

21, 1969

2

IN THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL

No. 18 of 1968

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

FEDERAL COURT CIVIL APPEAL No. X93 OF 1966

B E T W E E N

Borneo Airways Limited, Kuching  
(In Voluntary Liquidation) Appellant

- and -

The Commissioner of Inland Revenue, Kuching Respondent

A N D B E T W E E N

Harper, Gilfillan (Borneo) Ltd., Kuching Appellant

- and -

The Commissioner of Inland Revenue, Kuching Respondent

(IN THE MATTER OF CIVIL APPEALS Nos. K.5, K.6 and  
K.7 OF 1966 IN THE HIGH COURT IN BORNEO IN KUCHING

CIVIL APPEAL No. K.5 OF 1966

B E T W E E N

Borneo Airways Limited, Kuching  
(In Voluntary Liquidation) Appellant

- and -

The Commissioner of Inland Revenue, Kuching Respondent

CIVIL APPEALS Nos. K.6 AND K.7 OF 1966

B E T W E E N

Harper, Gilfillan (Borneo) Ltd., Kuching Appellant

- and -

The Commissioner of Inland Revenue, Kuching Respondent)

(CONSOLIDATED BY ORDER DATED THE 11th DAY  
OF NOVEMBER, 1966)

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
- 9 MAR 1970

25 RUSSELL SQUARE  
LONDON RECORD OF PROCEEDINGS

Coward, Chance & Co.,  
St. Swithin's House,  
Walbrook,  
London, E.C.4.

Solicitors for the  
Appellants.

Stephenson Harwood & Tatham,  
Saddlers' Hall,  
Gutter Lane,  
Cheapside,  
London, E.C.2.

Solicitors for the  
Respondent.

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O N A P P E A L  
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R E C O R D O F P R O C E E D I N G S

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O N A P P E A L  
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CIVIL APPEALS Nos. K.6 and K.7 OF 1966

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Harper, Gilfillan (Borneo) Ltd., Kuching Appellant  
- and -  
The Commissioner of Inland Revenue, Kuching Respondent

C (CONSOLIDATED BY ORDER DATED THE 11th DAY  
OF NOVEMBER, 1966)

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R E C O R D O F P R O C E E D I N G S

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No. 1

STATEMENT OF THE FACTS IN THE  
CASE OF HARPER, GILFILLAN (BORNEO) LTD.

YEAR OF ASSESSMENT 1965

Submitted under the Inland Revenue  
Ordinance, 1960, section 79, by the  
Assessor for the opinion of the Commis-  
sioner of Inland Revenue

No. 1

Statement of  
the facts in  
the case of  
Harper,  
Gilfillan  
(Borneo) Ltd.  
Year of assess-  
ment 1965 sub-  
mitted under  
the Inland  
Revenue Ordi-  
nance 1960  
Section 79, by  
the Assessor  
for the opinion  
of the Commis-  
sioner of  
Inland Revenue

D 1. The Appellant, Harper, Gilfillan (Borneo) Ltd.,  
(hereinafter referred to as "the Company") was

No. 1

Statement of the facts in the case of Harper, Gilfillan (Borneo) Ltd. Year of assessment 1965 submitted under the Inland Revenue Ordinance 1960 Section 79, by the Assessor for the opinion of the Commissioner of Inland Revenue.  
(Contd.)

incorporated in Sarawak on 12th August, 1959. Branches in Sabah and Brunei were established in 1961. The control and management of the Company's trade is, and has been throughout the relevant period, exercised in Sarawak.

2. For the basis period for the years of assessment 1960 and 1961, when business was carried on in Sarawak only, there was an assessable profit. The profits and losses, as agreed for the purpose of Sarawak corporation profits tax, for the basis periods for the years of assessment 1962 to 1964 are as follows (Losses are shown in brackets - Sabah profits for the year of assessment 1964 are omitted as they are not relevant to the dispute)

Year of Assessment	Sabah (up to year of assessment 1963)	Brunei	Sarawak	Total
1962	£( 33,627)	£(10,835)	£(65,388)	£(109,850)
1963	( 84,787)	(31,712)	26,504	( 89,995)
1964		4,976	48,721	53,697
Total	<u>£(118,414)</u>	<u>£(37,571)</u>	<u>£ 9,837</u>	<u>£(146,148)</u>

(These are the previously agreed figures as amended in respect of a retrospective stock adjustment at 31st December, 1963)

3. For the year of assessment 1965 the Brunei and Sarawak profits for tax purposes are computed as follows:-

Year of Assessment	Brunei	Sarawak	Total
1965	£36,589	£226,052	£262,641

4. Under section 43 of the Inland Revenue Ordinance, 1960, any profits of the Sabah and Brunei branches, up to the year of assessment 1963, would be included in the Sarawak assessment to corporation profits tax. As from the

year of assessment 1964, following the promulgation of the Modification of Laws (Income Tax) Order, 1964, Sabah profits would be excluded.

No. 1

- A
5. For the years of assessment 1962 and 1963, however, the Sabah and Brunei branches incurred losses. The Company contends that, under section 28 of the Inland Revenue Ordinance, 1960, read together with section 43, such losses should be available to set off against profits or carry forward.
- B
6. The Assessor considers that section 28 of the Ordinance does not extend to the losses of the Sabah and Brunei branches, as they are not covered by the expression "the amount of such loss attributable to activities in Sarawak". Such losses are therefore, in the Assessor's opinion, not available to carry forward and set off against the profit of subsequent years of assessment.
- C
7. The Assessor is however, willing to allow, by concession, the Brunei losses to be carried forward. Brunei profits continue to be assessable in Sarawak; the Modification of Laws (Income Tax) Order, 1964, applies only to territories within Malaysia and does not affect the assessment of Brunei profits in Sarawak.
8. The figures comparing the taxable position resulting from the Company's view and the Assessor's view are set out below:-

Statement of the facts in the case of Harper, Gilfillan (Borneo) Ltd. Year of assessment 1965 submitted under the Inland Revenue Ordinance 1960 Section 79, by the Assessor for the opinion of the Commissioner of Inland Revenue.  
(Contd.)



No. 1

Statement of the facts in the case of Harper, Gilfillan (Borneo) Ltd. Year of assessment 1965 submitted under the Inland Revenue Ordinance 1960 Section 79, by the Assessor for the opinion of the Commissioner of Inland Revenue. (Contd.)

<u>Company's View</u>	<u>Profit (Loss)</u>		<u>Total</u>	<u>Assessable Profit (Accumulated Loss)</u>	<u>Tax payable 40%</u>	<u>Remarks</u>
<u>Year of Assessment</u>	<u>Sabah (up to year of assessment 1963)</u>	<u>Brunei</u>				
1962	₹(33,627)	₹(10,835)	₹(109,850)	₹(109,850)		Sabah profit or loss omitted with effect from year of assessment 1964
1963	(84,787)	(31,712)	( 89,995)	(199,845)		
1964		4,976	53,697	(146,148)		
1965		36,589	221,471	75,323	₹30,129.20	

Assessor's View Profit (Loss)

<u>Year of Assessment</u>	<u>Profit (Loss)</u>		<u>Total</u>	<u>Assessable Profit (Accumulated Loss)</u>	<u>Tax payable 40%</u>	<u>Remarks</u>
<u>Year of Assessment</u>	<u>Sabah (up to year of assessment 1963)</u>	<u>Brunei</u>				
1962	₹(33,627)	₹(10,835)	₹(109,850)	₹(76,223)		Sabah losses omitted throughout. Brunei losses included throughout by concession. Sabah profit omitted with effect from year of assessment 1964.
1963	(84,787)	(31,712)	( 89,995)	(81,431)		
1964		4,976	53,697	(27,734)		
1965		36,589	221,471	193,737	₹77,494.80	
Difference =						₹47,365.60

9. The Commissioner is asked to decide whether the assessment for the year of assessment 1965 should be based on the Company's view or on the Assessor's view as shown above i.e. whether or not Sabah losses for years of assessment 1962 and 1963 should be carried forward and set against profits for the year of assessment 1965.

A

WMB/JL

B

No. 1

Statement of the facts in the case of Harper, Gilfillan (Borneo) Ltd. Year of assessment 1965 submitted under the Inland Revenue Ordinance 1960 Section 79, by the Assessor for the opinion of the Commissioner of Inland Revenue.  
(Contd.)

6.

RECORD OF PROCEEDINGS  
ON APPEAL BY HARPER GILFILLAN (BORNEO)  
LTD. TO COMMISSIONER OF INLAND REVENUE

Record of  
Proceedings  
on Appeal by  
Harper,  
Gilfillan  
(Borneo) Ltd.  
to Commis-  
sioner of  
Inland  
Revenue.  
8th February  
1966.

File No. 54/161/168.

Appeal No. CR. 78

A APPEAL BY HARPER, GILFILLAN (BORNEO)  
LIMITED AGAINST THE 1965 CORPORATION  
PROFITS TAX ASSESSMENT HEARD IN THE  
COMMISSIONER OF INLAND REVENUE'S  
OFFICE, TABUAN ROAD, KUCHING, AT 10  
A.M. ON 8th FEBRUARY, 1966

Before: Mr. Patrick Ho, Acting Commissioner  
of Inland Revenue, Sarawak.

Appellant: Represented by Mr. J.C. Bell of  
Messrs. Evatt & Company,  
Singapore.

B Assessor: Mr. W.M. Steele, Senior Assessor,  
present.

In Attendance: Mr. R.G.L. Barnes, Assistant  
(As Observer) Commissioner of Inland Revenue,  
Sarawak.

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Grounds of Appeal:

No allowance has been made for  
Sabah losses brought forward.

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The procedure followed in Appeals was ex-  
plained by the Commissioner of Inland Revenue  
and Mr. Bell commenced his case as follows:-

C Mr. Bell: Agreed. I don't think there are  
anything in the statement of facts  
in dispute. We have not had a copy  
of the statement of revised figures  
in connection with the Ben Line  
commission.

Mr. Steele: Would you like to note the amendment  
now? (copy of revised figures shown

to Mr. Bell who then made necessary amendments).

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Record of  
Proceedings  
on Appeal by  
Harper,  
Gilfillan  
(Borneo) Ltd.  
to Commis-  
sioner of  
Inland  
Revenue.  
8th February  
1966.  
(Contd.)

Mr. Bell: The figures are now agreed, the only point in dispute is the losses.

C.I.R.: The figures on the statement of facts, page 2 - amendments made now reads as follows - (Company's view:) Sarawak Profits amended to read ~~£184,882~~, total ~~£221,471~~ - Paragraph 8 - Assessable Profit for 1965 Year of Assessment ~~£75,323~~ and tax payable ~~£30,129.20~~. (Assessor's views:) 1965 Assessment, Sarawak Profits ~~£184,882~~, total ~~£221,471~~; assessable profits ~~£193,737~~, tax payable ~~£77,494.80~~.

A

Mr. Bell: The difference is ~~£47,365.60~~.

C.I.R.: Having agreed on the facts do I take it that the objection is that no allowances were given for Sabah losses brought forward?

B

Mr. Bell: You will have seen from previous correspondence that our views are fairly well set out in our letter of 27th May, 1965. As I understand it from Mr. Steele's contention, we are being penalised here because of Section 28 which refers to the amount of such losses attributable to activities in Sarawak. The Assessor takes the view that because the Company has profits or losses from trading in Sabah, therefore it is those activities which give rise to the losses; this seems to me to be ridiculous, so ridiculous that I have not been able to find any case law to help me at all, but, quite apart from the common sense aspect, you have here Section 43 which says by reason of the control and management being exercised in Sarawak, therefore the whole of the profits have to be assessed.

C

D

Mr. Bell: Now, those activities are the activities of control and management of the

business for the purpose of earning profits and therefore these activities determine the loss. If that were not the case, we would have a ridiculous situation, I emphasise the word, ridiculous - because we could have a business carrying on for the last 5 years and overall there are no profits or losses and yet because profits fluctuated up and down (say for the 1st year the profit was \$100,000 the 5th year it was \$100,000, \$50,000 in year two and three and \$100,000 loss in year four,) the Assessor contends there wasn't any allowable loss for a 5 year period and we are going to be assessed on \$200,000. This I would stress is inequitable and unreasonable, therefore it is necessary to find an interpretation which will give an equitable and reasonable result by looking to this phrase that "the amount of loss attributable to activities in Sarawak". In other words that activities refer to the activities of the control and management. The "activity in Sarawak" which resulted in the losses is the control and management. With all respect to the Company, I would go so far as to say that if the business had been properly managed those losses would not have occurred. The control and management was carried out in Sarawak; these were the "activities in Sarawak" which resulted in the losses.

C.I.R.: You are suggesting that you tie up Section 28 with Section 43 regarding where control is exercised.

Mr. Bell: In Section 43 you are looking at one business and the profits conception of plus or minus, balance on Profit and Loss account, so once we use Section 43 to make combined assessment I think you are bound by Section 28 which introduces the question of activities I agree with Mr. Steele that the situation changes as a result of the Modification of Laws Ordinance, from the point of view of assessing, but I do not think you can go back on something which is not in existence. If it is a 1964 loss, then this can be set off against profits

No. 2

Record of Proceedings on Appeal by Harper, Gilfillan (Borneo) Ltd. to Commissioner of Inland Revenue. 8th February 1966.

(Contd.)

which are going to be assessed but that does not mean to say that you can go back to 1963.

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Record of  
Proceedings  
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Harper,  
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(Borneo) Ltd.  
to Commis-  
sioner of  
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8th Feb-  
ruary 1966.  
(Contd.)

C.I.R.: The point here is, "attributable to activities in Sarawak". Please explain the Company's operation in the Head Office here and the branch in Sabah where the control and management is exercised in Sarawak. What do they do, do they get orders and instructions from Sarawak?

A

Mr. Bell: No.

C.I.R.: It will be a separate branch except that Directors meetings are held in Kuching and Annual General Meeting in Kuching also?

Mr. Bell: I have not come prepared to present data on this point of "control and management". It has been agreed however, that I can arrange for the Managing Director to furnish the answers if required.

B

C.I.R.: The words "attributable to activities in Sarawak" must be considered as a whole. When you have a branch in Sabah the activities are in Sabah. The Assessor has, in this case, claimed that the losses are not attributable to activities in Sarawak. You have your activities in Sabah and activities in Sarawak. Your activities in Sabah resulted in losses which could not be attributable to Sarawak.

C

Mr. Bell: But the Company exercised control from Sarawak.

C.I.R.: So far as trade is concerned.

Mr. Bell: I would sum up under 3 heads - legally that the proper computation of "loss attributable to activities in Sarawak" is similar to that which governs liability in Sarawak; that those activities are the activities of control and management in this area and that the

D

common sense aspect must prevail, not that the Ordinance attempts to assess a company on a figure of \$200,000 when in fact it had made no profits. Finally that where there are 2 constructions possible, the construction that is to be preferred is the one which gives common sense.

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sioner of  
Inland  
Revenue.  
8th February  
1966.

(Contd.)

- A C.I.R.: Mr. Steele - you would like to give a reply?
- Mr. Steele: I would like to deal point by point. I quite agree with Mr. Bell's understanding of my view that the Company was penalised by Section 28 "of loss attributable to activities in Sarawak." I also have not been able to unearth any case law. I purely put forward my contention which is a reasonable one - that the words "attributable to Sarawak" does not apply to management and control in Sarawak - it applies to activities of the Company, the business of buying and selling. I think the word "attributable" is a narrow one. Section 28 reads (Section 28 read out). Activities referred to can only be transactions in Sarawak, it would not include transactions in Sabah through control and management in Sarawak. I don't think this interpretation is ridiculous. We don't have to look for an equitable construction in the Ordinance. I would refer to the Granite City case where the Judge said, "Equity and Income Tax are strangers". We have to look at the wording in the Ordinance and tax accordingly. My reading of "profit" - I think a profit is a profit - the Company's Profit and Loss Account shows a profit or loss - the balance may be plus or minus - if it is minus, it is a loss.
- B
- C
- D C.I.R.: The words "in respect of profit" have been amended - the whole of the income - to me, income is profit or a loss, i.e. plus or minus.
- Mr. Steele: You are right, "the whole of the income. To me, income is a profit, not a loss."



No. 2

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(Contd.)

I agree we cannot recompute losses retrospectively because of the Modification of Laws (Income Tax) Order 1964 provided they were correctly calculated in the first place. Unfortunately I made an error in including these Sabah profits in the original computation. The amendment is not the result of the Modification of Laws (Income Tax) Order, 1964, but the result of discovering the original error.

A

C.I.R.: In other words you are exercising your rights under Section 73 of the Inland Revenue Ordinance.

Mr. Steele: Not really, because it is a loss computation - I do not think Section 73 comes into it - the losses were agreed - these losses were carried forward under Section 29. I recomputed them but the Company did not agree - they were not entitled to appeal at the time because it was not an assessment. I do not think Section 73 affects it.

B

C.I.R.: In any case it was an assessment.

Mr. Steele: It is not an assessment - it is a computation of losses.

C.I.R.: Your computation is in respect of a year of assessment - it should relate to the year of assessment - in this case if you say you are going to put right an error, then under which provision of the Ordinance you made alteration to the assessment.

C

Mr. Steele: No alteration was made.

C.I.R.: It must be in respect of the year of assessment - a nil assessment in respect of a year must relate to some basis.

Mr. Steele: No assessment was made - losses were computed.

D

C.I.R.: Relating to which period?

Mr. Steele: To a year of assessment.

A C.I.R.: It has to be related to a year of assessment. An assessment has been made, whether resulting in loss or profit depends on the results of the accounts. I would imagine in this case an error has been made by you, you then decided to recompute the assessment and as far as I can see if you say you are not exercising Section 73 I can't see how you can make alterations.

Mr. Steele: With respect, I would say that is not an assessment. Had I made an assessment then the taxpayer would appeal, and these proceedings would have taken place a few years ago instead of today.

B C.I.R.: Where in a case of a loss no appeal can be heard until there are profits in following year. In any case, my contention is an assessment has been raised whether it results in a loss or profit. In the case of a loss, no appeal will be heard as in this case the assessment assessed results in a loss, then appeal could only arise in the following year when there are profits, that is, the issue we are now discussing in the appeal. As far as I am concerned, that amendment was made under Section 73 (C.I.R. then read out Section 73).

D Mr. Steele: Mr. Bell stressed the common sense aspect and he has quoted an example of a Company's operations for a 5 year period during which period some years resulted in profits and some years in losses. He says that it is unfair that £200,000 loss should not be set off. That may be unfair but we must take the wording of the Ordinance. In England, there was no provision for carrying forward losses from 1795 until 1926 so far as I can ascertain, Mr. Bell will correct me if I am wrong, the effect was mitigated to some extent by the fact that assessments were based on a three year average. As for the construction of a taxing Act,

No. 2

Record of Proceedings on Appeal by Harper, Gilfillan (Borneo) Ltd. to Commissioner of Inland Revenue. 8th February 1966.

(Contd.)

No. 2

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 sioner of  
 Inland  
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 8th February  
 1966.  
 (Contd.)

where there are two possible construc-  
 tions the common sense one must be  
 adopted. I quite agree with this.  
 Evatts quoted a case on it in corres-  
 pondence but I would like to point that  
 this only applies when there are two  
 interpretations to consider. In this  
 case there is only one interpretation,  
 so that this particular legal point  
 does not arise; we don't have to con-  
 sider 2 interpretations. I have tried  
 to reply to the specific points made by  
 Mr. Bell. I had, before the hearing,  
 set out my case in logical form, now I  
 would like to read through it: Section  
 29 is bound by Section 28. It commen-  
 ces: "For the purposes of Section 28"  
 Under Section 29 the method of compu-  
 tation of losses is similar to that of  
 profits, but the losses to be included  
 in the computation are only those  
 "attributable to activities in Sarawak",  
 as mentioned in Section 28(1). Section  
 14 of the Hong Kong Ordinance states,  
 "Corporation Profits Tax shall be  
 charged for each year of assessment on  
 every corporation carrying on trade or  
 business in the Colony in respect of  
 the profits of the corporation arising  
 in or derived from the Colony from such  
 trade or business. Any sum arising in  
 or derived from the Colony, other than  
 a sum from the sale of capital assets,  
 received by or credited to a corpora-  
 tion carrying on a trade or business  
 in the Colony shall be deemed to arise  
 from the trade or business carried on".  
 This is similar to our Section 18 but  
 does not contain the words "received  
 in". It also contains sections similar  
 to our sections 28 and 29, but no  
 equivalent of our section 43. In Hong  
 Kong a loss computation is exactly  
 similar to a profit computation, that  
 is to say, it is restricted to profits  
 or losses arising in Hong Kong. The  
 addition of our section 43 does not  
 alter the meaning of sections 28 and  
 29: losses are calculated precisely  
 as in Hong Kong, and are limited to

A

B

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losses arising in Sarawak. Section 43 is intended to apply only to profits not losses. It is noteworthy that section 43 says "for the purposes of assessment under this Part". This links it to section 22 but not to section 28, as a loss computation is not an assessment. Please note the words "or be received in". A profit can be received in Sarawak but not a loss. And section 43 does not hint at "minus" income - this subject is fully covered by sections 28 and 29 which bear no relation to section 43. It is not fundamentally unreasonable that losses should not be available to carry forward to subsequent years of assessment. So far as I can ascertain, there was no provision for carrying forward losses in England from the introduction of income tax in 1842 until the passing of the Finance Act of 1926. Moreover the allowance of losses arising outside Sarawak would have opened the door to avoidance: a company with such accumulated losses could have had them all set off against subsequent Sarawak profits by shifting the management and control out of Sarawak. I ask for the assessment to be confirmed.

Mr. Bell: I would like to answer Mr. Steele's submission point by point. Mr. Steele agreed that the Company is penalised by the words in section 28 and later on he admits it is unfair that they should not get an allowance. Now I must confess I find the greatest difficulty in understanding how something which penalises the taxpayer and something which is unfair to the taxpayer is not unreasonable. He quotes the Granite City Steamship case as a demonstration, but the case which we have quoted, Luke v. C.I.R. (40 T.C.) is a more recent case than the Granite City Steamship case. Mr. Steele says that there are not two interpretations - I cannot accept that. I would suggest that the wording in section 28 is the crux of the whole matter and that actually the interpretation I put up is the only one possible - in other words, activities

No. 2

Record of  
Proceedings  
on Appeal by  
Harper,  
Gilfillan  
(Borneo) Ltd.  
to Commis-  
sioner of  
Inland  
Revenue.  
8th February  
1966.

(Contd.)

No. 2

Record of  
 Proceedings  
 on Appeal by  
 Harper,  
 Gilfillan  
 (Borneo) Ltd.  
 to Commis-  
 sioner of  
 Inland  
 Revenue.  
 8th February  
 1966.  
 (Contd.)

mean those of the control and management whereas Mr. Steele would include the word "business" and the Ordinance does not include "business". As for the Hong Kong legislation, it does not help because it is the same as Singapore and Malaya - it seeks to assess profits arising in those territories. As for the U.K. legislation I do not think it was specific until 1926 - until that time there was a 3 year average, and in fact under rule 13 of Schedule D it was provided that if there were 2 businesses you could set off a loss in one business against the profit in another business. If you had 2 distinct businesses not just branches in the U.K. you could set a loss in one against a profit in another. I don't think I have anything else to add except to reiterate my 3 points - that the interpretation of loss is wide enough to cover relief claimed, that it is an allowance due and we must apply common sense to the Ordinance. Thank you.

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B

C.I.R.:

Thank you very much for all the discussions which have been carried on. I will give my decision as required under section 79(9) after going through the submissions of you both.

C

Certified true copy.

Sd. S.T.P. Ho.

Commissioner of Inland Revenue,  
 SARAWAK.

26/3/66.

No. 3

No. 3

DECISION OF THE ACTING COMMISSIONER OF  
INLAND REVENUE, SARAWAK

Decision of  
the Acting  
Commissioner  
of Inland  
Revenue,  
Sarawak.  
24th February,  
1966.

Decision in an Appeal by Harper,  
Gilfillan (Borneo) Company Limited  
against the 1965 Corporation Profits  
Tax Assessment heard on 8th February  
1966 at 10 a.m. in the office of  
the Commissioner of Inland Revenue,  
Kuching.

A

Before: Mr. Patrick Ho, Acting Commissioner of  
Inland Revenue, Sarawak.

Appellant: Represented by Mr. J.C. Bell of Messrs.  
Evatt & Company, Singapore.

Assessor: Mr. W.M. Steele - Senior Assessor,  
present.

In attendance: Mr. R.G.L. Barnes - Assistant Commis-  
(as observer) sioner of Inland Revenue, Sarawak.

B Grounds of Appeal: No allowance made for Sabah losses  
brought forward.

---

Mr. Bell argued this Appeal on behalf of the  
Appellant Company and his contentions may be summar-  
ised as follows:-

(i) The Company is being penalised here because  
of Section 28 which refers to the amount of  
"loss attributable to activities in Sarawak."

(ii) By reason of Section 43 because the manage-  
ment and control is exercised in Sarawak, it  
is argued that therefore these activities  
also determine the loss in Sarawak. If that  
were not the case Mr. Bell said "We would  
have a ridiculous situation, I emphasise the  
word, ridiculous; because we could have a  
business carrying on for the last 5 years and  
overall there are no profits or losses and

C

No. 3

Decision of  
the Acting  
Commissioner  
of Inland  
Revenue,  
Sarawak.  
24th February,  
1966.

(Contd.)

yet because profits fluctuated up and down (say for the 1st year the profit was \$100,000 the 5th year it was \$100,000, \$50,000 loss in each of year two and three and \$100,000 loss in year four) the Assessor contends there wasn't any allowed loss for a 5 year period and we are going to be assessed on \$200,000."

- (iii) If this is so then the result is inequitable and unreasonable and it is necessary to find an interpretation which will give an equitable and reasonable result by looking to this phrase "the amount of loss attributable to activities in Sarawak". A
- (iv) The activities referred to are activities of the control and management. The "activity in Sarawak" which resulted in the losses is the control and management; the control and management was carried out in Sarawak. These were the "activities in Sarawak" which resulted in the losses. B
- (v) That the wording in Section 28 is the crux of the whole matter and that actually the interpretation Mr. Bell put up is the only one possible i.e. activities mean those of control and management.
- (vi) To suggest that no relief should be allowed for Sabah losses is unreasonable and contrary to the principle of construction laid down by Lord Reid in *Luke v. Commissioner of Inland Revenue*. T.C. 40 at Page 648 when he said, "If it is right that, in order to avoid imputing to Parliament an intention to produce an unreasonable result, we are entitled and indeed bound to discard the ordinary meaning of any provision and adopt some other possible meaning which will avoid that result, then what I am looking for in examining the obscure provision at the end of Section 16(1) is not its ordinary meaning (if it has one) but some possible meaning which will produce a reasonable result. I think that the interpretation which I have given is a possible D

interpretation and does produce a reasonable result." Lord Reid went on to say at Page 649 that he could not "recollect ever having seen statutory provisions which lead to a more unreasonable result if read literally. I cannot believe that this can have been the intention either of Parliament or of the draftsman or of those who advise Parliament and instruct the draftsman." Mr. Steele in support of his case in

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Decision of  
the Acting  
Commissioner  
of Inland  
Revenue,  
Sarawak,  
24th February,  
1966.

(Contd.)

- A disallowing the Sabah losses said: "I purely put forward my contention which is a reasonable one - that the words "attributable to Sarawak" does not apply to management and control in Sarawak - it applies to activities of the Company, the business of buying and selling. I think the word "attributable" is a narrow one." He then read out Section 28 and added "activities referred to can only be transactions in Sarawak, it would not include trans-
- B actions in Sabah though control and management is exercised in Sarawak. I don't think this interpretation is ridiculous. We don't have to look for an equitable construction in the Ordinance. I would refer to the Granite City case where the judge said "Equity and Income Tax are strangers". In considering Section 43 as amended and my reading of "profit" - I think a profit is a profit - the Company's Profit and Loss Account shows a profit or loss - "the balance may be plus or minus, if it
- C is minus, it is a loss". Mr. Steele went on to say "To me, income is a profit, not a loss. I agree we cannot recompute losses retrospectively because of the Modification of Laws (Income Tax) Order 1964, provided they were correctly calculated in the first place; unfortunately, I made an error in including these Sabah losses in the original computation. The amendment is not the result of the Modification of Laws (Income Tax) Order, 1964, but the result of discovering the original error."

- D At this stage, Mr. Steele when queried on the amendment to the loss computation explained that Section 73 did not come into it since losses were agreed and these losses were carried forward under Section 29. He went on to say "I recomputed them but the Company did not agree and they were not entitled to appeal at the time because it was not an assessment, it was a computation of losses." Mr. Steele next dealt with Mr. Bell's submission on the common sense aspect in the example given of



No. 3

Decision of  
the Acting  
Commissioner  
of Inland  
Revenue,  
Sarawak.  
24th February,  
1966.

(Contd.)

a Company's operation for a 5 year period during which period some years resulted in profits and some years in losses. Mr. Bell pointed out it was unfair that \$200,000 loss should not be set off. "That may be unfair", said Mr. Steele, "but we must take the wording of the Ordinance. As for the contention that in the construction of a taxing Act, where there are two possible constructions the common sense one must be adopted, I quite agree with this. In this case there is only one interpretation to consider, so that this particular legal point does not arise; we don't have to consider two interpretations. Section 29 is bound by Section 28. It commences "For the purposes of Section 28;" under Section 29 the method of computation of losses is similar to that of profits, but the losses to be included in the computation are only those "attributable to activities in Sarawak" as mentioned in Section 28(1)." Reference was then made by Mr. Steele to Section 14 of the Hong Kong Ordinance which is similar to our Section 18 but does not contain the words "received in". The Hong Kong Ordinance also contains sections similar to our Sections 28 and 29 but no equivalent of our Section 43. In Hong Kong a loss computation is exactly similar to a profit computation, that is to say, it is restricted to profits or losses arising in Hong Kong. The addition of our Section 43 does not alter the meaning of Sections 28 and 29, losses in Sarawak are calculated precisely as in Hong Kong and are limited to losses arising in Sarawak. Section 43 is intended to apply only to profits not losses." It is noteworthy, "continued Mr. Steele, "that Section 43 says "for the purposes of assessment under this Part". This links it to Section 22, but not to Section 28 as a loss computation is not an assessment. Please note the words "or be received in" a profit can be received in Sarawak but not a loss and Section 43 does not hint at "minus" income - this subject is fully covered by Sections 28 and 29 which bear no relation to Section 43. It is not fundamentally unreasonable that losses should not be available to carry forward to subsequent years of assessment. I ask for the assessment to be confirmed."

A

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D

Mr. Bell in summing up his case said "Mr. Steele agreed that the Company is penalised by the words in Section 28 and later on admits it

is unfair that they should not get an allowance. Now, I must confess I find the greatest difficulty in understanding how something which penalises the taxpayer and something which is unfair to the taxpayer is not unreasonable. Mr. Steele quotes the Granite City Steamship Case as a demonstration but the case which I have quoted, Luke v. Commissioner of Inland Revenue (40 TC), is a more recent case than the Granite City Steamship case. Mr. Steele says that there are not two interpretations - I cannot accept that." Mr. Bell then went on to say that the wording in Section 28 is the crux of the whole matter and that the interpretation he put up is the only one possible i.e. activities must mean those of the control and management whereas Mr. Steele would include the word "business". As for the Hong Kong legislation, it does not help because it is the same as Singapore and Malaya - it seeks to assess profits arising in those territories. In the United Kingdom under Rule 13 of Schedule D it was provided that if there were two businesses you could set off a loss in one business against the profits in another business. In summing up, Mr. Bell said "I don't think I have anything else to add except to reiterate my 3 points -

- (a) the interpretation of loss is wide enough to cover the relief claimed
- (b) there is an allowance due and
- (c) we must apply common sense to the Ordinance.

The Acting Commissioner announced that he would study the submissions by the Appellant and the Assessor and a decision will be conveyed to the Appellant and the Assessor and a decision will be conveyed to the Appellant in accordance with Section 79(9).

Decision: This is an appeal by Messrs. Harper, Gilfillan (Borneo) Limited against the 1965 Assessment on the ground that Sabah losses for the years of assessment 1962 and 1963 should be carried forward and allowed as set offs against profits for the year of assessment 1965.

2. The appellant, Harper, Gilfillan (Borneo) Limited (hereinafter referred to as the "Company")

No. 3

Decision of  
the Acting  
Commissioner  
of Inland  
Revenue,  
Sarawak,  
24th February,  
1966.

(Contd.)

No. 3

Decision of  
the Acting  
Commissioner  
of Inland  
Revenue,  
Sarawak.  
24th February,  
1966.  
(Contd.)

was incorporated in Sarawak on 12th August, 1959. Branches in Sabah and Brunei were established in 1961. The control and management of the Company's trade/business is, and has been throughout the relevant period, exercised in Sarawak.

3. For the basis period for the years of assessment 1960 and 1961 when business was carried on in Sarawak only, there was a profit. The profits and losses, as agreed for the purpose of Sarawak Corporation Profits Tax, for the basis periods for the years of assessment 1962 to 1964 are as follows: (Losses are shown in brackets; Sabah profits for the year of assessment 1964 are omitted as they are not relevant to the dispute.)

<u>Year of Assessment</u>	<u>Sabah</u>	<u>Brunei</u>	<u>Sarawak</u>	<u>Total</u>
1962	( 33,627)	( <del>8</del> 10,835)	(65,388)	(109,850)
1963	( 84,787)	( 31,712)	26,504	( 89,995)
1964		4,976	48,721	53,697
Total	<u>(118,414)</u>	<u>( 37,571)</u>	<u>9,837</u>	<u>(146,148)</u>

For the year of assessment 1965 the Brunei and Sarawak profits for tax purposes are computed as follows.

<u>Year of Assessment</u>	<u>Brunei</u>	<u>Sarawak</u>	<u>Total</u>
1965	£36,589	£184,882	£221,471

4. Under Section 43 of the Inland Revenue Ordinance, 1960, any profits of the Sabah and Brunei Branches, up to the year of assessment 1963, would be included in the Sarawak assessment to Corporation Profits Tax. As from the year of assessment 1964, following the promulgation of the Modification of Laws (Income Tax) Order, 1964, Sabah profits would be excluded.

5. For the years of assessment 1962 and 1963, however, the Sabah and Brunei Branches incurred losses. The Company contends that under Section

28 read together with Section 43 of the Inland Revenue Ordinance, 1960, such losses should be available for set off against profits or carry forward. The Assessor considers that Section 28 does not extend to losses of the Sabah and Brunei Branches as they are not covered by the expression "the amount of such loss attributable to activities in Sarawak." Such losses are therefore not available to carry forward and set off against the profits of subsequent years of assessment. The Assessor is however, willing to allow, by concession, the Brunei losses to be carried forward; Brunei profits continue to be assessable in Sarawak. The Modification of Law (Income Tax) Order 1964, applies only to territories within Malaysia and does not affect the assessment of Brunei profits in Sarawak. I am now asked to decide whether in computing the assessment for the year of assessment 1965 the Sabah losses in the basis periods for the years of assessment 1962 and 1963 should be carried forward and set off against profits for the year of assessment 1965.

A

B

6. I have given very careful study to the arguments advanced by the appellant's representative Mr. Bell, on the one side and the Assessor, Mr. Steele, on the other. I am afraid I can find no case law quoted in the appeal to assist me in my deliberations.

7. Emphasis has been made by Mr. Bell that there is only one possible interpretation of the words "loss attributable to activities in Sarawak" i.e. activities mean those of control and management and since the control and management is exercised in Sarawak these were the "activities in Sarawak" which resulted in the losses. If this is not so then the result is inequitable and unreasonable, and in support of this interpretation Mr. Bell made reference to the principle of construction laid down by Lord Reid in *Luke v. Commissioner of Inland Revenue* 40 T.C. at Page 648 and at Page 649.

C

D

8. I will first of all deal with the relevant section of the Ordinance as follows:-

Under Section 18 of the Inland Revenue Ordinance 1960 a Corporation carrying on a trade etc., in Sarawak is liable to Corporation Profits Tax in respect of the profits of the Corporation accruing in, derived from or received in Sarawak from such trade etc., The profits must be accruing in,

No. 3

Decision of  
the Acting  
Commissioner  
of Inland  
Revenue,  
Sarawak,  
24th February,  
1966.

(Contd.)

No. 3  
 Decision of  
 the Acting  
 Commissioner  
 of Inland  
 Revenue,  
 Sarawak.  
 24th February,  
 1966.  
 (Contd.)

derived from or received in Sarawak before such profits can be assessed. Section 43, however, enlarges the scope of the charge by deeming the whole of the income derived by any person from any trade etc., be derived or received in Sarawak if the control and management of such trade etc., is exercised in Sarawak.

Section 29 provides that for the purposes of Section 28 the amount of any loss incurred by a person shall be computed in like manner as assessable profits are computed. In computing the assessable profits of a person, the control or management of whose trade is exercised in Sarawak, the total profit is deemed to accrue in, be derived from or be received in Sarawak. Similarly the loss of such a person should be deemed to accrue in or be derived from Sarawak.

A

Turning however to Section 28 we find that "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 assessable profits of such person for that year of assessment."

B

In my opinion it is clear from the words underlined that the loss to be allowed is not the whole of the losses computed in accordance with the provisions of Section 29 but only that part of the loss which is attributable to activities in Sarawak. Thus although under Section 29 the losses are to be computed in the same manner as assessable profits are computed, that loss is not deductible in full unless it is attributable to activities in Sarawak. Here I think it is necessary to distinguish between a trade and the activities of a trade. The Company carries on a single trade but the activities of that trade are admittedly carried on in Sarawak, Sabah and Brunei. Section 43 in deeming the income of a person, the control and management of whose trade etc., is exercised in Sarawak, to accrue in, or be derived from or received in Sarawak does not also deem the whole of the activities of the trade, profession or business to be carried on in Sarawak. When we are looking at a loss position it is necessary

C

D

to arrive at the quantum of loss to be allowed as a deduction, i.e. "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." And the loss is therefore restricted to "the amount of such loss attributable to activities in Sarawak."

A

I am unable to agree with Mr. Bell's view that "activities" mean activities of control and management for the reason that the language imposing the tax must be given a strict construction, per Rowlatt J. in *Cape Brandy Syndicate v. Inland Revenue Commissioners* 12 TC/358 when he said "It does not mean that words are to be unduly restricted against the Crown or that there is to be any discrimination against the Crown in such Acts. It means this, I think: it means that in taxation you have to look simply at what is clearly said. There is no room for intendment; there is no equity about a tax: there is no presumption as to a tax; you read nothing in: you imply nothing, but you look fairly at what is said at what is said clearly and that is the tax." Applying this principle, an equitable construction of tax legislation is not permitted, and for this reason Section 28 must be construed with perfect strictness whether such construction is against the Revenue or against the person subject to be taxed.

B

C

I am of the opinion that the appellant has failed to discharge the burden of proof which rests upon him that the Sabah losses were, in fact, attributable to activities in Sarawak. I, therefore dismiss the appeal and since there appears to be no good reason for making a concession in allowing the Brunei losses, the Assessor is directed to treat such losses similarly as for Sabah.

D

Sd. S.T.P. Ho.  
Ag. Commissioner of Inland  
Revenue,  
Sarawak.

No. 3

Decision of  
the Acting  
Commissioner  
of Inland  
Revenue,  
Sarawak.  
24th February,  
1966.  
(Contd.)

Kuching,  
24th February, 1966.

26.

No. 4

No. 4

DECISION AND REASONS OF THE  
COMMISSIONER OF INLAND REVENUE, SARAWAK,  
ON APPEAL BY HARPER, GILFILLAN (BORNEO)  
LTD. - YEARS OF ASSESSMENT 1963 AND 1964

Decision and  
Reasons of the  
Commissioner  
of Inland  
Revenue,  
Sarawak, on  
Appeal by  
Harper,  
Gilfillan  
(Borneo) Ltd.  
Years of Assess-  
ment 1963 and  
1964.  
4th August,  
1966.

APPEAL NO. CR. 85 & 86

File No. 54/161/168

Harper Gilfillan (Borneo) Limited.  
Years of Assessment 1963 and 1964

A

Decision and the Reason therefor given by the Com-  
missioner of Inland Revenue in connection with the  
Appeal by Harper, Gilfillan (Borneo) Ltd. under  
Section 80 of the Sarawak Inland Revenue Ordinance,  
1960.

This is an Appeal without a formal hearing  
under Section 80 and the Commissioner has been  
requested to decide the Appeal against the Years  
of Assessment 1963 and 1964 on the facts known to  
him.

B

The Appellant, Harper Gilfillan (Borneo) Ltd.  
(hereinafter referred to as the "Company") was  
incorporated in Sarawak on 12th August, 1959.  
Branches in Sabah and Brunei were established in  
1961. The control and management of the Company's  
trade/business is, and has been throughout the  
relevant period, exercised in Sarawak.

C

For the basis period for the years of assess-  
ment 1960 and 1961 when business was carried on in  
Sarawak only, there was a profit. The profits  
and losses, as agreed for the purpose of Sarawak  
Corporation Profits Tax, for the basis periods for  
the years of assessment 1962 to 1964 are as follows:-

<u>Year of Assessment</u>	<u>Sabah</u>	<u>Brunei</u>	<u>Sarawak</u>
1962	(33,627)	( 10,835)	(65,388)
1963	(84,787)	( 31,712)	26,504
1964		4,976	48,721
	<u>(118,414)</u>	<u>( 37,571)</u>	<u>9,837</u>

D



Arising from the decision given in an earlier appeal against the assessment for the year of assessment 1965 the Assessor has made assessments for the year of Assessment 1963 and 1964 as follows :-

No. 4  
Decision and  
Reasons of the  
Commissioner  
of Inland  
Revenue,  
Sarawak, on  
Appeal by  
Harper,  
Gilfillan  
(Borneo) Ltd.  
Years of Assess-  
ment 1963 and  
1964.  
4th August,  
1966.  
(Contd.)

<u>1963 Year of Assessment</u>	
Net Profits	26,504
Less: Loss brought forward from year of assessment 1962 (Part)	26,504
Total Assessable Profit	<u>NIL</u>
Chargeable Profit	<u>NIL</u>
Tax	<u>NIL</u>
<u>1964 Year of Assessment</u>	
Net Profits	53,697
Less: Loss brought forward from year of assessment 1963	38,884
Total Assessable Profit	<u>14,813</u>
Chargeable Profit	<u>14,813</u>
	<u>£ 5,925.20</u>

On receipt of the Notices of Assessment for the 1963 and 1964, the Company duly lodged notice of objection to these assessments on the grounds that :-

- (1) in assessing the income derived by the Company from the trade which it carries on, the Assessor has failed to consider the overall position of the Company and in particular has disallowed losses claimed to have been incurred outside Sarawak;
- (2) on the true construction of Sections 28, 29 and 43 of the Ordinance, the term "loss attributable to activities in Sarawak" in the case of a person to which Section 43 applies means a loss wherever the same arises.

As required by Section 80 the Company consented to the Commissioner deciding these Appeals on the facts known to him without a formal hearing.

No. 4

Decision:

A I cannot see how I can depart from a previous decision given by me in an earlier Appeal heard before me on the 8th February, 1966. (Vide Appeal No. CR. 78). In that case it was an appeal by the Company against the assessment for the Year of Assessment 1965.

As the grounds of objection in these Appeals are precisely the same as the grounds of Appeal for 1965, and since no additional facts have been introduced, I must therefore dismiss the Company's Appeal against the Years of Assessment 1963 and 1964 and confirm the assessments accordingly.

Decision and Reasons of the Commissioner of Inland Revenue, Sarawak, on Appeal by Harper, Gilfillan (Borneo) Ltd. Years of Assessment 1963 and 1964. 4th August, 1966.  
(Contd.)

B Sgd. (Patrick Ho Swee Tin),  
Commissioner of Inland Revenue,  
Sarawak.

4th August, 1966.

30.

No. 5

LETTER, ACTING COMMISSIONER OF INLAND  
REVENUE, SARAWAK to TURQUAND, YOUNGS &  
CO. IN APPEAL BY BORNEO AIRWAYS LIMITED  
TO THE COMMISSIONER OF INLAND REVENUE

---

TURQUAND, YOUNGS & CO.

COPY

A Our Ref: 54/11/18.

JABATAN HASIL DALAM NEGERI,  
INLAND REVENUE DEPARTMENT  
KUCHING,  
SARAWAK.

Your Ref: CH/PP.

28th February, 1966.

Turquand, Youngs & Company,  
Hongkong Bank Building,  
Gays Street, P.O. Box 192,  
JESSELTON,  
B SABAH.

No. 5

Letter, Acting  
Commissioner  
of Inland  
Revenue,  
Sarawak to  
Turquand  
Youngs & Co.  
in Appeal by  
Borneo Airways  
Limited to the  
Commissioner  
of Inland  
Revenue.  
28th February,  
1966.

Gentlemen,

Borneo Airways Limited

In accordance with your request contained in  
your letter of 27th November, 1965 I have decided  
this appeal under Section 80 of the Inland Revenue  
Ordinance, 1960, on the facts known to me.

C I have carefully considered the correspondence  
which has passed between the Appellant and the  
Assessor and also the written submission of the  
Appellant in relation to this Appeal and I have  
come to the conclusion that the Assessor was  
correct in the treatment of losses under Section  
28(1) of the Inland Revenue Ordinance, 1960, i.e.  
the loss is restricted to "the amount of such loss  
attributable to activities in Sarawak".

In pursuance of Section 79(9) of the Ordinance  
I accordingly dismiss this appeal for 1964 and 1965  
Assessments. There appears to be no good reason

for making a concession in allowing the Brunei losses and the Assessor is therefore directed to treat such losses similarly as for Sabah.

No. 5

Letter, Acting  
Commissioner  
of Inland  
Revenue,  
Sarawak to  
Turquand  
Youngs & Co.  
in Appeal by  
Borneo Airways  
Limited to the CIR/C1.  
Commissioner  
of Inland  
Revenue.  
28th February,  
1966.  
(Contd.)

I am, Gentlemen,  
Your obedient servant,

Sgd/- Patrick Ho  
Ag. Commissioner of Inland Revenue,  
SARAWAK.

No. 6

DECISION AND REASONS OF ACTING  
 COMMISSIONER OF INLAND REVENUE,  
 SARAWAK IN APPEAL BY BORNEO  
AIRWAYS LIMITED

Appeal No. C-79 &amp; 80

File No. 54/11/18

A

BORNEO AIRWAYS LIMITED

Decision and the Reason therefor given  
 by the Acting Commissioner of Inland  
 Revenue in connexion with the Appeal by  
 Borneo Airways Limited, under Section 80  
 of the Sarawak Inland Revenue Ordinance  
1960.

No. 6

Decision and  
 Reasons of  
 Acting Commis-  
 sioner of  
 Inland  
 Revenue,  
 Sarawak in  
 Appeal by  
 Borneo Airways  
 Limited.  
 2nd March,  
 1966.

This is an Appeal without a formal hearing under  
 Section 80 and the Acting Commissioner has been  
 requested to decide the Appeal on the facts known to  
 him.

B

Briefly the facts are as follows:

Insofar as the profits or losses of the Appell-  
 ant Company, as adjusted for Corporation Profits Tax  
 purposes are concerned these are not in dispute and  
 have been agreed as follows:-

Year of Assessment:	1959	Loss	₹	83,195
	1960	Loss		295,566
	1961	Loss		41,929
	1962	Loss		224,942
	1963	Profit		180,649

C

Modification of Law (Income Tax) Order 1964

Year of Assessment:	1964	Profit	₹	833,908
		Less Sabah's Propor- tion:		518,691
				<u>₹315,217</u>

Year of Assessment:	1965	Profit		2,015,371
		Less Sabah's Propor- tion:		1,253,561
				<u>761,810</u>

D

No. 6

Decision and  
Reasons of  
Acting Com-  
missioner of  
Inland  
Revenue,  
Sarawak in  
Appeal by  
Borneo Air-  
ways Limited.  
2nd March,  
1966.  
(Contd.)

2. Arising from the above results the Assessor has raised assessments in respect of the years 1964 and 1965 in the amounts of \$90,995 and \$761,810 respectively on the premise that only that part of the losses "attributable to activities in Sarawak" are available for set offs against the profits. The Assessor's computations are set out below:-

Year of Assessment	Profit (Loss)	Sabah Proportion Percentage	Value	Sarawak & Brunei Balance	Assessable Profit - Accumulated Loss	A
1959	( 83,195)	52.1	( 43,344)	( 39,851)	( 39,851)	
1960	(295,566)	52.1	(153,990)	(141,576)	(181,427)	
1961	( 41,929)	52.1	( 21,845)	( 20,084)	(201,511)	
1962	(224,942)	63.0	(141,713)	( 83,229)	(284,740)	
1963	180,649	66.5	120,131	60,518	(224,222)	B
1964	833,908	62.2	518,691	315,217	90,995	
1965	2,015,371	62.2	1,253,561	761,810	761,810	
	<u>2,384,296</u>		<u>1,531,491</u>	<u>852,805</u>	<u>852,805</u>	

The proportion of Sabah profits relation to the Year of Assessment 1963 has, by concession, been excluded from the computation by the Assessor.

The percentages arrived at in each of the years were based on earnings applicable to each territory viz.

<u>Year</u>	<u>Sabah</u>	<u>Brunei</u>	<u>Sarawak</u>	<u>Total</u>	C
1959	52.1%	15.8%	32.1%	100%	
1960	52.1%	15.8%	32.1%	100%	
1961	52.1%	15.8%	32.1%	100%	
1962	63.0%	1.9%	35.1%	100%	
1963	66.5%	2.1%	31.4%	100%	
1964	62.2%	3.3%	34.5%	100%	
1965	62.2%	3.7%	34.1%	100%	

3. It is the Appellant Company's view that the whole of the losses brought forward up to and including the 1963 Year of Assessment should be allowed against profits and that the assessment raised in respect of the Year of Assessment 1964 should be annulled and the assessment raised in respect of the Year of Assessment 1965 be reduced to a sum of \$612,044. The Appellant Company's computations are set out as follows:-

No. 6

Decision and Reasons of Acting Commissioner of Inland Revenue, Sarawak in Appeal by Borneo Airways Limited. 2nd March, 1966.  
(Contd.)

A	Year of Assessment	Profit (loss)	Loss b/f	Loss c/f	Assessable Profit
	1959	( 83,195)	Nil	83,195	-
	1960	(295,566)	83,195	378,761	-
	1961	( 41,929)	378,761	420,690	-
	1962	(224,942)	420,690	645,632	-
	1963	180,649	645,632	464,983	-
	1964	315,219	464,983	149,766	-
B	1965	761,810	149,766	-	612,044

The Appellant Company contends that if in arriving at the balance of profit in the Profit and Loss Accounts of the Company there proves to be a loss instead of a profit, then the whole of the loss is deemed to be derived from or received in Sarawak by operation of Section 43 and so the whole of the loss and ranks for relief under Section 28.

C 4. Prior to the introduction of the Modification of Laws (Income Tax) Order 1964, the whole of the income of the Company arose or was deemed to arise in Sarawak under Section 18, as extended by Section 43 and fell to be charged to Sarawak Corporation Profits Tax for all years up to and including the year of Assessment 1963. Following the introduction of the Modification of Laws (Income Tax) Order 1964, with effect from the Year of Assessment 1964 profits of the Company arising from its operation in Sabah were exempt from Sarawak Corporation Profits Tax.

D 5. I will first of all deal with the relevant Sections of the Ordinance as follows:-



No. 6

Decision and  
Reasons of  
Acting Com-  
missioner of  
Inland  
Revenue,  
Sarawak in  
Appeal by  
Borneo Air-  
ways Limited.  
2nd March,  
1966.

(Contd.)

Under Section 18 of the Inland Revenue Ordinance 1960 a Corporation carrying on a trade etc., in Sarawak is liable to Corporation Profits Tax in respect of the profits of the Corporation accruing in, derived from or received in Sarawak from such trade etc., The profits must be accruing in, derived from or received in Sarawak before such profits can be assessed. Section 43, however, enlarges the scope of the charge by deeming the whole of the income derived by any person from any trade etc., be derived or received in Sarawak if the control and management of such trade etc., is exercised in Sarawak.

A

"Income" includes profits - vide Section 2.

Section 29 provides that for the purposes of Section 28 the amount of any loss incurred by a person shall be computed in like manner as assessable profits are computed. In computing the assessable profits of a person, the control or management of whose trade is exercised in Sarawak, the total profit is deemed to accrue in, be derived from or be received in Sarawak. Similarly the loss of such a person shall be deemed to accrue in or be derived from Sarawak.

B

Turning however to Section 28 we find that "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 assessable profits of such person for that year of assessment."

C

6. In my opinion it is clear from the words underlined that the loss to be allowed is not the whole of the losses computed in accordance with the provisions of Section 29 but only that part of the loss which is attributable to activities in Sarawak. Thus although under Section 29 the losses are to be computed in the same manner as assessable profits are computed, that loss is not deductible in full unless it is attributable to activities in Sarawak. When we are looking at a loss position it is necessary to arrive at the quantum of loss to be allowed as a deduction i.e. "where a loss is incurred in the basis period for any year of

D

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," and the loss must therefore be restricted to "the amount of such loss attributable to activities in Sarawak." The word "attributable" here has a narrow meaning and is defined in Stroud's Judicial Dictionary as follows: "For a result to be "attributable" to anything it must be wholly, or in material part, caused by that thing;"

A

I am therefore of the opinion that the Appellant Company has failed to discharge the burden of proof which rests upon him that the whole of the losses were in fact attributable to activities in Sarawak. I therefore dismiss the appeal for the 1964 and 1965 Assessments. The Assessor has, as a concession, excluded profits of the Sabah Branch in making his computation for the Year of Assessment 1963. There appears to be no good reason for making the concession as the full profits for the year of assessment 1963 should be assessed. The Assessor is also directed to disallow the Brunei losses allowed concessionally.

B

Sd. Patrick Ho

(PATRICK HO)

Ag. Commissioner of Inland Revenue,  
SARAWAK.

C

Kuching,  
2nd March, 1966.

No. 6

Decision and  
Reasons of  
Acting Com-  
missioner of  
Inland  
Revenue,  
Sarawak in  
Appeal by  
Borneo Air-  
ways Limited.  
2nd March,  
1966.

(Contd.)



No. 7

NOTICE OF APPEAL BY BORNEO AIRWAYS  
LIMITED

In the High  
Court in Borneo

No. 7

Notice of  
Appeal by Borneo  
Airways Limited.  
18th April,  
1966.

A

Take Notice that Borneo Airways Limited (in voluntary liquidation) abovenamed Appellant will appeal to the High Court at Kuching against the whole of the decision of the Commissioner of Inland Revenue given herein on the 28th day of February, 1966.

Dated this 18th day of April, 1966.

Sd. Reddi & Co.  
.....

Advocates for the Appellant

To: The Senior Assistant Registrar,  
High Court, Kuching.

The Commissioner of Inland Revenue,  
Kuching.

B

Filed this 18th day of April  
1966.

Sd. Illegible  
Assistant Registrar, High  
Court, Kuching.

40.

No. 8

STATEMENT OF GROUNDS OF APPEAL  
BY BORNEO AIRWAYS LIMITED

In the High  
Court in Borneo

No. 8  
Statement of  
Grounds of  
Appeal by  
Borneo Airways  
Limited.  
18th April,  
1966.

A 1. The Commissioner of Inland Revenue (herein-  
after referred to as "the Commissioner") has erred  
in law and in fact in that in assessing the income  
derived by the abovenamed Company from the trade  
which it carries on he failed to consider the  
overall position of the Company and in particular  
disallowed losses claimed to have been incurred  
outside Sarawak.

B 2. The Commissioner erred in law and in fact in  
that on a true construction of Sections 28, 29 and  
43 of the said Inland Revenue Ordinance 1960 the  
term "loss attributable to activities in Sarawak"  
in the case of a person to which S.43 applies means  
a loss wherever the same arises.

Dated this 18th day of April, 1966.

Sd. Reddi & Co.

.....

Advocates for the Appellant

To: The Senior Assistant Registrar,  
High Court, Kuching.

To: The abovenamed Respondent The Commissioner of  
Inland Revenue, Kuching.

42.

43.

No. 9

NOTICE OF APPEAL BY HARPER, GILFILLAN  
(BORNEO) LTD.

In the High  
Court in  
Borneo

No. 9

Notice of Appeal  
by Harper,  
Gilfillan  
(Borneo) Ltd.  
25th April,  
1966.

A In accordance with Section 83(1) of the  
Inland Revenue Ordinance 1960 (No. 13 of 1960) we  
hereby give you Notice of Appeal against the  
Corporation profits Tax assessment dated 4th March  
1966 made on us for year of assessment 1965 in  
respect of Profits for the year ended 31st December  
1964 in the sum of \$221,471 carrying tax of  
\$88,588.40.

We enclose:

- (a) a copy of the Commissioner's written  
decision and reasons.
- (b) a certified copy of the proceedings and  
evidence in the Appeal as transmitted by  
the Commissioner.
- B (c) a statement of the Grounds of the Appeal.

Dated 25th April, 1966.

Signed Harper, Gilfillan (Borneo)  
Ltd.  
Secretary.





45.

No. 10

STATEMENT OF GROUNDS OF APPEAL BY  
HARPER, GILFILLAN (BORNEO) LTD.

In the High  
Court in Borneo

No. 10

Statement of  
Grounds of  
Appeal by  
Harper,  
Gilfillan  
(Borneo) Ltd.  
25th April,  
1966.

A 1. That in assessing the income derived by the Company from the trade which it carries on, the Assessor has failed to consider the overall position of the Company and in particular has disallowed losses claimed to have been incurred outside Sarawak;

2. That on the true construction of Section 28, 29, and 43 of the Ordinance, the term "loss attributable to activities in Sarawak" in the case of a person to which Section 43 applies means a loss wherever the same arises.

Dated 25th April, 1966.

B Signed Harper, Gilfillan (Borneo)  
Ltd.  
Secretary.

46.

47.

No. 11

NOTICE OF APPEAL BY HARPER, GILFILLAN  
(BORNEO) LTD.

In the High  
Court in Borneo

No. 11

Notice of  
Appeal by Harper,  
Gilfillan  
(Borneo) Ltd.  
1st September,  
1966.

A

Take Notice that Harper, Gilfillan (Borneo) Limited abovenamed Appellant will appeal to the High Court at Kuching against the whole of the decision of the Commissioner of Inland Revenue given herein on the 4th day of August, 1966.

Dated this 1st day of September, 1966.

Sd. Reddi & Co.  
Advocates for the Appellant

To: The Senior Assistant Registrar,  
High Court, Kuching.

To: The Commissioner of Inland Revenue,  
Kuching.



No. 12

STATEMENT OF GROUNDS OF APPEAL BY  
HARPER, GILFILLAN (BORNEO) LTD.

In the High  
Court in Borneo

No. 12

Statement of  
Grounds of  
Appeal by  
Harper,  
Gilfillan  
(Borneo) Ltd.  
1st September,  
1966.

A 1. The Commissioner of Inland Revenue (herein-  
after referred to as "the Commissioner") has erred  
in law and in fact in that in assessing the income  
derived by the abovenamed Company from the trade  
which it carried on he failed to consider the  
overall position of the Company and in particular  
disallowed losses claimed to have been incurred  
outside Sarawak.

B 2. The Commissioner erred in law and in fact in  
that on a true construction of Sections 28, 29 and  
43 of the said Inland Revenue Ordinance 1960 the  
term "loss attributable to activities in Sarawak"  
in the case of a person to which S.43 applies means  
a loss wherever the same arises.

Dated this 1st day of September, 1966.

Sd. Reddi & Co.  
Advocates for the Appellant.

To: The Senior Assistant Registrar,  
High Court, Kuching.

To: The abovenamed Respondent The Commissioner of  
Inland Revenue, Kuching.



No. 13

NOTES OF ARGUMENT RECORDED BY  
HARLEY J.

In the High  
Court in Borneo.

No. 13

Wednesday, 26th October, 1966

Notes of Argu-  
ment recorded  
by Harley J.  
26th October,  
1966.

Mr. Hill for Appellants.

A Mr. Wan Hamzah bin Salleh for Respondent.

JUDGE'S NOTES

Hill: In my view Appeal turns on 2 questions  
of law (submitted, typed) -

B (1) Does Section 43 permit the Commis-  
sioner of Inland Revenue to include  
in his assessment on a company  
carrying on a trade which is con-  
trolled or managed in Sarawak any  
profits arising in branches outside  
Sarawak without setting off any  
losses incurred in other branches  
outside Sarawak in the same basis  
period? (See Y/A 1963)

C (2) Assuming that the answer to (1) is  
in the negative, does Section 28  
nevertheless restrict relief in  
respect of past losses brought  
forward to the losses incurred in  
the Sarawak branch, even though the  
profits of other branches with past  
losses are included in the assess-  
ment? (See Y/A 1964 and 1965)

Wan Hamzah: I agree that all 3 Appeals can be  
decided by the answers to these two  
points.

Order: All 3 hearings consolidated.

K. 5 Hill: 3 Appeals K.5 1964/65

K.6 (Argued) Assessments 1965

K.7 Assessment 63/64



In the High Court in Borneo

No. 13

Notes of Argument recorded by Harley J. 26th October, 1966.  
(Contd.)

Both Companies controlled and managed in Sarawak.

Both have branches in Sabah and Brunei. Both carry on a single trade.

General principles of construction. K.6 p.12  
Burden of proof inapposite to question of law.  
Question of construction.

C.I.R. v. Clarkson-Webb, 17 T.C. 451 at p.458. A

"The fair words of the taxing Act."

I.R.C. v. Bladnoch, 1948 1 A.E.R. 616 at p.633H  
Strict construction.

P.634 "if the balance between the two constructions is equal, that in favour of the subject is to be preferred."

C.I.R. v. Luke, 40 T.C. 630

P.646 more than one possible meaning. B

III T.C. 143 London Bank.

Businesses, part carried on abroad.  
Singapore I.T. Ord. Cap. 166, S.10.

Test is territorial.

Inland Revenue Ord. in Hong Kong (photostat copy) S. 14.

Cp. Sarawak S.18.

How has H.K. Ord. been construed?

See H.K. and W. Dock Co. v. Inland Rev.

H.K. Ct. of App. case. C

Source of profits must be separated territorially.

S.19 H.K. Ord. Cp. S.28 Sarawak Ord.

S.19A corresponds to S.29 S. Ord.

S.43 of Sar. Ord. has no counterpart in H.K.

S.43 abandons the territorial limit. That was a section added by the draftsman at the last minute. The one trade must be looked at overall.

In the High  
Court in Borneo

No. 13

S.29: losses to be calculated in the same way as profits -

Notes of  
Argument  
recorded by  
Harley J.  
26th October,  
1966.  
(Contd.)

A

17. T.C. C.I.R. v. Morrison at p.331

5 T.C. Revell v. Ed. at p.227

What is  
income?

Whimster v. C.I.R. 12 T.C. 813

Green v. Glicksten 14 T.C. at p.325

E. Collins v. C.I.R. XII T.C. at p.780

Indian provision. "Law and Practice of Income Tax" - Kanga.

P.313 "Profits and Gains".

P.314, 325 "List of Allowances".

B

C.I.T. v. Chitnavis (P.C.) (photostat)  
at p.180

Wan Hamzah:-

S.43 is subject to S.28. The construction is peculiar to Sarawak. III T.C. Aikin v. Trustees, p.308.

"not at liberty to consider whether it is equitable or inequitable."

Paul v. Governors VII T.C. 181.

Barton v. Millar VIII T.C. p.315 at p.319.

C

Cape Brandy Syndicate v. C.I.R. p.366.

Law and Practice of S.A. Income Tax.

Isaacs. p.27 p.28.

Hill:

Draftsman may have aimed at same effect

In the High  
Court in  
Borneo

No. 13

Notes of  
Argument  
recorded by  
Harley J.  
26th October,  
1966.  
(Contd.)

as Singapore Act or S.33 Straits of Malaya.  
S.33(2) Ord. 48/47.

All sections of the Ord. must be construed  
together. Losses are allowed in circumstances  
where if they had been profits they would have  
been taxed.

C.A.V.

(Signed) E.R.H.

A

Certified true copy.

Sd. Illegible 12/12/66

. Secretary to Chief Justice.

No. 14JUDGMENT OF HARLEY J.BEFORE THE HONOURABLE MR. JUSTICE E.R.HARLEYJUDGMENTIn the High  
Court in BorneoNo. 14Judgment of  
Harley J.  
11th November,  
1966.

A Appeals without a formal hearing were decided by the Commissioner of Inland Revenue, Civil Appeal K.5/66 on 2nd March, 1966, and Civil Appeal K.7/66 on 4th May, 1966. Civil Appeal K.6/66, after a formal hearing, had already been decided by the Commissioner of Inland Revenue on 24th February, 1966. All these three Appeals to the Commissioner of Inland Revenue were based on the same ground. The appeals to this Court from the decisions of the Commissioner of Inland Revenue are brought under section 83 of the Inland Revenue Ordinance No.13 of 1960. As the grounds of Appeal are the same in all three cases, the hearing of these three Appeals has been consolidated. Counsel submitted that the Appeals turn on two points of law namely:

- C (1) Does section 43 permit the Commissioner of Inland Revenue to include in his assessment on a company carrying on a trade which is controlled or managed in Sarawak any profits arising in branches outside Sarawak without setting off any losses incurred in other branches outside Sarawak in the same basis period?
- (2) Assuming that the answer to (1) is in the negative, does section 28 nevertheless restrict relief in respect of past losses brought forward to the losses incurred in the Sarawak branch, even though the profits of other branches with past losses are included in the assessment?

D We are concerned with corporation tax and with companies carrying on a single trade in Borneo, with general direction from Sarawak, and with branches in Sabah and Brunei. The law which concerns us is contained in Ordinance 13 of 1960 as it was before amendment by the Modification of Laws (Income Tax) Order, 1964. From the date of such amendment, profits of companies arising for

In the High  
Court in  
Borneo

No. 14

Judgment of  
Harley J.  
11th November,  
1966.  
(Contd.)

instance in Sabah are exempt from Sarawak corporation profits tax.

The following sections of Ordinance 13 of 1960 are particularly relevant: sections 18, 28, 29, 42 and 43. For purposes of comparison, reference has been made to the Hong Kong Inland Revenue Ordinance, Cap. 112. In that Ordinance, section 14(1) corresponded to section 18(1) of the Sarawak Ordinance 13 of 1960, section 19(1) and (2) corresponded to section 28(1) and (2), and section 19A (1) corresponded to section 29. The Hong Kong Ordinance has no section similar to the Sarawak section 43, which reads as follows:

<p>"Profits deemed to accrue where control or manage- ment is exercised.</p>	<p>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."</p>	<p>A</p> <p>B</p>
--	---	-------------------

The section refers to income, which is not synonymous with, but includes, profits. I do not see how one could describe losses as "income". The question is whether section 43 completely alters, or qualifies, the interpretation of section 28, particularly of the words: "the amount of such loss attributable to activities in Sarawak".

On the question of interpretation the following authorities were cited:

London Bank of Mexico v. Apthorpe, III T.C.  
p.143

Revell v. Edinburgh Life Insurance Co.,  
V.T.C., p.221

Cape Brandy Syndicate v. C.I.R., XII T.C.  
p.358

Whimster & Co. v. C.I.R., XII T.C. p.813

Edward Collins & Sons Ltd. v. C.I.R., XII  
T.C. p.773

A

B

C

D

Green v. Glicksten & Son, XIV T.C. p.365

C.I.R. v. Morrison, XVII T.C. p.325

Hong Kong & Whampoa Dock Co. Ltd. v. Inland  
Revenue Department, Hong Kong Appeal  
1/60

In the High  
Court in  
Borneo

No. 14

Judgment of  
Harley J.  
11th November,  
1966.  
(Contd.)

A In the last of these cases, the Appeal Court of Hong Kong gave a legal interpretation to the phrase "profits arising in or derived from the Colony". This phrase appears in section 14(1) of the Hong Kong Inland Revenue Ordinance, and from it one turns to the consideration of the meaning in the Sarawak section 18(1) of the words "profits ... derived from or received in Sarawak". One cannot of course consider profits without first computing losses. Hence the grounds of appeal in all the instant three cases are:

- B (1) That in assessing the income derived by the Company from the trade which it carries on, the Assessor has failed to consider the overall position of the Company and in particular has disallowed losses claimed to have been incurred outside Sarawak;
- (2) That on the true construction of section 28, 29, and 43 of the Ordinance, the term "loss attributable to activities in Sarawak" in the case of a person to which section 43 applies means a loss wherever the same arises.
- C

D I am not sure that the points of law submitted in the first paragraph of this judgment correctly present the issue in the same way as the grounds of Appeal. My answer to the second point raised would be "Yes". I think that section 28 does restrict relief in respect of past losses brought forward to the losses incurred in the Sarawak Branch. It may well be that losses generally should be computed similarly to profits; but it does not follow that particular losses incurred outside the territory of Sarawak can be set off against profits made inside Sarawak; section 82(1) expressly limits the losses which can be set off to those "attributable to activities in Sarawak". I do not propose to elaborate on this, because the facts, the arguments and the law are summarised concisely and accurately

In the High  
Court in  
Borneo

No. 14

Judgment of  
Harley J.  
11th November,  
1966<sup>a</sup>  
(Contd.)

in the Decisions of the Commissioner, particularly  
in his Decision of 24th February, 1966. I do not  
feel that I can improve on it. I accept that  
Decision as correct; therefore all these three  
Appeals are dismissed with costs.

(Signed) E.R. Harley

Judge.

Kuching, 11th November, 1966.

A

Order. Costs on higher scale.

(Signed) E.R. Harley

Messrs. Graham Hill and S.K. Reddi appeared for  
the Appellants.

Inche Wan Hamzah bin Salleh appeared for the  
Respondent.

Certified true copy.

Sd. Illegible

14/11/66

Secretary to the Chief Justice.

B

59.

No. 15

ORDER

BEFORE THE HONOURABLE MR. JUSTICE E.R. HARLEY

IN OPEN COURT

THIS 11th DAY OF NOVEMBER, 1966.

In the High  
Court in Borneo

No. 15

ORDER

11th November,  
1966.

ORDER

- A        THESE APPEALS having been consolidated and come on for hearing on the 26th day of October, 1966 in the presence of Mr. G.S. Hill and Mr. S.K. Reddi of Counsel for the appellant above-named and of Inche Wan Hamzah bin Salleh, Treasury Solicitor, of Counsel for the respondent above-named AND UPON READING the records of appeal AND UPON HEARING Mr. G.S. Hill and Inche Wan Hamzah bin Salleh of Counsel aforesaid when an adjournment was ordered for judgment AND THE COURT having this day delivered judgment IT IS ORDERED that
- B        the appeals be and are hereby dismissed AND IT IS FURTHER ORDERED that costs of these appeals be on the higher scale.

Given under my hand and the seal of the Court  
this 11th day of November, 1966.

Sgd. Shim Pan Chi

Senior Assistant Registrar,  
High Court, Kuching.

(L.S.)





No. 16

NOTICE OF APPEAL BY BORNEO AIRWAYS  
LIMITED AND HARPER GILFILLAN (BORNEO) LTD.

In the Federal  
Court of  
Malaysia

No. 16

A TAKE NOTICE that Borneo Airways Limited, Kuching (In voluntary liquidation) and Harper, Gilfillan (Borneo) Limited, Kuching, the Appellants abovenamed being dissatisfied with the decision of the Honourable Mr. Justice Edward Ralph Harley given at the High Court of Appeal in Kuching on the 11th day of November 1966 appeal to the Federal Court against the whole of the said decision.

Notice of Appeal  
by Borneo  
Airways Limited  
and Harper  
Gilfillan  
(Borneo) Ltd.  
7th December,  
1966.

Dated this 7th day of December, 1966.

Advocates for the Appellants.

To: The Registrar,  
The Federal Court,  
Kuala Lumpur;

B and to:

The Registrar,  
The High Court in Borneo at Kuching;

and to:

The Treasury Solicitor,  
c/o The Commissioner of Inland Revenue,  
Kuching.

The address for service of the Appellants is care of Messrs. Reddi & Co., advocates, Lanka Building, Khoo Hun Yeang Street, Kuching, Sarawak.



No. 17

MEMORANDUM OF APPEAL

In the Federal  
Court of  
Malaysia

No. 17

Memorandum of  
Appeal.  
10th January,  
1967.

Borneo Airways Limited and Harper Gilfillan  
(Borneo) Ltd. the appellants abovenamed appeal to  
the Federal Court against the whole of the  
decision of the Honourable Mr. Justice Edward  
Ralph Harley given at the High Court in Borneo at  
Kuching on the 11th day of November 1966 on the  
following grounds:

A

(1) That the learned Judge was wrong in  
holding that particular losses incurred  
outside the territory of Sarawak cannot  
be set off against profits made inside  
Sarawak and in giving a literal inter-  
pretation to Section 28(1) of the Inland  
Revenue Ordinance of Sarawak which limits  
the losses which can be set off to "those  
attributable to activities in Sarawak".

B

(2) That the learned Judge was wrong in  
holding that the law is summarised con-  
cisely and accurately in the decisions  
of the Commissioner and particularly in  
his decision of 24th February 1966 and in  
holding that that decision was correct.

(3) That the learned Judge was wrong in  
failing to hold:

C

(i) that in assessing the income derived  
by the appellant companies from the  
trades which they carry on the  
Assessor failed to consider the  
overall position of the appellant  
companies and in particular disallowed  
losses claimed to have been incurred  
outside Sarawak.

D

(ii) that on the true constructions of  
sections 28, 29 and 43 of the  
Ordinance the term "losses attribu-  
table to activities in Sarawak" in the  
case of a person to which section 43  
applies means a loss wherever the same  
arises.

Dated this 10th day of January, 1967.

Advocates for the Appellants

In the Federal To: The Registrar,  
Court of The Federal Court,  
Malaysia Kuala Lumpur;

No. 17 and to

Memorandum of The Registrar,  
Appeal. The High Court in Borneo at Kuching;

10th January,  
1967. and to

(Contd.)

The Treasury Solicitor and  
The Commissioner of Inland Revenue,  
Kuching.

A

The address for service of the Appellants is care  
of Messrs. Reddi & Co., advocates, Lanka Building,  
Khoo Hun Yeang Street, Kuching, Sarawak.

No. 18

NOTES OF ARGUMENT RECORDED BY  
LORD PRESIDENT

In the Federal  
Court of  
Malaysia

No. 18

27th June, 1967

Notes of Argu-  
ment recorded  
by Lord  
President.  
27th June,  
1967.

Hill for Apps.

Wan Hamzah, Fed. Co., for Resp.

A

Hill:

Formal order p.70.

Two questions of principle.

Appeal K.5 - Assessments 1964 & 65 and consequential  
directions affecting 1963.  
pp. 4 - 14.

Appeal K.6 - 1965 assessment.  
pp. 15 - 60.

Appeal K.7 - 1963 & 64.  
pp. 55 - 61.

B

Both Coys, have 2 qualifications:

1. Resident in Sarawak.
2. Controlled & managed in Sarawak.

Both Coys. had branches in Sabah & Brunei - separate  
entities.

Both Coys. carry on one trade - not in dispute.

pp. 10 & 48.

Agreed to 2 questions of law.

P. 62.

C Sec. 18 (Part IV) - p.18 - Sarawak Inland Revenue Ord.

Sec. 43.

Sec. 28(1)(2).

In the Federal Sec. 29.

Court of

Malaysia

Sec. 33 Income Tax Ord. Malaya.

No. 18

P. 37, P. 47G.

Notes of Argu-  
ment recorded

by Lord

President.

27th June,

1967.

(Contd.)

Question of the construction of the law; not of facts.

P.65, P.68D - not a fully reasoned judgment.

∴ Harley's judgment to be ignored and regarded as  
a direct appeal from the Commissioner. A

Commissioners of Inland Revenue v. Clarkson-Webb

17 T.C. 451, 458.

Inland Revenue Commissioners v. Bladnoch Distillery Co. Ltd.

(1948) 1 A.E.R. 616, 633.

If there is an even balance, the subject gets the  
benefit of the doubt.

Commissioners of Inland Revenue v. Luke 40 T.C. 630,  
646.

London Bank of Mexico v. Aphorpe 3 T.C. 143, 146. B

Hong Kong Ord. strictly a territorial Ord.

Commissioners of Inland Revenue v. Morrison 17 T.C.  
325, 331.

Revell v. The Edinburgh Life Insurance Co. 5 T.C.  
221, 227.

Whimster & Co. v. Commissioners of Inland Revenue  
12 T.C. 813, 823.

Green v. Gliksten & Son Ltd. 14 T.C. 364, 375.

Edward Collins & Sons Ltd. v. Commissioners of  
Inland Revenue 12 T.C. 773, 780. C

Submit Sec. 28 gives authority to carry forward  
losses in a Company to which Sec. 43 applies.

To make finding on 2 questions of law.

Wan Hamzah:

This is a case of strict construction of the law.

Income - Sec. 43.

Losses - Sec. 28.

In the Federal  
Court of  
Malaysia

Commissioners of Inland Revenue v. The Granite City  
Steamship Co. Ltd. 13 T.C. 1, 16 (I need hardly  
say .....)

No. 18

Notes of Argu-  
ment recorded  
by Lord  
President.  
27th June,  
1967.  
(Contd.)

Aikin v. Macdonald's Trustees 3 T.C. 308 (3rd para.)

A Fergusson v. Noble 7 T.C. 181 (1st para.)

Steamship "Glensloy" Co. Ltd. v. Lethem 6 T.C. 467  
(2nd para.)

Barton v. Miller 8 T.C. 319 (middle of 2nd para.)

The Cape Brandy Syndicate v. Commissioners of Inland  
Revenue 12 T.C. 366 (2nd para.)

Hill:

Activities of Directors are activities of Company.

C.A.V.

B

Sgd. S.S. Barakbah  
27.6.67

1st December, 1967

Ronald Khoo for Apps.

Wan Hamzah for Resp.

Judgments delivered by L.P. & C.J. Malaya and Ong,  
F.J. dissenting.

Order: Appeal dismissed with costs.

Sgd. S.S. Barakbah  
1.12.67

C

True Copy

Sd. Tneh Liang Peng  
(TNEH LIANG PENG)

Secretary to the Lord President  
Federal Court of Malaysia  
9/1/68





No. 19

NOTES OF ARGUMENT RECORDED BY AZMI,  
CHIEF JUSTICE

In the Federal  
Court of  
Malaysia

No. 19

Notes of Argu-  
ment recorded  
by Azmi, Chief  
Justice.  
27th June,  
1967.

Kuala Lumpur, 27th June, 1967.

G.S. Hill Esq., for Appellant.

A Inche Wan Hamzah for Respondent.

Hill:

3 consolidated appeals.

Appeal against Income Tax.

Court to consider two principles:

Page 4 - Record of Appeal - Borneo Airways Ltd, v.  
Commissioner of Inland Revenue.

Page 5 - Harper Gilfillan Ltd. v. Commissioner of  
Inland Revenue.

B Argued fully.

Page 55 - Another record

Harper Gilfillan (Borneo) Ltd. v. Commissioner of  
Inland Revenue.

Facts disputed.

I will give facts.

Both companies have two qualifications - important:-

(1) They are resident in Sarawak.

(2) They are controlled and managed in Sarawak -  
same thing as in (1).

C In addition, both companies have branches in Sabah  
and Brunei.

If taken as separate entities, profit in Sarawak,  
loss in others.

Both companies only carried one trade.

In the Federal See page 10.  
Court of  
Malaysia 48.

No. 19

Notes of Argu-  
ment recorded  
by Azmi, Chief  
Justice.  
27th June,  
1967.  
(Contd.)

Before Harley J. Counsel argued two questions of  
law sufficient to decide appeal.

Page 62.

Refer Report Inland Revenue of Sarawak 1960.

Sec. 18 - page 18 -

only profits arising in Sarawak.

But see sec. 43 - in effect - wherever arises.

Sec. 28.

Sec. 29.

Pausing then - refer to Ordinance of Malaya -  
sec. 33.

Return to page 62 of Record.

Construction of Controller page 37.

He applies strict letter of law.

Sec. 28.

He discussed it at page 47 bottom "Turning however  
to sec. 28 .....

(Sec. 18 - in reference profits).

Page 49 - bottom - wrong - should be disregarded

Page 65 - Harley J's decision.

Page 68.

I ask Court to ignore Harley's judgment and regard  
this appeal as if it came direct from Commissioner.

I submit written summary:

Head 1.

(i) .....

A

B

C

(ii)(a) .....

"It has been pointed out ..... appeal allowed."

In the Federal Court of Malaysia

No. 19

(ii)(b) - important -

Lord Porter (p. 633H) "The effect has been dealt with ..... two constructions ..... in favour of subject ....."

Notes of Argument recorded by Azmi, Chief Justice. 27th June, 1967.

(Contd.)

(ii)(c) - no equity in a taxing statute.

Page 646: "How then are we to apply ....."

Page 648: "If this ..... I adopt it."

(bottom of page 649) "This result ..... overwhelmingly".

Page 653: Guest.

If two constructions - one favourable to subject must be accepted.

C. 2nd Head - (i) general scheme of legislation.

(ii) Simon's Income Tax. Material to keep in mind this principle.

(ii)

London Bank of Mexico v. Athorpe - 3 Tax Case 143.

Headnote:

Page 146.

Page 147 "If a person ....."

(iii)

(iv) Unitary trade.

(v) Hongkong Ordinance Cap. 112.

(vi) Computation section. Hongkong Ordinance is territorial Ordinance.

That is sec. 19 of Hongkong Ordinance.

A

B

C

In the Federal Court of Malaysia

No. 19

Notes of Argument recorded by Azmi, Chief Justice. 27th June, 1967. (Contd.)

This Ordinance has been construed.

Court of Appeal 1/1960.

Page 20.

Page 10.

Page 32.

Paragraph of Notes.

D. 2 - You cannot make loss and profit same year.

A

3

Page 331 - Lord Sands - "I think that this argument is based ..... gains of previous year."

Page 227 of case "I am bound to say ..... prosperous one."

4 Page 823 "In computing the balance of profits and gains ..... taxing statutes."

5 "I have the trading account ..... there is the total."

B

6 Page 780 "It is a general principle ..... makes the profit."

Is contrary to what sec. 43 offers. I ask Court to make finding of law and direct adjustment should be made accordingly.

Sd. Azmi.

Wan Hamzah:

Appellant has not shown successfully that there are two constructions.

C

The law is clear so that this Court should not interpret it as requested.

This is a case for direct construction.

Profits - sec. 43 Sarawak.

Loss - sec. 28 "attributable to activities in Sarawak."

"Activity" means "activities of the person."  
"income".

Section 43.

A Section 28.

Application by analogy is wrong in income Tax.

"Income"

Sec. 43 is to be read subject to 42 but not Sec. 28.

Sec. 28 deals with "scope" of loss.

but sec. 29 deals extent of the loss.

Sec. 43 deals with scope of "profit".

B Refer:

1. C.I.R. v. Granite City Steamship Ltd. -  
13 T.C. 1 page 16 - "I need hardly say  
....."

2. Aikin v. Macdonald's Trustees - 3 T.C. 308  
Lord Adam.

3. Fergusson v. Noble - 7 T.C. 181.  
1st paragraph.

4. Steamship "Glensloy" Co. Ltd. v. Lethem -  
6 T.C. 467.

C 5. Barton v. Miller - 8 T.C. 315, 319.

6. Capt Brandy Syndicate v. C.I.R. - 12 T.C. 366.  
Sd. Azmi.

Hill:

2nd observation.

Activity of Board of Directors an activity of  
Company, wherever they take place.

In the Federal  
Court of  
Malaysia

No. 19

Notes of Argu-  
ment recorded  
by Azmi, Chief  
Justice.  
27th June,  
1967.  
(Contd.)

In the Federal Sec. 28 is accidental.  
Court of  
Malaysia

Sd. Azmi.

No. 19

C.A.V.

Notes of Argu- 1st December, 1967.  
ment recorded

by Azmi, Chief Justice. Coram: Barakbah, Lord President, Malaysia,  
Azmi, Chief Justice, Malaya,  
27th June, Ong Hock Thye, Judge, Federal Court.  
1967.

(Contd.)

Ronald Khoo Esq., for Appellant,

Wan Hamzah for Respondent.

Lord President and myself - appeal dismissed  
with costs.

Ong, F.J. allowed appeal.

Sd. Azmi.

TRUE COPY

Sd. G.E. Tan  
Secretary to Chief Justice  
High Court  
Malaya  
13/1/68.

A

B

No. 20

NOTES OF ARGUMENT RECORDED BY ONG,  
FEDERAL JUDGE

In the Federal  
Court of  
Malaysia

No. 20

27th June, 1967

Notes of Argu-  
ment recorded  
by Ong, Federal  
Judge.  
27th June,  
1967.

G.S. Hill for appellant

A Wan Hamzah, Federal Counsel for respondent.

Hill:

Order p.70

2 questions

K.5 - 1964-5 year of assessment 1963

pp. 4 - 14

K.6 - pp. 15 - 54

Commissioner's grounds of decision p.37

K.7 - 1963-4 - p. 55-61

B Facts:

Both companies (1) resident in Sarawak

(2) controlled & managed in Sarawak

Both at all times had branches in Sabah & Brunei

- losses at branches

- profits in Sarawak.

Both Companies carry on only one trade (pp.10 & 48)

Counsel agreed to 2 questions of law before Harley  
J. (p.62)

Part IV - s.18 of Ordinance 13/60

C s.43

s.28

s.29



In the Federal Court of Malaysia Compare our s.33  
 Controller's decision on construction - p.37

No. 20 Section dealt with in p.47 G

Notes of Argument recorded by Ong, Federal Judge. 27th June, 1967. (Contd.) Harley J's decision p.65 - 68  
Law: handed up notes  
Commissioner of Inland Revenue v. Clarkson-Webb  
 17 T.C. 451, 458

Inland Revenue Commissioners v. Bladnoch  
Distillery Co. Ltd. (1948) 1 A.E.R. 616, 633

Commissioners of Inland Revenue v. Luke 40 T.C.  
 630, 646

Sarawak s. 43 never in Hong Kong Ord.

Hong Kong found it necessary to have their s.19

Hong Kong case pp. 20 & 16

Sarawak s.28 = Hong Kong s.19

Submit s.28 gives authority to carry forward losses, wherever incurred in all companies to which s. 43 applies.

Words in s.28 - must mean control and management  
 (vide s. 43) - compare London Bank of Mexico v. Apthorpe 3 T.C. 143, 146

Wan Hamzah:

Income s. 43

losses s. 28

s. 43 enlarges scope of word "income"

Refers -

Commissioners of Inland Revenue v. The Granite City Steamship Co. Ltd., 13 T.C. 1 @ 16 para 2.

Aikin v. Macdonald's Trustees 3 T.C. @ 308 (3rd para)

A

B

C

Fergusson v. Noble 7 T.C. 181 (1st para)

Steamship "Glensloy" Co. Ltd. v. Lethem 6 T.C. 467  
(2nd para)

Barton v. Miller, 8 T.C. 319 (middle of 2nd para)

The Cape Brandy Syndicate v. Commissioner of I.R.  
12 T.C. 366 (2nd para)

In the Federal  
Court of  
Malaysia

No. 20

Notes of Argu-  
ment recorded  
by Ong, Federal  
Judge.

27th June,  
1967.

(Contd.)

A

Hill: Company can only act through its directors  
and servants.

Compare Hong Kong with Sarawak legislation.

C.A.V.

(Sd) H.T. Ong  
27.6.'67

1st December, 1967:

Ronald Khoo for appellants.

B Wan Hamzah for Respondent.

L.P. dismisses appeal.

C.J. follows - agrees with L.P.

I read dissenting judgment.

Decision of majority - appeal dismissed with costs.

(Sd) H.T. Ong  
1.12.'67

Certified true copy

Sd. B.E. Nettar

(B.E. Nettar)  
Ag. Secretary to Judge,  
Federal Court,  
Malaysia,  
K. Lumpur.

C

17.1.'68.

78.

No. 21JUDGMENT OF LORD PRESIDENTIn the Federal  
Court of  
MalaysiaNo. 21Judgment of  
Lord President.  
1st December,  
1967.

A This appeal concerns three appeals which were consolidated by Harley, J., when they came on for hearing in the High Court at Kuching as they were based on the same grounds. The appellant companies who were aggrieved by the assessments made upon them under the Inland Revenue Ordinance, 1960, appealed to the Commissioner of Inland Revenue and the Commissioner in Civil Appeals Nos: K.5 of 1966 and K.7 of 1966 without a formal hearing under section 80 dismissed the two appeals. He also dismissed the appeal in Civil Appeal No. K.6 of 1966 after a formal hearing.

B The appellant companies, it would appear, carried on a single trade in Borneo with general direction from Sarawak and with branches in Sabah and Brunei. We are not here concerned with the State of Brunei. It is an accepted fact that the business is controlled from Sarawak. As the facts have been fully stated in the judgments of the Commissioner I need not go into them again.

According to the submission of counsel only two points of law should be considered in this appeal, namely:

- C (1) Does section 43 permit the Commissioner of Inland Revenue to include in his assessment on a company carrying on a trade which is controlled or managed in Sarawak any profits arising in branches outside Sarawak without setting off any losses incurred in other branches outside Sarawak in the same basis period?
- D (2) Assuming that the answer to (1) is in the negative, does section 28 nevertheless restrict relief in respect of past losses brought forward to the losses incurred in the Sarawak branch, even though the profits of other branches with past losses are included in the assessment?

These two questions can be answered together and the relevant laws applicable here, in my view, are

In the Federal  
Court of  
Malaysia

No. 21

Judgment of  
Lord President,  
1st December,  
1967.

(Contd.)

sections 18, 28, 29, 42 and 43 of the Inland Revenue Ordinance, 1960, which read as follows:-

"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. A

(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: B

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

28.--(1) Subject to the provisions of subsection (3), where a loss is incurred in the basis period for any year of assessment by a person chargeable to tax under this Part, the amount of such loss attributable to activities in Sarawak shall be set off against what would otherwise have been the assessable profits of such person for that year of assessment. D

(2) Where the amount of loss which may be set off under subsection (1) is such that it cannot be wholly set off against the assessable profits for the year of

assessment in the basis period for which the loss occurred, the amount not so set off shall be carried forward and shall be set off against what would otherwise have been assessable profits for the future years in succession:

In the Federal Court of Malaysia

No. 21

Judgment of Lord President, 1st December, 1967.  
(Contd.)

A

Provided that the amount of any such loss allowed to be set off in computing the assessable profits for any year of assessment shall not be set off in computing the assessable profits for any other year of assessment.

- (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:

B

Provided that in respect of a person who immediately prior to the commencement of this Ordinance was chargeable to tax 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.

C

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.

D

- (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

In the Federal  
Court of  
Malaysia

No. 21

Judgment of  
Lord President,  
1st December,  
1967.

(Contd.)

that such profit is not such a profit shall be on the person charged to tax in respect of such profit.

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." A

It is not disputed that sections 18, 28 and 29 are similar to the Hong Kong Inland Revenue Ordinance (Cap. 112), but section 43 is not in the Hong Kong Ordinance. It is clear from section 42 that the reference is to the whole of the income and according to section 2 the word "income" includes "profits". No reference is made to "loss". According to Lord Macnaghten in Tennant v. Smith<sup>(1)</sup> B the tax whether under Schedule D or E is "not on what saves his pocket, but on what goes into his pocket". In my opinion it was the intention of the Legislature to impose tax on profits obtained outside Sarawak. The intention is made apparent by the fact that it was not in the Hong Kong Inland Revenue Ordinance but specially stated in the Sarawak Ordinance.

As far as tax on loss is concerned, in my opinion, the true construction of section 28 is that such loss must be attributable to activities in Sarawak only and not elsewhere. In my view there is no ambiguity about it. It may well be that it is inequitable that such loss elsewhere should not be taken into account but the law as regards income tax is very strict. In the case of Canadian Eagle Oil Co. Ltd. v. The King and Selection Trust Ltd. v. Devitt (Inspector of Taxes)<sup>(2)</sup> C Viscount Simon had this to say

"In the words of the late Rowlatt J., D  
whose outstanding knowledge of this subject

---

(1) 1892 A.C. 150, 164.

(2) 1946 A.C. 119, 140.

was coupled with a happy conciseness of phrase, 'in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.'"

In the Federal  
Court of  
Malaysia

No. 21

Judgment of  
Lord President,  
1st December,  
1967.  
(Contd.)

A I am therefore in full agreement with the judgments of the Commissioner of Inland Revenue and Harley, J., and would accordingly dismiss the appeal with costs.

(Sgd.) S.S. Barakbah.

LORD PRESIDENT,  
Federal Court of Malaysia.

Kuala Lumpur,  
1st December, 1967

G.S. Hill Esq. for Appellants.

B Wan Hamzah bin Wan Mohd, Salleh for Respondent.

TRUE COPY

Sd. Tneh Liang Peng

(TNEH LIANG PENG)

Secretary to the Lord President  
Federal Court of Malaysia

5.12.67.



84.

No. 22JUDGMENT OF AZMI, CHIEF JUSTICEIn the Federal  
Court of  
MalaysiaNo. 22Judgment of  
Azmi, Chief  
Justice.  
1st December,  
1967.

A This is an appeal by Harper Gilfillan (Borneo) Limited (hereinafter referred to as the Company) against the judgment of Harley J. dismissing the Company's appeal against the decision of the Commissioner of Inland Revenue, Sarawak, but since the learned Judge merely said that he agreed with the Commissioner without giving any other reasons of his own, it would only be necessary therefore to refer to the grounds of decision of the Commissioner.

The Company was incorporated in Sarawak on 12th August 1959 and in 1961, established branches in Sabah and Brunei. The control and management of the Company's trade or business was and has always been throughout the relevant period exercised in Sarawak.

B For the basis period for the years of assessment 1960 and 1961 when the business was carried on only in Sarawak there was a profit, but for the periods 1962 to 1963, losses were incurred for the business in Sabah and Brunei and in 1962 in Sarawak. There was however, profit for the period 1964.

It is not disputed that the appellant was carrying on a single trade.

C The Company contended before the Commissioner and also here that in computing the assessment for the year of assessment 1965 the Sabah losses in the basis periods for the years of assessment 1962 and 1963 should be carried forward and set off against the profits for the year of assessment 1965.

The Commissioner was of the view that the Sabah losses not being losses attributable to the activities in Sarawak could not therefore be set off against the profits for the year of assessment 1965.

I will now set out the relevant provisions of the Sarawak Inland Revenue Ordinance 1960.

D "Sec. 28(1). Subject to the provisions of subsection (3), where a loss is incurred in the basis period for any year of

In the Federal  
Court of  
Malaysia

No. 22

Judgment of  
Azmi, Chief  
Justice.  
1st December,  
1967.  
(Contd.)

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."

"Sec. 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." A

"Sec. 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." B

It will be seen that under sec. 43 the whole of the income derived by a person from any trade, shall be deemed to accrue, derived from or received in Sarawak if the control or management of such trade is exercised in Sarawak, with the result that any profit made by the Company in Sabah is profit of the Company. On the other hand, in reference to losses, section 28 provides that only the amount of such loss attributable to activities in Sarawak shall be set off against what would otherwise have been the assessable profits of a person for the year of assessment in question. As the learned Commissioner said: C

"In my opinion it is clear from the words (the amount of such loss attributable to activities in Sarawak) that the loss to be allowed is not the whole of the losses computed in accordance with the provisions of Section 29 but only that part of the loss which is attributable to Sarawak. Thus although under Section 29 the losses are to be computed in the same manner as assessable profits are computed, that loss is not deductible in full unless it is attributable to activities in Sarawak." D

The learned Commissioner then went on to distinguish between what he calls "a trade" and "the activities of a trade", by saying that the Company carried on a single trade but the activities of that trade were admittedly carried on in Sarawak, Sabah and Brunei. He declined to accept the appellant's submission that "activities" meant activities of control and management.

In the Federal  
Court of  
Malaysia

No. 22

Judgment of  
Azmi, Chief  
Justice.  
1st December,  
1967.

(Contd.)

A The appellant now contends before us that the learned Commissioner had given a too literal interpretation to section 28 sub-section 1 of the Inland Revenue Ordinance which limits the losses which can be set off to "those attributable to activities in Sarawak" but that he should on the true construction of sections 28, 29 and 43 hold that the term "losses attributable to activities in Sarawak", in a case of a person to which section 43 applies, to mean losses wherever they arose.

B

In his argument for the Company before us, Mr. Hill pointed out that the relevant provisions of the Sarawak Ordinance are substantially similar to those of Hong Kong but with one exception in that Sarawak added the provisions of the vital section 43 with the result that in so far as the profits are concerned they are assessable wherever derived provided that they are profits from a trade the control or management of which is exercised in Sarawak. In Hong Kong, profits from operations from outside Hong Kong are not assessable. (See Hong Kong Whampoa Dock Co. Ltd. v. Inland Revenue Department, Supreme Court of Hong Kong Appeal No. 1 of 1960). On the other hand, Hong Kong's policy of confining loss attributable to internal activities only, is retained in Sarawak's section 28. It would therefore be clear to my mind that it was the intention of this legislation that on the one hand the whole of the income derived by a person 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. Whereas on the other hand, only losses attributable to activities in Sarawak shall be set off against what would otherwise have been the assessable profits of such person. In my view, the language of this Ordinance is clear. As

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In the Federal Court of Malaysia Viscount Simon L.C. said in Canadian Eagle Oil Co. v. R.(1)

No. 22

Judgment of  
Azmi, Chief  
Justice.  
1st December,  
1967.  
(Contd.)

"In the words of the late Rowlatt J. (in Cape Brandy Syndicate v. I.R.C. /1921/ (1) K.B. 64,71) whose outstanding knowledge of this subject was coupled with a happy conciseness of phrase 'In a taxing act one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.'"

A

Again, as Lord Thankerton said in I.R.C. v. Ross and Coulter(2) at page 624:-

"Counsel are apt to use the adjective "penal" in describing the harsh consequences of a taxing provision but if the meaning of a provision is reasonably clear, the courts have no jurisdiction to mitigate such harshness. On the other hand, if the provision is capable of two alternative meanings, the courts will prefer that meaning more favourable to the subject. If the provision is so wanting in clarity that no meaning is reasonably clear, the courts will be unable to regard it as of any effect."

B

In my view, it is plain in this matter that the Ordinance intends to disallow the assessment of losses due to activities outside Sarawak and in the circumstances I would have no other alternative but to dismiss the appeal with costs.

C

Sgd. Azmi bin Haji Mohamed

CHIEF JUSTICE  
MALAYA

Date: 1/12/67

(1) 1946 A.C. 119, 140

(2) 1948 1 A.E.R. 616, 624

Mr. G.S. Hill for the Appellant

Enche Wan Hamzah bin Wan Mohd. Salleh, Federal  
Counsel for the respondent.

In the Federal  
Court of  
Malaysia

No. 22

TRUE COPY

Sd. G.E. Tan

Secretary to Chief Justice  
High Court  
Malaya

Judgment of  
Azmi, Chief  
Justice.  
1st December,  
1967.  
(Contd.)

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2/12/67.

90.

No. 23JUDGMENT OF ONG, FEDERAL JUDGEIn the Federal  
Court of  
MalaysiaNo. 23

This is an appeal against the judgment of Harley, J., dismissing consolidated appeals against the decision of the Commissioner of Inland Revenue, Sarawak.

Judgment of  
Ong, Federal  
Judge.  
1st December,  
1967.

A Both the appellant companies were resident in Sarawak, with the management and control of each also in Sarawak. Both companies at all relevant times had branches in Sabah and Brunei and each carried on a single trade only. Profits were made in Sarawak, but losses incurred at the branches. The facts concerning Harper Gilfillan (Borneo) Limited, one of the appellants, have been set out in the judgment of the learned Chief Justice and need not be repeated here.

B Two questions of law were raised by agreement before Harley, J., namely:

- C (a) Does section 43 of the Inland Revenue Ordinance 1960, of Sarawak, permit the Commissioner of Inland Revenue to include in his assessment on a company carrying on a trade which is controlled or managed in Sarawak any profits arising in branches outside Sarawak without setting off any losses incurred in such branches outside Sarawak in the same basis period?
- (b) If not, does section 28 nevertheless restrict relief in respect of past losses brought forward to the losses incurred in the Sarawak branch, even though the profits of other branches with past losses are included in the assessment?

D In the words of Harley, J., "We are concerned with corporation tax and with companies carrying on a single trade in Borneo, with general direction from Sarawak, and with branches in Sabah and Brunei." For present purposes no question arises regarding Brunei.

As the learned Judge pointed out, section 18(1), section 28(1) and (2) and section 29 of the Sarawak



In the Federal Court of Malaysia Ordinance corresponds to section 14(1), section 19(1) and (2) and section 29A(1) of the Inland Revenue Ordinance of Hong Kong. But the Hong Kong Ordinance has no provision similar to the Sarawak section 43 which is as follows:-

No. 23

Judgment of  
Ong, Federal  
Judge.  
1st December,  
1967.  
(Contd.)

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

A

Herein lies the essential difference, in my opinion, between the Sarawak and the Hong Kong Ordinances, the former being on a world basis, involving the application of English principles of unified trade as against the Hong Kong idea of divisible trade on a territorial basis (see decision of the Supreme Court of Hong Kong in Hong Kong & Whampoa Dock Co. Ltd. v. Inland Revenue Department(1)). In that case what fell to be decided was the scope of the words "profits arising in or derived from the Colony". The problem would not have arisen at all had there been a section in the Colony Ordinance corresponding to the Sarawak section 43 which should have resolved the question at issue.

B

C

Since the Sarawak computation of income is on a world-wide scale by virtue of section 43, it is matched - as it should be, in fairness and good sense - by section 29, for computation of losses, as follows:-

"Computation 29. For the purposes of section of losses. 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."

D

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(1) H.K. Appeal No. 1/1960

(cf. section 19A(1) of the Hong Kong Ordinance).

This section is interpreted by the learned Commissioner of Inland Revenue himself, in my view quite rightly, as follows:-

In the Federal  
Court of  
Malaysia

No. 23

Judgment of  
Ong, Federal  
Judge.  
1st December,  
1967.  
(Contd.)

A "Section 29 provides that for the purposes of Section 28 the amount of any loss incurred by a person shall be computed in like manner as assessable profits are computed. In computing the assessable profits of a person, the control or management of whose trade is exercised in Sarawak, the total profit is deemed to accrue in, be derived from or be received in Sarawak. Similarly the loss of such a person should be deemed to accrue in or be derived from Sarawak."

B It should be specially noted that the opening words of section 29 are not "Subject to the provisions of Section 28", but, on the contrary, "For the purposes of section 28". Can there be any doubt, therefore, that section 28 is governed by section 29? Clearly it must be so, for the simple reason that, before any question of "treatment" of loss can arise under section 28, there must first of all be a computation" thereof in the manner provided by section 29. Section 29 is thus a condition precedent, without which section 28 can have no effect.

C The question Harley, J., posed to himself in the course of his judgment was: Whether section 43 completely alters, or qualifies, the interpretation of section 28, particularly the words: "the amount of such loss attributable to activities in Sarawak." In the event he held that: "It may well be that losses generally should be computed similarly to profits but it does not follow that particular losses incurred outside the territory of Sarawak can be set off against profits made inside Sarawak", the reason, in his view, being that section 28(1) expressly limits the losses which can be set off to those "attributable to activities in Sarawak".

D With respect, I am unable to accept such an interpretation of section 29 whereby it became wholly irrelevant, meaningless and nugatory merely by reason of a sidewind arising out of those words in section 28. Once the basic principle for

In the Federal Court of Malaysia computation of losses is laid down without any trace of ambiguity, can it nevertheless be overruled by another section clearly subordinated by express words to itself?

No. 23

Judgment of  
Ong, Federal  
Judge.  
1st December,  
1967.  
(Contd.)

I am also unable to perceive the distinction between "a trade" and the "activities of a trade", which the Commissioner thought all-important. Is there any form of trade that can go on spontaneously without any form of activity whatsoever? In my judgment "activities in Sarawak" can only mean activities of control and management because this interpretation gives effect equally to the provisions of sections 28, 29 and 43, whereas the other construction by the Commissioner can only be valid if section 29 is wholly disregarded. I should have thought that where there is more than one possible meaning and one is reasonable, and the other not, it is unnecessary to apply a literal interpretation if some other reasonable meaning can be applied. Moreover, my interpretation of section 28 accords with the maxim: ut res magis valeat quam pereat.

"It is a good general rule in jurisprudence," said the Judicial Committee in Ditcher v. Denison(2) "that one who reads a legal document whether public or private, should not be prompt to ascribe - should not, without necessity or some sound reason, impute - to its language tautology or superfluity, and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use."

Indeed, from the factual, rather than the artificial point of view, one may well ask whether there could have been carried on any branch business which was running at a loss unless it was actively kept going by funds supplied by the management in Sarawak. To use a metaphor, is it not the engine which supplies the motive force for the wheels? What turns the wheels if the engine is dead? My answer, therefore, to both questions is the reverse of that given in the court below.

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(2) (1857) 11 Moore P.C. 325, 337

A I am all the more gratified in being able to arrive at this decision because a construction leading to unreasonableness is thus avoided. There is, of course, no presumption that a taxing statute normally errs on the side of unfairness and injustice towards the subject. With all respect, therefore, I am unable to agree with the judgments of my learned colleagues, whose reasons, such as they are, seem to be nothing more than that the five words in section 28 are all that need be taken into account regardless of sections 29 and 43. It is true that "there is no equity about a tax. There is no presumption as to a tax", but the mere fact that section 28 produces inequitable results is no reason for holding it to be valid.

For my part, I would allow this appeal, with costs here and in the Court below.

(Sgd.) H.T. ONG

B JUDGE  
Federal Court,  
Malaysia.

Kuala Lumpur,  
1st December '67.

Mr. G.S. Hill for the appellants

Wan Hamzah bin Wan Mchd. Salleh, Federal Counsel  
for the respondent.

Certified true Copy,

B.E. Mettar

C Setia-usaha Kapada Hakim  
Mahkamah Persekutuan  
Malaysia,  
Kuala Lumpur.

In the Federal  
Court of  
Malaysia

No. 23

Judgment of  
Ong, Federal  
Judge.  
1st December,  
1967.  
(Contd.)

No. 24

ORDER

In the Federal  
Court of  
Malaysia

No. 24

IN OPEN COURT

This 1st day of December, 1967

Order.  
1st December,  
1967.

ORDER

- A        THIS APPEAL coming on for hearing on the 27th day of June, 1967, in the presence of Mr. G.S. Hill of Counsel for the Appellants abovenamed and Inche' Wan Hamzah bin Wan Mohd. Salleh, Federal Counsel for the Respondent abovenamed AND UPON READING the Record of Appeal herein AND UPON HEARING Counsel as aforesaid for the parties IT WAS ORDERED that this Appeal do stand adjourned for judgment AND the same coming on for judgment this day in the presence of R.T.S. Khoo on behalf of Mr. G.S. Hill of Counsel for the
- B        Appellants and Inche Wan Hamzah bin Wan Mohd. Salleh of Counsel for the Respondent IT IS ORDERED that this Appeal be and is hereby dismissed AND IT IS ORDERED that the costs of this appeal be paid by the Appellants to the Respondent as taxed by the proper officer of the Court AND IT IS LASTLY ORDERED that the sum of \$500/- (Dollars five hundred only) deposited in Court as security for costs of this Appeal be paid to the Respondent towards taxed costs.

- C        Given under my hand and the Seal of the Court  
this 1st day of December, 1967.

Sd. Ng Man Sau

L.S.

DEPUTY REGISTRAR,  
FEDERAL COURT, MALAYSIA.

No. 25

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

In the Federal  
Court of  
Malaysia

No. 25

IN OPEN COURT

THIS 6th DAY OF MAY, 1968

Order granting  
final leave to  
Appeal to His  
Majesty the  
Yang di-Pertuan  
Agong.  
6th May, 1968.

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ORDER

UPON MOTION made to this Court this day by Mr. Letchumi Kandan mentioning on behalf of Mr. Thomas Home Alan Potts of Counsel for Borneo Airways Limited, Kuching (In Voluntary Liquidation) and Harper Gilfillan (Borneo) Ltd., Kuching the above-named Appellants and Mr. Ng Mann Sau, Senior Federal Counsel for the Respondent AND UPON READING the Notice of Motion dated the 24th day of April 1968 and the Affidavit of Walter Bowman Bellam sworn on the 19th day of April 1968 and filed herein AND UPON HEARING Counsel as aforesaid IT IS ORDERED that final leave be and is hereby granted to the Appellants to appeal to His Majesty the Yang di-Pertuan Agong AND IT IS ORDERED that the costs of this application be costs in the said Appeal

B

Given under my hand and the Seal of the Court this 6th day of May, 1968.

(Seal)

Sd. A.W. Au

C

CHIEF REGISTRAR  
FEDERAL COURT  
MALAYSIA

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O N A P P E A L  
FROM THE FEDERAL COURT OF MALAYSIA  
(Appellate Jurisdiction)

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FEDERAL COURT CIVIL APPEAL NO. X93 OF 1966

B E T W E E N

Borneo Airways Limited, Kuching  
(In Voluntary Liquidation) Appellant

- and -

The Commissioner of Inland Revenue, Kuching Respondent

A N D B E T W E E N

Harper, Gilfillan (Borneo) Ltd., Kuching Appellant

- and -

The Commissioner of Inland Revenue, Kuching Respondent

(IN THE MATTER OF CIVIL APPEALS Nos. K.5, K.6 and  
K.7 OF 1966 IN THE HIGH COURT IN BORNEO IN KUCHING

CIVIL APPEAL No. K.5 OF 1966

B E T W E E N

Borneo Airways Limited, Kuching  
(In Voluntary Liquidation) Appellant

- and -

The Commissioner of Inland Revenue, Kuching Respondent

CIVIL APPEALS Nos. K.6 and K.7 OF 1966

B E T W E E N

Harper, Gilfillan (Borneo) Ltd., Kuching Appellant

- and -

The Commissioner of Inland Revenue, Kuching Respondent)

(CONSOLIDATED BY ORDER DATED THE 11th DAY  
OF NOVEMBER, 1966)

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R E C O R D O F P R O C E E D I N G S

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Coward, Chance & Co.,  
Solicitors for the Appellants.

Stephenson Harwood & Tatham,  
Solicitors for the Respondent.

Coward, Chance & Co.,  
St. Swithin's House,  
Walbrook,  
London, E.C.4.

Stephenson Harwood & Tatham,  
Saddlers' Hall,  
Gutter Lane,  
Cheapside,  
London, E.C.2.

Solicitors for the Appellants.

Solicitors for the Respondent.