the Income Tax Ordinance 1947 and as such it is chargeable to income tax;

(e) that the redundancy pay is not retiring gratuity within the meaning of section 13 (1)(i) of the Income Tax Ordinance 1947 so that it is not exempt from income tax.

2. It is ordered that the assessment of income tax in respect of the Appellant as per notice of amended assessment dated 30th November 1965 shall be and is hereby confirmed.

Exhibits

Annexure D

Deciding Order

29th October 1968 (continued)

Dated this 29th day of October, 1968.

Sgd.
(Wan Hamzah bin Wan Mohd. Salleh)
Pengerusi,
Pesurohjaya Khas Chukai Pendapatan

Sgd.
(Lee Kuan Yew)
Pesurohjaya Khas Chukai Pendapatan

Sgd.
(David Kuok Khoon Hin)
Pesurohjaya Khas Cukai Pendapatan

Annexure E

Grounds of Decision of the Special Commissioners of Income Tax

ANNEXURE E

GROUNDS OF DECISION OF THE SPECIAL COMMISSIONERS OF INCOME TAX

1. For the purposes of stating our grounds of decision we find it convenient to consider at the outset the law as expounded in decided cases in the United Kingdom on questions similar to the points in issue in this case.

2. The U.K. decided cases can be divided broadly into two classes: first, the class of cases of voluntary payments, i.e. the cases where the employer or some other person was not obliged under the terms of any agreement to make the payment to the employee but made it voluntarily at his own absolute discretion; secondly, the class of cases of obligatory payments, i.e. the cases in which the employer made the payment pursuant to the terms of an agreement between him and the employee which required him to do so. It is important in order to arrive at the correct answer, to determine first under which of the two broad classes a particular case falls. Different considerations apply to voluntary payments and to obligatory payments. Lawrence L.J. in the Court of Appeal in Henry v. Arthur Foster and Henry v. Joseph Foster, 16 T.C. 605 said -

"In my opinion neither Duncan's case nor

any other case dealing with voluntary payments made on the relinquishment of an office or an employment of profit has any bearing on the question which we have to decide. In my judgment, the determining factor in the present case is that the payment to the Respondent whatever the parties may have chosen to call it was a payment which the company had contracted to make to him as part of his remuneration for his services as a director."

3. We shall later in the course of stating our gouunds of decision, discuss this case with reference to the case law affecting voluntary payments.

4. The broad class of cases of obligatory payments can be further divided into two smaller groups. Sir Raymond Evershed, M.R., in the Court of Appeal said in his judgment in Henley v. Murray, 31 T.C. 351 " ... but it is quite plain that the real basis of the decision (in Hofman v. Wadman, 27 T.C. 192) was .... that the bargain there was that the company, Parnall Components Ltd., the employers, should remain liable under the contract for the remuneration they had contracted to pay though they gave up their right to call upon Mr. Hofman, their works manager, to perform the duties under the contract which he was bound to perform. If that is a correct analysis then it seems to me that the case is clearly one of the first kind which I have stated - a case in which the contract persists. Though the right of one party to call upon the other for performance of its terms may be modified, or indeed wholly given up, still the corresponding right to acquire payment either of the whole sum or of some less figure is preserved and is still payable under the contract. But there is another class of case where the bargain is, as it seems to me, of an essentially different character, for in the second class of case the contract itself goes altogether and some sum becomes payable for the consideration of the total abandonment of all the contractual rights which the other party had under the contract.....". So the first group of cases of obligatory payments is the group of cases in which the employer is obliged to make the payment to the employee under the employment agreement itself. It can be generally stated that such payment in the hand of the employee is his income from employment and therefore assessable to income tax. Under this group can be

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Grounds of Decision of the Special Commissioners of Income Tax (continued)

placed the following cases:-

Davis v. Harrison, 11 T.C. 707 (King's Bench Division)

Henry v. Arthur Foster) 16 T.C. 605 (Court of Appeal)
Henry v. Joseph Foster)

Allen & Another v. Trehearne, 22 T.C. 15 (Court of Appeal)

Prendergast v. Cameron, 23 T.C. 122 (House of Lords)

Hofman v. Wadman, 27 T.C. 192 (King's Bench Division)

Dale v. de Soissons, 32 T.C. 118 (Court of Appeal)

Moorhouse v. Dooland, 36 T.C. 1. (Court of Appeal)

5. The other group of cases of obligatory payments is the group of cases where the payment to the employee is not in pursuance of the terms of the employment agreement itself but in pursuance of a separate agreement entered into subsequent to the employment agreement, whereby the employer undertakes to make the payment to the employee as a consideration for the employee agreeing to abrogate the employment agreement or as a consideration for the employee to give up any of his rights under the employment agreement. The true cases of compensation for the loss of employment or office are really cases falling under this group, because the compensation paid to the employee is in essence the consideration for the employee agreeing to give up his right to be employed or to hold office under the service agreement. Under this group can be placed the following cases:-

Duff v. Barlow 23 T.C. 633 (King's Bench Division)

Henley v. Murray 31 T.C. 351 (Court of Appeal)

6. In the present case before us it was contended on behalf of the Appellant that the payment to him of what was called redundancy pay was in fact

compensation paid in consideration for his loss of a source of income or of a right to remuneration as the result of the abrogation of the service agreement. Before us no direct evidence was adduced of any agreement, either written or verbal, entered into between the Appellant and his employers whereby it was agreed that the redundancy pay should be the consideration for the Appellant agreeing to have the service agreement abrogated or for him agreeing to give up his source of income or his right to remuneration. Nor was any direct evidence adduced of any agreement, written or verbal, to abrogate the service contract. If there were such an agreement in existence, clearly the burden was on the Appellant to produce it in evidence, in view of section 76 (3) of the Income Tax Ordinance 1947 and paragraph 13 of Schedule 5 to the Income Tax Act 1967.

7. In the absence of direct evidence of such an agreement we proceeded to consider whether on the facts which we found in this case it is reasonable to infer that there was such an agreement. After considering these facts we find it difficult to draw such an inference. The fact that Malaya Borneo Building Society Ltd. paid the cost of the travelling of the Appellant, of his wife and of his children to the United Kingdom after the Appellant had ceased work seems to be in accordance with clause 8 (1) and (2) of the service agreement and seems to suggest that the service agreement had not been abrogated but was still being pursued after the Appellant had ceased work. It was aruged before us that the payment by Malaya Borneo Building Society Ltd. of the cost of the passage was part of the consideration for the abrogation of the service agreement, but there was no evidence adduced before us to that effect.

8. We also find it difficult to accept that the payment was a consideration for the Appellant giving up his right to continued employment under the service agreement or his right to a source of income or to remuneration, as we find that under the terms of the service agreement the Appellant has no absolute right to continued employment because there is provision in the service agreement for it to be determined at any time at the discretion of either party. The service agreement in clause 11 (a) prescribed the method by which it

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Grounds of Decision of the Special Commissioners of Income Tax (continued)

may be determined, i.e. by either party giving the other not less than three calendar months' notice in writing.

9. From the conduct of the parties and from other facts which we found in this case, we find that the reasonable inference for us to draw is that the Appellant and the Malaya Borneo Building Society Ltd. had agreed to introduce a supplementary provision to the service agreement so that while Malaya Borneo Building Society Ltd. may determine the service agreement by giving the Appellant not less than three calendar months' notice in writing, Malaya Borneo Building Society Ltd. may also determine the service agreement if at any time the Society found the Appellant redundant, by declaring the Appellant redundant and paying him redundancy pay at the fixed rate and such declaration may be made at any time which may be less than three calendar months to the date when the service agreement is to be determined (which actually happened in this case). Such is the inference which we have drawn, and we arrive at this inference for the following reasons particularly. About 5½ years before the Appellant was declared redundant Malaya Borneo Building Society Ltd. already by letter Annexure C made known to the Appellant to the effect that it might at any time find him redundant and in such event would consider paying him redundancy pay and the rate of the redundancy pay was made known to him in the same letter. It would be implicit from the letter that if he were declared redundant it might not be possible for Malaya Borneo Building Society Ltd. to give him notice to determine the service agreement within the time stipulated in Clause 11(a). One staff surveyor was declared redundant in April 1963 and paid redundancy pay. Since there is no evidence to show that the Appellant made protest or raised objection to the proposed redundancy pay scheme and since the Appellant eventually accepted the payment, we infer that he did not in fact make protest or raised objection but tacitly accepted the scheme. This means that as an alternative to the method of determining the employment agreement as stipulated in clause 11 (a), the Appellant had agreed that the employment agreement may also be determined by Malaya Borneo Building Society Ltd. if the Society found him redundant, by making at any time (which might be less than three calendar months to the date of the

determination) a declaration that the Appellant was redundant and by paying him redundancy pay. That the Appellant had so agreed is confirmed by the fact that he did cease to work one month after the declaration was made, and by the fact that he has not taken, nor is he contemplating, any legal action against the Malaya Borneo Building Society Ltd. for failing to give not less than three calendar months' notice under clause 11(a).

10. If the proposal to declare the Appellant redundant and to pay him redundancy pay was for the first time put to the Appellant immediately the employers found it necessary to terminate his employment, some weight might, in our opinion, be given to the argument that the redundancy pay was consideration to the Appellant for giving up his right under the service agreement. The facts that the proposal was first made known to the Appellant very long before it was found necessary to terminate his employment tends to refute that argument.

11. So we found that the redundancy pay was made by Malaya Borneo Building Society Limited and received by the Appellant under the service agreement, and since it was a payment made at the end of employment we found that it was a gratuity within the meaning of section 10(2)(a) of the Income Tax Ordinance 1947.

12. It was argued on behalf of the Appellant that even if we found that the redundancy pay was a gratuity, still it would not be assessable to income tax on the ground that if it were a gratuity it must be a retiring gratuity and a retiring gratuity is exempt from income tax under section 13 (1)(i) of the Income Tax Ordinance, 1947. We do not agree that the redundancy pay was received by the Appellant by way of retiring gratuity because the Appellant never applied to retire, and his employment was terminated at the instance of his employers.

13. We now proceed to consider what would be the position in law if on the facts we had found that the payment to the Appellant was a voluntary payment instead of a contractual payment. The U.K. decided cases of voluntary payments can be divided into two groups. The first group of cases of voluntary payments were treated by the Courts as

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Annexure E

Grounds of Decision of the Special Commissioners of Income Tax (continued)

personal gifts and therefore held to be not assessable to income tax. The meaning of "personal gifts" is fully explained by Atkinson J. in Calvert v. Wainwright, 27. T.C. 475. According to Atkinson J., what is meant by "personal gifts" is a condensation of the full sentence, personal gifts given on personal grounds other than for services rendered. Under this group can be placed the following cases:-

Reed v. Seymour 11 T.C. 625 (House of Lords)

Beynon v. Thorpe 14 T.C. 1 (King's Bench Division)

14. The second group of cases of voluntary payments were those held by the Courts as payments made to the recipient by virtue of his office or employment and assessable to income tax. Thus tips received from passengers by a taxi driver employed by a taxi hire company were held assessable to income tax in the hand of the driver: Calvert v. Wainwright, 27 T.C. 475. Other cases which can be placed under this group are:-

Hartland v. Diggins 10 T.C. 247 (House of Lords)

H. Denny v. Reed) 18 T.C. 254 (Kings' Bench
A. Denny v. Reed) Division)

15. It is clear that the payment to the Appellant was not a personal gift to him and that it was made to him by virtue of his employment. It was not made to the Appellant because he was Alan Richard Knight but because he was a staff surveyor of Malaya Borneo Building Society Ltd. The letter Annexure C in dealing with redundancy pay refers to "staff surveyor" and not to the Appellant by name. It is clear that the intention was to give redundancy pay to all staff surveyors under the circumstances mentioned, and therefore the payment when made to the recepient was made to him by virtue of his office or employment. Thus even if we had on the facts found that the payment to the Appellant was a voluntary payment, the result would be the same, i.e. it would be assessable to income tax.

16. In order to support his argument, learned Counsel for the Appellant cited the following statement of Rowlatt J. in his judgment in Chibbett v.

Joseph Robinson & Sons, 9 T.C. 48:-

> "..... compensation for loss of an employment which need not continue, but which was likely to continue, is not an annual profit within the scope of the Income Tax at all."

We are of the opinion that it is not safe to place reliance on that statement of Rowlatt J. in view of the subsequent judgment of the Court of Appeal in Henry v. Arthur Foster and Henry v. Joseph Foster, 16 T.C. 605, reversing the judgment of Rowlatt J. It appears that Rowlatt J. based his decision in Henry v. Arthur Foster and Henry v. Joseph Foster on the same general principle on which he based his decision in Chibbett v. Joseph Robinson & Sons, because in Henry v. Arthur Foster and Henry v. Joseph Foster he said -

> "..... it is certainly covered by what I said in Chibbett's case, and I still hold that opinion. It is a very important point. What I said was: 'If it was a payment in respect of the termination of their employment I do not think that is taxable. I do not think that is taxable as a profit. It seems to me that a payment to make up for the cessation for the future of annual taxable profits is not itself an annual profit at all'. I adhere to that, and that is what I think this was ....."

Since the decision of Rowlatt J. in Henry v. Arthur Foster and Henry v. Joseph Foster was reversed by the Court of Appeal, it is doubtful whether the general principle on which he based his decision in those cases and which was quoted above can be relied upon as a correct statement of the law, and therefore it is also doubtful whether reliance can be placed on the statement of Rowlatt J. as quoted before us by the learned Counsel for the Appellant, which was made on the basis of that general principle.

17. Although in Hunter v. Dewhurst, 16 T.C. 605, Rowlatt J. based his decision on that same general principle and although in that case the House of Lords pronounced the same ultimate result as that arrived at by Rowlatt J., a careful study of the judgment of Rowlatt J. and of the judgments of the Law Lords shows that the House of Lords arrived at

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Grounds of Decision of the Special Commissioners of Income Tax (continued)

the ultimate result for entirely different reasons and on entirely different principle that those of Rowlatt J. Moreover, Lord Warrington of Clyffe in his judgment made it clear that the House of Lords decided the case "on its special circumstances".

18. Moreover, Chibbett v. Joseph Robinson & Sons is a case of a voluntary payment, and we do not think that the statement of Rowlatt J. in that case quoted by learned Counsel for the Appellant can be taken as relevant in the consideration of a contractual payment.

19. Learned Counsel for the Appellant urged upon us to follow the decision in Duff v. Barlow, 23 T.C. 633. We agree with the decision in that case, and if the facts of the present case before us were same as the facts of that case we would have followed the decision in that case. But we found that there are vital differences in the facts of the two cases. In Duff v. Barlow it is clear that under his service agreement Barlow had the right to continued employment which was stated expressly up to 31.12.45, and there seems to be no provision in the service agreement for the termination of his employment. In the subsequent agreement it was agreed that Barlow was to cease working as from 25.11.37. Therefore it is clear that Barlow was giving up his right to employment and to remuneration for the period from 25.11.37 to 31.12.45. In the present case before us the Appellant had no absolute right to be employed up to a certain date but his employment was liable to be terminated at any time by his employers by giving the requisite notice. In Barlow's case the first time his employers felt it necessary to terminate his services was on 28.10.37, and the first time the suggestion for terminating his services was put to him and the first time the terms were discussed with him was after 28.10.37. Agreement for the payment of a lump sum to him was entered between him and his employers on 25.11.37 and he ceased to be employed on the same date. Since the discussion was held and the agreement was reached at about the same time when the employers found it necessary to terminate Barlow's services and at about the same time as when his services were actually terminated, there should be no difficulty in concluding that the payment was consideration for his loss of right to further remuneration.

Therefore in Barlow's case it was not open to argument that the payment was a stipulation under the service agreement. In the present case before us there was no evidence to show that a discussion to determine the terms for terminating the Appellant's employment was held, or that agreement on the terms was reached, at about the same time as his employers found it necessary to terminate his services.

20. In Barlow's case the Board of Directors of the employer company at its meeting decided to make the lump sum payment expressly "as compensation in full satisfaction of all claims for loss of their right to future remuneration from the present date to 31st December 1945". The resolution of the Board of Directors of Malaya Borneo Building Society Ltd. to pay the Appellant the redundancy pay did not state that it was meant to be compensation for the loss of any right. Again in Barlow's case the written agreement to terminate Barlow's services declared that Barlow accepted the lump sum payment "in full and final satisfaction of all claims for compensation for the loss of right to remuneration", whereas in the present case there is no evidence of a similar stipulation expressed in so clear and unambiguous terms.

21. Learned Counsel for the Appellant urged upon us to follow the decisionin Henley v. Murray, 31 T.C. 351, contending that the present case is on all fours with that of Henley v. Murray. We do not agree that the two cases are on all fours with each other. In Henley's case his employers were obliged under the service agreement to employ him until 31.3.44. His employers were not allowed by the service agreement to terminate his appointment before that date and could do so only after that date. His appointment was in fact terminated on 6.7.43, i.e. at a time when his employers had no right to terminate it under the service agreement. It is clear therefore that the payment agreed upon was consideration for his surrender of his right to continued appointment and to continued remuneration, whereas in the present case (as we have stated earlier) the Appellant's employment was terminated from a date when his employers had under the service agreement the right to terminate it. In Henley's case there was a letter dated 6.7.43 (the same date on which his appointment was terminated) written by Henley to his solicitors to the effect that as a

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Annexure E

Grounds of Decision of the Special Commissioners of Income Tax (continued)

condition for complying with his employers' request to him to retire he made a stipulation that he be paid the amount being compensation for loss of office. It is clear from the judgments of Sir Raymond Evershed and Jenkins L.J. that the Court of Appeal placed great weight on that letter as being evidence of the true nature of the payment. In the present case there is no evidence similar to that letter.

22. Learned Counsel for the Appellant quoted the following passage from the judgment of Lord Atkin in the House of Lords in Hunter v. Dewhurst, 16 T.C. 605:-

> It seems to me that a sum of money paid to obtain a release from a contingent liability under a contract of employment cannot be said to be received "under" the contract of employment, is not remuneration for services rendered or to be rendered under the contract of employment, and is not received "from" the contract of employment.

Learned Counsel for the Appellant contended that the redundancy pay in the present case was paid to obtain a release from a contingent liability under a contract of employment. In our opinion the contingent liability in Dewhurst's case was the obligation of his employers to pay him a certain sum of money if he retired, and the contingent liability in the present case would be the obligation of the Appellant's employers to give him not less than three calendar months' notice if they wished to terminate his employment and to pay him damages if they failed to give such notice. We would agree that the present case would be a case of payment made to obtain a release from a contingent liability if the facts of the case had been that during the course of the employment the employers requested the Appellant to agree to release them from the obligation to give the requisite notice and to pay damages in lieu of the notice and offered to pay him a lump sum in consideration of his so agreeing and if the Appellant accepted the lump sum and agreed that the employers should not be obliged any more to give the notice or to pay damages in lieu of the notice. No evidence was adduced before us to show that such were the facts in the present case. From the facts which we

found in the present case we infer that the position was as follows: long before the Appellant's employment was terminated the parties had agreed that in the event that the employers found the Appellant redundant and wished to terminate his employment in less than three months they could do so by declaring him redundant and paying him redundancy pay, and in any other events (apart from the events specified in clause 11(b)(i) to (vi) of the service agreement) the employers had to give the Appellant not less than three calendar months' notice under clause 11 (a) if they wished to terminate his employment. Thus in our opinion the present case is not a case of a release from contingent liability contemplated by Lord Atkin.

23. Both parties produced to us the letter dated 16.4.66 written by the Setia Usaha of the Malaya Borneo Building Society Limited to the Income Tax Department which reads as follows:-

16th April, 1966.

Penolong Kanan Pengawal Hasil Dalam Negeri,
Chawangan Penaksir Chukai Pendapatan,
Bangunan Suleiman,
KUALA LUMPUR.

Tuan,

Mr. A.R. Knight - SG 68842

I refer to your letter dated 6th April, 1966 which was received by this office on the 12th instant.

There was no mention in Mr. Knight's Service Agreement dated 23rd August, 1954 regarding redundancy pay. Moreover, according to the normal practice of last in first out, Mr. Knight should not have been the one to go as he was the most senior Staff Surveyor in the Society by virtue of his length of service. This procedure was, however, not followed by the Society in Mr. Knight's case as it was the Society's policy to Malayanise its senior appointments wherever possible. There being sufficient local surveyors to take over the duties of expatriate officers, Mr. Knight was declared redundant at the end of 1965.

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Annexure E

Grounds of Decision of the Special Commissioners of Income Tax (continued)

The amount of $28,050 was paid to Mr. Knight as consideration for the release of the Society's obligations and the scale of compensation based on one month's salary for every completed year of service merely follows the practice of other commercial concerns. This scale was adopted because it was considered to be a fair and easy way to quantify the amount of compensation. The payment was also in no way related to compensation for past services rendered.

Yang benar,

Sgd.

SETIA USAHA.

24. We called Enche Loh Cheok Leng who signed that letter as Setia Usaha to give evidence before us. We asked him what were "the Society's obligations" (referred to in the last paragraph of the letter reproduced above) to the Appellant which the Society sought to discharge by the payment to him of redundancy pay. In reply he said the Society did not look into its legal obligations. He said the Society merely felt obliged to adopt past practice.

25. When examined by the learned Counsel for the Appellant as to when the Appellant held discussion with the Manager of the Society on the subject of leaving the Society, Enche Loh Cheok Leng said he did not know as he was not then working with the Society. An Enche Loh Cheok Leng was not then working with the Society we feel that it would be unsafe for us to accept the statement in the second and last paragraphs of the letter of 16.4.66 as facts of his own personal knowledge. Enche Loh Cheok Leng was appointed Secretary of the Society in 1963.

26. It appears to us that it was merely his own opinion when he stated in that letter that "the payment was in no way related to compensation for past services rendered." The accuracy of his statement in that letter is further doubted when it seems to us that he has attributed the redundnncy payment to Malayanisation when Annexure C clearly dealt with each of them separately under different headings.

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Annexure E

Grounds of Decision of the Special Commissioners of Income Tax (continued)

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

Sgd. ?
Chairman
Special Commissioners of Income Tax

Sgd. ?
Special Commissioners of Income Tax

Sgd. ?
Special Commissioners of Income Tax

In the High Court in Malaya at Kuala Lumpur

No. 3

Notes of Mr. Justice Chang Min Tat

4th April 1969

No. 3

NOTES OF MR. JUSTICE CHANG MIN TAT

Friday, 4th April, 1969

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

ORIGINATING MOTION NO. 9/69

Alan Richard Knight ... Appellant

v.

The Comptroller-General of Inland Revenue, Malaysia ... Respondent

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For Appellant: S. Woodhull.

" Respondent: Nik Saghir.

Woodhull:

I ask for a short adjournment to bring my books.

Ct: adjourned for ½ hour.

In the High Court in Malaya at Kuala Lumpur

No. 3

Notes of Mr. Justice Chang Min Tat

4th April 1969 (continued)

Woodhull:

Annexure E - Grounds of decision of Special Commissioners were never made known to either of the parties.

Record served on me on 2nd April, 1969 at 4.00 p.m. - first occasion on which I saw the grounds.

Submit: to state a clause

Clause 37 Schedule V

To include: Facts as found and deciding order.

I do not apply for matter to be referred back to S. Commissioners but do apply to expunge grounds from record.

Nik Saghir:

In reply.

Admit nothing said about setting grounds.

Nothing objectionable.

Grounds of considerable assistance to Court.

Practice in U.K.

Encyclopaedia of Court Forms and Precidents in Civil proceedings Edn. 1968 23rd Cumulative Supplement 1968 at p. 184, Form 14, para. for grounds of decision.

cp. para 7 of Case Stated at p. 4 of Record.

Woodhull:

Hal's: Vol. 20, page 691.

"a definite finding but not an approval of contentions."

In view of the short notice, I would ask to reserve the right to make further submissions.

Income Tax Ord. 1947.

Contract of Employment - Annexure B.

Clause 11. determination of contract.

Submit only contract.

S.C. included Annexure C.

Annexure C is only a circular of intentions and in no way modifies or extends the contract of employment.

Question is does "C" form part of "B".

If payment made for abrogation of contract, then it is a capital sum.

If however paid under contract, then income is liable to tax.

Submit, nothing in B & C of legal or contractual liability on part of M.B.B.S. to pay this sum.

Quantum paid.

Submit not under para 3 of "C".

Formula actually used in arriving at quantum was a fixed sum for each year of completed service.

Submit payment not under contract, and therefore not a profit and assessable to tax.

Hal'sː Vol. 20, p. 324.

Appellant entitled to 3 months' notice of termination.

Contract of employment for an indefinite period. No necessity to but likely to continue.

Chibbett v. Joseph Robinson & Sons.
(1924) 9 T.C. 48 at 61.

Duff v. Barlow.
(1938-41) 23 T.C. 633.
per Lawrence J. at 640.

Loss of source of income and a right to remuneration. No obligation on part of employers to make this payment to employee.

In the High Court in Malaya at Kuala Lumpur

No. 3

Notes of Mr. Justice Chang Min Tat

4th April 1969 (continued)

Submit facts on all fours.

Henley v. Murray
(1946-1950) 31 T.C. 351.
per Evershed, M.R. at p. 363.

Hal's Vol. 20 p. 324. re quantum.

Submit sum of $28,000/- odd not paid under contract but for the abrogation of the contract.

Query: What is the true consideration for the payment?

Barr Crombie & Co. Ltd. v. Commissioners of Inland Revenue (1942-1945) 26 T.C. 406, at 411. 10

British Insulated & Helsby Cables v. Atherton
(1926) A.C. 205 at 213.

Submit sum paid was for abandoning a contract which was continuing.

No legal obligation on MBBS to make this payment.

Re "redundancy" and Malayanisation.

Submit, not a redundancy payment and no evidence on it. 20

Need to look at true nature of transaction. Not what parties call it.

Commissioners of Inland Revenue v. Wesleyan & Gen. Ass. Snd
(1943-49) 30 T.C. 11 at 25.

Test: quality of payment in Laws of recipient.

Hal's. Vol. 20 p.13.

Submit sum capital.

Vaad den Berghs Ltd. v. Clark
(1933-35) 19 T.C. 390. 30

2nd ground:

Payment not specifically charged under Ordinance.

Hal's. Vol. 20 p. 12.

Appellant taxed under S.10(1) Ord. 1947.

Believe, though not definitely told, that appellant taxed under S. 10(1)(b).

S.10(2) defines gains or profits from employment. Does not include compensation for loss of office.

Russell v. Scott
(1948) 2 All E.R.1 at p.5.
per Lord Simonds.

Requirement for specific taxation.

Coltness Iron Co. v. Black
(1881) 6 A.C. 315 at p.330.
cp. 1967 Act.

S.13(1)(e) - Compensation for loss of office included.

Greenwood v. Smith & Co.
(1922) 1 A.C. 417 at 423.
per Lord Buckmaster.

Maxwell's Interpretation (11th Edn.) p. 22.

For clarification of ambiguity, recourse to later enactment.

See: Kirkness v. John Hudson & Co. Ltd.
(1955) 2 All E.R. 345 H.L.

See Schedule VI Clause 15 of 1967 Act.

Here - compensation for loss of office given a special treatment. Now regarded as income, but up to a point.

Third ground:-

Voluntary payment in absence of any obligation. Such payment not generally income except payment by virtue of loss.

Duncan's Executors v. Farmer
(1909) 5 T.C. 417 at 422.
payment when recipient no longer in office.

In the High Court in Malaya at Kuala Lumpur

No. 3

Notes of Mr. Justice Chang Min Tat

4th April 1969 (continued)

Beynon v. Thorpe
(1928-1929) 14 T.C. 1.
per Rowlatt J. at p. 14.

If a voluntary payment, it is one to one who has ceased to be employed.

Hence not assessable.

In the alternative, if income, it is retiring gratuity, under S.13(1)(i).

- exempted from income tax.

Annexure "B" - 3 months' notice a contingent liability.

By mutual consent, parties have released themselves.

See: Hunter v. Dowhurst
(1929-1932) 16 T.C. 635 at p. 645
per Lord Atkin.

Nik Saghir:

Submit payment not for compensation for loss of office but payment made under a service agreement as modified. ("B" & "C").

Admit compensation for loss of office not taxable under 1947 Ord.

"C" forms part and parcel of service agreement. It was sent to appellant (Annexure "A", para 2, Page 6).

Offer to pay redundancy payment.

Offer accepted by appellant, in the absence of any objection.

Hence a binding contract.

Hence payment made was under contract of employment.

Fact: practice of trade.

Evidence from Sec. M.B.B.S.

Submit M.B.B.S. obliged to make this redundancy payment.

Re. para 3 of "C" see resolution

Page 6 - declaration of redundancy and resolution to make redundancy payment.

Ct: How was the $28,050/- calculated?

Nik Saghir:

It is not apparent on the record and there was no finding of fact in "A".

Woodhull:

I agree it is important to know how the sum was determined.

Ct: By consent, case remitted to Special Commissioners to determine as a fact how the sum of $28,050/- was calculated.

Adjourned to 9.5.1969.

Friday, 9th May, 1969. 9th May 1969

as previously.

Nik Saghir:

Refers to supplementary finding of fact.

S. Woodhull:

I do not wish to make any further submission.

Nik Saghir:

As agreed, I put in a written submission.

Appeal on a question of law.

11 years of completed service x $2550 p.m. - $28,050/-

Henley v. Murray
31 T.C. 351 at 360 per Evershed M.R.
also C.A. (1950) 1 All E.R. 908.

In the High Court in Malaya at Kuala Lumpur

No. 3

Notes of Mr. Justice Chang Min Tat

9th May 1969 (continued)

Alternatively, if voluntary payment, still assessable to tax, as not a personal gift.

Concede compensation for loss of office not taxable, but submit this was not such compensation.

Henley v. Murray does not apply - here total abrogation of office.

Concede if sum paid as total abrogation, then compensation and not taxable.

But submit not a total abrigation, as leave passage paid, see page 7, in pursuance of contract of employment.

Chibbett's case distinguishable.

Last para of letter dated 10.4.1966 from Sec. M.B.B.S. rejected by Special Commissioners (page 32 and page 33).

Submit Knight did not retire.

Woodhull:

In reply.

Re finding of facts.

Submit no evidence to support Commissioners' determination of fact.

Hals. Vol. 20 - p. 697 (para 1375).

Edwards v. Bairstow.
36 T.C. 207; (1955) 3 W.L.R. 410.
para 2 of "A" cannot be supported.

Absence of protest, if so, does not establish acceptance.

Offer must be accepted to establish a binding contract.

Lapse if not accepted.

(Onus on tax-payer).

Absence of legal action establishes case for appellant in that it showed abrogation by consent.

Page 8; para 10: no evidence of commercial practice for redundancy payment.

(Both counsel concede that a similar case in Singapore re. a surveyor in the same company was on appeal to the Board of Review decided against the Commissioners. The Appeal therefrom was not persisted with.

Nik Saghir submits this is not binding on me).

Para 11 (page 8): Submit a power to grant gratuities does not make a term of the contract.

Ct: c.a.v.

Saturday, 30th August, 1969.

30th August 1969

as previously.

Ct: I read my written judgment.

Appeal allowed.

Costs to the appellant.

Sgd. Chang Min Tat

No. 4

JUDGMENT OF MR. JUSTICE CHANG MIN TAT

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

ORIGINATING MOTION NO. 9/69

Between

Alan Richard Knight ... Appellant

And

The Comptroller-General of Inland Revenue ... Respondent

In the High Court in Malaya at Kuala Lumpur

No. 4

Judgment of Mr. Justice Chang Min Tat

30th August 1969 (continued)

JUDGMENT

This is an appeal by way of case stated against the decision of the Special Commissioners of Income Tax that the $28,050/- paid to the appellant by his employers at the termination of his employment with them was a gratuity within the meaning of S. 10(2)(a) Income Tax Ordinance No. 48 of 1947 and chargeable to income tax. The Special Commissioners further ruled that the payment was not a retiring gratuity within the meaning of S.13(1)(i) Income Tax Ordinance and therefore not exempt from income tax.

In this case stated, the questions for the opinion of the High Court are expressed to be as follows:-

(a) whether on the facts which we found in this case we rightly decided that the sum of $28,050/- paid by the Malaya Borneo Building Society Limited to the appellant and called redundancy pay was in his hands income in respect of gains or profits from employment chargeable to income tax under S.10(1)(b) of the Income Tax Ordinance 1947 and

(b) whether on the facts which we found in this case we rightly decided that the said sum was not received by way of retiring gratuity within the meaning of S.13(1)(i) of the Ordinance.

It will be convenient at this stage to refer to the facts as found by the Special Commissioners.

By an agreement in writing dated 23.8.1954 (Annexure B) the appellant entered into employment with the predecessors of and subsequently with the Malaya Borneo Building Society as a staff surveyor. The terms and conditions of his employment were contained therein. Subsequently the appellant was promoted Chief Staff Surveyor. On 6.2.1960 a letter was sent by the Company's Deputy General Manager to the Company's staff surveyors including the appellant. Since so much turned at the hearing on this letter, I give here as much of it as is relevant.

A.R. Knight, Esq.,
Penang

In the High Court in Malaya at Kuala Lumpur

No. 4

Judgment of Mr. Justice Chang Min Tat

30th August 1969 (continued)

6th February, 1960

OCM/60/103.

(1) The conditions of service of technical staff were reviewed at a Management Meeting held on 3rd February.

The salary scale for staff surveyors has been considered and it is felt that the current scale, a copy of which is attached, is satisfactory.

(2) Education Allowance

(not relevant).

(3) Redundancy Pay

The subject of redundancy was discussed and it was agreed that should a staff surveyor become redundant, Management would consider the payment of redundancy pay to the surveyor concerned, the maximum benefit payable being limited to one month's pay (Based on salary at date of redundancy) for every completed year's service subject to:-

(a) minimum compensation of 3 months' pay
(b) maximum compensation of 12 months' pay

(4) Loss of Office

The Society is a commercial company and as such need not have a Malayanisation policy. Should it eventually become the policy of the Society's Board that expatriate staff should be replaced by suitably qualified local staff, Management would at that time draw up for the Board; consideration of a scheme for compensation for loss of office. Management cannot, however, anticipate what the scheme will be neither can it anticipate Board's approval. However, it can safely be

In the High Court in Malaya at Kuala Lumpur

No. 4

Judgment of Mr. Justice Chang Min Tat

30th August 1969 (continued)

assumed that should compulsory replacement be introduced, staff surveyors would be granted compensation for loss of office on terms not less generous than those that apply to redundancy.

Sgd. ?

Deputy General Manager.

The Special Commissioners further noted the absence of any evidence that the appellant after receiving the letter made any protest or raised any objection to the Company on the subject of redundancy which was dealt with in that letter.

On 2.11.1965 the Board of Directors of the Company passed a resolution in these words:

"That -

(a) the Company's Chief Staff Surveyor Mr. A.R. Knight be declared redundant as from 1st December 1965.

(b) Mr. A.R. Knight be given redundancy pay at the rate of one month's basic salary for every completed year's service subject to a maximum of 12 month's pay."

Accordingly, the appellant was paid $28,050/- which was arrived at by multiplying his then basic pay of $2,550/- by eleven (the number of his completed years of service). This sum of $28,050/- is of course the subject matter of this appeal.

The Appellant ceased to work for the Company on 30.11.1965. He was not given the 3 months' notice of termination as stipulated in Clause 11(a) of the agreement of employment. The appellant had also not taken any legal action against the Company for failure to give the required 3 months' notice nor did he contemplate any such action. Neither did he give notice to terminate his employment.

The appellant was paid his salary up to 30.11.1965. On that day he left Malaya for London, the cost of the passage of himself, his wife and

children being defrayed by the Company. As at 30.11.1965, there were 87 days' leave due to him, in respect of which the Company paid him $8,120/-.

The Special Commissioners further noted and here I quote their words:

> "Previous to the resolution declaring the appellant redundant, two other staff surveyors of the Company had been declared redundant, one in April 1963 and the other in June 1965. They were also paid redundancy pay. Similar payments were also made to local staff who were declared redundant by the Company. It is also customary practice for commercial companies to pay redundancy pay."

The respondent raised an assessment on the amount of $28,050/- and it is in respect of this assessment that the tax-payer appealed to the Special Commissioners and now appeals to this Court.

On these facts the Special Commissioners held that the letter of 6.2.1960 from the Deputy General Manager became incorporated into the contract of employment as to become part thereof. This was challenged by counsel for the appellant who contended that the letter was nothing more or less than an intimation of a proposal to provide, inter alia, for redundancy payment and for compensation for loss of office and in the absence of any definite offer by the Company and especially in the absence of any acceptance or evidence of any acceptance of a definite offer by the appellant, it could not and did not constitute a variation by consent of the service agreement. On this point the Special Commissioners found that it was, in their words, "a supplementary provision to the service agreement." They based their finding on the fact that the appellant was paid passage money for himself, his wife and children on 30.11.1965 which to them showed that the service agreement had not been abrogated. Further, the service agreement provided no absolute right to continued employment, in view of the provisions for determination by specified notice by either party. The Company's decision to introduce this supplementary provision was, it was held, in the absence of any protest "tacitly accepted" by the

In the High Court in Malaya at Kuala Lumpur

No. 4

Judgment of Mr. Justice Chang Min Tat

30th August 1969 (continued)

appellant. This acceptance was, in the opinion of the Special Commissioners, confirmed by cessation of work one month after the declaration of redundancy and by the fact that the appellant had not taken nor had he contemplated taking any legal action against the Company for failure to give the stipulated notice of termination.

Now whether a contract of employment has or has not been varied by consent or by offer and acceptance is, in general, properly a fact for the Special Commissioners to find and they would normally have been able to find it from the circumstances of the employment but where they came to this finding for the reasons stated by them, their finding must be seen to be more correctly an inference from the facts found by them rather than a primary fact. It is not a primary fact with which it would not be quite right for me to disagree especially in the absence of any record of the evidence taken at the hearing before the Special Commissioners, but on the authorities, it is clear that where it is a matter of inference, I on appeal am in as good a position as the Special Commissioners were to find if it is properly drawn. As was said by Viscount Cave L.C. in British Insulated and Helsby Cables v. Atherton (1926) A.C. 205 at 213 on the question whether a payment was in substance a revenue or a capital expenditure:

> "This appears to me to be a question of fact which is proper to be decided by the Commissioners upon the evidence brought before them in each case but where as in the present case, there is no express finding of the Commissioners upon the point, it must be determined by the Courts upon the materials which are available and with due regard to the principles which have been laid down in the authorities."

With every respect, it seems to me that the conclusion or inference arrived at by the Special Commissioners ignores the verba ipsa of the letter of 6.2.1960, and in the absence of an offer and acceptance cannot be justified. In the first place, read properly, the letter is, in my view, as contended by counsel for the appellant, nothing more or less than an intimation of what the Board

was thinking. And thinking, even if done aloud or in writing, does not, without more, constitute an offer. I think the use of the subjunctive "would consider" under the heading Redundancy Pay clearly indicates in the absence of any subsequent action on the part of the Board that the consideration given to this matter did not crystallise into an offer. I find confirmation for my view in the absence of any words in the letter asking for acceptance by the addressee. There is also no evidence of any sort of acceptance. It may be that in view of the obvious advantage accruing to the appellant in being given, even in 1960, rather more than the 3 months' pay in lieu of notice which he would have received under the service agreement, he would hardly have been expected to refuse to agree or to object or to protest, but this is an entirely different thing to saying that failure to protest implies acceptance, especially if regard is paid to the tenor of the letter.

Again with respect, I do not think that the payment of passage money, per se, established that the service agreement had not been abrogated. Such a contention does not meet the possibility that the agreement could have been abrogated on terms which might very well include a term for passage. Neither do I think, again with respect, that the absence of any right to continued employment had, per se, any relevance to the conclusion of a variation of the service agreement. Nor do I think it can be conclusively considered that cumulatively these factors led to such an inference, which was made by the Special Commissioners in these words:

> "From the conduct of the parties and from other facts which we found in this case, we found that the reasonable inference for us to draw is that the appellant and the Malaya Borneo Building Society Ltd. had agreed to introduce a supplementary provision to the service agreement ....."

For myself, I can find or detect no such agreement either express or implied on the part of the appellant.

If I am right then it follows that the conclusion

In the High Court in Malaya at Kuala Lumpur

No. 4

Judgment of Mr. Justice Chang Min Tat

30th August 1969 (continued)

of the Special Commissioners that the redundancy pay was made by the Company and received by the appellant under the service agreement was wrong.

I come next to the question whether the payment termed in the Company's resolution as redundancy payment was in fact having regard to the circumstances of payment, redundancy payment under the agreement. It is obvious in the grounds of their decision that the Special Commissioners were greatly influenced by the terms of the letter of 6.2.1960 and by the name put on to the payment. There was however a letter from the Secretary to the Company written to the Senior Assistant Comptroller of Inland Revenue on 16.4.1966 in answer to a query made for the purpose of the assessment which would appear to contradict the terms of the resolution, or at least to suggest a looseness of terminology in the resolution. It reads in its relevant parts:

> "There was no mention in Mr. Knight's service agreement dated 23rd August, 1954 regarding redundancy pay. Moreover, according to the normal practice of last in first out Mr. Knight should not have been the one to go as he was the most Senior Staff Surveyor in the Society by virtue of his length of service. This procedure was, however, not followed by the Society in Mr. Knight's case as it was the Society's policy to Malayanise its senior appointments wherever possible. There being sufficient local surveyors to take over the duties of expatriate officers. Mr. Knight was declared redundant at the end of 1965.
>
> The amount of $28,050/- was paid to Mr. Knight on consideration for the release of the Society's obligation and the scale of compensation based on one month's salary for every completed year of service merely follows the practice of the commercial concerns. This scale was adopted because it was considered to be a fair and easy way to quantify the amount of compensation. The payment was also in no way related to compensation for past services rendered."

The Special Commissioners feeling somewhat

dissatisfied with this letter orally examined the author thereof. In their grounds of decision, they had recorded the effect of this examination. They wrote that in answer to a question what were "the Society's obligations", the Secretary said that the Society did not look into its legal obligations and that the Society merely felt obliged to adopt part practices. He also admitted that he did not personally know if there was any discussion between the appellant and the Company on the subject of the former's leaving the Society as he was at that time not working with the Society and could not speak from personal knowledge.

The Special Commissioners then refused to accept this letter. They considered it unsafe to accept the statements therein. They were, as it appears to me, greatly influenced by the contrary appellation put to the payment by the Board of the Society. Learned counsel for the appellant however submitted that the correct approach was to look at the true nature of the transaction and not merely to accept what the parties called it, on the authority of Commissioners of Inland Revenue v. Wesleyan & Anor., 30 T.C. 11 at 25.

I conceive there can be no doubt that the name given to a transaction by the parties concerned does not necessarily decide its nature and that the question is what is the real character of the payment. Lord Greene M.R. in Henriksen v. Grafton Hotel Ltd., (1942) 2 K.B. 184 at p. 189, in an appeal where the question raised was whether the payments of the monopoly value of licensed premises were properly deductible as disbursements for the purposes of trade approached the question thus:

> "For this purpose the first thing to do is to examine the nature of the payment, that is to say, the nature of the subject in respect of which the payment is made .... In many cases - and in my opinion this is one of them - the question will be found to answer itself once the true nature of the payment is ascertained."

For myself, I propose with respect to follow the advice of Lord Greene M.R. In this connection, it appears to me a grave pity that the circumstances which led to the resolution of the Board in declaring

In the High Court in Malaya at Kuala Lumpur

No. 4

Judgment of Mr. Justice Chang Min Tat

30th August 1969 (continued)

the appellant redundant were not more fully gone into. If such an exercise had been held as was done in North Riding Garages Ltd. v. Butterwick, (1967) 2 Q.B. 56, which though a case on the Redundancy Payments Act 1965 is a most illuminating example of the assistance given to the tribunal by a full exploration of the facts, I could not help feeling that the difficulties encountered in this case would not have arisen.

Following the approach adopted by Lord Greene M.R. I find it very clarifying to particularise the facts. The appellant entered the Society's service as a staff surveyor in 1954. By 1965 he had reached the position of Chief Staff Surveyor and was occupying such a position when he left the Society's service. There was no re-organisation in the Society which rendered the Chief Staff Surveyor's post redundant, in the ordinary dictionary meaning of the word as superabundant, superfluous or excessive, since if there were several staff surveyors in the employment of the Society there would ordinarily be a senior staff surveyor, unless it was the deliberate policy of the Society to abolish this post. But of abolition, there was also not the slightest evidence. If there was this post of Chief Staff Surveyor, then the departure of the appellant from it, at the instance of the Board, was clearly to make way for another. The principle of "first in last out" is a policy that was stated by the Secretary to be normal by which I take him to mean applicable. It is a policy which must be seen to be in accord with the principles of natural justice, all things being equal. There had been no indication of any dissatisfaction with the appellant's services. Under these circumstances, a process of Malayanisation must be reasonably inferred. To support this there was the evidence of the Secretary. The rejection of his evidence was, in my view, with every respect, not justified. He might not be employed at the relevant time but as Secretary he must have access to all the information relating to the case and must write from knowledge of such information. He must know whether or not there was a policy of Malayanisation in the Society. Such a policy follows - this must be taken judicial notice of - the set policy of the Government of the country not only to Malayanise its public

officers but also to insist on commercial firms and private enterprises doing so in respect of their own staff. He had said there was such a policy. There was no valid reason, as far as I can see, to doubt him. He could have been borne out by reference to whether there was an appointment to the appellant's position after his departure and whether this appointee was a Malayan. There was no such evidence and it must be left to infer, if possible. For myself, I see it on the facts as found by the Special Commissioners as a reasonable inference and I consider it reasonably certain that the appellant's post was in point of fact Malayanised. If so, the payment made to him was compensation for abrogation of contract and not chargeable to tax.

This, in my view, disproves the contention of the Special Commissioners that there was no evidence direct or inferable of an agreement to abrogate the service contract. The Special Commissioners however considered that the fact that the appellant was paid the cost of the return passage of himself and his family to England, as provided for in his service agreement suggested:

> "that the service agreement had not been abrogated but was still being pursued after the appellant had ceased work."

With every respect, this appears to me to be an unjustifiable suggestion. After the appellant was paid the sum of money and the passage fares - and it is of no consequence whether one followed the other or both occurred at the same time - there was no more in existence any service agreement between the company and the appellant. It had been abrogated. For that reason, the appellant had not the right to and I doubt very much if he could have insisted on his 3 months' notice or pay in lieu of notice to determining his employment.

The Special Commissioners also placed great reliance on the fact that under the service agreement the appellant had no right to continued employment. This fact made it difficult for them to accept that the payment was a consideration for the appellant to give up his right to continued employment under the service agreement.

In the High Court in Malaya at Kuala Lumpur

No. 4

Judgment of Mr. Justice Chang Min Tat

30th August 1969 (continued)

It seems to me that to hold thus would be to introduce a note of cynicism into human relationship which in the absence of any such evidence must surely be unjustified. Except in an agreement for a specified period there could be no abrogation of the right to continued employment. The service agreement in this case had a break clause, enabling such party to give 3 months' notice. In the context of this clause which even in the findings of the Special Commissioners had never been revoked, the contemplation of a redundancy or an abolition payment in the letter of 6.2.1960 or a payment for abrogation of office must be seen to be unnecessary, or extremely generous. Why pay 11 x $2,550 = $28,050 when the company need to pay 3 x $2,500 = $7,650 in lieu of the 3 months' notice agreed on. Why indeed, unless having regard to his service, the appellant would normally have been able to expect continued employment.

It seems to me also that the Special Commissioners were, with respect, wrong in holding that:

> "it would be implicit from the letter that if he were declared redundant it might not be possible for the Malayan Borneo Building Society Ltd. to give him notice to determine the service agreement within the time stipulated in clause 11 (a)."

Time was never a factor of consequence as it was always possible to give the pay for the required period in lieu of notice. The Special Commissioners therefore appeared to me to have failed to recognise the possibility of an employee earning the good regards of his employers so that when the time came to replace him, such regards would be expressed in a tangible form. One must guard against cynicism.

I regret that I feel compelled to disagree with the Special Commissioners and to hold that the sum of $28,050/- paid to the Appellant was for abrogation of his employment and not chargable to income tax.

The appeal is therefore allowed.

Dated at Kuala Lumpur this 30th day of August, 1969.

(Chang Min Tat)
Judge,
High Court, Malaya.

Mr. S. Woodhull for Appellant.
Enche Nik Saghir for Respondent.

No. 5

ORDER OF THE HIGH COURT

In the High Court in Malaya at Kuala Lumpur

No. 5

Order of the High Court

30th August 1969

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

ORIGINATING MOTION NO. 9 OF 1969

Between

Alan Richard Knight ... Appellant

And

The Comptroller-General of Inland Revenue ... Respondent

BEFORE THE HONOURABLE MR. JUSTICE CHANG MIN TAT, JUDGE, MALAYA

IN OPEN COURT

O R D E R

WHEREAS pursuant to the Income Tax Ordinance of 1947 a case has been stated at the request of the Appellant by the Special Commissioners of Income Tax for the opinion of this Court;

AND WHEREAS the case coming on for hearing on the 9th day of May 1969;

AND UPON READING the same and UPON HEARING Mr. S. Woodhull of Counsel for the Appellant and Mr. Nik Saghir of Counsel for the Respondent IT WAS ORDERED that this case do stand adjourned for judgment AND THE SAME coming on for judgment this 30th day of August, 1969 in the presence of Counsel aforesaid;

THIS COURT is of the opinion that the determination of the said Special Commissioners of Income Tax is erroneous; AND IT IS ORDERED that the appeal be and is hereby allowed;

AND IT IS ALSO ORDERED that the cost of the Appellant be taxed by a proper officer of the Court and paid by the said Respondent to the said Appellant or his Solicitor,

Given under my hand and the seal of the Court this 30th day of August, 1969.

SENIOR ASSISTANT REGISTRAR
HIGH COURT, KUALA LUMPUR

In the Federal Court of Malaysia

No.6

Notice of Appeal

22nd September 1969

No. 6

NOTICE OF APPEAL

IN THE FEDERAL COURT OF MALAYSIA

(APPELLATE JURISDICTION)

CIVIL APPEAL NO. OF 1969

BETWEEN

The Comptroller-General of Inland Revenue Malaysia ... Appellant

AND

Alan Richard Knight ... Respondent

(In the matter of Originating Motion No. 9 of 1969 in the High Court in Malaya at Kuala Lumpur.

BETWEEN

Alan Richard Knight ... Appellant

and

Comptroller-General of Inland Revenue, Malaysia ... Respondent)

NOTICE OF APPEAL

TAKE NOTICE that the Comptroller-General of Inland Revenue, Malaysia, the Appellant abovenamed, being dissatisfied with the decision of the Honourable Mr. Justice Chang Min Tat given at the High Court in Kuala Lumpur on the 30th day of August 1969 appeals to the Federal Court against the whole of the said decision.

Dated this 22nd day of September, 1969.

.....
Federal Counsel
for and on behalf of the Appellant.

To

The Registrar,
The Federal Court,
Kuala Lumpur.

and to

The Registrar,
The High Court in Kuala Lumpur.

and to

Alan Richard Knight,
c/o Messrs. Shearn, Delamore & Co.,
Advocates and Solicitors,
Eastern Bank Building,
2, Benteng, Kuala Lumpur.

The address for service for the Appellant is JABATAN HASIL DALAM NEGERI, BANGUNAN SULLIMAN, KUALA LUMPUR.

Filed this day of September, 1969.

No. 7

MEMORANDUM OF APPEAL

IN THE FEDERAL COURT OF MALAYSIA

(Appellate Jurisdiction)

Federal Court Civil Appeal No. X 98 of 1969.

BETWEEN

The Comptroller-General of Inland Revenue, Malaysia ... Appellant

AND

Alan Richard Knight ... Respondent

(In the matter of Originating Motion No. 9 of 1969 in the High Court in Malaya at Kuala Lumpur

BETWEEN

Alan Richard Knight ... Appellant

AND

The Comptroller-General of Inland Revenue, Malaysia ... Respondent)

In the Federal Court of Malaysia

No.7

Memorandum of Appeal

3rd November 1969 (continued)

MEMORANDUM OF APPEAL

The Comptroller-General of Inland Revenue, Malaysia, the Appellant abovenamed appeals to the Federal Court against the whole of the decision of the Honourable Mr. Justice Chang Min Tat given at Kuala Lumpur on the 30th day of August, 1969 on the following grounds:-

1. That the Learned Judge erred in law in holding that the sum of $28,050/- paid to the above named Respondent by the Malaya Borneo Building Society Ltd. (hereinafter referred to as "the Society") was not assessable to income tax.

2. That the Learned Judge had failed to consider that the onus of proving that the assessment under appeal was excessive or erroneous was on the Respondent.

3. That in arriving at the decision as he did, the Learned Judge had wrongly rejected the inferences drawn or the conclusions reached by the Special Commissioners of Income Tax, particularly the following inferences or conclusions:-

   (a) that the Society and the Respondent had agreed to modify the service agreement dated the 23rd August, 1954, to the effect that if the Respondent's post was declared redundant, his employment with the Society could be terminated without the Society giving him three months' prior notice provided that the Respondent was paid what was termed as redundancy pay;

   (b) that the payment to the Respondent of the said sum of $28,050/- was not in fact compensation for loss of a source of income or of a right to remuneration as a result of abrogation of the service agreement; and

   (c) that the Respondent had no absolute right to continued employment under the service agreement.

4. That the learned Judge was wrong in coming to the conclusion that the Respondent's post was Malayanised.

5. That on the facts as found by the Special Commissioners of Income Tax, the Learned Judge ought to have held that the sum of $28,050/- paid to the Respondent was gratuity within the meaning of Section 10(2)(a) of the Income Tax Ordinance, 1947, and therefore chargeable to income tax.

In the premises your Appellant prays that this Honourable Court may be pleased to allow this Appeal and set aside the decision of the Honourable Mr. Justice Chang Min Tat given on the 30th day of August, 1969, allowing the appeal by the Respondent against the decision of the Special Commissioners of Income Tax, and for such further or other Order as this Honourable Court may be pleased to order and for costs.

Dated this 3rd day of November, 1969.

(sgd.)
Federal Counsel
for and on behalf of the Appellant

To:

The Registrar,
The Federal Court,
Kuala Lumpur.

and to

Alan Richard Knight,
c/o Messrs. Shearn, Delamore & Co.,
Advocates & Solicitors,
2, Benteng, Kuala Lumpur.

The address for service of the Appellant is JABATAN HASIL DALAM NEGERI, BANGUNAN SULLIMAN, KUALA LUMPUR.

In the Federal Court of Malaysia

No.8

Written Submission of Counsel for the Respondent

No. 8

WRITTEN SUBMISSION OF COUNSEL FOR THE RESPONDENT

IN THE FEDERAL COURT OF MALAYSIA

(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO. X.98 OF 1969

BETWEEN

The Comptroller-General of Inland Revenue, Malaysia ... Appellant

AND

Alan Richard Knight ... Respondent

(In the matter of Originating Motion No.9 of 1969 in the High Court in Malaya at Kuala Lumpur

BETWEEN

Alan Richard Knight ... Appellant

AND

The Comptroller-General of Inland Revenue, Malaysia ... Respondent)

SUBMISSION OF THE RESPONDENT

The grounds of law on which the Respondent shall argue the case against the assessability to tax of the sum of $28,050/- paid to him are:-

(a) That the said sum was a capital payment;

(b) That the payment of the said sum is not specifically charged under the Income Tax Ordinance of 1947;

(c) That the said sum is a voluntary payment not paid by virtue of the Appellant's employment;

(d) That, in the alternative, the said sum is exempt income;

(e) That there was no evidence upon which the

Special Commissioners could have supported their determination of fact.

(a) Capital Payment

2. On the evidence available it is submitted on behalf of the Respondent that the only document of contract between the Respondent and the Society is the Agreement entered into by the parties in 1954 and contained in pages 37-41 of the Appeal Record. The document, it would be observed, provides for a continuing contract.

3. The document referred to as Annexure C in page 42 of the Appeal Record is merely a Circular Letter and does not constitute part of the undertaking by the Society to make any payments in the event of redundancy or loss of office. In regard to Redundancy the Management only undertook "to consider the payment of redundancy pay". (Appeal Record page 42 at D). In regard to Loss of Office the Management informed the Respondent of its intention to draw a scheme for compensation but stated however that it cannot "anticipate what the scheme will be neither can it anticipate the Board's approval". (Appeal Record page 42 at F.)

4. It is submitted that the document marked Annexure C is not and was never intended to be part of a binding contract between the parties.

5. It is further submitted that the Society was under no legal obligation to make the payment of compensation and that the payment made by the Society was in no way related to compensation for past services rendered by the Respondent. (Appeal Record, page 60 at G.)

6. The sum of $28,050/- was a quantum worked out on the basis of years of service. It was in order to arrive at a quantum that a months' salary for each complete year of service was adopted as a formula. The Society has informed the Revenue of the fact that "this scale was adopted because it was considered to be a fair and easy way to quantify the amount of compensation". (Appeal Record, page 60 at F.)

7. The Service Contract between the Respondent

In the Federal Court of Malaysia

No.8

Written Submission of Counsel for the Respondent (continued)

and the Society was in fact abrogated. This abrogation was in furtherance of the Malayanisation Policy of the Society. (Appeal Record, page 60 at D). Compensation was therefore paid for loss of office following on the abrogation. No right to compensation had been reserved under the Contract nor were there any outstanding payments due for services performed.

8. It is a rule of law that "compensation for loss of an office or employment, if it be truly such, there being no reserved right to it under the contract of services and no outstanding remuneration due for services performed, is not a profit of the office or employment assessable to tax". (Halsbury Vol. 20 page 324, 3rd edition).

9. Under the Respondent's contract of employment with the Society the employment in question could be terminated by each party giving three months' notice in writing. No such Notice was given. Nor was any payment made in lieu of notice. Though the employment was terminable it was a continuing employment or one likely to continue.

> "..... compensation for loss of an employment which need not continue, but which was likely to continue, is not an annual profit within the scope of the Income-Tax at all." (per Rowlatt J. in Chibbett v. Joseph Robinsons & Sons, 9 T.C. at page 61).

10. The revenue accepts that if the sum paid to the Respondent is held to be compensation for loss of office then it is not taxable under the Ordinance of 1947. (Appeal Record, page 14 at F).

11. "Compensation for loss of employment' means, to adopt the words of Romer, L.J. in Henry v. Forster,* payment to an employee as compensation for being deprived of profits to which as between himself and his employer he would, but for an act of deprivation by his employer or some third party such as the Legislature, have been entitled". (Kanga: Income Tax, 6th edition, page 133).

sic

12. The Special Commissioners have, by a somewhat ingenious and almost inexplicable process of reasoning which shall be examined later, deduced that the

Circular Letter of the 6th February, 1960 (Appeal Record, page 42) is a supplementary provision to the Agreement of 1954 (Appeal Record, pages 37-41).

13. It is submitted, with respect, that the Commissioners appear to have steered clear of the fact that the Circular Letter itself, even if regarded as supplementary to the Agreement (which is denied) specifically provides or contemplates payment of compensation for loss of office in the event of Malayanisation.

14. And clear evidence of the Respondent's post being Malayanised in furtherance of the Society's policy is contained in the Society's letter to the Revenue dated the 16th April 1966 (Appeal Record, page 60 at D).

15. In the case of Duff (H.M. Inspector of Taxes) v. Barlow 23 T.C. at page 633 the Taxpayer had agreed to the termination of his contract and in consideration for this termination to accept £500/- as remuneration for his services up to November 1937, and £4,000/- as compensation for loss of the right to future remuneration under an earlier agreement. The Special Commissioners decided that the sum of £4,000/- was received by the Taxpayer not under the Contract of Employment nor as remuneration for services rendered or to be rendered, but as compensation for giving up a right to remuneration. The decision of the Special Commissioners was appealed against and it was held by the High Court at King's Bench that the decision of the Commissioners was correct.

16. Lawrence J. at page 640 stated that he had come to the conclusion that "the Special Commissioners were right in their decision and were entitled to assume that whether or not Mr. Barlow was performing any of the services in connection with the Company which he had performed, he was not under any obligation to do so, and that therefore in the circumstances of this case the £4,000/- which was paid to him was properly treated as compensation for loss of his office as Manager of the Company, which was a source of income to him and was therefore a capital asset". Further, he stated, "in my opinion, as that agreement was determined, and as Mr. Barlow received under that

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agreement a sum of £4,000/- for compensation for loss of his right to remuneration, there will rest upon him thereafter no obligation to perform his services in connection with the Company and as such services will not be any part of the consideration for the payment of that sum".

17. It is submitted that the Respondent's contract was a continuing contract and that by the abrogation there was a loss of a source of income or a right to remuneration. It was in consideration for this loss that compensation was paid and as such this sum is a capital asset not assessable to tax.

18. In the case of Henley v. Murray (H.M. Inspector of Taxes) 31 T.C. at page 351 the facts were as follows:-

> "The Appellant was director and managing director of a property company. Under his service agreement dated 17th January 1938, he was entitled as managing director to a fixed salary and commission; and as director he was entitled to fees. The appointment as managing director was to continue until 31st March, 1944, and was terminable thereafter by three months' notice in writing by either side. He was also entitled to director's fees as director of a subsidiary of the property company. By agreement, and at the request of the board of directors, the Appellant resigned from the property company on 6th July, 1943, and from the subsidiary company on 2nd September, 1943. From the property company he received a sum of £2,779.14s.4d., being as to £577 remuneration under the agreement as managing director for the period 6th April, 1943 to 6th July, 1943, and as to £2,202.14s.4d., the remuneration he would have been entitled to for the period from 7th July, 1943 to 31st March, 1944, if his appointment had continued to that date. He also received from each of the companies a sum on account of arrears of director's fees."

19. It was held by the Revenue that the sum of £2,202.14s.4d. was assessable to tax. On appeal to the Commissioners the Appeal was dismissed. The decision of the Commissioners was upheld by the High Court.

20. On further appeal to the Court of Appeal it was held that on the facts of the case the £2,202.14s.4d. was not assessable. Sir Raymond Evershed M.R. stated as follows:-

> "I think in the circumstances of this case as I have stated, it does not open to the Crown to say that the sum of 2,000 odd pounds constituted profits from the office or employment, since I think upon its true analysis it constituted the consideration payable to Mr. Henley for the total abrogation imposed upon him of his Contract of Employment; so that from the 6th July 1943 no contract existed under which that figure or any other sum could be paid". (at page 363).

21. It is submitted that the Respondent's case is almost on all fours with that of Henley's Case in that there was a prior agreement or understanding and following on this understanding the Society had decided on the total abrogation of the contract as from the 1st December 1965.

22. The Respondent seeks to urge on this Honourable Court an examination of the legal effect of the transactions between the Respondent and the Society. It is submitted that the Agreement of 1954, on all the evidence available, constituted in fact the only binding contract. Variations in salary to this contract were made from time to time. Apart from such variations the Agreement of 1954 was the only binding document.

23. The fresh agreement that appears to have been reached prior to the abrogation of the Contract related only to the quantum payable for such an abrogation.

> "If, on a true appreciation of the legal effect of the transaction, the compensation is payable because the contract of employment has been abrogated, then, whether that compensation is due by fresh agreement or as a result of proceedings, it is not chargeable to tax as an emolument of the employment". (Halsbury Vol. 20 at page 324).

24. It is submitted that the question to be answered

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is: was the sum of $28,050/- paid to the Respondent under the contract or for the contract, as compensation for the loss of earnings which would otherwise be received under the contract or as compensation for the loss of the contract itself? In other words, what has to be decided is the true consideration for which the compensation was paid.

25. In this connection reference is made once again to the letter of the Society dated the 16th April 1966 (Appeal Record, page 60 at E). The Society explains the payment made to the Respondent in the following words:-

> "The amount of $28,050/- was paid to Mr. Knight as consideration for the release of the Society's obligations and the scale of compensation based on one month's salary for every completed year of service merely follows the practice of other commercial concerns. This scale was adopted because it was considered to be a fair and easy way to quantify the amount of compensation. The payment was also in no way related to compensation for past services rendered."

26. It is submitted that the nature of the payment is made abundantly plain in the letter referred to above.

27. In Barr, Crombie & Co. Ltd. v. I.R.C. 26 T.C. 406 where there was an agreement that in the event of the ship managers' contract being terminated by the shipping company which employed them, a sum equal to the remuneration which would have been earned under the contract should be paid to the ship managers, the sum so paid by way of compensation was held to be a capital sum. Lord Normand in the case referred to the familiar dictum of Lord Cave that

> "when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason ..... for treating such an expenditure as properly attributable not to revenue but to capital" (at page 411)

Lord Normand then proceeded to state:-

> "and, of course, one may equally say that an expenditure made once and for all as payment for abandoning or surrendering an asset is received by the recipient as a capital and not as a revenue payment". (at page 411).

28. It is argued on behalf of the Respondent that what has to be looked at is the true character of the payment. If, as has been suggested by the Revenue it is a payment in accordance with the original contract of service entered into, it would attract tax. If, on the other hand, as is contended by the Respondent, it is a payment as compensation for loss of a right to remuneration on a continuing contract no tax liability arises under the Act of 1947.

29. In considering the substance of the transaction there is a danger of so construing the matter as to cause it to be brought under tax liability. This doctrine of "the substance of the matter", urged in earlier tax cases, was finally exploded by a decision of the House of Lords.

> "The sooner this misunderstanding is dispelled and the supposed doctrine given its quietus the better it will be for all concerned ....."

> "Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be".

(Duke of Westminster v. Commissioners of Inland Revenue 19 T.C. 490 at 520).

30. The sum paid to the Respondent and presently in dispute has been variously described as a payment on account of redundancy, a payment as compensation for loss of office, a payment in accordance with his contract of employment.

31. It is urged that the name given to a transaction by the parties does not necessarily decide the nature of the transaction. "The question always is what is the real character of the payment, not what the parties call it". (Commissioners of Inland Revenue v. Wesleyan & General Assurance Society 30 T.C. 11 at page 25 per Viscount Simon). There are

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ample authorities for this statement of the law but I shall rest merely by reference to the Judgment of His Lordship, Chang J, quoting Lord Greene M.R. in Henriksen v. Grafton Hotel Ltd. (1942) 2 K.B. 184 at page 189. (Appeal Record, page 26 at E and F).

32. It is contended by the Respondent for reasons set out in the foregoing paragraph that the payment of $28,050/- is a capital payment and not of an income nature. The test of this will finally be seen in the quality of the payment in the hands of the recipient i.e. the Respondent. (Halsbury, vol. 20 page 13).

(b) Payment not specifically charged

33. The payment of the compensation for loss of office is not specifically charged as income nor is it a designated source of income. A profit not itself specifically charged as income and not derived from a designated source is not taxable as income (Halsbury vol. 20 page 12).

34. It is assumed that the Respondent is sought to be taxed under Section 10(1)(b) of the Income Tax Ordinance 1947. The tax is in respect of gains or profits from any employment. Section 10(2)(a) defines "gains or profits from any employment" to mean

> "any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite or allowance (other than a subsistence, travelling, conveyance or entertainment allowance which is proved to the satisfaction of the Comptroller to have been expended for purposes other than those in respect of which no deduction is allowed under Section 15) paid or granted in respect of the employment whether in money or otherwise".

35. It is an important canon in the construction of Revenue Acts that the subject is not to be taxed unless there are clear words in the Act imposing such a tax.

> "... there is a maxim of Income Tax Law which though it may sometimes be over-stressed

yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the Taxing Statute unambiguously imposed a tax on him. It is necessary that this maxim should on occasion be reasserted and this is such an occasion". (Russell (Inspector of Taxes) v. Scott 1948, 2 A.E.R. 1 at page 5).

"No tax can be imposed on the subject without words in the Act of Parliament clearly showing an intention to lay a burden upon him ..... The only safe Rule is to look at the words of the Enactment and see what is the intention expressed by those words". (Coltness Iron Company v. Blank (1881) 6 App. CAS at page 330). Maxwell's Interpretation 12th Edn. p.256.

36. The words of Section 10 in themselves do not unambiguously impose a tax for payments made as compensation for loss of office. It is submitted that in view of the absence of any clear intention that tax should be imposed the Respondent is not liable to payment for the sum granted for the abrogation of his contract.

37. In this connection the Respondent refers to the Income Tax Act of 1967 Section 13(1)(e) which reads as follows:-

"Gross income of an employee in respect of gains or profits from an employment includes any amount received by the employee, whether before or after his employment ceases, by way of compensation for loss of the employment...."

38. This later Act imposes a new liability, extends the burden and alters the intention of the Ordinance of 1947. Section 13(1)(e) of the Act of 1967 imposes a new burden. The fact that it has so imposed a burden is sufficiently indicative that this burden was not previously intended.

"It is, I think, important to remember the Rule, which the courts ought to obey, that, where it is desired to impose a new burden by way of taxation, it is essential that this intention should be stated in plain terms. The courts cannot assent to the view that if a section in a Taxing Statute is of doubtful

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and ambiguous meaning, it is possible out of that ambiguity to extract a new and hard obligation not formally cast upon the tax-payer". (per Lord Buckmaster in Greenwood v. F.L. Smidth & Company (1922) 1 A.C. 417 at page 423).

39. As stated above the later Act of 1967 clearly alters the intention in the Ordinance of 1947. In view of this, it is proper to interpret the earlier Act by reference to the later Act.

> "There is some presumption that Statutes passed to amend the Law are directed against defects which have come into notice about the time when those Statutes passed ....." (Maxwell on the Interpretation of Statutes, 11th edition at page 22).

40. There is an ambiguity in the Ordinance of 1947 in that it is "fairly equally open to diverse meanings" (per Lord Buckmaster in Ormond Investment Company v. Betts (1928) A.C. 143 at page 156). Where there is an ambiguity in an earlier Act recourse may be had to a later Act for its construction. (Kirkness v. John Hudson & Co. Ltd. (1955) 2 A.E.R. 345).

41. Apart from the fact that "compensation for loss of office" is now specifically included as income under Section 13(1)(e) of the Act of 1967, such compensation for loss of office is now also given partial exemption for tax purposes under Clause 15 of Schedule 6 of the Act.

42. The Respondent had served 11 years with the Society. Had the later Act of 1967 applied he would have been, on the basis of $2,000/- for each year of service under paragraph 15 of Schedule 6 to the Act, exempt from payment of tax up to $22,000/- of the $28,050/- paid to him.

43. It can hardly be suggested by the Revenue that if the Respondent were paid the sum he received after the Act of 1967 the legislature had intended that he should be in a better position for tax purposes.

(c) Voluntary Payment

44. The payment of $28,050/- made to the Respondent may be viewed in another light, namely, that it is a voluntary payment on the part of the Society. The Rule of interpretation is that voluntary payments are not generally income of the recipient. But where such payments are made by virtue of the office or employment of the recipient they would be taxable.

45. There are numerous authorities which hold that voluntary payments to the holder of an office made in virtue of his office or employment is taxable notwithstanding that there may not be any legal obligation to make the payment. However, we are not concerned with payments to the holder of the office. We are, if at all, rather concerned with the situation where a payment is made to a person who has ceased to hold office.

46. A payment made to a former holder of an office or employment for the reason that he is no longer in the office or employment is not a profit of the office or employment. (Duncans' Executives v. Farmer (Surveyor of Taxes) 1909, 5 T.C. 417 at page 422).

47. In this connection the Respondent seeks to refer to the case of Beynon (H.M. Inspector of Taxes) v. Thorpe 14 T.C. 1 where the facts were as follows:-

> "In 1922 the Respondent resigned his position as managing director to a limited company on account of ill-health, but retained his seat on the board as an ordinary director until 1925. Between 1922 and 1925 he did no work for the company, attended no board meetings and received no remuneration as a director. It was the company's custom to give retiring employees voluntary pensions or allowances, and in 1923 the directors passed a resolution awarding the Respondent during his retirement a pension of £5,000 a year, but this resolution was rescinded in 1925 and a final payment of £5,000 was voted to the Respondent "not as or because he is a director but as a personal gift". The Respondent was

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assessed under Schedule E in respect of both the pension and the final payment, and the assessments were discharged on appeal by the Special Commissioners who decided that the allowances were gifts of a personal nature only".

48. It was held that payments were not income assessable to income tax in the Respondent's hands. As Rowlatt J. stated at page 14,

> "It is nothing but a gift moved by the rememberance of past services already efficiently remunerated as services in themselves; it is merely a gift moved by that sort of gratitude for that sort of moral obligation if you please; it is merely a gift of that kind. In this case it happens to be very large; in many cases it is very small, but in other cases it seems to me whether it is a large gift like this or whether it is a small gift to a humble servant, they are exactly on the same footing as gifts which are made to a child or gifts which are made to any other person whom the giver thinks he ought to supply with funds for one reason or another ...."

49. The Special Commissioners have felt strangely reluctant to accept the letter of the Society of the 16th April 1966 (Appeal Record, page 60 at G) where the Society makes it clear that the payment to the Respondent "in no way related to compensation for past services rendered". On examining the Secretary to the Society the Commissioners elicited the statement that the Society did not look into its legal obligations but felt obliged to accept past practice. (Appeal Record, page 61 at B).

50. It is submitted that, if anything, the finding of the Commissioners brings the payment within the character and description of Rowlatt J. in Thorpe's Case as quoted above.

(d) Retiring Gratuity

51. On the three separate grounds stated above the Respondent argues that the payment was a capital sum and therefore not assessable to tax. As an alternative ground, examining the payment as

possible income, the Respondent urges that it is, if at all income, a retirement gratuity and therefore exempt from tax under Section 13(1)(i) which reads as follows:-

> "There shall be exempt from tax sums received by way of retiring or death gratuities."

52. Gratuity income is therefore chargeable to tax under Section 10(1)(b) as defined in Section 10(2) (a). The word gratuity includes any money gratuitously granted or paid, whether it is paid in one sum or in instalments. (Holloway v. Poplar Corpn. 1940 1 K.B. 173, 178). Gratuity or retired pay is income (Re: Ward 1897 1 Q.B. 266).

53. There appear to be two reasons for the Special Commissioners inability to accept the alternative ground of the payment being a retirement gratuity and therefore exempt from tax, viz:-

(a) the payment was made at the end of employment (Appeal Record, page 51 at E); and

(b) the Respondent "never applied to retire, and his employment was terminated at the instance of his employers" (Appeal Record, page 52 at B).

54. Without further ado, I leave it to Your Lordships to assess the tenuity or strength of the reasons adduced.

55. It is submitted that if the sum paid is a gratuity it is income and should ordinarily be taxable. But as it is a retiring gratuity under Section 13(1)(i) it is income that is exempt from taxation. In other words, it is "exempt income".

(e) Findings Unsupported by Evidence

56. The Special Commissioners considered the Appeal before them on the erroneous assumption that the letter dated 6th February 1960 (Appeal Record page 42) formed part of the contract between the Respondent and the Society. What the Special Commissioners in effect chose to assume was that the contract of the Respondent (Appeal Record

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page 37-41) and the Circular Letter of the 6th February should be read together as one. On the bases of these primary facts the Special Commissioners have proceeded to make the inference that the Circular of the 6th February was, in their words, "a supplementary provision to the Service Agreement". (Appeal Record page 49, at F).

57. It is submitted on behalf of the Respondent that whether the Commissioners could find such a secondary fact from an inference of primary facts is a question of law open to review by this Court.

> "The question whether or not there was any evidence for the commissioners to support their determination of a fact is a question of law, and, where the only true and reasonable conclusion from the evidence contradicts the determination of the commissioners, the court must intervene to review their decision. Moreover where it appears to an appellate court that no person, if properly instructed in the law and acting judicially, could have reached the determination in question, the court may proceed on the assumption that a misconception of law has been responsible for the determination, although the case stated shows on the face of it no misconception of law". (Halsbury, Vol. 20, at page 697)

58. As stated earlier in the Submission the letter of the 6th February 1960 was merely a Circular Letter not intended to be an "offer". The entire tenor of the letter plainly indicates that it was meant to be an intimation to the Surveyors of the Company as to what the Management had in mind. As stated by His Lordship Chang J., the phrase "would consider" clearly emphasises the subjective character of the Circular Letter.

59. Notwithstanding the patent terms in which the Circular Letter was written, the Special Commissioners have chosen to make inferences and therefore to imply that the letter of the 6th February was intended as "a supplementary provision to the Service Agreement".

60. Even if an extreme view is taken and the Circular Letter (Appeal Record page 42) is read as an "offer" by the Company, the said "offer" was, by

the very discovery of the Special Commissioners, never accepted.

61. The Special Commissioners state:-

> "Since there is no evidence to show that the Appellant (Respondent in this case) made no protest or raised objection to the proposed redundancy pay scheme and since the Appellant eventually accepted the payment, we infer that he did not in fact make protest or raised objection but tacitly accepted the scheme". (Appeal Record page 50 at E and F).

62. Further even if the Circular Letter is regarded as an "offer", the fact that this offer was not accepted as stated by the Special Commissioners only goes to establish, if at all, that the "offer" was allowed to lapse. An "offer" lapses with the passing of time, and if no time is stipulated for its acceptance the question then to be decided is whether it is reasonable to regard the offer as still open. (Chitty on Contracts, 23rd edition, page 75.) In Ramsgate Victoria Hotel Company vs. Montefiore (1866) L.R. 1 E.X. 109 the Defendant applied in June for shares in the Plaintiff Company and paid a deposit. He received no reply until November when he was informed that the shares had been allotted to him and that the balance on them was due. The Defendant refused to accept the shares and his refusal was upheld by the court as the offer had not been accepted within a reasonable time and had lapsed in consequence.

63. In the case with which we are concerned a period of 5½ years passed since the "offer". It is submitted that the Special Commissioners had misdirected themselves on a question of law apart from making an inference unsupported by evidence.

64. The case of Edwards vs. Bairstow (1955) 36 T.C. 207 establishes that the determination of the Special Commissioners may be reversed by the Court of Review if the facts found are such that no person acting judicially or properly instructed as to the relevant law could have come to the determination.

65. The Respondent seeks to refer to the alleged "facts" upon which the Special Commissioners have

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chosen to make the inference that the Circular Letter is a supplementary provision to the Service Agreement. To summarise, it may be said that the Special Commissioners have made the inference for the following reasons:-

(a) it was implicit in the Circular Letter that in the event of redundancy no Notice to terminate would be given under Clause 11(a) of the Service Agreement (Appeal Record page 50, at D);

(b) that the Respondent had failed to protest or raise objection to the proposed redundancy scheme and therefore tacitly accepted it; (Appeal Record, page 50 at E);

(c) that the Respondent did cease to work one month after he was declared redundant (Appeal Record, page 51 at B);

(d) that he had not taken nor was contemplating taking any legal action for failing to give notice (Appeal Record page 51 at B).

66. I shall deal first with the question of redundancy. There are conflicting descriptions of the payment and the circumstances of the termination of the Respondent's employment. In the resolution of the Board (Appeal Record, page 20 at E) the Respondent is declared as being redundant. In the letter of the Society dated the 6th April (Appeal Record page 60 at E) the Society states:-

> "The amount of $28,050/- was paid to Mr. Knight as consideration for the release of the Society's obligations and the scale of compensation based on one month salary for every completed year of service merely follows the practice of other commercial concerns. The scale was adopted because it was considered to be a fair and easy way to quantify the amount of compensation. The payment was also in no way related to compensation for past services rendered".

67. In the same letter the Society points out that there was no mention in the Service Agreement

regarding redundancy pay and that as Mr. Knight was the most senior staff surveyor he should not have been the one to go with the normal practice of last in first out.

68. As His Lordship Chang J. finds the post was not in effect redundant "in the ordinary dictionary meaning of the word a super-abundant, superfluous or excessive". This was never the case. Further by the Statement of the Society the post was in effect Malayanised, and Malayanisation was a term that comes under compensation for loss of office as provided under the Circular Letter of the 6th February 1960 (Appeal Record page 42).

69. The Society was cognisant of the fact that if it were redundancy the principal of last in first out would have to apply on the basis of commercial practice.

70. In regard to the application of this principle the Respondents attach herewith the award of the Industrial Court Award No. 6/68 and reference is made in particular to page 4 under the title "last come first go" which reads as follows:-

> "It has been well established and accepted in industrial law that in effecting retrechment, an employer should comply with the industrial principal of "last come first go", unless there are sound and valid reasons for departure.
>
> This court adopts the principle as indeed has the former Industrial Arbitration Tribunal of Malaysia".

71. In page 50 at C of the Appeal Reocrd the Commissioners infer as follows:-

> ".....long before the Appellant's employment was terminated the parties had agreed that in the event that the employers found the Appellant redundant and wished to terminate his employment in less than three months they could do so by declaring him redundant and paying him redundancy pay, and in any other events ..... the employers had to give the Appellant not less than three calendar months' notice under

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clause 11(a) if they wished to terminate his employment."

72. It is submitted, with respect, that this can only be regarded as an highly contrived inference on the basis of the Circular Letter of the 6th February, 1960.

73. The second ground on which the Special Commissioners seek to make the inference that the Circular Letter forms part of the Service Agreement was the fact that the Respondent on receipt of the Circular Letter and thereafter had made no protest or raised objection. It is submitted that to construe the failure to protest or make an objection as tantamount to acceptance is a misconception of law where clear acceptance is not only required but a communication of acceptance is insisted upon.

74. Thirdly the Special Commissioners have sought to suggest that because the Respondent had ceased to work one month after the declaration of "redundancy" this was evidence of the fact that no notice was required in accordance with the Service Agreement. Under Clause 11(a) of the Agreement 1954 the Society was obliged to give three months' notice of termination.

75. It is submitted on the evidence available that it can only be inferred that the parties had released themselves from this contingent liability. The Rule in such an event has been stated by Lord Atkin in Hunter vs. Dewhurst 16 T.C. at page 645. "It seems to me that a sum of money paid to obtain a release from a contingent liability under a contract of employment cannot be said to be received 'under the contract of employment', is not remuneration for services rendered or to be rendered under the contract of employment, and is not received 'from' the contract of employment".

76. Neither in the Service Agreement nor in the Circular Letter is there the remotest suggestion that this contingent liability was removed. There is not an iota of authority or evidence upon which the Commissioners could have made the inference.

77. We finally come to the Statement of the Special Commissioners (Appeal Record page 51 at B) that the

fact that the Respondent had not taken or was not contemplating taking any legal action was evidence of redundancy payment in accordance with the Circular Letter. It is humbly submitted that this inference is somewhat bewildering, if not ingenuous and altogether inexplicable.

78. The determination of the Special Commissioners have been quashed by the courts where:-

(a) the evidence is inconsistent with the determination((Bowden vs. Russell & Russell (1965) 42 T.C. 301);

(b) there is no evidence to support the determination (Frazer vs. Trebilock (1964) 42 T.C. 217);

(c) the only reasonable conclusion contradicts the determination (J.P. Harrison vs. Griffiths (1962) 40 T.C. 281).

79. The Respondent seeks to refer the Honourable Court to the primary facts namely the Service Agreement and the Circular Letter and to the letter of the Secretary dated the 16th April 1966 with which letter the Special Commissioners were dissatisfied. They found it "unsafe" to accept the statements contained therein and their reason given was that the Secretary to the Society who had written the letter was not then working with the Society (Appeal Record page 61 at D). Oddly enough the Special Commissioners recorded the Secretary's statement that in making payment the Society did not look into its legal obligations but merely felt obliged to adopt past practices. If anything the reasons for not accepting the statements contained in the letter of the 16th April 1966 only confirms that at no time was the Society obliged or felt itself obliged to make payment of the sum of $28,050/-.

80. Finally reference is made to the finding by the Special Commissioners that the Memorandum of Association of the Society empower it to grant gratuities to its employees or ex-employees (Appeal Record page 36 at C). By an extraordinary reasoning with no basis in law or evidence this mere power contained in the Memorandum of Association is being

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imputed as an obligation to make such payment.

81. Memorandum and Articles of Association normally embody wide and extensive powers and it seems to be the view of the Special Commissioners that these powers are to be construed as obligations. Without labouring the nature of this misconstruction the position at law may be summarised by reference to Chitty on Contracts at page 509:-

1. No article can constitute a contract between the Company and the third person;

2. No right purporting to be given by an article to a person, whether a member or not, in a capacity other than that of a member, as for instance solicitor, promoter or director can be enforced against the Company;

3. Articles regulating the duties and obligations of members generally as such do create rights and obligations between them and the Company respectively.

82. In their finding of facts the Special Commissioners refer to other staff surveyors of the company who were declared redundant earlier.

83. My learned friend would forgive me if I make reference to the fact that the staff surveyor who was employed by the Society under the same contract and who also received a Circular Letter was made a payment for the termination of his employment. This payment was an appeal before the Board of Review in Singapore where the case was decided against the Revenue and the appeal thereafter was not proceeded with by the Revenue. (Appeal Record page 17 at A).

84. My Lords, one of the reasons why this case has long been delayed is because the Revenue had advised the Respondent that as an appeal was pending before the Board of Review in Singapore their final decision at the time of assessment to tax should await the outcome of the decision in Singapore. However, when the decision was unfavourable to the Revenue in Singapore (a decision that occasioned severe comment against the Revenue) the Income Tax

Department Singapore decided not to proceed with the appeal. However, the Department here, after holding out hopes that their attitude would be governed by the decision in Singapore, as the case was an identical one have nevertheless proceeded on the matter.

85. My Lords it is fully appreciated that the decision of the Board of Review in Singapore is not binding upon the Revenue here. But it seems rather unfortunate that having held out hopes and delayed consideration of this case on account of the Singapore hearing the Revenue should proceed in the matter. I make this reference only in parenthesis to illustrate the extraordinary attitude that has been taken in this case.

86. It is an attitude that is reflected in statements of the Commissioners which His Lordship, Chang J., has guardedly described as cynicism. I would like to go further and suggest, with respect, that it is an attitude of impunity, particularly the off-handed observations of the law which make such a travesty of the most mundane processes of reasoning.

Summary of Case

87. It is submitted that:-

(a) the Agreement of 1954 was the only contractual document between the Respondent and the Society binding the parties;

(b) the Society was under no legal obligation to make payment of compensation;

(c) the Respondent was under a continuing contract of service with the Society;

(d) the said contract was abrogated and compensation paid in consideration of such abrogation;

(e) the said compensation for a loss of a source of income or right to remuneration was a capital payment not assessable to tax; and further that -

(f) the payment of the said compensation is

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Written Submission of Counsel for the Respondent (continued)

not specifically charged as income under the Income Tax Ordinance of 1947;

(g) if the said sum be regarded as a voluntary payment to the Respondent it did not accrue to him by virtue of his employment, or by way of remuneration for his services;

(h) if in the alternative, the said sum be regarded as a gratuity it is income exempt from tax by virtue of Section 13 (1)(i) of the Ordinance of 1947;

(i) the Special Commissioners had made their finding without the supporting evidence and on a misconception of law;

(j) the Society released itself from a contingent liability under the contract to give the requisite 3 months' notice thereunder, and the payment of the said sum was thereby not <u>from</u> the contract of employment.

88. In the premises the Respondent prays for an order that the sum of $28,050/- is not assessable to tax and that this Appeal be dismissed with costs.

SOLICITORS FOR THE APPELLANT.

This Submission is filed by Messrs. Shearn, Delamore & Company and Drew & Napier on behalf of the Appellant abovenamed.

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No.8

Written Submission of Counsel for the Respondent (continued)

INDUSTRIAL COURT

AWARD NO.16/68

Industrial Court Case No. 4 of 1968

Between

Sharikat Eastern Smelting Berhad, Pulau Pinang

And

Kesatuan Kebangsaan Pekerja2 Perusahaan Peleboran Logam Sa-Malaya

Before: The President (Sir George Oehlers)
Enche Abdullah bin Udi
Enche Cheah Theam Swee
Enche T.P.D. Nair

Enche S. Woodhull of Counsel for the Sharikat Eastern Smelting Berhad, Pulau Pinang

Enche A.R. Rajasingam of Counsel for the Kesatuan Kebangsaan Pekerja2 Perusahaan Peleboran Logam Sa-Malaya.

THE REFERENCE

1. Date of Reference: This trade dispute between the Sharikat Eastern Smelting Berhad, Pulau Pinang (hereinafter referred to as "the Company") and the Kesatuan Kebangsaan Pekerja2 Perusahaan Peleboran Logam Sa-Malaya (hereinafter referred to as "the Union") was on the 16th day of March 1968, on the joint request of the parties, referred to the Industrial Court by the Minister for Labour under the provisions of subsection (1) of section 23 of the Industrial Relations Act 1967 (hereinafter referred to as "the Act").

2. The Dispute: The dispute as so referred to the Court by the Minister was stated to be in relation to the termination of the services of Puan Anita Tan, a typist in the Company, on the 30th day of April 1967.

THE COURT

3. Constitution of the Court: The President together with the following three members selected by the Minister under the provisions of the Act

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Written Submission of Counsel for the Respondent (continued)

constituted the Court for the purpose of dealing with the matters in dispute:-

Enche Abdullah Bin Uda : Independents
Enche Cheah Theam Swee : Employers
Enche T.P.D. Nair : Workmen.

4. Hearing.

4.1 The case was mentioned before the President on the 28th day of March 1968 and fixed for hearing on the first available dates, that is to say on the 11th and 12th days of April 1968.

4.2 The case was heard on the 11th and 12th days of April 1968.

4.3 With the consent of the parties, the Court acted notwithstanding the absnece of Enche Cheah Theame Swee during the afternoon of the 11th day of April 1968.

THE CASE

5. The Company's Case

5.1 Pursuant to a decision to retrench staff, the Company on the 31st day of January 1967 addressed a letter to Puan Anita Tan whereby she was informed, inter alia, that her services would not be required after the 30th day of April 1967.

5.2 Puan Anita Tan, a married woman, was a copy typist senior in service by 3 days to another copy typist, Miss Chee Kim Oi. The Company decided to follow the principle first adopted in July 1965 of retrenching married women rather than unmarried women because it was felt that a married woman who is not a family's sole support should go before a woman who has to support herself.

6. The Union's Case: The Court understood the Union, by its Statement in Reply, to challenge the retrenchment on the following grounds:-

(1) The Company was guilty of victimisation and unfair labour practice and its actions and intentions were mala fide;

(2) There was no necessity to retrench;

(3) (a) Retrenchment was governed by the principle embodied in the Company's Industrial Relations Policy booklet as follows:-

"To support these major points (of policy) the Company will . . . . . (i) in the event of redundancy apply retrenchment wherever practicable on the principle of last in, first out;"

(b) The Union never accepted the principle adopted by the Company of retrenching married women rather than unmarried women; and

(c) The Company never discussed the question of retrenchment with the Union, but acted unilaterally and unjustly in terminating the services of Puan Anita Tan.

VICTIMISATION

7. Union's Allegations.

7.1 In its Statement in Reply, the Union asserted -

(a) that it would substantiate that the interpretation of "practicability" by the Company seemed to vary with circumstances to colour the mala fide intention of the company;

(b) that it would substantiate that the Company's retrenchment of Puan Anita Tan was an act of victimisation of employees who were members of the Union; and

(c) that it would show that the Company had always acted in a manner which could only be termed as unfair labour practice as regards employees who were members of the Union.

7.2 In support of its assertions, the Union called, as witnesses, Puan Anita Tan and Khoo Huat Hin, now the National President of the Union and at the relevant time a member and later the Chairman of the Branch Committee of the Union in the Company.

7.3 Puan Anita Tan, in reply to the President, stated -

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Written Submission of Counsel for the Respondent (continued)

"I feel I have been vicitimised because I am a member of the Union. I know of no other worker who was a member and who has been victimised. Because I happen to be member of the Union, I assume I was victimised".

7.4 Khoo Huat Hin stated that there had been a deterioration in employer/Union relationship lately. When questioned further, he stated that by that he meant there had been no give and take since 1966.

7.5 Khoo also referred to the case of three workers who had been dismissed on grounds of ill health, and who had been reinstated after the Union had intervened. Earlier on, Enche Young, the Personnel Officer of the Company, had explained that the three workers had been sent for a routine tuberculosis check by the Company Doctor who had certified that they were unfit for work. The workers then went to another Doctor who disagreed with the Company Doctor. The Company suggested that the workers should be examined by a neutral Doctor but the Union refused. The Company then reinstated the workers. Khoo, in his evidence, made the serious allegation that the Union felt that the Company told their Doctor to give false medical certificates for the three workers, implying that this was because the Company was out to victimise them for being members of the Union.

8. <u>The Court's Views</u>.

8.1 With reference to the allegation made by Khoo, no attempt was made to justify such a libellous and damaging statement. The Court can only conclude that the statement has no substance in fact and that in making such a statement, Khoo was acting in a highly irresponsible manner. The Court, however, has no doubt that Khoo acted on the spur of the moment and that by now Khoo must have realised the seriousness of the allegation made by him. The Court is of the view that it would be to his own interests if he took steps to retract his statement if he has not already done so.

8.2 In relation to the allegation made by the Union as to victimisation, unfair labour practice and mala fides, the Court can find nothing in the evidence adduced to substantiate any of them. In fact, Counsel for the Union, in his final submissions,

agreed that the allegations of victimisation had not been made out.

8.3 The Court accordingly rejects the Union's allegations as being frivolous and without any substance whatsoever.

RETRENCHMENT

9. General Principles

9.1 It is well settled that it is for the management to decide the strength of its staff which it considers necessary for efficiency in its undertaking.**

9.2 Where the management decides that workmen are surplus and that there is, therefore, a need for retrenchment, an arbitration tribunal will not intervene unless it can be shown that the decision was capricious or without reason ** or was mala fide or was actuated by victimisation or unfair labour practice.***

9.3 In the absence of any evidence to show that retrenchment was a colourable pretext to get rid of certain workmen, the order of retrenchment cannot be said to be an act of victimisation merely because the discharged workmen are active members of the Union.****

10. The Court's Views

10.1 No evidence was adduced to indicate that the Company's decision to retrench was capricious or without reason, and as indicated earlier, the Court rejects the allegation of the Union that there was victimisation or any mala fide action on the part of the Company.

10.2 The Court, accordingly, rejects the Union's assertion that there was no necessity to retrench.

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** See Soonavala on the Supreme Court in Industrial Law at page 741.
*** Ibid at page 746.
**** Compare Soonavala at page 745.

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Written Submission of Counsel for the Respondent (continued)

"LAST COME FIRST GO"

11. General principles

11.1 It has been well established and accepted in industrial law that in effecting retrenchment, an employer should comply with the industrial principle of "last come first go", unless there are sound and valid reasons for departure.*****

11.2 This Court adopts that principle as indeed has the former Industrial Arbitration Tribunal of Malaysia.

11.3 Thus, where other things are equal, the principle must be followed. This means that the employer is not entirely denied the freedom to depart from that principle, but he can do so only for sufficient and valid reasons.*

11.4 In a case in India, it was held that the employer may take into account considerations of efficiency and the trustworthy character of the employees and if he is satisfied that a person with long service is inefficient, unreliable or habitually irregular in the discharge of his duties, it would be open to the employer to retrench him while retaining in his employment another who may be junior to him in service.* Once the employer's decision is challenged, the onus would be on him to satisfy the arbitration tribunal that the departure from the principle was justified by sound and valid reasons.*

12. Facts

12.1 In this case, as indicated earlier, the principle of "last come first go" was spelt out in the Company's Industrial Relations Policy booklet, the expression used being "last in first out".

12.2 In July 1965, the Company had caused to retrench certain workers, and the principle of last come first go was departed from when the Company retrenched two senior married women rather than two junion unmarried women, as it was felt that a

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***** See Soonavala at page 746.
* Soonavala at page 747.

married women who is not a family's sole support should go before a woman who has to support herself.

12.3 The married women who were retrenched were not members of the Union and consequently, if they had complained, the Union could not have espoused their causes.

12.4 There is, however, no evidence as to whether or not they did complain and Khoo testified that the Union was not aware that there had been a departure from the principle of "last come first go".

12.5 On the 19th day of September 1966, the Company announced at a meeting of the Joint Work's Council that there was a possibility of redundancy occurring and a scheme described as "voluntary retrenchment" by the Company in its Statement of Case, was proposed. It was stated that although there was no immediate intention of retrenching anyone, the position would have to be considered on the 31st day of January 1967, the end of the Company's financial year. There was no discussion with the Union representatives in the matter.

12.6 On the 31st day of January 1967, the position was reviewed and the decision to retrench the senior of two copy typists, Puan Anita Tan, was taken. In its Statement of Case, the Company stated -

> "There were only two candidates (for retrenchment), one of whom (Puan Tan) was married with a husband in gainful employment (he is in fact employed by the Company in a senior clerical position), the other (Miss Chee) was single and dependent on her own earnings, hence it was naturally decided that the fairest course was to retrench the married employee".

12.7 There was no discussion with the Union before the decision was taken. The Union protested and asserted that they had never accepted the principle adopted by the Company of retrenching married women rather than unmarried women.

12.8 It would appear that there was a tacit admission by the Company that the Union had valid

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Written Submission of Counsel for the Respondent (continued)

grounds to protest as indicated in a letter dated the 21st day of November 1967, wherein the Company referred to a conditional offer made to adopt a rule granting increases in salary of an employee on promotion provided that the Union accepted the principle "first in last out where practicable excepting that married women who are not a family's sole source of income shall be retrenched before other employees".

13. The Court's Views

13.1 The Court is satisfied that, in fact, on the question of retrenchment, there was an agreement between the Company and the Union as spelt out in the Company's Industrial Relations Policy booklet (paragraph 6(3)). Enche Young, the Personnel Officer of the Company, testified that he expected that the policy as so spelt out would be honoured, and the Union had every reason to believe that it would be honoured.

13.2 Enche Young maintained that the principle adopted by the Company in relation to married women was covered by the phrase "wherever practicable". The Court took this to mean that in his view there had, therefore, been no departure from the principle enunciated in the booklet.

13.3 The Court is unable to accept this view. The Court is of the opinion that the phrase "wherever practicable" must be taken to cover cases where, in accordance with the general principles enunciated earlier (paragraph 11), an employer has departed from the industrial principle of "last come first go" for sufficient sound and valid reasons.

13.4 The Court has not been referred to any authority nor has it been able to trace any authority to indicate that marriage or indeed any private or personal reason as such would justify a departure from the principle of "last come first go".

13.5 There is, of course, nothing to prevent such a departure being made by agreement, albeit it is not difficult to imagene that, for instance in relation to marriage, such an agreement, unless

drawn in precise terms, might, in some cases, cause more hardship to the married woman than to the unmarried woman.

13.6 In this case, however, there was no such agreement. The Court accordingly finds that there were no sufficient sound or valid reasons to justify the Company's departure from the principle of "last come first go".

REINSTATEMENT

14. Reinstatement

14.1 The Court hestiated as to whether, in the circumstances of this case and in the light of the unfounded and libellous allegations made by the Union in relation to victimisation, it would not be proper to award compensation in lieu of reinstatement rather than reinstatement.

14.2 The Court, however, noted that Puan Anita Tan herself was far from positive that she had, in fact, been victimised and could only say with some hesitation that she felt or assumed that she had been victimised because she was a member of the Union.

14.3 The Court also took note of the statement made by Enche Young that Puan Anita Tan's work was good, that there was no question of inefficiency and that no bad blood had been created by the case.

14.4 The Court accordingly is of the opinion that Puan Anita Tan should be reinstated in the service of the Company.

15. Back Pay

15.1 Ordinarily upon reinstatement, an employee is entitled to all back pay, allowances and other privileges from the date of dismissal.

15.2 This Court has, however, followed the principle that there is a duty upon the employee who seeks reinstatement to make all reasonable efforts to search for and obtain gainful employment during the interim period, and that upon reinstatement, there should be deducted from his back pay his actual earnings

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Written Submission of Counsel for the Respondent (continued)

while in such employment. If the employee has not made such a search for employment or has unreasonably refused employment offered, then it is assumed that any other employment would have yielded earnings equal to the earnings of the employee in the job from which he was dismissed.*

15.3 In this case, Puan Anita Tan drew a salary of $270/- per month, at the date of her dismissal, that is to say the 30th day of April 1967. She obtained employment as a probationary travel assistant on the 1st day of November 1967 at a salary of $170/- per month.

15.4 No evidence was tendered as to the efforts, if any, which were made by Puan Anita Tan to search for employment between the 30th day of April 1967 and the 1st day of November 1967, a period of six months. The Court considers that, in the circumstances, it would be reasonable to expect that if Puan Anita Tan had made a reasonable effort to search for employment, she would have obtained employment within a period of three months, and consequently, in accordance with the principles enunciated, it is assumed that her earnings for the remaining three months could have been at the rate of $270/- per month.

15.5 The Court was informed that Puan Anita Tan had, without prejudice, received a payment of $810/- by way of severance pay and an extra two weeks pay to which she was not entitled under her contract of employment but which was made as a concession to the Union in the hope that the case could be settled.

15.6 In the light of the foregoing observations, the Court finds that at the effective date of this award, after allowing for the deductions indicated, there would be a sum of approximately $515/- which would be payable to Puan Anita Tan upon her reinstatement as balance of compensation in lieu of back pay.

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* See Smith & Merrifield on Labour Relations Law Cases & Materials at page 211.

THE AWARDS

16. Effective Date: The Court awards that this award shall take effect on the 15th day of May 1968.

17. Reinstatement

17.1 The Court further awards that, upon Puan Anita Tan reporting for duty on the 15th day of May 1968 or upon such later date as may be mutually agreed upon by the Company and Puan Anita Tan -

(1) the Company do reinstate Puan Anita Tan in its employment in her former post, upon the same terms and conditions of service and without any break in the continuity of her service; and

(2) the Company do pay to Puan Anita Tan the sum of $515/- by way of balance of compensation in lieu of back pay.

17.2 The Court further awards that, in the event of Puan Anita Tan not reporting for duty as aforesaid, she shall lose all benefits under this award and forfeit all other claims she may have in relation to the termination of her services.

HANDED DOWN ON AND DATED THIS 26th DAY OF APRIL, 1968.

(SEAL)

(G.E.N. OEHLERS)
President

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No.9

Judgment of Tan Sri Gill J.

2nd March 1970

No. 9

JUDGMENT OF TAN SRI GILL J.

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

(Appellate Jurisdiction)

FEDERAL COURT CIVIL APPEAL NO. x 98 of 1969

(Kuala Lumpur High Court Originating Motion No.9/69)

Between

The Comptroller-General of Inland Revenue, Malaysia — Appellant/Respondent

and

Alan Richard Knight — Respondent/Appellant

Coram: Azmi, Lord President, Malaysia
Suffian, Judge Federal Court
Gill, Judge Federal Court

JUDGMENT OF GILL, F.J.

The question for determination in this appeal is whether the sum of $28,050 paid to the respondent as redundancy pay on the termination of his services as the Chief Staff Surveyor with the Malaya-Borneo Building Society is chargeable to income tax under section 10(1)(b) of the Income Tax Ordinance, 1947 as "gains or profits from any employment" within the meaning of section 10(2)(a) of the said Ordinance.

The question was answered in the affirmative by the Comptroller-General of Inland Revenue and he was upheld on appeal to the Special Commissioner of Income Tax. On a further appeal by way of case stated to the High Court, however, Chang Min Tat J. reversed the decision of the Special Commissioners. Hence the appeal to this court with the Comptroller-General as appellant.

The primary facts of the case are not in dispute. The respondent was employed as a staff surveyor by the Federal & Colonial Building Society Limited under a written agreement between the parties dated 23rd August, 1954. Clause 8 of the

agreement provided for the payment by the Society of the cost of the passages and travelling expenses of the respondent and his wife and children from the United Kingdom to Malaya, and of their return passages and travelling expenses bakc to the United Kingdom on the termination of the respondent's employment by death or otherwise, unless the agreement was terminated within a period of 33 calendar months from the date of its commencement. Clause 11 of the agreement provided for the determination of the agreement by either party giving to the other not less than three calendar months' notice in writing to expire it at any time.

In 1956 the name of the Society was changed to the Malaya Borneo Society Limited, and the respondent continued to be employed by the Society as a Staff Surveyor. On 3rd February, 1960 the Society at a Management Meeting reviewed the conditions of service of its technical staff. On 6th February, 1960 the Deputy General Manager of the Society wrote to the Company's staff surveyors including the respondent a letter which, after referring to the Management Meeting held on 3rd February, 1960 stated as follows on the subjects of redundancy pay and loss of office:

"Redundancy Pay

The subject of redundancy was discussed and it was agreed that should a staff surveyor become redundant, Management would consider the payment of redundancy pay to the surveyor concerned, the maximum benefit payable being limited to one month's pay (Based on salary at date of redundancy) for every completed year's service subject to:-

(a) minimum compensation of 3 months' pay

(b) maximum compensation of 12 months' pay

Loss of Office

The Society is a commercial company and as such need not have a Malayanisation policy. Should it eventually become the policy of the Society's Board that expatriate staff should be replaced by suitably qualified local staff,

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Judgment of Tan Sri Gill J.

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Management would at that time draw up for the Board's consideration a scheme for compensation for loss of office. Management cannot, however, anticipate what the scheme will be neither can it anticipate Board's approval. However, it can safely be assumed that should compulsory replacement be introduced, staff surveyors would be granted compensation for loss of office on terms not less generous than those that apply to redundancy."

In 1965 the respondent was made the Chief Staff Surveyor of the Society. On 2nd November, 1965 the Board of Directors of the Society passed a resolution -

(a) that the Society's Chief Staff Surveyor, Mr. A.R.Knight be declared redundant as from 1st December, 1965, and

(b) that Mr. Knight be given redundancy pay at the rate of one month's basic salary for every completed year's service subject to a maximum of 12 months' pay.

In pursuance of that resolution the respondent ceased to work with the Society on 30th November, 1965 and left Malaya for London on the same day. His salary up to that day was paid, and he was paid a sum of $8,120 in lieu of 87 days' leave which was then due to him. He was further paid a sum of $28,050 as redundancy pay, which was worked out by multiplying his then salary by eleven, being the number of completed years of his service with the Society. The Society also paid for the passages of the respondent and his wife and children back to the United Kingdom.

As regards the nature of the payment in question in this appeal, the Secretary of the Society in answer to a letter dated 6th April, 1966 from the appellant's office stated in his letter dated 16th April, 1966 as follows:-

"There was no mention in Mr. Knight's Service Agreement dated 23rd August, 1954 regarding redundancy pay. Moreover, according to the normal practice of last in first out Mr.Knight should not have been the one to go as he was the most senior Staff Surveyor in the Society by virtue of his length of service. This procedure was,

however, not followed by the Society in Mr. Knight's case as it was the Society's policy to Malayanise its senior appointments wherever possible. There being sufficient local surveyors to take over the duties of expatriate officers, Mr. Knight was declared redundant at the end of 1965.

The amount of $28,050 was paid to Mr. Knight as consideration for the release of the Society's obligations and the scale of compensation based on one month's salary for every completed year of service merely follows the practice of other commercial concerns. This scale was adopted because it was considered to be a fair and easy way to quantify the amount of compensation. The payment was also in no way related to compensation for past services rendered."

He also gave evidence before the Commissioners. When asked what the Society's obligations were, he said that the Society did not look into its legal obligations but merely felt obliged to adopt past practice. He further said that he did not know what discussions, if any, the respondent had with the Manager of the Society on the subject of his leaving the Society, because he was not then employed by the Society.

The conclusions at which the Commissioners arrived with regard to the Secretary's letter and his evidence before them was that it was unsafe for them to accept the statement in the last paragraph of the letter as this was something of which he had no personal knowledge, that the statement in the letter that the payment was in no way related to compensation for the past services rendered was merely his own opinion, and that there was doubt as to the accuracy of his statements in the letter in that he attributed redundancy pay to Malayanisation when they were mentioned separately under different headings in the letter of 6th February, 1960.

In my opinion, the Special Commissioners were wrong in totally rejecting the Secretary's letter and his testimony before them. The Secretary had not sent the letter of his own volition. It was sent in answer to a letter from the appellant's office. The Secretary quite clearly had no improper motive

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2nd March 1970 (continued)

in writing or saying anything to the benefit or detriment of Mr. Knight. The fact that he was not an employee of the Society when the letter of 6th February, 1960 was written did not mean that he had no access to all the information relating to Mr. Knight's departure. That the Society had no Malayanisation policy as such was clear from the letter. The letter clearly stated that the Society had in mind the question of replacing expatriate staff by suitably qualified local staff and that in the event of their pursing that policy they would consider the scheme for compensation for loss of office.

It is clear that the normal practice of "last in first out" was not followed in the case of Mr. Knight because he was the most senior staff surveyor in the Society by virtue of his length of service. The Secretary's statement in the letter that that procedure was not followed by the Society in Mr. Knight's case because it was the Society's policy to Malayanise its senior appointment was not seriously challenged. It would appear clear therefore that redundancy pay was in fact tied up with loss of office by virtue of Mr. Knight's appointment being Malayanised. Again, the Secretary's statement that, there being sufficient local surveyors to take over the duties of expatriate officers, Mr. Knight was declared redundant at the end of November, 1965 was also not challenged. Bearing in mind the ordinary dictionary meaning ofthe word "redundant" to be 'superabundant, Superfluous or excessive', and the fact that Mr. Knight became redundant not because his post was abolished but because there were suitably qualified local officers to take his place, this was not a case of redundancy in the true sense of the word. It therefore follows that his so-called redundancy pay was in fact Malayanisation money or compensation for loss of office.

The sum paid to the respondent has been variously described as a payment on account of redundancy, a payment as compensation for loss of office, or a payment in accordance with the contract of employment. But the name or description given by the parties to the payment made is not necessarily decisive of the nature of the payment. Lord Green, M.R., in Henriksen v. Grafton Hotel, Ltd.(1) said:

"For this purpose the first thing to do is

to examine the nature of the payment, that is to say, the nature of the subject in respect of which the payment is made. In this connection the manner of payment may be relevant as throwing light upon its nature. In many cases - and in my opinion this is one of them - the question will be found to answer itself once the true nature of the payment is ascertained."

As stated by Viscount Simon in Commissioners of Inland Revenue v. Wesleyan and General Assurance Society(2), "the question always is what is the real character of the payment, not what the parties call it." The test in a case such as this will finally be seen in the quality of the payment in the hands of the recipient (see Halsbury, 3rd edition, Volume 20, page 30).

The principal ground of appeal before this court is that the learned Judge wrongly rejected the following inferences drawn or the conclusions reached by the Special Commissioners:

(a) that the Society and the Respondent had agreed to modify the service agreement dated the 23rd August, 1954, to the effect that if the Respondent's post was declared redundant, his employment with the Society could be terminated without the Society giving him three months' prior notice provided that the Respondent was paid what was termed as redundancy pay;

(b) that the payment to the Respondent of the said sum of $28,050 was not in fact compensation for loss of a source of income or of a right to remuneration as a result of abrogation of the service agreement; and

(c) that the Respondent had no absolute right to continued employment under the service agreement."

It is contended for the appellant, on the authority of Rellim v. Vise(3) and Shadford v. Fairweather(4) that the cardinal principal to be followed by an appeal court is that it should not interfere with the findings of fact of the Special Commissioners. The question then is, what are the circumstances under which an appeal court is justified

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in disturbing the findings of the Special Commissioners? This question was answered by the House of Lords in Edwards v. Bairstow.(5) Viscount Simonds said at Page 29:

> "For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarized by saying that the court should take that course if it appears that the commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained."

Lord Radcliffe in the same case stated the principle in much more elaborate terms when he said at pages 35 and 36:

> "I think that the true position of the court in all these cases can be shortly stated. If a party to a hearing before commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has

(3) 32 T.C.254 (4) 43 T.C.291 (5) (1956) A.C.14

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

Thus, the determination of the Special Commissioners was quashed by the courts in Frazer v. Trebilcock(6) where there was no evidence to support the determination, in Bowden v. Russell & Russell(7) where the evidence was inconsistent with the determination and in H.P.Harrison v. Griffiths(8) where the only reasonable conclusion contradicted the determination. Halsbury, 3rd edition, Volume 20 at page 697 states the principle succinctly as follows:-

"The question whether or not there was any evidence for the commissioners to support their determination of a fact is a question of law, and, where the only true and reasonable conclusion from the evidence contradicts the determination of the commissioners, the court must intervene to review their decision. Moreover where it appears to an appellate court that no person, if properly instructed in the law and acting judicially, could have reached the determination in question, the court may proceed on the assumption that a misconception of law has been responsible for the determination, although the case stated shows on the face of it no misconception of law."

As I have stated, there is no dispute about the primary facts. The inference which the Special Commissioners drew from those facts was that by the Society stating in the letter of 6th February to the respondent that should a staff surveyor become redundant the Management would consider the payment

In the Federal Court of Malaysia

No.9

Judgment of Tan Sri Gill J.

2nd March 1970 (continued)

of redundancy pay, and by the respondent making no protest or raising any objection to the proposed redundancy pay scheme, thereby tacitly accepting the scheme, there was introduced a supplementary provision to the service agreement. In other words, the inference drawn by them was that clause 11 of the service agreement between the parties was modified to the extent that the Society could terminate the services of the respondent by paying him the amount arrived at by multiplying his then salary by a number representing the number of years of his completed service and that such payment would then be under his contract of service and therefore liable to income tax.

The question, however, is whether there was ever a concluded agreement between the parties for modifying or varying the initial agreement in the sense that there was a definite offer made to the respondent and an unqualified acceptance of that offer by him. The learned Judge in the court below said that he could find or detect no such agreement either express or implied on the part of the appellant. With respect, I entirely agree. It is clear that there was in fact no concrete proposal in the nature of an offer by the Society for the variation or modification of the service agreement. A statement by one party to another that in the event of a situation arising in the future he might consider making an offer of some sort does not amount to an offer which is meant to be accepted by such other party so as to conclude a legally binding agreement between them. Similarly, silence on the part of the party to whom such a proposal is made does not amount to an acceptance of the proposal. In my judgment the letter of 6th February, 1960 by the Society was nothing more than an intimation of its intention as to what it might consider doing with a view to terminating the services of its staff surveyors, and it called for no answer on the part of any of the staff surveyors to whom it was sent. At best, it was an advance information of what the Society had in mind.

The agreement under which the respondent's services with the Society were terminated was the agreement which came into being by the Society conveying the terms of the resolution by its Board of Directors on 2nd November, 1965 and the respondent

accepting the terms of the resolution by leaving the service on 30th November, 1965 as required. The travelling expenses of the respondent and of his wife and children back to the United Kingdom were paid impliedly under this new agreement. In any event, the respondent was entitled to free passages for himself and his family if his services were terminated by "death or otherwise" after 33 months from the commencement of the agreement. I can therefore find no merit in the appellant's argument that because the Society paid for the passages back to the United Kingdom of the respondent and his family, for which there was provision in the original agreement, the so-called redundancy pay was also paid under the same agreement.

As regards the duration of the respondent's employment, it is clear, as stated by the Special Commissioners, that he had no absolute right to be employed up to a certain date, because under the terms of his contract of service his employment was liable to be terminated at any time by his employers giving the requisite notice. In other words, it was open to the Society, when they decided that the respondent should go, to get rid of him by giving him three months' notice under the agreement. But they chose not to do so. Obviously they had no such intention, because no reputable Society would mete out such shabby treatment to a longstanding and faithful servant. Their policy was to replace expatriate officers by local officers, but they also had in mind their moral, if not legal, obligation to provide suitable compensation in pursing that policy. It would therefore be correct to say that the respondent's employment was an employment which was likely to continue so long as he carried out his duties faithfully and until the Society decided to ask him to go by offering him reasonable compensation for loss of his career.

Rowlatt J. in Chibbett v. Joseph Robinson & Sons(9) said: "...compensation for loss of an employment which need not continue, but which was likely to continue, is not an annual profit within the scope of the Income Tax at all." He adhered to the same general principle in Henry v. Arthur Foster, Henry

(9) 9 T.C. 48,61

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2nd March 1970 (continued)

v. Joseph Foster and Hunter v. Dewhurst(10), but his judgment in those three cases was reversed by the Court of Appeal. Hunter v. Dewhurst(10), however, went up to the House of Lords where the ultimate result was the same as that arrived by Rowlatt J., although for entirely different reasons and on an entirely different principle. It would seem clear that the House of Lords decided the case on its special circumstances but there is nothing in the judgments of the Court of Appeal or the House of Lords to suggest that the dictum of Rowlatt J. in Chibbett v. Joseph Robinson & Sons(9) was expressly disapproved of. I do not therefore agree with the Commissioners that it is not safe to place reliance on that ductum. It is true that Chibbett v. Joseph Robinson & Sons(9) was a case of voluntary payment, but that does not make the dictum as a rule of general application irrelevant to a contractual payment. The conclusion at which I have arrived is that, since the respondent's employment was one which was likely to continue, the sum of $28,050/- if it was in fact compensation for loss of his employment and in no way related to compensation for the services rendered in the past, is not liable to Income Tax.

I agree with the Special Commissioners that the payment of $28,050 was made to the respondent, not because he was Alan Richard Knight but because he was a staff surveyor of the Society, it being clear that the intention of the Society was to give redundancy pay to all expatriate staff surveyors who were asked to go. Clearly, therefore, this was not a case of a personal gift given on personal grounds other than for services rendered, as explained by Atkinson J. in Calvert v. Wainwright(11). A personal gift as such is of course not liable to income tax (see Read v. Seymour(12) and Beynon v. Thorpe(13), but a voluntary payment made to the recipient by virtue of his office or employment would be a gratuity within the meaning of section 10(2)(a) and therefore liable to income tax under section 10(1)(b) of the Income Tax Ordinance, 1947. It was upon this ground that the Special Commissioners held the amount paid to the respondent to be assessable to income tax on the basis that it was a payment made by virtue of the respondent's employment.

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(9) T.C.48,61 (10) 16 T.C.605 (11) 27 T.C.475
(12) 11 T.C.625 (13) 14 T.C. 1

In my judgment they were clearly wrong in reaching that finding, because this was not an obligatory payment under the agreement of 23rd August, 1954 which was the only contract of employment between the parties. As I have already stated, there never was any agreement between the parties to vary the terms of that original agreement as regards the clause relating to the termination of the respondent's employment. The determining factor in the present case is that the payment to the respondent, whatever the parties may have chosen to call it, was not a payment which the Society had contracted to make to the respondent as part of his remuneration for his services as a staff surveyor. It was therefore in no way related to compensation for the past services rendered by the respondent. But for the subsequent agreement, to which I have referred earlier in my judgment, the Society was under no legal obligation to make a payment in respect of the so-called redundancy pay. Clearly, therefore, the amount of $28,050 was paid to the respondent for the release of the Society's obligations under the contract of employment. In other words, it was a payment of compensation for the total abrogation of the service contract as from 1st December, 1965 following a prior agreement or understanding.

The agreement reached here prior to the abrogation of the contract related only to the quantum payable for such an abrogation. In this connection, Lord Atkin in the House of Lords in Hunter v. Dewhurst(10) said at page 645:

> "It seems to me that a sum of money paid to obtain a release from a contingent liability under a contract of employment cannot be said to be received 'under' the contract of employment, is not remuneration for services rendered or to be rendered under the contract of employment, and is not received 'from' the contract of employment."

The legal position is summed up by Halsbury, 3rd edition, Volume 20, paragraph 593 at page 324 as follows:-

> "Compensation for the loss of an office or employment, if it be truly such, there being no reserved right to it under the contract of service

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2nd March 1970 (continued)

and no outstanding remuneration due for services performed, is not a profit of the office or employment assessable to tax. If, on a true appreciation of the legal effect of the transaction, the compensation is payable because the contract of employment has been abrogated, then, whether that compensation is due by fresh agreement or as a result of proceedings, it is not chargeable to tax as an emolument of the employment. Neither is a sum received by the employee in consideration of his releasing the employer from a contingent liability under the contract of service so chargeable."

In Duff v. Barlow(14) and Henley v. Murray(15) the amounts paid to the employees on the abrogation of their contracts of employment were held not to be liable to income tax. In the first case Barlow had the right under his service agreement to continued employment up to 31st December, 1945 but he ceased to work as from 25th November, 1937 by a subsequent agreement. Similarly, in the second case Henley's employers were obliged under the service agreement to employ him until 31st March, 1944 but his appointment was terminated on 6th July, 1943. The Special Commissioners sought to distinguish the present case from those two cases on the ground that in the present case the respondent had no absolute right to be employed up to a certain date and that his employment was terminated from a date on which his employers had the right to terminate it under the service agreement. The question, however, is, did the Society in the case terminate the respondent's employment under the service agreement? The answer clearly is that they did not, even though they could have, as I have pointed out earlier. It is true that the respondent's contract was not up to any definite date, but it was a contract which was likely to continue until terminated. Eventually when his employment was terminated it was not terminated under the terms of his contract of employment, there being no consensual variation of the contract as in Marriott v. Oxford and District Co-operative Society Ltd.(16), but under a fresh agreement which was reached by the communication to the respondent of the resolution by the Board of Directors and of his acceptance by leaving the service as required by that

(14) 23 T.C.633 (15) 31 T.C.351 (16) (1969) 1 A.E.R.47

resolution. There can therefore be no doubt that the sum of $28,050 having been paid to the respondent in consideration of the abrogation of his contract of employment, it is not liable to income tax.

In considering the substance of the transaction there is a danger of so construing the matter as to cause it to be brought under tax liability. This doctrine of "the substance of the matter" urged in earlier tax cases was finally rejected by the House of Lords in Duke of Westminster v. Commissioners of Inland Revenue(17) in which Lord Tomlin said:

> "Apart, however, from the question of contract with which I have dealt it is said that in Revenue cases there is a doctrine that the Court may ignore the legal position and regard what is called 'the substance of the matter' and that here the substance of the matter is that the annuitant was serving the Duke for something equal to his former salary or wages and that therefore while he is so serving, the annuity must be treated as salary or wages. This supposed doctrine (upon which the Commissioners apparently acted) seems to rest for its support upon a misunderstanding of language used in some early cases. The sooner this misunderstanding is dispelled and the supposed doctrine given its quietus the better it will be for all concerned, for the doctrine seems to involve substituting 'the uncertain and crooked cord of discretion' for 'the golden and straight mete wand of the law'
>
> Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow tax-payers may be of his ingenuity, he cannot be compelled to pay an increased tax. This so-called doctrine of 'the substance' seems to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable."

(17) 19 T.C.490, 520.

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2nd March 1970 (continued)

It is common ground that the respondent is sought to be taxed under section 10(1)(b) of the Income Tax Ordinance, 1947. The tax is in respect of gains or profits from any employment. Section 10(2)(a) defines "gains or profits from any employment" to mean

> "any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite or allowance (other than a subsistence, travelling, conveyance or entertainment allowance which is proved to the satisfaction of the Comptroller or have been expended for purposes other than those in respect of which no deduction is allowed under section 15 of this Ordinance) paid or granted in respect of the employment whether in money or otherwise;"

Thus, payment by way of compensation for loss of office is not specifically charged as income, nor is it a designated source of income. The corollary therefore is that a profit not itself specifically charged as income and not derived from a designated source is not taxable as income.

The words of section 10 in themselves do not unambiguously impose a tax for payments made as compensation for loss of office. In the absence of a clear intention that tax should be imposed, the respondent is not liable to payment for the sum granted for the abrogation of his contract. It is an important canon in the construction of Revenue Acts that the subject is not to be taxed unless there are clear words in the Act imposing such tax. In this connection, Lord Blackburn said in the House of Lords in Coltness Iron Company v. Black(18)

> "No tax can be imposed on the subject without words in an Act of Parliament clearly shewing an intention to lay a burden on him. .....and I think the only safe rule is to look at the words of the enactments and see what is the intention expressed by those words."

Lord Simonds in Russell v. Scott(19) reasserted the same rule of construction when he addressed the House of Lords in the following words:-

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(18) (1880-81) 6 A.C.315, 330.
(19) (1948) 2 A.E.R. 1, 5

"My Lords, there is a maxim of income tax law which, though it may sometimes be over-stressed, yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax on him. It is necessary that this maxim should on occasion be reasserted and this is such an occasion."

It is to be observed that section 13(1)(e) of the Income Tax Act, 1967 provides as follows:-

"Gross income of an employee in respect of gains or profits from an employment includes any amount received by the employee, whether before or after his employment ceases, by way of compensation for loss of the employment....."

This new Act satisfies the rule to which reference was made by Lord Buckmaster in Greenwood v. F.L. Smidth & Co. in the following words:-

"It is, I think, important to remember the rule, which the Courts ought to obey, that, where it is desired to impose a new burden by way of taxation, it is essential that this intention should be stated in plain terms. The Courts cannot assent to the view that if a section in a taxing statute is of doubtful and ambibuous meaning, it is possible out of that ambiguity to extract a new and added obligation not formerly cast upon the taxpayer."

The later Act of 1967 imposes a new liability, extends the burden and clearly alters the intention of the earlier Ordinance of 1947. In view of this, it is proper to interpret the earlier Ordinance by reference to the later Act if, in the words of Lord Buckmaster in Ormond Investment Company Ltd. v. Betts(21), the provision in the earlier Act is "fairly and equally open to divers meanings".

In Kirkness v. John Hudson & Co., Ltd.(22) it was held that a later statute may not be referred to for the purpose of interpreting clear terms of an earlier Act which the later statute does not amend, even though both Acts are by the express provision

(20) (1922) 1 A.C.417, 423 (21) (1928) A.C.143, 156
(22) (1955) 2 A.E.R. 345.

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Judgment of Tan Sri Gill J.

2nd March 1970 (continued)

of the later statute to be construed as one, unless the later statute expressly places a particular interpretation onthe terms of the earlier Act; but if the earlier enactment was ambiguous, a later statute may throw light on the true interpretation of that enactment, as where a particular construction of the earlier enactment will render the later incorporated statute effectual. Maxwell on Interpretation of Statutes, 11th edition, at page 22 says:

> "There is some presumption that Statutes passed to amend the law are directed against defects which have come into notice about the time when those Statutes passed."

In my judgment there can be little doubt that there was a defect in the Ordinance of 1947 which has been cured by the new Act by including in the definition of "gains or profits from an employment" the words "compensation for loss of employment" which are not to be found in the earlier Ordinance. Clearly, therefore, the compensation paid to the respondent on the abrogation of his contract of service is not liable to tax under the Ordinance of 1947. Indeed, it was acknowledged by counsel for the appellant in the court below that if the sum paid to the respondent is held to be compensation for loss of office, then it is not liable to income tax under that Ordinance.

That brings me to the only other point to be considered, namely, whether the amount paid to the respondent was a retiring gratuity within the meaning of section 13(1)(i) of the Income Tax Ordinance, 1947. The Special Commissioners held that it was not a retiring gratuity because the respondent never applied to retire and his employment was terminated at the instance of his employers. Before us it was contended for the appellant that since the respondent got a job in Trinidad soon after he stopped working for the Society he cannot be said to have retired, the argument being that no man can be said to have retired unless he stops working altogether. I do not think either of these reasons is a valid reason for holding that what was paid to the respondent was not a retiring gratuity. A retirement from employment is none the less a retirement whether it takes place at the instance of the employer or of the employee, and it does not cease

to be a retirement merely because the man subsequently finds a job with another employer. Counsel for the appellant laid emphasis on the fact that in section 13(1)(i) of the Ordinance the word "retiring" is followed immediately by the words "or death". But that is neither here nor there. While there may be finality in death, it does not necessarily follow that there is finality about retirement, because a person may retire from one employment and yet take up another. As far as the respondent was concerned, he had retired from his service with the Society and the money was paid to him on such retirement. It was therefore a retiring gratuity which is exempt from income tax.

In the result, for the reasons I have stated the payment of $28,050 to the respondent was in respect of compensation for loss of office following on the abrogation of his service contract and therefore in the nature of a capital payment and not in the nature of an income, so that it is not assessable to income tax. Alternatively, it was a payment in the nature of a retiring gratuity within the meaning of section 13(1)(i) of the Income Tax Ordinance, 1947 and therefore exempt from income tax.

I would dismiss the appeal with costs.

S.S. Gill
JUDGE
FEDERAL COURT

Kuala Lumpur,
2nd March, 1970

Lord President and Suffian F.J. concur.

Enche Nik Saghir, Senior Federal Counsel,
for Appellant/Respondent.

Enche S.Woodhull, of Messrs. Shearn, Delamore & Co.,
for Respondent/Appellant.

In the Federal Court of Malaysia

No. 10

Order of the Federal Court

2nd March 1970

No.10

ORDER OF THE FEDERAL COURT

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

FEDERAL COURT CIVIL APPEAL NO.X98 OF 1969

Between

The Comptroller-General of Inland Revenue Malaysia — Appellant

And

Alan Richard Knight — Respondent

(In the matter of Originating Motion No.9 of 1969 in the High Court in Malaya at Kuala Lumpur

Between

Alan Richard Knight — Appellant

And

The Comptroller-General of Inland Revenue Malaysia — Respondent)

CORAM: AZMI, LORD PRESIDENT, FEDERAL COURT, MALAYSIA.

SUFFIAN, JUDGE, FEDERAL COURT, MALAYSIA.

GILL, JUDGE, FEDERAL COURT, MALAYSIA.

IN OPEN COURT

THIS 2ND DAY OF MARCH, 1970

O R D E R

THIS APPEAL coming on for hearing on the 7th day of January 1970 in the presence of Inche Nik Saghir bin Mohamed Noor, Senior Federal Counsel on behalf of the Appellant abovenamed, Mr.S.Woodhull of Counsel for the Respondent abovenamed AND UPON READING the Record of Appeal herein AND UPON HEARING Counsel as aforesaid IT WAS ORDERED that this appeal do stand adjourned for Judgment AND the same coming on for Judgment this day in the presdnce of the Senior Federal Counsel for the Appellant and Counsel for the Respondent as aforesaid IT IS ORDERED that this appeal be and is hereby dismissed AND IT IS ORDERED that the Appellant do pay to the Respondent the costs of this appeal as taxed by the proper officer of this Court.

GIVEN under my hand and the seal of the Court this 2nd day of March 1970.

(L.S.) Sgd: Illegible
CHIEF REGISTRAR, FEDERAL COURT OF MALAYSIA

In the Federal Court of Malaysia

No. 11

Notice of Motion

3rd April 1970

No. 11

NOTICE OF MOTION

IN THE FEDERAL COURT OF MALAYSIA
(Appellate Jurisdiction)
FEDERAL COURT CIVIL APPEAL NO.X 98 OF 1969

BETWEEN

The Comptroller-General of Inland Revenue, Malaysia — Appellant

AND

Alan Richard Knight — Respondent

(In the matter of Originating Motion No.9 of 1969 in the High Court in Malaya at Kuala Lumpur

BETWEEN

Alan Richard Knight — Appellant

AND

The Comptroller-General of Inland Revenue, Malaysia — Respondent)

NOTICE OF MOTION

TAKE NOTICE that on Monday the 8th day of June, 1970 at 9.30 o'clock in the forenoon, or as soon thereafter as can be heard Nik Saghir bin Mohamed Noor, Federal Counsel for the abovenamed Appellant will move the Court for an Order:-

(a) that conditional leave be granted to the Appellant to appeal to His Majesty the Yang di-Pertuan Agong against the judgment or order of this Honourable Court given on the 2nd day of March, 1970, in the above Federal Court Civil Appeal No. X 98 of 1969; and

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

Dated this 3rd day of April, 1970.

Sd.
Federal Counsel
for and on behalf of
the Appellant abovenamed.

Dated at Kuala Lumpur this 20th day of May, 1970

Chief Registrar, Federal Court, Kuala Lumpur

To: Messrs. Shearn, Delamore & Co.
Advocates & Solicitors,
The Eastern Bank Buildings,
2 Benting, KUALA LUMPUR

This application will be supported by the affidavit of Nik Saghir bin Mohamed Noor affirmed on the day of April, 1970. This application is taken out by the Federal Counsel for and on behalf of the Appellant whose address for service is c/o Jabatan Hasil Dalam Negeri, Bangunan Suleiman, Kuala Lumpur.

In the Federal Court of Malaysia

No. 12

Affidavit in support of Motion

3rd April 1970

No.12
AFFIDAVIT OF NIK SAGHIR BIN MOHAMED NOOR

IN THE FEDERAL COURT OF MALAYSIA
(Appellate Jurisdiction)

Federal Court Civil Appeal No. X 98 of 1969

BETWEEN

The Comptroller-General of Inland Revenue, Malaysia — Appellant

AND

Alan Richard Knight — Respondent

(In the matter of Originating Motion No. 9 of 1969 in the High Court in Malaya at Kuala Lumpur

BETWEEN

Alan Richard Knight — Appellant

AND

The Comptroller General of Inland Revenue, Malaysia — Respondent)

A F F I D A V I T

I, Nik Saghir bin Mohamed Noor, of full age, residing at No. 7, Jalan Conlay, Kuala Lumpur, do solemnly affirm and state as follows

I am a Federal Counsel attached to the Department of Inland Revenue, Kuala Lumpur, and am authorised to act in this matter.

2. On the 22nd September, 1969, the abovenamed Appellant appealed to the Federal Court against the decision of the Honourable Mr. Justice Chang Min Tat given at the High Court in Kuala Lumpur on the 30th day of August, 1969.

3. The said appeal which is Federal Court Civil Appeal No. X 98 of 1969 was duly heard by this Honourable Court and the reserved judgment was delivered on the 2nd day of March, 1970, whereby the appeal was dismissed with costs.

4. The Appellant is now desirous of appealing to His Majesty the Yang di-Pertuan Agong against the

said Judgment of this Honourable Court as he is advised and verily believes that this case is from its nature a fit and proper case for appeal.

5. The said Judgment is a final order in a civil matter where the matter in dispute in the appeal exceeds five thousand dollars.

6. The Appellant is willing to undertake as a condition for leave to appeal to enter into good and sufficient security, to the satisfaction of this Court, in such sum as this Court may prescribe and to conform to any other conditions that may be imposed under rule 7 of the Federal Court (Appeals from the Federal Court) (Transitional) Rules, 1963.

7. In the circumstances I pray that this Honourable Court will be pleased to grant the Appellant leave to appeal to His Majesty the Yang di-Pertuan Agong.

Affirmed by the abovenamed)
Nik Saghir b. Mohamed Noor)
at Kuala Lumpur this 3rd day)
of April, 1970 at)
am/pm.)

Before me

This affidavit is filed by the Federal Counsel on behalf of the Appellant whose address for service is c/o Jabatan Hasil Dalam Negeri, Bangunan Suleiman, Kuala Lumpur.

In the Federal Court of Malaysia

No. 13

Order giving conditional leave to appeal to His Majesty the Yang di-Pertuan Agong

8th June 1970

No. 13

ORDER GIVING CONDITIONAL LEAVE TO APPEAL TO HIS MAJESTY THE YANG DI-PERTUAN AGONG

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO. X 98 OF 1969.

BETWEEN

THE COMPTROLLER-GENERAL OF INLAND REVENUE, MALAYSIA — APPELLANT

AND

ALAN RICHARD KNIGHT — RESPONDENT

(In the matter of Originating Motion No. 9 of 1969 in the High Court in Malaya at Kuala Lumpur

BETWEEN

ALAN RICHARD KNIGHT — APPELLANT

AND

THE COMPTROLLER-GENERAL OF INLAND REVENUE, MALAYSIA — RESPONDENT)

CORAM: AZMI, LORD PRESIDENT, FEDERAL COURT, MALAYSIA; SUFFIAN, JUDGE, FEDERAL COURT, MALAYSIA; and GILL, JUDGE, FEDERAL COURT, MALAYSIA

IN OPEN COURT

THIS 8th DAY OF JUNE, 1970

O R D E R

UPON MOTION made unto this Court this day by Inche Nik Saghir bin Mohamed Noor, Federal Counsel for the Appellant abovenamed in the presence of Mr. S. Woodhull of Counsel for the Respondent abovenamed AND UPON READING the Notice of Motion dated the 20th day of May, 1970 the Affidavit of Nik Saghir b. Mohamed Noor affirmed on the 3rd day of April 1970

and filed herein AND UPON HEARING Counsel as aforesaid IT IS ORDERED that leave be and is hereby granted to the Appellant abovenamed to appeal to His Majesty the Yang di-Pertuan Agong against the decision of this Honourable Court given on the 2nd day of March, 1970, upon the following conditions:-

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

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

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

GIVEN under my hand and the seal of the Court this 8th day of June, 1970.

(Sgd.)

CHIEF REGISTRAR
FEDERAL COURT, MALAYSIA.

In the Federal Court of Malaysia

No. 14

Order for final leave to appeal to His Majesty the Yang di-Pertuan Agong

6th October 1970

No. 14

ORDER FOR FINAL LEAVE TO APPEAL TO HIS MAJESTY THE YANG DI-PERTUAN AGONG

IN THE FEDERAL COURT OF MALAYSIA AT KUALA LUMPUR

(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO. X 98 OF 1969

BETWEEN

THE COMPTROLLER-GENERAL OF INLAND REVENUE, MALAYSIA — APPELLANT

AND

ALAN RICHARD KNIGHT — RESPONDENT

(In the matter of Originating Motion No. 9 of 1969 in the High Court in Malaya at Kuala Lumpur

BETWEEN

ALAN RICHARD KNIGHT — APPELLANT

AND

THE COMPTROLLER-GENERAL OF INLAND REVENUE, MALAYSIA — RESPONDENT)

CORAM: ONG, CHIEF JUSTICE, HIGH COURT, MALAYA;

GILL, JUDGE, FEDERAL COURT, MALAYSIA; and

ALI, JUDGE, FEDERAL COURT, MALAYSIA.

IN OPEN COURT

THIS 6TH DAY OF OCTOBER, 1970

O R D E R

UPON MOTION made unto Court this day by Enche Nik Saghir bin Mohamed Noor, Federal Counsel for the Appellant abovenamed in the presence of Mr. V. L. Kandan of Counsel for the Respondent abovenamed

AND UPON READING the Notice of Motion dated the 17th day of September, 1970 andthe Affidavit of Nik Saghir bin Mohamed Noor affirmed on the 8th day of September, 1970 and filed herein AND UPON HEARING Counsel as aforesaid IT IS ORDERED that final leave be and is hereby granted to the Appellant abovenamed to appeal to His Majesty the Yang-di-Pertuan Agong against the decision of this Honourable Court given on the 2nd day of March, 1970.

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

GIVEN under my hand and the seal of the Court this 6th day of October, 1970.

Sd.

CHIEF REGISTRAR
FEDERAL COURT, MALAYSIA.

In the Federal Court of Malaysia

No. 14

Order for final leave to appeal to His Majesty the Yang di-Pertuan Agong

6th October 1970

(continued)

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL No. 49 of 1970

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN :

THE COMPTROLLER GENERAL OF INLAND REVENUE, MALAYSIA — Appellant

- and -

ALAN RICHARD KNIGHT — Respondent

RECORD OF PROCEEDINGS

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