

21, 1969

IN THE PRIVY COUNCIL No.18 of 1968

ON APPEAL FROM THE FEDERAL COURT OF MALAYSIA (Appellate Jurisdiction)

UNIVERSITY OF LONDON INSTITUTE OF ADVANCED STUDIES - 25 MAR 1970 25 RUSSELL SQUARE LONDON, W.C.1

BETWEEN BORNEO AIRWAYS LIMITED, KUCHING (In Voluntary Liquidation) Appellant -and- THE COMMISSIONER OF INLAND REVENUE, KUCHING Respondent AND BETWEEN HARPER GILFILLAN (BORNEO) LIMITED, KUCHING Appellant -and- THE COMMISSIONER OF INLAND REVENUE, KUCHING Respondent

CASE FOR THE RESPONDENT

- 1. This is an appeal from the Judgment and Order of the Federal Court of Malaysia dated the 1st day of December 1967 dismissing the consolidated appeals of the Appellants against the Formal Judgment of the High Court in Borneo dated 11th November 1966 dismissing the consolidated appeals of the Appellants against the Decisions of the Commissioners of Inland Revenue dated 24th February, 2nd March and 4th August 1966, respectively confirming assessments made on the Appellants. 2. In the years in question each of the Appellants carried on a single business managed and controlled in Sarawak and with branches in Sabah and Brunei. The question in issue is this appeal is whether certain losses incurred by the Appellants in their respective Sabah and Brunei branches may properly be set against the profits of their respective businesses for the

Record p.p.79-96

p.55

p.p.17,33 and 27

Record

purposes of Sarawak corporation tax, and in all Courts the issue has been debated by reference to losses incurred in Sabah. The question arises under the provisions in the Inland Revenue Ordinance 1960 (hereinafter called "the Ordinance") and, in particular, Section 28 (1) and Section 43 thereof.

3. The provisions of Section 28 and Section 43 of the Ordinance are as follows:-

- 28(1) Subject to the provisions of subsection (3), 10  
where a loss is incurred in the basis  
period for any year of assessment by a  
person chargeable to tax under this Part,  
the amount of such loss attributable to  
activities in Sarawak shall be set off  
against what would otherwise have been  
the assessable profits of such person for  
that year of assessment.
- (2) Where the amount of loss which may be set 20  
off under subsection (1) is such that it  
cannot be wholly set off against the  
assessable profits for the year of assess-  
ment in the basis period for which the loss  
occurred, the amount not so set off shall be  
carried forward and shall be set off against  
what would otherwise have been assessable  
profits for the future years in succession;  
Provided that the amount of any such  
loss allowed to be set off in computing the  
assessable profits for any year of 30  
assessment shall not be set off in computing  
the assessable profits for any other year  
of assessment.
- (3) No losses incurred by any person in any year  
prior to the year preceding that commencing  
on the 1st January 1961 shall be taken into  
account for the purposes of this section:  
Provided that in respect of a person  
who immediately prior to the commencement  
of this Ordinance was chargeable to tax 40  
under the repealed Ordinance -  
(i) such losses may be taken into account:  
and  
(ii) all losses so taken into account shall  
be computed in accordance with the

provisions of this Ordinance.

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

4. Other relevant statutory provisions of the Ordinance are as follows:-

20 18- (1) Corporation profits tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every corporation carrying on any trade, profession or business in Sarawak in respect of profits of the corporation accruing in, derived from or received in Sarawak from such trade, profession or business.

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

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

40 Provided that notwithstanding this section, sub-section (1) of section 42 and section 43 corporation profits tax shall not be charged on any profits of any such corporation which are

Record

derived from the States of Mayala or Sabah.

29.- For the purposes of section 28, the amount of any loss incurred by a person chargeable to tax under this Part, shall be computed in like manner as assessable profits are computed.

42.- (1) In this Part the expression 'profits accruing in, derived from or received in Sarawak' shall, without prejudice to the generality of its meaning, include all profits from business transacted in Sarawak, whether directly or through an agent.

10

(2) In the case of any doubt as to whether a profit is for the purposes of this Part a profit accruing in, derived from or received in Sarawak the onus of proving that such profit is not such a profit shall be on the person charged to tax in respect of such profit.

20

p.1.  
p.17.

5. In the case of Harper Gilfillan (Borneo) Limited the facts of the case appear in the Statement of Facts submitted for the opinion of the Commissioner of Inland Revenue, and in the Decision of the Commissioner of Inland Revenue. So far as material the facts may be summarised as follows:

Harper Gilfillan (Borneo) Limited was incorporated in Sarawak on 12th August 1959. It established branches in Sabah and Brunei in 1961. Throughout the relevant period it was managed and controlled in Sarawak. In the year of assessments 1962 and 1963 losses of \$33,627 and \$84,787 respectively were incurred in the Sabah branch. In the same years of assessment losses of \$10,835 and \$1,712 respectively were incurred in the Brunei branch. In the year of assessment 1962 there was a loss of \$65,388 in Sarawak; but in the years of assessment 1963, 1964 and 1965 there were profits in Sarawak of \$26,504, \$48,721 and \$226,052 respectively.

30

40

p.33

6. In the case of Borneo Airways Limited the facts of the case appear in the Decision of the Commissioner of Inland Revenue.

There is therein set out tables showing the amounts of profits and losses made in Sabah, Brunei and Sarawak respectively. The profits and losses were derived from a single trade controlled and managed from Sarawak with branches in Sabah and Brunei.

10 7. Having considered the relevant provisions in the Ordinance, the Commission of Inland Revenue came to the conclusion that only losses attributable to the activities of the Appellants in Sarawak, and not the losses attributable to the branches in Sabah and Brunei, could be taken into account in computing their profits for corporation tax purposes. The Appellants appealed against the Decisions of the Commissioner of Inland Revenue

20 8. The Statements of the Grounds of Appeal of both Appellants were substantially the same. They maintained, firstly, that the overall position of the Appellants had not been considered and in particular that losses incurred outside Sarawak had been disallowed; and, secondly, that on a true construction of Sections 28, 29 and 43 of the Ordinance the term "loss attributable to activities in Sarawak" in Section 28 meant, in a case to which Section 43 applied, a loss wherever the same arose.

pp.41 and  
45

30 9. The High Court in Borneo (Harley J.) dismissed the appeals against the Decisions of the Commission of Inland Revenue. The learned judge was of the opinion that the provisions in Section 28 of the Ordinance did restrict relief in respect of past losses brought forward to losses incurred in the Sarawak branch of the business.

p.55

40 10. The Appellants appealed to the Federal Court of Malaysia against the decision of Harley J. on the grounds set out in the Memorandum of Appeal dated 10th January 1967, viz. (i) that he gave a literal meaning to the words in Section 28 (1) of the Ordinance "losses attributable to activities in Sarawak," and held that losses incurred outside Sarawak could not be set off against profits inside Sarawak; (ii) that he held that the law was accurately summarised

p.63

Record

in the Decision of the Commissioner of Inland Revenue and in particular that he held that the Decision dated 24th February 1966 was correct; (iii) that he was wrong in failing to hold (a) that the Assessor should have considered the overall position of the Appellants and should have allowed the losses incurred outside Sarawak and (b) that on a true construction of Sections 28, 29 and 43 of the Ordinance the term "losses attributable to activities in Sarawak" in the case of a person to which Section 43 applies means a loss wherever the same arises.

10

p. 79-95

11. On the 1st December 1967 the Federal Court of Malaysia (s.s. Barakbah, Lord President, and Azmi bin Haji. Mohamed, Chief Justice, with H.T. Ong, Federal Judge, dissenting) dismissed the appeal.

In the view of the Lord President there was no ambiguity about the construction of Section 28 of the Ordinance: losses to be allowable must be attributable to activities in Sarawak only and not elsewhere. The Chief Justice took the view that the language of the Ordinance was clear and that only losses attributable to activities in Sarawak were allowable.

20

Ong, Federal Judge, was of the opinion that the basic principle for the computation of losses was to be found in Section 29 of the Ordinance. The principle was that losses were not to be confined to losses attributable to activities in Sarawak. And in his view this was fair and sensible because the Sarawak computation of income was on a world wide scale by virtue of Section 43 of the Ordinance. The learned judge did not consider that any restriction was imposed on losses by the provisions in Section 28 (1) of the Ordinance. He was unable to perceive the distinction between "a trade" and the "activities of a trade" and in his judgment the phrase "activities in Sarawak" in Section 28 (1) of the Ordinance meant activities of control and management because that interpretation gave effect equally to the provisions of Sections 28, 29 and 43 of the Ordinance.

30

40

12. On the 6th day of May 1968 an Order granting final leave to appeal to His Majesty The Yang di-Pertuan Agong was given to the Appellants.

10 13. It is respectfully submitted that Ong, Federal Judge, has misconstrued the meaning and effect of Section 29 of the Ordinance. It is submitted that Section 29 simply indicates that for the purposes of Section 28, losses are to be computed in the same manner as profits: it does not, and does not seek to, identify the losses which are to be computed. Sections 42 and 43 identify the profits which are to be charged. And it is submitted that Section 28 identifies the losses which are to be taken into account.

20 Further, it is submitted that a consequence of the construction of Section 29 by Ong, Federal Judge, is to make meaningless the words "the amount of such loss attributable to activities in Sarawak" used in Section 28 (1).

14. The Respondent humbly submits that the decision of the Federal Court of Malaysia is right and should be affirmed and that this Appeal should be dismissed with costs here and below for the following amongst other

R E A S O N S

- 30 1. BECAUSE properly construed the provisions in Section 28 (1) of the Ordinance restrict the amount of set off to the amount of loss attributable to activities in Sarawak.
2. BECAUSE properly construed the provisions in Section 29 of the Ordinance simply indicate the manner of computing losses and do not identify the losses to be computed.
- 40 3. BECAUSE the reasoning in the Decisions of the Commissioner of Inland Revenue and in the judgment in the High Court in Borneo is correct and ought to be confirmed.

Record

4. BECAUSE the reasoning of the majority in the Federal Court in Malaysia is correct and ought to be confirmed.

ROY BORNEMAN. *de ✓*  
STEWART BATES. ✓



No.18 of 1968  
*JUDICIAL COMMITTEE OF THE*  
IN THE *PRIVY COUNCIL*

---

ON APPEAL  
FROM THE FEDERAL COURT OF  
MALAYSIA  
(Appellate Jurisdiction)

---

BETWEEN  
BORNEO AIRWAYS LIMITED, KUCHING  
(In Voluntary Liquidation)  
-and- Appellant  
THE COMMISSIONER OF INLAND  
REVENUE, KUCHING Respondent

AND BETWEEN  
HARPER GILFILLAN (BORNEO)  
LIMITED, KUCHING Appellant  
-and-  
THE COMMISSIONER OF INLAND  
REVENUE, KUCHING Respondent

---

CASE FOR THE RESPONDENT

---

---

STEPHENSON HARWOOD & TATHAM,  
Saddlers Hall,  
Gutter Lane,  
Cheapside, E.C.2.  
Solicitors for the Respondent.