

No. 31 of 1977
IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA
(Appellate Jurisdiction)

B E T W E E N :

N.T.S. ARUMUGAM PILLAI Appellant
(Defendant)

- and -

10 GOVERNMENT OF MALAYSIA Respondent
(Plaintiff)

CASE FOR THE RESPONDENT

Record

1. This is an appeal from the Judgment and Order of the Federal Court of Malaysia at Kuala Lumpur (Suffian L.P., Ong Hock Sim F.J., Wan Suleiman F.J.) dated the 15th day of March 1977 dismissing an appeal by the Appellant from an Order of the High Court of Malaysia (Chang Min Tat J.) dated 13th September 1976, dismissing an appeal by the Appellant from a Deciding Order of the Special Commissioners dated the 27th day September 1975 by which Order the sum of \$10,323,230.75 was payable by the Appellant in respect of his tax liabilities for the years of assessment 1953, 1957 to 1962 inclusive, and 1966 to 1972 inclusive.

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2. The facts material to this appeal are not in dispute. At all material times the Appellant carried on businesses of, inter alia, the purchasing of plantations for re-sale in fragmented lots, moneylending, and printing and publishing. As a result of a search of his business premises in the course of investigations by Inland Revenue Department officers on 16th August 1972 it was discovered by the Revenue that the Appellant had maintained more than one set of business books, one set being for the purpose of his income tax returns and the other for his own use.

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In consequence the Revenue carried out a detailed investigation into the Appellant's affairs and served upon the Appellant further assessments to income tax in respect of the following business activities for the years of assessment 1953, 1957 to 1962 inclusive, and 1966 to 1972 inclusive as shown in Exhibit R233. The said assessments related to :-

- (i) Fragmentation profits understated.
- (ii) Bonus and salaries. 10
- (iii) Interest paid to banks.
- (iv) Wages and other expenses inflated.
- (v) Profit on export of gold currency, diamonds and other valuables.
- (vi) Interest income omitted.
- (vii) Penalty payments.
- (viii) Juru Estate - fragmentation profits.
- (ix) Singapore Tamil Malar losses.
- (x) Bad debts written off.

p.95 3. The assessments in respect of each year which were initially for a total of \$8,145,841.50 but were re-computed prior to the hearing before the Special Commissioners to a total of \$10,325,230.75 are set out in the Deciding Order of the Special Commissioners. 20

p.93 4. The assessments for the years 1953, 1957, 1958 and 1959 were statute barred at the date of assessment and therefore could not be raised by the Revenue in the absence of fraud or wilful default on the part of the Appellant tax payer. The matter was heard by the Special Commissioners of Income Tax at hearings lasting a total of 30 days between December 1974 and September 1975 during which the Appellant gave evidence in chief for five days and was cross-examined for a further five days. By their Deciding Order dated 27th September 1975 the Special Commissioners held upon the evidence before them both documentary and oral that there was fraud or wilful default within the meaning of Section 69 of the Income Tax Ordinance 1947, that the Director-General of Inland Revenue had 30 40

validly raised additional assessments on the Appellant for the said years 1953, 1957, 1958 and 1959; and that the Appellant had not shown that the Respondent's computation of his income and tax under assessed for any of the years in question was excessive or erroneous; and therefore directed that the Notices of Assessment and additional assessment be amended to \$10,232,230.75 as asked by the Respondents.

10 5. The Appellant appealed to the High Court by way of Case Stated and thence to the Federal Court.

6. The issues which arise upon this appeal, being the only issues pursued in argument before the Federal Court are as follows :

20 (1) Whether the procedure followed by the Special Commissioners in arriving at their Deciding Order, particularly with regard to the order of evidence and the onus of proof, was correct.

(2) Whether the Appellant had opportunity to present his case, in other words whether the principles of natural justice had been observed.

7. The statutory provisions which have been considered relevant in the Courts below are as follows :

Income Tax Act 1967

Section 91

30 (1) The Director-General where for any year of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax, may in that year or within 12 years after its expiration make an assessment or additional assessment, as the case may be, in respect of that person in the amount or additional amount of chargeable income and tax or
40 in the additional amount of tax in which, according to the best of the Comptroller-General's judgment, the assessment with respect to that person ought to have been made for that year.

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- (2) ...
- (3) The Director-General where it appears to him that -
 - (a) any form of fraud or wilful default has been committed by or on behalf of any person; or
 - (b) any person has been negligent, in connection with or in relation to tax, may at any time make an assessment in respect of that person for any year of assessment for the purpose of making good any loss of tax attributable to the fraud, wilful default or negligence in question.

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Income Tax Act 1967

Schedule 5

10. One of the Special Commissioners may order -

- (a) two or more appeals by the same person,
- (b) ...

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to be heard together.

13. The onus of proving that an assessment against which an appeal is made is excessive or erroneous shall be on the Appellant.

19. The Special Commissioners shall have ...

(f) subject to Section 142(5), power to admit or reject any evidence whether oral or documentary and whether admissible or inadmissible under the provisions of any written law for the time being in force relating to the admissibility of evidence.

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22. Subject to this Act and any rules made under Section 154(1) -

(d) the Special Commissioners may regulate the procedure at the hearing of the appeal and their own procedure.

N.B. Sections 142(5) and 154(1) are not relevant hereto.

Income Tax Ordinance 1947

Section 69 [as amended]

10 Where it appears to the Comptroller that any person liable to tax has not been assessed or has been assessed at a less amount than that which ought to have been charged, the Comptroller may within the year of assessment or within twelve years after the expiration thereof assess such person at such amount, or additional amount as according to his judgment ought to have been charged and the provisions of this Ordinance as to notice of assessment, appeal and other proceedings under this Ordinance shall apply to such assessment or additional assessment and to tax charged thereunder.

Section 76

(3) The onus of proving that the assessment is excessive shall be on the Appellant.

20 8. The Special Commissioners heard the Appellant's appeal for a total of 30 days between December 1974 and September 1975. They directed themselves that by Schedule 5 of the Income Tax Act 1967 they were entitled to regulate their own procedure and that since the onus in respect of the non-statute barred years from 1960 onwards lay upon the Appellant it was convenient for him to begin; but they further directed themselves that on the issue of fraud or wilful default the onus lay on the Revenue on the criminal standard of proof; and they further directed themselves that the Appellant should have the opportunity in the event of fraud or wilful default being established, to show that the assessments for those years were excessive or erroneous.

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40 The Appellant himself gave evidence in chief for five days including evidence on the issue of fraud and wilful default and was cross-examined by the Revenue for a further five days. He himself led evidence as to 34 documents, and was cross-examined on a further 76 documents. The Revenue then gave evidence and introduced the further documents numbers 112 to 240 consisting mainly of documents seized from the Appellant himself a list of which had been supplied to the Appellant and copies of which

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had been made available to his lawyers and accountants but on which no point was raised by his Counsel on cross-examination nor did his Counsel take advantage of the opportunity offered by the Special Commissioners to him to lead evidence to the effect that assessments for the years up to and including 1959 were excessive or erroneous or to lead evidence on any document upon which he could show that he had been taken by surprise. The Special Commissioners stated that upon the evidence both oral and documentary they had no difficulty in finding that the Appellant was not a witness of truth; that he was guilty of fraud or wilful default in respect of his tax returns for each of the statute barred years; that he had under-stated his benefit from fragmentation business, kept more than one set of books, and submitted false returns in respect of each of the categories of business in issue. They were satisfied that the assessments by the Revenue were made on a reasonable and conservative basis and they therefore directed that the Notices of Assessment or additional assessment be amended to \$10,232,230.75 as asked by the Respondents.

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9. Chang Min Tat J. held that the Special Commissioners had rightly directed themselves as to the onus of proof both on the issue of fraud or wilful default, namely that the onus lay upon the Respondents to establish the same beyond reasonable doubt, and upon the issue as to whether the assessments were excessive or erroneous, namely that the onus fell upon the Appellant to negative the same upon balance of probabilities. He further held that the Special Commissioners were entitled, as they had directed themselves, by Schedule 5 of the Income Tax Act 1967 to regulate their own procedure; and that there was no denial of natural justice merely because the Appellant had begun and had led evidence and been cross-examined on the issue of fraud and wilful default before the Respondents called their evidence thereon. The Learned Judge held that the Appellant had had every opportunity to challenge documents R112 to R240 in cross-examination of the Revenue witness. He had had the right of reply and every chance to call evidence in rebuttal of any fact providing only that he showed himself to have been taken by surprise. Furthermore, he was given express opportunity to call evidence in discharge of the onus upon him

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then to show that the assessments for the statute barred years were excessive or erroneous. Nevertheless, he had elected by his Counsel not to exercise these rights. There was no denial of natural justice. The appeal should be dismissed with costs.

10 11. On appeal to the Federal Court of Malaysia Ong Hock Sim F.J. delivering the judgment of the whole Court reviewed the law upon the Special Commissioners' right to control its own procedure pursuant to Schedule 5 of the Income Tax Act 1967 and adopted the dictum of Lord Widgery L.C.J. in Regina v. Special Commissioners (ex parte Martin) 48 T.C. 1 to the effect that it was "very important that the procedure before the Commissioners should be kept as flexible as possible to deal with the widely varying types of case which came before them." With respect to the Appellant's submission that the Special
20 Commissioners had wrongly admitted the further documents put in evidence by the Revenue and in particular documents R112 to 240 the Federal Court upheld the ruling of the Learned Judge at first instance that there was no breach of natural justice. The Federal Court held that upon the facts set out in the Case Stated there was no error in law nor wrong inference drawn and likewise dismissed the appeal with costs.

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30 12. The Respondents submit that as provided by Schedule 5 of the Income Tax Act 1967 and held in Regina v. Special Commissioners (ex parte Martin) aforesaid the Special Commissioners are properly masters of their own procedure.

40 13. The Respondents further submit that there was no injustice in the order of evidence followed. The Appellant himself led evidence upon the issue of fraud or wilful default as well as other issues and was duly cross-examined thereon. The Special Commissioners rightly
50 directed themselves both as to the onus of proof on the issue of fraud or wilful default and as to the criminal standard of proof applicable thereto.

50 14. Having regard to the fact that the documents objected to, save for those which were schedules prepared by the Revenue, were documents seized from the Appellant himself, to the fact that lists of those documents had been provided to the Appellant and copies made available to his legal and accounting advisers, the Appellant was in no way taken by surprise by them, and the

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said documents were properly admitted. Further the Respondents submit that the Appellant was given the express opportunity to call evidence in rebuttal of facts, if any, by which he had been taken by surprise and to lead further evidence, if he desired, to show that the assessments for the time barred years were excessive or erroneous, but by his Counsel the Appellant had expressly elected to take advantage of neither opportunity. In the premises the Respondents submit that the Appellant had every proper opportunity to present his case and there was no breach of natural justice.

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15. The Respondents finally submit that, as held by the Learned Judge at first instance and the Federal Court the Special Commissioners rightly directed themselves upon all matters of law arising upon the facts found in the Case Stated.

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16. The Respondents therefore submit that the Order of the Federal Court of Malaysia was right and should be affirmed for the following amongst other

R E A S O N S

- (1) BECAUSE it was rightly held that the Special Commissioners in arriving at their Deciding Order had correctly fulfilled the requirements as to onus of proof and proper procedure.
- (2) BECAUSE the Appellant had ample opportunity to present his case and the principles of natural justice were at all times properly observed.
- (3) BECAUSE the judgments of the High Court and the Federal Court of Malaysia (Appellate Division) were correct.

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NICHOLAS LYELL

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B E T W E E N :

N.T.S. ARUMUGAM PILLAI	<u>Appellant</u> (Defendant)
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- and -

GOVERNMENT OF MALAYSIA	<u>Respondent</u> (Plaintiff)
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CASE FOR THE RESPONDENT

STEPHENSON HARWOOD,
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Gutter Lane,
LONDON, EC2V 6BS.