

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

- and -

THE DIRECTOR GENERAL OF
INLAND REVENUE

Respondent

RECORD OF PROCEEDINGS

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Respondent

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL
FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N :

N.T.S. ARUMUGAM PILLAI Appellant

- and -

THE DIRECTOR GENERAL OF
INLAND REVENUE Respondent

RECORD OF PROCEEDINGS

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* The Respondent objected to the reproduction of these documents

EXHIBITS

REPRODUCED SEPARATELY

(ORIGINALS AVAILABLE FOR INSPECTION IF REQUIRED)

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NOTE: The Respondent objected to the reproduction of all these exhibits save for exhibit R233.

DOCUMENTS TRANSMITTED TO PRIVY COUNCIL
BUT NOT REPRODUCED

Description of Document	Date
Written submission of Counsel for Appellant in High Court.	
Further written submission of Counsel for Appellant in High Court.	
Written submission of Counsel for the Respondent in High Court.	
Notes of Proceedings in High Court.	20th July 1976
Written submissions for the Appellants in Federal Court	
Notes of argument recorded by Suffian LP	26th January 1977
Notes of argument recorded by Ong Hock Sim FJ	26th January 1977
Notes of argument recorded by Wan Suleiman FJ	26th January 1977
Notice of Motion for conditional leave to appeal to His Majesty the Yang di-Pertuan Agong	21st March 1977
Affidavit of Appellant in support of Motion	19th March 1977
Order granting conditional leave to appeal	4th April 1977

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

- and -

10

THE DIRECTOR GENERAL OF
INLAND REVENUE Respondent

RECORD OF PROCEEDINGS

No. 1

CASE STATED AND
ANNEXURE THERETO
31st December 1975

In the
High Court

No.1

Case Stated
and annexure
thereto

31st December
1975

IN THE HIGH COURT IN MALAYA AT PENANG

N.T.S. Arumugam Pillai Appellant

And

20

The Director General of
Inland Revenue Respondent

CASE STATED by Special
Commissioners of Income Tax
for the opinion of the High
Court pursuant to paragraphs
34 and 35 of Schedule 5 to
the Income Tax Act, 1967

1. At meetings of the Special Commissioners
held on 3rd and 4th December, 1974, 3rd February

In the
High Court
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thereto
31st December
1975
(continued)

1975, 24th, 25th, 26th, 27th and 30th June,
1975, 1st, 2nd, 3rd, 4th, 7th, 8th, 9th, 10th,
11th, 17th, 18th, 19th, 21st, 22nd, 23rd, 24th
and 31st July, 1975, 7th and 8th August, 1975
at Penang and on 21st and 22nd August and 2nd
September, 1975 at Kuala Lumpur, a total of 30
days, N.T.S. Arumugam Pillai (hereinafter
called the "Appellant") appealed against the
assessments and additional assessments of
income tax made upon him under the Income Tax
Ordinance, 1947, or the Income Tax Act, 1967,
as the case may be, as follows :-

<u>Year of Assess- ment</u>	<u>Date of notice of assess- ment or additional assessment</u>	<u>Tax payable</u>	
1953	17. 3.73	58,188.00	(additional)
1957	1.12.72	40,000.00	-do- 20
1958	6. 4.74	11,606.00	-do-
1959	1.12.72	800,000.00	-do-
1960	27.10.72	360,000.00	-do-
1961	27.10.72	1,800,000.00	-do-
1962	27.10.72	901,158.85	
1966	23. 2.74	12,844.40	
1967	23. 2.74	101,710.00	
1968	23. 2.74	1,391,050.25	
1969	23. 2.74	244,540.60	
1970	23. 2.74	517,565.00	30
1971	3. 7.71	150,687.50	
1971	31. 7.71	670,665.90	(additional)
1972	2. 9.72	1,085,825.00	
Total: \$		<u>8,145,841.50</u>	

The above assessments were made in respect of
income alleged to have been received by the
Appellant during the relevant years. In most
of the notices of appeal (exhibit A1) the
Appellant's principal ground of appeal was that
"the assessments and/or additional assessments
are excessive and not in accordance with the

accounts already submitted."

In the
High Court
No.1
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(continued)

10 2. The assessments for the years of assess-
ment 1953 to 1959 inclusive were additional
assessments made on the Appellant under the
provisions of section 69 of the Income Tax
Ordinance, 1947, and at the commencement of
the hearing the first Counsel for the Appellant,
the late Dato' Sri Seenivasagam, took the point
as regards the years of assessment 1953, 1957,
1958 and 1959 that the onus was on Revenue to
show that there was fraud and that the additional
assessments had been properly made. Counsel
also contended that "the onus should be on the
Revenue to start". Encik Nizar, Counsel for
the Respondent contended that even with the
proviso to the said section 69 of the Income
Tax Ordinance, 1947, Schedule 5 to the Income
Tax Act, 1967, contains the only set of rules
governing appeals before the Special Commis-
sioners and that although Revenue would adduce
evidence of fraud, yet it was clearly stated
in paragraph 13 of the said Schedule 5 that the
onus of proof was on the Appellant. We
considered the matter and then in accordance
with our powers under paragraph 22 of Schedule
5 ruled that the onus of proving that the
assessments for the years of assessment 1960
to 1972 were excessive and erroneous was on
the Appellant who should begin and lead evidence
first relating to those years of assessment.
We also ruled at the same time that when Revenue
adduced evidence in reply it should, in the
circumstances, also discharge its onus of
satisfying us that fraud or wilful default had
been committed by or on behalf of the Appellant
in relation to income tax for the statute-
barred years in question, i.e., for the years
of assessment 1953, 1957, 1958 and 1959, before
the onus of proving that the additional assess-
ments in respect of those statute-barred years
were excessive and erroneous shifted to the
Appellant.

3. The question for our decision was whether,
on the evidence heard by us and on the basis
of the facts found by us, as set out in paragraph
8 below, we were entitled to decide:

- 50 (i) that the Appellant had committed
fraud or wilful default and that,
therefore, under the proviso of
section 69(1) of the Income Tax
Ordinance, 1947, the additional

In the
High Court

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thereto

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(continued)

assessments for the years of
assessment 1953, 1957, 1958 and
1959, should not be discharged
merely because they were raised
more than 12 years after the ends
of the respective years of assess-
ments;

- (ii) that all or any of the assessments
and additional assessments for
the relevant years of assessment
appealed against are excessive or
erroneous or that all or any of
those assessments or additional
assessments for the years of assess-
ment concerned should be confirmed
or amended to the amounts shown in
Revenue's "Computation of Income
Tax under-assessed for years of
assessment 1953 and 1957 to 1972"
marked as exhibit R233. 10 20

4. The late Dato' Sri S.P. Seenivasagam,
Advocate and Solicitor, assisted by Encik K.
Chandra and V. Veerapan, Advocates and Solici-
tors and the late Encik A.V.Chari, Accountant,
originally appeared for the Appellant when
hearing commenced. The Respondent was
represented by Encik Mohd. Nizar bin Idris,
Senior Federal Counsel, assisted by Encik Lim.
Chooi Leong, Senior Assistant Director (Invest-
igations), and Encik P. Thambipillai, Assist- 30
-ant Director (Investigations), Department of
Inland Revenue. When we met on 4th December,
1974, the late Dato' Sri S.P. Seenivasagam
applied for postponement of continued hearing
on the grounds of the death of the late Encik
A.V.Chari and that at least two months were
required before the Appellant's new Accountant,
Encik V. Ramanujam, was ready to assist the
Appellant's Counsel. When we reconvened on 40
24th June, 1975, for continued hearing, the
late Dato' Sri S.P. Seenivasagam was taken ill
and the Appellant was thereafter represented
by Encik K.Chandra, V.Veerapan and Paramjit
Singh, all Advocates and Solicitors, together
with Encik V.Ramanujam, Accountant. On 30th
June, 1975, Encik Lim Ewe Hock, Advocate and
Solicitor, and Encik Wong Hoong Keat, Account-
ant, were also retained by the Appellant to
represent him. On 30th July, 1975, Encik S.
Woodhull, Advocate and Solicitor, also appeared 50
for the Appellant to apply for a postponement
on the ground that he had just been retained

and would like some time to read the evidence recorded so far before addressing us on points of law. Encik S.Woodhull applied for permission to withdraw from the proceedings after we refused his application for a postponement on that day and hearing was continued with Encik Lim Ewe Hock, K. Chandra, V.Ramanujam and Wong Hoong Keat representing the Appellant.

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High Court

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thereto

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1975

10 5. On the first day of hearing, i.e., 3rd
December, 1974, counsel for the Respondent
applied for a direction that the proceedings
be heard by way of a hearing open to the
public under paragraph 43(1) of Schedule 5
to the Income Tax Act, 1967. Encik K.
Chandra, the second counsel for the Appellant
objected to the application on the ground
that there were five criminal cases brought
by Revenue pending against the Appellant.
20 Encik Nizar, counsel for the Respondent
informed us that the criminal cases concerned
only related to a very minor portion of the
proceedings before us. After consideration
we ruled, in accordance with the provisions
of the proviso to the said paragraph 43(1)
of Schedule 5, that the proceedings shall
be heard by way of a hearing open to the
public subject to the Appellant's right to
30 apply to us again for part of the hearing to
be heard in camera where the interests of the
Appellant might be prejudiced in the pending
criminal cases.

6. At the hearing, evidence was given
before us by the following persons: the
Appellant himself and Encik N. Sadasivam,
a Chartered Accountant, holding the post of
Assistant Director of Inland Revenue (Invest-
igations), Malaysia, who was concerned in the
back duty investigation into the income tax
40 affairs of the Appellant.

7. The following documents were proved or
admitted before us :-

<u>Exhibit No.</u>	<u>Particulars</u>
A1	- Agreed Bundle of Documents - Part 1 (Notices of appeal)

(continued)

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High Court

No.1

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thereto

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1975

(continued)

Exhibit No.

Particulars

A2	-	Agreed Bundle of Documents - Part 2 (Copies of correspondence)	
A3	-	Agreed Bundle of Documents - Part 3 (Capital Statements of assets, liabilities, private expenses, etc. in Malaysia and India)	10
A4	-	Statement of Income Tax in dispute	
A5	-	Schedule of Rubber Estates, Coconut Estates, Lots etc. purchased for resale after fragmentation during 1951 to 1972.	
A6	-	Agreement of sale dated 3.12.1958 between The Bukit Tupah Rubber Estates Ltd. and N.T.S. Arumugam Pillai	20
A7	-	Copy of letter of instruction dated 30.8.1965 from Arumugam Pillai Estates to M/s.Presgrave & Matthews, Penang.	
A8	-	Copy of letter of instruction dated 14.7.1965 from Arumugam Pillai Estates to M/s.Presgrave & Matthews, Penang.	30
A9	-	Ledger Book for 1958/1959 marked "EL 4" (in Tamil).	
A9(a)	-	Extracts of A9 (pp 48, 128, 130, 133, 135 & 139).	
A9(b)	-	Extracts of A9 (pp 53 & 137).	
A10	-	Advance Receipt dated 26.12.1958 issued by N.T.S. Arumugam Pillai (in Tamil) to Ong Sah Goh.	
A10T	-	Translation of A10.	
A11	-	Junun Chempedak Estate - Cost, Sales, Profit & Stock Tally.	40

<u>Exhibit No.</u>	<u>Particulars</u>	In the High Court No.1 Case Stated and annexure thereto 31st December 1975 (continued)
A12	- Original Survey Plan of Portion No.198 in respect of Jawi Krian Estate - Mukim 7 Nibong Tebal.	
A13	- Field Plan of A12.	
A14	- Plan of A12 after private survey.	
A15	- Final Government Survey Plan of A12.	
10	A16 - Transkrian Estate - Cost, Sales, Profit & Stock Tally.	
	A17 - Lubok Kiap Estate - Cost, Sales, Profit & Stock Tally.	
	A18 - Bukit Genting Estate - Cost, Sales, Profit & Stock Tally.	
	A19 - Inchong Estate - Profit & Loss Statement.	
	A20 - Summary in respect of United Patani Estate.	
20	A21 - Copy of letter dated 9.12.1967 from Revenue to Messrs. Sam Ah Chow & Co., Penang.	
	A22 - Statement showing fortnightly balances with United Commercial Bank Ltd., Penang in Current Account for period from September, 1955 to March, 1968.	
30	A23 - Statement showing fortnightly balances with Malayan Banking Ltd., K.L. in a/c No.168 for period from 31.12.1962 to 27.3.1970.	
	A24 - Statement showing fortnightly balances with Malayan Banking Ltd., K.L. in a/c No.1-208 for period from 17.1.1963 to 30.6.1967.	
40	A25 - Statement showing fortnightly balances with Malayan Banking Ltd., K.L. in a/c No.1-210 for period from 30.1.1963 to 30.9.1963.	

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High Court

No.1

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(continued)

Exhibit No.

Particulars

A26	- Statement showing Profit & Losses from Estate Fragmentation Business for period from 1.1.1951 to 13.4.1971	
A27	- Summary in respect of Juru Estate (purchased in 1956) Capital Gains.	
A28	- Analysis of salary, bonus & wages paid to staff for the years ended 13.4.1957 to 13.4.1962.	10
A29	- Statement showing yearly interest payment to banks & others.	
A30	- Statement showing fortnightly balances with United Commercial Bank Ltd., Penang in a/c No.1 for the period 28.2.1959 to 21.3.1961.	20
A31	- Details of jewellery purchases during the period 1952 to 1972 and debited to current account.	
A32	- Statement showing chargeable income & taxes as agreed and chargeable income & taxes in dispute.	
A33	- Tax computation as shown in additional assessments.	
A34(a)- to A34(t)	- Accounts for 1953 to 1972 submitted to Inland Revenue Department.	30
R35	- Letter dated 18.9.1952 from N.T.S.Arumugam Pillai to the Chief Comptroller of Imports, New Delhi, India.	
R36	- Receipt from the Eastern Shipping Corporation Ltd. in respect of excess baggage.	
R37	- Details of accounts up to 16.10.1952 (in Tamil).	40

<u>Exhibit No.</u>	<u>Particulars</u>	<u>In the High Court</u>
	R37T - Translation of R37.	No.1
	R38 - Letter dated 6.1.1968 from R.Bhanumathi to N.T.S. Arumugam Pillai (in Tamil).	Case Stated and annexure thereto
	R38T - Translation of R38.	31st December 1975
	R39 - Fifteen (15) Indian Bank Ltd. bank drafts.	(continued)
10	R40 - Copy of Appellant's account with M/s Lim, Lim & Oon showing payments & Receipts for the years 1952 to 1954.	
	R41 - Green Book showing details of remittances home (in Tamil).	
	R41T - Translation of an extract from R41 together with translation of the outer cover.	
	R42 - Statement of account (in Tamil).	
	R42T - Translation of R42.	
20	R43 - Letter pad containing duplicate copies of letters (in Tamil).	
	R44 - Translation of some extracts from R43.	
	R45 - Another letter pad (in Tamil).	
	R45T - Translation of extracts from R45.	
30	R46 - United Commerical Bank Ltd. bank draft dated 19.3.1960 for Rs.19,000/-.	
	R47 - Letter dated 25.2.1961 from N.T.S. Arumugam Pillai to M. Karunakar, Manager United Commercial Bank Ltd., Madras.	
	R48 - Letter dated 13.6.1964 written by Nagarajan about the Arumugam Pillai Seethai Ammal College (in Tamil).	

In the
High Court

No.1

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and annexure
thereto

31st December
1975

(continued)

Exhibit No.

Particulars

- | | | | |
|------|---|---|----|
| R48T | - | Translation of R48. | |
| R49 | - | Press release regarding Arumugam Pillai Seethai Ammal College. | |
| R50 | - | Letter dated 5.12.1964 from Registrar, University of Madras. | |
| R51 | - | Letter dated 17.8.1966 from Arumugam Pillai Seethai Ammal College and Minutes of meeting of the governing body. | 10 |
| R52 | - | Letter dated 19.1.1968 from Arumugam Pillai Seethai Ammal College to N.A.R.Nagarajan. | |
| R53 | - | Letter dated 4.6.1964 from R.Srinivasa Iyengar, Advocate. | |
| R54 | - | Letter dated 6.9.1964 from N.T.S.Arumugam Pillai to Home Minister to the Govt. of India. | 20 |
| R55 | - | Letter dated 18.8.1961 from S.Arjuna Raja to K.R.Somasundaram, Penang. | |
| R55A | - | Instructions from N.T.S. Arumugam Pillai. | |
| R56 | - | Mail Transfer dated 22.9.1961 for SW.FR. 12,015.00. | |
| R57 | - | Translation of extracts from 1961-1962 Current Ledger. | |
| R58 | - | Letter dated 18.9.1967 from Income Tax Officer, Karaikudi-2 to N.T.S.Arumugam Pillai. | 30 |
| R59 | - | Extract from Journal Cash Book 1956 (in Tamil). | |
| R59T | - | Translation of R59. | |
| R60 | - | Telegraphic Transfer dated 7.9.1956 for \$60,000/-. | |

<u>Exhibit No.</u>	<u>Particulars</u>	In the High Court
	R61 - Postal Services Dept. receipt & Slip attached to it.	No.1
	R62 - Letter dated 25.7.1967 from Local Council Tiruppattur and Minutes of Council meeting held on 22.7.1967 (in Tamil).	Case Stated and annexure thereto 31st December 1975
	R62T - Translation of R62.	(continued)
10	R63 - Statement of Bills Purchased dated 26.11.1960	
	R64 - Telegraphic Transfer dated 5.7.1957 for \$6,000/-.	
	R65 - Extract from Journal/Cash Book 1957 at page 93 (in Tamil).	
	R65T - Translation of R65.	
	R66 - Telegram from Madras to Arum, Penang.	
20	R67 - Letter dated 28.8.1964 from Arumugam Printers Private Ltd., Madras (in Tamil).	
	R68 - Letter dated 24.5.1963 from Nagarajan to V.H.David, Madras.	
	R69 - Extract of Jewellery Purchase A/c at page 91 (in Tamil).	
	R70 - Letter dated 4.12.1959 from Flinter Grinberg & Co., Ltd. together with invoice.	
30	R71 - Receipt dated 28.11.1959 for \$4,800/- from Flinter Grinberg & Co.Ltd., issued to Arumugam, Penang.	
	R72 - Receipt dated 24.4.1959 for \$1,600/- from Flinter Grinberg & Co.Ltd., to N.T.S.Arumugam Pillai.	
	R73 - Invoice dated 12.12.1959 from Flinter Grinberg & Co.Ltd.	

In the High Court	<u>Exhibit No.</u>	<u>Particulars</u>	
No.1	R74	- Chit (in form of receipt) dated 3.1.1961 in respect of 2 diamond set gold rings and one gold chain.	
Case Stated and annexure thereto			
31st December 1975	R75	- Bank Statement for September, 1960.	
(continued)	R76	- Extract from Journal/Cash Book, 1960 at page 242 (in Tamil).	10
	R76T	- Translation of R76.	
	R77	- Copy of cheque butt No. PH 423148 dated 15.9.1960 for \$20,000/-.	
	R78	- Extract from Journal/Cash Book at page 324 (in Tamil).	
	R78T	- Translation of R78.	
	R79	- Extract of Jewellery Purchase A/c at page 56 (in Tamil).	
	R80	- The United Commercial Bank Ltd. cheque No. PH 423149 for \$25,000/-.	20
	R81	- The United Commercial Bank Ltd. cheque No. PH 423150 for \$28,000/-.	
	R82	- Invoice No.403 dated 10.8.1960 from Flinter Grinberg & Co.Ltd.	
	R83	- Invoice No.542 dated 15.9.1960 from Flinter Grinberg & Co.Ltd.	
	R84	- Translation of extracts of letters from N.T.S. to P.L.S. (brother-in-law).	30
	R85	- Copy of deed of partnership dated 19.5.1961.	
	R86	- Letter dated 17.3.1969 to Chief Minister of Tamil Nadu, Madras.	

<u>Exhibit No.</u>	<u>Particulars</u>	In the High Court
	R87 - Telegram from Arjuna Raja to Nagarajan, Penang.	No.1
	R88 - Telegram from Arjuna Raja to Arum, Penang.	Case Stated and annexure thereto
	R89 - Telegram from Aparanjitham to Nagarajan, Penang.	31st December 1975
	R90 - Telegram from Arjuna Raja to Arum, Penang.	(continued)
10	R91 - Telegram from Arjuna Raja to Arum, Penang.	
	R92 - Telegram from Arjuna Raja to Arum, Penang.	
	R93 - Copy of letter dated 2.6.1963 from Arjuna Raja to Nagarajan.	
	R94 - Copy of letter dated 3.3.1961 from Arumugam Pillai to P. Aparanhitham Mudaliar.	
20	R95 - Copy of letter dated 19.3.1963 from Chairman, Sree Nithyakalyani Textiles Ltd. to Arumugam Pillai.	
	R96 - Copy of letter dated 11.2.1969 from Nagarajan to Arumugam Pillai (in Tamil).	
	R97 - Letter dated 7.2.1960 from Arumugam Pillai to Lim Kim Cheong about loan of \$50,000/-.	
30	R98 - Letter dated 16.3.1959 from Manager, Somasundaram to Low Thai San about loan of \$30,000/-.	
	R99 - Letter dated 10.6.1952 from Sam Ah Chow & Co., Certified Accountants to Income Tax Department.	
	R100 - Letter dated 7.4.1952 from Income Tax Department to Sam Ah Chow & Co.	
40	R101 - Letter dated 18.7.1952 from Income Tax Department to Sam Ah Chow & Co.	

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|-------|--|----|
| R102 | - Letter dated 6.8.1952 from Sam Ah Chow & Co. to Income Tax Department. | |
| R103 | - Agreement dated 19.4.1955 between Juru Estates Ltd. and N.T.S.Arumugam Pillai. | |
| R104 | - Schedule of sub-purchasers in respect of Juru Estates. | |
| R105 | - Copies of Juru Estates Ledger pages 67 to 75 (in Tamil). | 10 |
| R106 | - Juru Estates - Details of sales of fragmented lots and details of sales of other lots (in Tamil). | |
| R106T | - Translation of R106. | |
| A107 | - Arumugam Pillai Seethai Ammal Trust - Balance Sheets as at 31.3.1967, 1968, 1969, 1970 and 1971. | 20 |
| A108 | - Appellate Order and Ground of Decision dated 30.4.1968. | |
| A109 | - Particulars of total net wealth for year ended 31.3.1974 in respect of N.A.R.Nagarajan (Hindu Undivided Family). | |
| A110 | -- Particulars of total net wealth as on 31.3.1974 in respect of N.A.R.Nagarajan (individual). | 30 |
| R111 | - Income Tax Return for Y/A 1953. | |
| R112 | - Copy of receipt dated 9.8.1952 for \$44,800/-. | |
| R113 | - Letter dated 12.5.1952 from N.T.S.Arumugam Pillai to the Registrar of Statistics, K.L. | |
| R114 | - Agreement dated 15.5.1950 between N.T.S.Seedhiamall, Bukit Mertajam and Loo Guan Heng | 40 |

<u>Exhibit No.</u>	<u>Particulars</u>	In the High Court No.1 Case Stated and annexure thereto 31st December 1975 (continued)
R115	- List of owners of Merah Rubber Estate - Padang China Division.	
R116	- Particulars of Gordon Estate (in Tamil).	
R116T	- Translation of R116.	
10	R117 - Letter dated 16.3.1954 from Colonial Income Tax Office, London to Comptroller of Income Tax, Kuala Lumpur relating to Gordon Estate.	
	R118 - Letter dated 12.1.1961 from Revenue to Messrs. Sam Ah Chow & Co.	
	R119 - Letter dated 21.4.1961 from Sam Ah Chow & Co. to Revenue.	
	R120 - Letter dated 30.12.1957 from Sam Ah Chow & Co. to Revenue.	
20	R121 - Details of Wellesley Estate.	
	R122 - Wellesley Estate - document showing lot numbers, Mukim and selling prices.	
	R123 - Copy of R122 with particulars of the respective lots filled in by Revenue.	
	R124 - Income Tax Return for Y/A 1957.	
30	R125 - Juru Estate - Lot 557 showing details of fragmented lots and sales (in Tamil).	
	R125T - Translation of R125.	
	R126 - Appellant's account (List of Payments & receipts) for the years 1955 to 1960 with Messrs. Lim, Lim & Oon.	
	R127 - Outer cover of note book (without contents) in respect of Juru Estate - Lot 556 (in Tamil).	
	R127T - Translation of R127.	

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R128	- Extracts of Estate Ledger, pages 7 & 8 for the years 1957 and 1958 in respect of Juru Estate (in Tamil).	
R128T	- Translation of R128.	
R129	- Extract of Cash Book, page 24 for year 1959.	
R130	- Extract of daily Cash Book (in Tamil) with translation of one item in respect of Juru Estate.	10
R131	- Computation by Revenue for Y/A 1953 in respect of fragmentation profits omitted.	
R132	- Income Tax Returns for Y/A 1959.	
R133	- Paya Besar Estate - List showing details of purchasers, addresses, lot numbers, area and total prices.	20
R134	- Extracts of accounts of subdivided lots relating to Paya Besar Estate (in Tamil).	
R134T	- Translation of R134.	
R135	- Alor Pongsu Estate - List of Purchasers.	
R136	- Extracts of accounts of subdivided lots - Alor Pongsu Estate, pages 8, 10, 11 & 13 (in Tamil).	30
R136T	- Translation of R136.	
R137	- Padang Estate - List of purchasers.	
R138	- Extracts of Padang Estate Book.	
R139	- Sempah Estate - List of purchasers.	

<u>Exhibit No.</u>	<u>Particulars</u>	In the High Court
	R140 - Extracts of lists of purchasers in respect of Sempah Estate & Penanthi Estate (in Tamil).	No.1
	R140T - Translation of R140.	Case Stated and annexure thereto
	R141 - Note Book marked "Remembrances".	31st December 1975
	R142 - Extract of R141 (in Tamil).	(continued)
	R142T - Translation of R142.	
	R143 - Income Tax Return for Y/A 1960.	
10	R144 - Statement showing details of sale of Selambau Estate.	
	R145 - Selambau Estate Purchase Account (Extracts of A9, pages 35, 36, 37 & 38) (in Tamil).	
	R146 - 9 Receipts (in Tamil).	
	R146T - Translation of R146.	
	R147 - Statement dated 25.11.1974 by Rajadurai s/o Sinnathamby.	
20	R148 - Extracts of Sungei Batu Estate Sales Book.	
	R149 - Receipt dated 14.3.1958 given to Chong Chee Chua (in Tamil).	
	R149T - Translation of R149.	
	R150 - Statement dated 14.6.1974 by Chong Chi Chua (in Chinese).	
	R150T - Translation of R150.	
	R151 - Copy of instruction dated 22.10.1963 to Messrs. Lim, Lim & Oon.	
30	R152 - Letter dated 22.12.1963 from Teh Ah Seng to Arumugam Pillai and Receipt dated 27.12.1963.	
	R153 - Income Tax Return for Y/A 1961.	

In the High Court	<u>Exhibit No.</u>	<u>Particulars</u>	
No.1	R154	- Extracts of details of sales	
Case Stated	(a)	in respect of Junun Champedak	
and annexure		Estate (in Tamil).	
thereto	R154	- Details of sales of Junun	
31st December	(b)	Chempedak Estate (in Tamil).	
1975	R155	- Receipt dated 21.1.1959 for	
(continued)		₹5,837/- (in Tamil).	
	R155T	- Translation of R155.	
	R156	- Copies of letter dated 13.6.1974	10
		from Revenue to N.T.S.Arumugam	
		Pillai and two reminders.	
	R157	- United Patani Estate Purchaser's	
		List.	
	R158	- Extracts of details of sales	
		of United Patani Estate.	
	R158	- Extracts of details of Portion	
	(a)	188.	
	R159	- Details of sales of Portion 188.	
	R160	- Copy of day-to-day Cash Book	20
		page 61 (in Tamil).	
	R160T	- Translation of an entry in R160.	
	R161	- Income Tax Return for Y/A 1962.	
	R162	- Extracts of Estate Sales Book	
		(in Tamil).	
	R162T	- Translation of R162.	
	R163	- Kuala Dingin Estate Purchasers	
		Statement.	
	R164	- Schedule showing details of	
		sales of Kuala Dingin Estate.	30
	R165	- Broker's Statement dated	
		20.2.1962 in respect of Kuala	
		Dingin Estate.	
	R166	- Trans Krian Estate Purchasers	
		Statement.	

<u>Exhibit No.</u>	<u>Particulars</u>	In the High Court
	R167 - Details relating to Lot 445.	No.1
	R168 - Details relating to Lot 3805.	Case Stated and annexure thereto
	R169 - Income Tax Return for Y/A 1963.	31st December 1975
	R170 - Schedule showing details of Trans Krian Estate Sales (in Tamil).	(continued)
	R171 - Advance receipt dated 13.4.1961 (in Tamil).	
10	R171T - Translation of R171.	
	R172 - Income Tax Return for Y/A 1964.	
	R173 - Statement of a/c with taxpayer's lawyers.	
	R174 - Statement of a/c with taxpayer's lawyers.	
	R175 - Statement of a/c with taxpayer's lawyers.	
	R176 - Extract of Bertam Estate Sales.	
20	R177 - Copy of letter dated 29.10.1962 to Manager, Gemas Estate.	
	R178 - Income Tax Return for Y/A 1965.	
	179 - Income Tax Return for Y/A 1966.	
	R180 - Advance Receipt dated 5.11.1964 (in Tamil).	
	R180T - Translation of R180.	
	R181 - Advance Receipt dated 9.12.1964 (in Tamil).	
	R181T - Translation of R181.	
30	R182 - Copy of day-to-day cash book page 94 (in Tamil).	
	R183 - Income Tax Return for Y/A 1967.	
	R184 - Income Tax Return for Y/A 1968.	

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<u>Exhibit No.</u>	<u>Particulars</u>	
R185	- Income Tax Return for Y/A 1970.	
R186	- Income Tax Return for Y/A 1971.	
R187	- Extract of day-to-day Cash Book, page 12.	
R188	- Extract of day-to-day Cash Book, page 32.	
R189	- Extract of day-to-day Cash Book, page 94.	10
R190	- Extract of day-to-day Cash Book, page 85.	
R191 (a) to R191 (d)	- Extracts of day-to-day Cash Book, pages 60, 179, 106 & 10 respectively	
R192 to R196	- Extracts of day-to-day Cash Book, pages 48, 97, 74, 105 & 98 respectively.	20
R197	- Telegraphic transfer dated 13.7.1965 for \$15,000/-.	
R198	- Copy of bank draft dated 27.5.1965 for \$10,000/-.	
R199	- Extract of Cash Book page 141.	
R200 (a) & R200(b)	- Extracts of day-to-day Cash Book.	
R201(a)- to R201(n)	- Extracts of day-to-day Cash Book.	30
R202(a)- to R202(t)	- Extracts of day-to-day Cash Book.	
R203(a)- to R203(m)	- Extracts of day-to-day Cash Book.	

<u>Exhibit No.</u>	<u>Particulars</u>	In the High Court No.1 Case Stated and annexure thereto 31st December 1975 (continued)
	R204 - Three (3) Bank Drafts dated 23.3.1966.	
	R205 - Letter dated 18.5.1973 from Chari & Co. to Revenue.	
	R206 - Extract of Ledger, page 6.	
	R207 - Copy of bank statement for April, 1957.	
10	R208 - Notes of Accounts and Bank Statement for April, 1956.	
	R209 - Copy of Bank Statement for September/October, 1956.	
	R210 - Extract of Cash Book/Journal page 276.	
	R211 - Extract of Cash Book/Journal, page 387.	
	R212 - Day-to-day Cash Book in respect of bank transactions.	
20	R213 - Extract of day-to-day Cash Book in respect of bank transactions.	
	R214 - Income Tax Return for Y/A 1972.	
	R215 - Income Tax Return for Y/A 1958.	
	R216 - Statement of A.R.S.P. Salary Account (in Tamil).	
	R216T - Translation of R216.	
	R217 - Extract of Ledger - Salary a/c (in Tamil).	
30	R218(a)- Extracts of Ledgers (in Tamil). to R218(d)	
	R219 - Letter pad - Book III (in Tamil).	
	R219T - Translation of extracts of R219.	
	R220 - Letter pad - Book 4 (in Tamil).	

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| R220T | - Translation of extracts of R220. | |
| R221 | - Letter pad - Book 7 (in Tamil). | |
| R221T | - Translation of extracts of R221. | |
| R222 | - Letter pad - Book 8 (in Tamil). | |
| R222T | - Translation of extracts of R222. | |
| R223 | - Letter pad - Book 9 (in Tamil). | 10 |
| R223T | - Translation of extracts of R223. | |
| R224 | - Letter pad - Book 10 (in Tamil). | |
| R224T | - Translation of extracts of R224. | |
| R225 | - Letter pad - Book 14 (in Tamil). | |
| R225T | - Translation of extracts of R225. | |
| R226 | - Letter pad - Book 12 (in Tamil). | 20 |
| R226T | - Translation of extracts of R226. | |
| R227 | - Copy of receipt dated 29.8.1959 (in Tamil). | |
| R227T | - Translation of R227. | |
| R228 | - Bundle of Letters (in Tamil). | |
| R228T | - Translation of extracts of R228. | |
| R229
(a) | - Computation of Income and Tax Under-assessed for Y/A 1953. | 30 |
| R229(b)-
to
R229(q) | - Computation of Income and Tax Under-assessed from Y/A 1957 to Y/A 1972. | |

<u>Exhibit No.</u>	<u>Particulars</u>	In the High Court
	R230 - Statements of disbursements not employed as capital (16 in all).	No.1 Case Stated and annexure thereto
	R231 - Computation of Fragmentation Profits understated.	31st December 1975
	R232 - Statement showing total payments into bank for Y/A 1964 and Y/A 1965.	(continued)
10	R233 - Computation of Income and Tax Under-stated for Years of Assessment 1953 and from 1957 to 1972.	
	A234 - Copy of letter dated 29.8.1972 from Arumugam Pillai to Revenue	
	A235 - Copy of letter dated 29.7.1972 from Revenue to Arumugam Pillai	
20	A236 - Copy of Memorandum of Transfer of Gordon (Malaya) Rubber Estates Ltd.	
	A237 - Copy of Memorandum of Transfers of Gordon (Malaya) Rubber Estates Ltd.	
	A238 - Agreement dated 31.12.1951 between N.T.S. Seethai Ammal d/o Shokalingam Pillay and Lee Kooi Peng.	
	A239 - Juru Estate - Fragmentation Sales Understated.	
30	A240 - Annual Replanting Expenses.	

The above documents are not appended to the Case Stated but are available for inspection, if required.

8. As a result of the evidence, both oral and documentary, adduced before us we find the following facts proved or admitted :-

(i) The Appellant was aged 61 years and

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had been engaged, inter alia, in the business of money-lending, printing and publishing and of purchasing plantations for re-sale in fragmented lots (hereinafter referred to as "fragmentation business"). He resided at No.216-B, MacAlister Road, Penang and at No. 46, Jalan Arumugam Pillai, Bukit Mertajam, Province Wellesley and conducted his business at No.132, Penang Street, Penang and at No.46, Jalan Arumugam Pillai, Bukit Mertajam, Province Wellesley. He came to this country in 1929 and has since acquired Malaysian citizenship, but both he and his family still commuted frequently between this country and India. In 1948 he was adjudged a bankrupt but later on settled his debts and was discharged. Before the date of his discharge some time in 1952, he had however started fragmentation business in his wife's name. His capital then was only \$10,000/-. His wife is called Seethai Ammal and his sons, called Nagarajan and Thangeveloo and daughter, Thanga Nachiar was born on 19th September, 1939, 18th September, 1953 and in October, 1959 respectively.

- (ii) As a result of a back duty investigation into the income tax affairs of the Appellant for the years of assessment 1953 to 1972 by Encik Sadasivam, the latter called the Appellant for an interview on 16.8.1972. During that interview the Appellant claimed that his returns were correct. That same day the Appellant accompanied Encik Sadasivam and other Inland Revenue officials to his office and residence at No.132, Penang Street and No.216-B MacAlister Road, Penang. Another party of Inland Revenue officers went to his premises at No. 46, Jalan Arumugam Pillai, Bukit Mertajam, Province Wellesley. From all his three premises, the Inland Revenue officers took possession of certain books and documents which they

then considered relevant to his tax returns. They were examined and compared with his returns and it was discovered by Revenue that the Appellant maintained more than one set of books for recording his business transactions. The accounts submitted by him with his income tax returns to the Inland Revenue Department were prepared from one set of books whilst the other books were maintained for his own use and information. In the books from which the accounts for income tax returns were prepared (hereinafter referred to as "account books kept for income tax purposes") there were many omissions and under-statements of income received, and failures to record drawings for personal and private purposes resulting in over-statement of his business expenses.

(iii) As regards his fragmentation business he normally bought plantations from European companies which he later sold in sub-divided lots. Generally, the sub-purchasers made payments to the Appellant's lawyers, but sometimes payments were made directly to him. The monies collected by his lawyers were paid by them to the vendors of the plantations and the balance was paid to the Appellant. During the relevant years the Appellant bought and sold about 40 plantations with a total acreage of over 50,000 acres. He fragmented and sold most of the plantations bought by him and retained for himself about 5,200 acres. In most instances the fragmented lots were transferred directly from the vendors of the plantations to the sub-purchasers. The 'modus operandi' adopted by the Appellant was that after payment of a deposit for a fragmented lot, a Tamil 'receipt' in which the said lot was described was given to the sub-purchaser. Later on, after survey, an agreement in English was signed by the parties

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concerned before a Solicitor. There was invariably a difference in the price stated in the Tamil 'receipt' and that stated in the English agreement, which was drawn up by Solicitors instructed by him and to whom he did not always declare the actual sale price. Counsel for the Respondent indicated during the hearing that he would not challenge all those transactions which were accurately recorded, but was only concerned with transactions which were either not recorded at all or were recorded inaccurately in the Appellant's books. Examples of inaccurately recorded figures were disclosed when a schedule containing details of sub-sale of fragmented lots of Juru Estate submitted by the Appellant to Revenue with his accounts (exhibit R104) were compared with details of such sales recorded in a note book which was taken by Revenue officials from the Appellant's house (exhibit R106 and R106T). There were four items, namely, items 9, 37, 42 and 68 in which total receipts amounting to \$29,370.00 were omitted in the said schedule submitted with the accounts to Revenue and the Appellant, whilst agreeing that there were differences between the figures submitted to Revenue and the figures recorded in the note book seized from his house, was unable to offer any explanation for the omissions.

- (iv) Brokers, who had helped the Appellant to dispose of sub-divided lots, as well as some sub-purchasers of such lots, were interviewed by Encik Sadasivam and his Revenue colleagues. An examination of some of the relevant documents produced (exhibits R40, R111, R112, R113, R114, R115, R116 and R116T, R117, R118, R119, R120, R121, R122 and R123) and in the light of the evidence given by Encik Sadasivam of investigations conducted by Revenue revealed that the Appellant had for the year of assessment 1953

10 either under-stated his profits from fragmentation business as in the case of Merah Estate, Lunas Estate, and Gordon Estate or had failed entirely to disclose in his accounts submitted for Income Tax purposes the purchase and sale of a plantation called Wellesley Estate on which Revenue has estimated omission of profits amounting to \$274,900/- (exhibit R231). The total fragmentation profits omitted during the year of assessment amounted to \$542,916/-. His accounts submitted with his return for the year of assessment 1953 were not only inaccurate but false. Prior to 20 the year of assessment 1953 the Appellant's basis year corresponded with the calendar year, but during that year he adopted the Tamil year ending in April of each year as his basis year and for subsequent years of assessment.

30 (v) The Appellant's income tax return for the year of assessment 1957 (exhibit R124) was also examined and compared with a schedule containing details of sub-sales of fragmented lots of Juru Estate (exhibit R104), three books seized by Revenue from the Appellant's house (exhibits R106 and R106T, R125 and R125T, R127 and R127T), his accounts in 1955 with his lawyers (exhibit R126), his ledger in respect of that plantation (extracts at pages 7 and 8 thereof 40 produced and marked as exhibits R128 and R128T) and his cash book for the years 1969/1970 (extracts produced and marked as exhibits R129, R130 and R130T). The examination of all these documents showed that the said return and schedule submitted by the Appellant to Revenue giving details of sub-sales of fragmented parts of Juru Estate 50 (exhibit R104) were false and that correct details of the transactions were only recorded in the books

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(exhibits R106 and R125) which were seized from the Appellant. Under cross-examination the Appellant admitted that there were differences between the sale prices declared and the actual sale prices recorded in the books seized by Revenue. He, however, refused to admit that those differences were omissions of income which he should have declared. Revenue also discovered that the Appellant had failed to disclose details of the purchase and sale of three other plantations, namely, Batu Kawan Estate, Breih Estate and Nagarajan Estate, in his return for the year of assessment 1957. When Encik Sadasivam and his Revenue colleagues visited and searched the Appellant's premises they could not trace his records relating to those three plantations and in these cases Revenue had to work out a basis of computation of omitted profits after having examined and considered all the recorded transactions relating to the sale of fragmented lots of plantations during that year of assessment, when total omitted profits from his fragmentation business amounted to \$283,595.00.

- (vi) For the year of assessment 1959 a return (exhibit R132) was submitted by the Appellant. He was later asked by Revenue to submit a schedule showing details of sub-sales concerning Paya Besar Estate (exhibit R133). These were examined and compared with a book called "Paya Besar Estate and Alor Pongsu Estate Balance Book", extracts of which were produced (exhibits R134 and R134T) and it was discovered that there were 33 transactions relating to that plantation in which a total sum of \$67,440.00 had been omitted from the declared profits in that the prices paid by sub-purchasers were deliberately understated. In the case of Alor Pongsu Estate, submitted accounts

were also examined and compared with a schedule of sub-sales (exhibit R135) submitted by the Appellant and the relevant extracts (exhibit R136 and R136T) from the said "Balance Book". It was found that the Appellant had under-stated profits from sub-sales of Alor Pongsu Estate totalling \$14,300.00. Details concerning the purchase of Padang Estate were shown in the Appellant's return for the year of assessment 1959 and a schedule of sub-sales (exhibit R137) was also submitted by him. But in the course of investigations Revenue took possession of a book, extracts of which were produced (exhibit R138) and on examination and comparison the documents showed that there were several under-statements of proceeds from sub-sales of that plantation. Encik Sadasivan's investigations revealed that the omissions in respect of the profits of Padang Estate amounted to \$541,036.00. There was also another plantation called Sempah Penanti Estate declared in the return for the year of assessment 1959 which was examined and compared with the schedule of sub-sales (exhibit R139) supplied by the Appellant. In the course of investigations, Encik Sadasivam discovered another schedule (exhibit R140 and R140T) which contained different figures from the schedule submitted to Revenue, i.e., exhibit R139. From these documents it was revealed that the Appellant had under-stated sale profits of Sempah Penanti Estate by \$330,237.00. Revenue also discovered that the Appellant had sold part of his stock of Jawi Krian Estate during the year of assessment in question. No records could be traced and Revenue estimated that the Appellant had understated his profits from sub-sales of that plantation by \$50,000.00. The total understated income for the year of assessment 1959

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amounted to \$1,003,013.00.

- (vii) Profits from the sale of Selambau Estate were declared for the year of assessment 1960 in the Appellant's relevant return (exhibit R143); no schedule of sub-sale was supplied in this case but in the course of investigation, Encik Sadasivam found a document (exhibit R144) which referred to the sale of a part of that plantation to one Saraswathy Ammal. He counter-checked it with the Appellant's estate or plantation's ledger for the years 1958 and 1959 (exhibit A9) and discovered that the declared sale price was different from that shown in the document in question (exhibit R144). That was the only document discovered in respect of Selambau Estate but Revenue continued its investigations by interviewing one Rajadurai, the husband of another sub-purchaser of a fragmented lot of the same plantation. The said Rajadurai produced a receipt (exhibits R146 and R146T) to Revenue and also signed a statement (exhibit R147) to show the actual price which his wife called Nagaratnam Ammal had paid the Appellant for their sub-divided lot. On the basis of the said two omissions discovered, Encik Sadasivam worked out the total omitted profits of the rest of the sub-sales concerning Selambau Estate. In the course of investigations of another plantation called Sungei Batu Estate, similar instances of under-statements of profits were discovered. Although there was no schedule of sub-sales, Revenue found a book described as "Sungei Batu Estate - Sales Book". Photostat copies of relevant extracts of that book were produced (exhibit R148) and Encik Sadasivam, having examined that book, found that total sale proceeds from that plantation were \$2,070,191.00 and he established that the omitted profits amounted to \$362,888.00. He was also able to establish that that book contains
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10 details of actual sales after comparing it with other documents such as a copy of an agreement (exhibits R149 and R149T) relating to the sale of a sub-divided lot to one Chong Chee Chua who also made a statement to Revenue (exhibits R150 and R150T) concerning the actual price he had paid the Appellant for his fragmented lot. Encik Sadasivam also found a letter of instruction by the Appellant to his lawyers (exhibit R151) indicating that the price of the lot sold to the said Chong Chee Chua was \$1,100.00 per relong whereas the actual price was \$1,400.00 per relong (see exhibits R149 and R149T). The total omitted profits for that year of assessment amounted to \$680,482.00.

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20 (viii) In his return for the year of assessment 1961 (exhibit R153) the Appellant declared that he had sold 4754 relongs out of a total of 4870 relongs of a plantation called Junun Chempadak Estate for \$1,988,154.45. No schedule of sub-sales in respect of this plantation was supplied by him, but in the course of investigations, Encik Sadasivam found two schedules in respect of that plantation (exhibits R154A and R154B) in the Appellant's office. He examined those documents and compiled actual sales figures which he found to be \$3,317,715.81 and not \$1,988,154.45 as declared by the Appellant. During that year in question, the Appellant also declared that he had sold 7375 relongs of United Patani Estate for \$4,562,449.63. He also submitted a schedule of sub-sales (exhibit R157) showing sale proceeds of \$4,560,244.77. Revenue, however, had taken possession of some documents (exhibits R159, R160 and R160T) including a schedule relating to sub-sales of that plantation

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(exhibit R158) which on comparison with the documents submitted by the Appellant to Revenue showed that the documents seized contained actual sale figures and that he had in the documents submitted to Revenue under-stated profits in respect of that plantation by \$1,232,265.00. There was yet another plantation called Bertam Estate fragmented and sold by the Appellant during that year. No records could be traced but major portions of that plantation had been sold to co-operative societies. The balance was sold to individuals for \$63,873.00, and on the information available, Revenue estimated that the understated profits of that plantation was \$20,000.00. For the year assessment 1961, the Appellant's total understated profits from his fragmentation business amounted to \$2,569,226.00. 10

(ix) The year of assessment 1961 was the high water-mark in so far as the under-statement of profits from the Appellant's fragmentation business was concerned. But investigations revealed that he continued with his practice of under-stating such profits right up to the year of assessment 1971. Thus for the year of assessment 1962 Revenue came across a book (extracts of which were produced as exhibits R162 and R162T) which, when compared with a schedule of sub-sales (exhibit R163) submitted by Appellant to Revenue showed that the accounts submitted with his return for the year of assessment 1962 (exhibit R161) were false. Revenue calculated that the profits understated in respect of a plantation called Kuala Lingin Estate amounted to \$527,650.00. In the course of investigations, Revenue also found other documents which showed that Appellant had understated profits from sale of subdivided lots of Trans-Krian Estate amounting to \$396,948.00 during the year of assessment 1962. The total omitted profits for the year of 30 40 50

assessment in respect of Trans-
Krian Estate and Kuala Dingin
Estate therefore amounted to
\$914,598.00; for the year of
assessment 1963, total omission
for the said two plantations
amounted to \$20,606.00; for the
year of assessment 1964, total
omitted profits in respect of
Bawali Estate, Bertam Estate and
Gemmas Estate amounted to \$178,162.00;
for the year of assessment 1965,
total omitted profits were only
\$23,518.00 and for the year of
assessment 1966, total omitted
profits in respect of stock of
Juru Estate and Paya Besar Estate
were \$68,388.00.

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(x) The amount of understated profits
derived from the Appellant's frag-
mentation business increased during
the year of assessment 1967. The
accounts submitted with his return
for that year (exhibit R183) were
examined and compared with a sche-
dule of sub-sales which he submit-
ted and with other documents which
had been seized from his premises.
It was found that during that year
in question he had bought and
sold three plantations, namely,
Sungei Lalang Estate, Bukit Genting
Estate and Lubok Kiab Estate.
Understated profits from sub-sales
of fragmented lots of those planta-
tions together with profits from the
sale of 3.369 relongs of Paya Besar
Estate amounted to \$581,770.00 for
that year of assessment. For the
year of assessment 1968, Revenue
calculated, after examining the
relevant accounts and documents, that
understated profits in respect of
Jitra Estate and Glugor Estate
amounted to \$198,162.00. Under-
stated income from his fragmentation
business for the year of assessment
1969 was merely \$8,000.00, but for
the year of assessment 1970 a sum
of \$149,170.00 was omitted in
respect of sales from his stock of
fragmented portions of Juru Estate

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and Bertam Estate.

- (xi) During the year 1970, the Appellant re-possessed a part of Kuala Dingin Estate which he had sold during 1961. In his accounts for the year of assessment 1962 that property was shown as sold for \$172,005.00 but the Appellant claimed that he had re-possessed that property for \$2,000.00 only. Revenue wrote a letter to the Appellant's Accountant on 12.5.1972 for full details but there was no reply. A sum of \$170,000.00 was therefore included as value of the property not brought in and that sum together with a sum of \$27,500.00 which had been omitted as declared income in respect of sub-sale of portions of Glugor Estate brought the total sum of understated profits for the year of assessment 1971 to \$197,500.00. 10
- (xii) On 13th June, 1974 and again on 16th July and 22nd August, 1974 (exhibit R156), the Assistant Director of Inland Revenue (Investigations) wrote to the Appellant for a copy of his accounts for the years 1958 to 1961 with his lawyers, M/s. Presgrave and Mathews, but he never received a single reply from him. Revenue wanted the accounts because they found out that most of the sale proceeds during that period had been paid directly to the lawyers by the sub-purchasers. The Appellant himself was not co-operative at all during the years of investigations and Revenue was not able to find all the documents relevant to his tax affairs. Both he and his Accountants maintained the attitude throughout the entire period of investigations that his returns were correct, although Revenue had indicated to them that there were many omissions and under-statements of profits. When Revenue wanted the Appellant to produce his other documents which were not seized during the raids on his premises by income tax officials on 16.8.1972, they were 30 40 50

10 informed by him that the documents had been either destroyed or had been sent to India. The Appellant had throughout the relevant years of assessments understated and/or omitted to declare his profits from his fragmentation business. There were many cases when Revenue found sufficient genuine records, which after comparison with his other records kept for income tax purposes, enabled them to calculate the amount of understated and omitted profits. In other cases where no documentary evidence could be found or obtained, Revenue could only raise assessments after taking into consideration those similar transactions for which such evidence was available. In some cases there were total omissions of income and in others 40% to 80% of the profits were understated. The Assistant Director of Inland Revenue (Investigations) used a conservative estimate of 20% to 25% of declared profits in raising additional assessments in respect of fragmentation profits. He considered that the Appellant might have bought and sold other plantations which he had not disclosed and for which no records were available. The following table summarises the amount of omitted and/or understated profits of the Appellant for the relevant years of assessment :-

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<u>Year of Assessment</u>	<u>Amount of Fragmentation Profits Omitted and/or Understated</u>
1953	\$ 542,916.00
1957	283,595.00
1959	1,003,013.00
1960	680,482.00
1961	2,569,226.00
1962	914,598.00
1963	20,606.00
1964	178,162.00

In the High Court No.1	<u>Year of Assessment</u>	<u>Amount of Fragmentation Profits Omitted and/or Understated</u>	
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	1966	68,388.00	
	1967	581,770.00	
	1968	198,162.00	
	1969	8,000.00	
	1970	149,170.00	
	1971	197,500.00	10
			<u>Total: \$7,419,106.00</u>

(xiii) In the course of investigations, Encik Sadasivam discovered that bonus and salaries which were claimed to have been paid were either not payable or were partly paid or were not in fact paid. In the Appellant's return for the year of assessment 1958 (exhibit R215), one Suppiah Pillai whose salary was only \$95.00 per month was shown to have received \$15,000.00 as bonus and this amount was shown in the ledger kept for income tax purposes as having been credited to the latter's account (relevant extracts produced and marked as exhibit R217). But a statement of account was found in one of the Appellant's files (exhibits R216 and R216T) which did not show that Suppiah Pillai was credited with any bonus. Encik Sadasivam verified that statement with the said ledger account of Suppiah Pillai as appearing in the Appellant's books from which accounts were prepared and submitted. All items tallied except that the statement (exhibit R216) does not show any credit for bonus. On 12.4.1961, a sum of \$39,654.41 was shown in the Appellant's books kept for income tax purposes as due to Suppiah Pillai (other extracts of the said ledger produced and marked as

exhibits R218A to R218D), whereas the said statement (exhibits R216 and R216T) show a debit balance for the said Suppiah Pillai. The returns for the relevant years of assessment were compared with all the relevant entries in the Appellant's said ledger and the said statement of account (exhibits R216 and R216T) and Encik Sadasivam came to the conclusion that bonus had not in fact been paid to Suppiah Pillai.

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(xiv) Another example of such a false claim by the Appellant was discovered by Encik Sadasivam when he interviewed one Ayavoo, the Appellant's former driver, who was shown in the return for the year of assessment 1958 to have received \$500.00 salary and \$1,000.00 bonus. Ayavoo informed Revenue that he never received any bonus from the Appellant and had in fact filed a civil suit in 1959 against him to recover the bonus. Investigations also revealed that even his salary for that year was not paid. Encik Sadasivam, after investigations, concluded that bonus of \$28,490.00 was not paid as claimed in the return for the year of assessment 1958 and he disallowed it after adding \$1,510.00 which he reckoned would cover Ayavoo's salary of \$500.00 and other bonus payments charged to an estate account, which should also be disallowed that year. Likewise he also disallowed all bonus payments claimed in the Appellant's returns for subsequent years up to the year of assessment 1962.

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(xv) The Statement of Cash Flow for the years ended 13th April, 1956 to 12th April, 1961 (page 21 of exhibit A3) shows that on 12th April, 1957 and 13th April, 1959, two sums of \$226,171.00 and \$1,208,955.00 respectively had been remitted to and deposited in banks in India. The late Encik Chari, who had prepared the Appellant's Cash Flow

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Statement treated those remittances as "business out-go", which is misleading. The money and deposit in banks of India were not employed as capital in Malaysia and had nothing to do with business here. Income generated in India by the money borrowed from Malaysia banks was not brought back to this country.

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(xvi) As example of a fraudulent entry in the Appellant's books can be seen in folio 6 of his ledger (exhibit R206) showing a balance on 12.4.1957 of \$116,855.49, which together with cash in hand was \$117,930.00. The figures were fictitious because they were arrived at after passing an entry to show in the books that a sum of \$421,570.50 drawn on 11.4.1957 was paid back on 12.4.1957. No such payment back into the bank was ever made and a bank statement for the relevant period (exhibit R207) shows that the Appellant had withdrawn \$421,570.50 on 11.4.1957 but there was no payment back of an equivalent sum the next day. Those entries in exhibit R206 were fictitious and his ledger did not reflect the true position.

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(xvii) Further investigations by Revenue revealed that throughout the years concerned the figures for money borrowed by the Appellant from banks kept on increasing. For the year of assessment 1958, a sum of \$225,536.00 was borrowed. On 7.9.1956 the Appellant withdrew \$60,020.00 and paid the money to one P.Arunasalam, who is the husband of his wife's sister. On 30.10.1956, a sum of \$32,310.00 was transferred to India as shown in the bank statement (exhibit R209). The Appellant donated various sums of money in 1956 to the Waterfall Temple Penang, and on 8.1.1957, a sum of \$193,861.00 was transferred to India. All these

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sums of money together with numerous other payments were totalled up by Encik Sadasivam and he found that \$755,036.00 was not utilised in the production of income that year.

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(xviii) Interest charged on borrowed monies for the year of assessment 1958 was \$2,708.00 and for the year of assessment 1959 was \$29,537.00. By the end of the year of assessment 1959 the Appellant's overdraft had increased to \$1,206,717.00 which sum was computed by Encik Sadasivam from his books. The amount declared to have been borrowed during the year of assessment 1960 was \$1,531,705.00. For that year of assessment Revenue has calculated the amount drawn and utilised for purposes other than for the production of income. For example, various sums were remitted to India and a sum of \$10,000.00 was given to a brother-in-law called Doraisamy Pillai. The Appellant paid \$6,147.00 for life insurance premium and \$25,058.00 for income tax. Jewellery worth \$26,942.00 was purchased during that year and \$23,576.00 was given as donations to unapproved charities. The Appellant spent \$66,397.00 on his residence at MacAlister Road and gave his son two gifts amounting to \$206,272.00 and \$16,077.00 respectively. Shares, which did not produce income, worth \$59,857.00 were purchased by the Appellant during that year and he also paid his son's insurance premium of \$615.00. All these and other similar payments during the year as shown in the statements marked exhibit R230 were totalled up by Revenue after the relevant figures had been extracted from his books and amounted to \$1,519,924.00. Interest paid to banks that year was only \$30,464.00 which was a comparatively small amount because most of the borrowings that year were made towards the end of the year.

(xix) During the next year, i.e. year of

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assessment 1961, there were further borrowings of \$655,231.00. There were again remittance to India, purchase of jewellery, payment of income tax, expenditure on the MacAlister Road residence, donations to unapproved charities, payment of both the Appellant's and his son's insurance premia and the purchase of a property in Market Street, Penang, for \$71,181.00 which did not produce any income. At the beginning of that year, total borrowings by the Appellant were \$2,021,118.00 and interest charged by banks during that year amounted to \$131,558.00. 10

(xx) No money was borrowed during the year of assessment 1962 but Appellant was charged \$216,305.00 as bank interest on his outstanding overdrafts. During that year his remittances to his son in India amounted to \$136,084.00 and there were the usual payments of his own and his son's insurance premia and his income tax, purchase of jewellery and donations to unapproved charities. But there were in addition to those payments two other payments of \$30,000.00 to Malayan Times Limited for which there was no income and an interest-free loan of \$10,610.00 to one V.Sundaram. During that year he repaid \$428,476.00 and at the end of that basis year, i.e., 22.4.1961 his accounts showed an overdraft of \$2,595,735.00. Revenue computed that the sum of \$4,158,768.00 was not utilised for the production of income until he brought back to Malaysia from India a sum of \$1,255,126.00 which was paid back to the banks, after which \$2,903,642.00 was left outstanding and used for purposes other than in the production of income. 30 40

(xxi) The figures re-produced below show the total amounts borrowed during each of the respective years of 50

assessment, the amount borrowed during the year concerned, the outstanding overdraft at the end of the relevant basis year, the amount not utilised for production of income and the amount of interest on the outstanding bank overdrafts for the relevant years of assessment

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(1)	(2)	(3)	(4)	(5)	(continued)
<u>10 Year of assessment</u>	<u>Total amount borrowed during year of assessment</u>	<u>Outstanding overdraft at the end of relevant basis year</u>	<u>Total amount not utilised for production of income</u>	<u>Interest charged by banks on outstanding overdrafts</u>	
1958	\$ 225,536/-	\$ 253,992/-	\$ 797,463/-	\$ 2,708/-	
1959	175,420/-	458,949/-	1,206,717/-	29,537/-	
1960	1,531,705/-	2,021,118/-	2,757,104/-	30,463/-	
1961	655,231/-	2,807,906/-	3,560,350/-	131,558/-	
1962	No Borrowings	2,595,735/-	2,903,642/-	216,305/-	
201963	415,274/-	3,224,905/-	3,777,237/-	213,895/-	
1964	2,098,909/-	5,614,073/-	4,495,391/-	319,240/-	
1965	490,743/-	6,338,477/-	5,555,525/-	423,132/-	
1966	No Borrowings	6,283,461/-	6,162,902/-	518,879/-	
1967	- do -	6,444,201/-	6,804,212/-	583,585/-	
1968	37,771/-	5,241,110/-	7,634,140/-	620,978/-	
1969	1,205/-	5,434,476/-	8,335,175/-	479,482/-	
1970	No Borrowings	5,633,376/-	9,127,488/-	510,026/-	
1971	1,206/-	5,317,353/-	9,989,321/-	507,485/-	
1972	19,130/-	5,294,010/-	10,707,684/-	511,069/-	

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As a result of investigations by Encik Sadasivam who has also extracted the relevant figures from the Appellant's books and prepared statements to show the amount of monies borrowed from banks which have not been utilised as capital (exhibit R230), Revenue has therefore disallowed all the interests paid to the banks for the years of assessment from 1958 to 1972 inclusive.

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(xxii) Moneys drawn for private and personal purposes were not debited to

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the Appellant's drawings account, and wages and other expenses were therefore inflated to the extent of those drawings so as to balance the account books kept for income tax purposes. For instance on 7.9.1956 a sum of \$60,020.00 was shown in the Journal cum Cash Book kept for income tax purposes (exhibits R59 and R59T) as received from the bank. The said amount was on the same day sent by telegraphic transfer to one D. Arunasalam of No. 85, Ampang Street, Kuala Lumpur (exhibit R60), but this payment was not shown in the same Journal cum Cash Book nor was Arunasalam's account or the Appellant's drawings account in his books debited with the said amount. Another instance of a withdrawal which was not recorded in the Appellant's books kept for income tax purposes occurred on 12th January, 1952, when he drew a sum of \$40,000.00 from Messrs. Lim, Lim & Oon, Advocates & Solicitors (vide exhibit R40 which is a copy of his client's account with the said lawyers). Revenue discovered, after further investigations, that there were many similar withdrawals for private and personal purposes during subsequent years and Encik Sadasivam has estimated the amount of wages and other expenses inflated as shown in exhibit R233.

(xxiii) The Appellant's activities concerning currency, jewellery, gold articles and other valuables were also investigated and Revenue found that several diamonds and jewellery purchases had not been debited to the Appellant's jewellery account or drawings account for income tax purposes. Thus, for instance, Revenue discovered that the Appellant had bought \$4,800.00 worth of diamonds (exhibit R71) from M/s. Flinter, Grinberg & Co.Ltd. on 28.11.1959 but this purchase was not debited to any of his accounts in his books kept for income tax purposes. A previous purchase of \$1,600.00 worth of diamonds on 24.4.1959 from

the same firm was not so debited too. The Appellant himself admitted under cross-examination that the diamonds for \$94,808.50 and \$42,832.50 referred to in two notes from M/s. Flinter, Grinberg & Co.Ltd. (exhibits R82 and R83) had been bought by him, but he could not explain the source of the funds from which he had withdrawn to pay for those diamonds. The Appellant also admitted that he had bought \$50,000.00 to \$60,000.00 worth of gold in order to make jewellery with some of the diamonds he had bought for his son's wedding and they were all taken to India by his wife and children. Invoices and cheque payments were all checked and amongst the documents found and scrutinised by Revenue were several letters or book pads (exhibits R219, R220, R221, R222, R223, R224, R225 and R226 and translated extracts thereof marked as exhibits R219T and R226T) and a bundle of letters (exhibits R228 and R228T). After investigations and scrutiny of all those documents Encik Sadasivam found that the Appellant had sent jewellery and other valuable goods to India frequently through various people, such as his employees, who were travelling to that country from Malaysia. He noticed that the Appellant's Indian Capital Statement (exhibit A3) did not show that he has retained them in India, and the inference was that he had sold them in that country, where the goods in question were prohibited goods and could be sold at profits of 200% to 300%. He also noticed that large sums of money had also been remitted to India and residents of India who wanted to leave the country for travel abroad could arrange to obtain foreign currency from the Appellant after payment had been made to him or his agents in India. His activities showed that he was carrying on a business of dealing in foreign exchange and of exporting jewellery, gold articles and other valuable goods from Malaysia to India.

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(xxiv) Investigations by Revenue moreover revealed that there was ample evidence in day-to-day transactions to show that money had been remitted to India by the Appellant through channels other than banks and that those remittances have not been recorded in the Appellant's books on which the submitted accounts were based. Examples of such transactions can be seen in photostat extracts from the Appellant's day-to-day transactions book (exhibits R187, R188, R189, R190, R191A to R191D, R192, R193, R194, R195 and R196). The word "Home-shop" mentioned in the exhibits referred to the Appellant's Indian establishments and the figures against each of those entries showed the India rupees equivalent to Malaysian dollars. The remittances which were not recorded in his books from which his returns and submitted accounts were prepared, were, however, recorded in his other books on which his submitted returns and accounts were not based. An example of this was found in a bank voucher (exhibit R198) to show that a sum of \$10,012.50 was sent to one K. Abdul Rahman of Singapore. That transaction was not recorded in the accounts from which his returns were submitted but was recorded in one of the books seized from his premises (extracts thereof produced as exhibit R199). For the year of assessment 1966, investigations revealed that total remittances not declared by the Appellant totalled \$76,062.25 whilst for the year of assessment 1967 total remittances discovered amounted to \$65,828.95.

(xxv) Similar examples of money sent by the Appellant to India were also found recorded in two sets of books seized during raids on his premises. Extracts from those books were produced (exhibits R201A to R201N) and they showed that the remittances by the Appellant were not made at official rates of exchange but had been made at what were called "black market"

10 rates. All those entries were not made in the Appellant's set of books from which his income tax return for the year of assessment 1968 and accounts were prepared. For the year of assessment 1968, Revenue found that the Appellant had not declared remittances totalling \$76,343.85. Further extracts from those seized books (exhibits R202A to R202T) were produced and showed that for the year of assessment 1969 remittances recorded in the seized books amounted to \$52,585.10. In the second set of books seized from the Appellant, all entries marked "No.2 Account" were not declared in his submitted returns and were also not recorded in his books which were kept for income tax purposes. For the year of assessment 1970 entries in a file called "Penang Shop" file (extracts produced as exhibits R203A to R203N) showed that \$74,013.02 had been remitted abroad. Those entries were also not recorded in the Appellant's books which he prepared and kept for income tax purposes.

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(xxvi) As the investigations by Revenue revealed that there was evidence to show that the Appellant was carrying on a business of dealing in foreign exchange and of exporting jewellery, gold articles and other valuable goods from Malaysia to India, Revenue has therefore estimated the Appellant's profits in connection with currency and the export of jewellery, gold articles and other valuables from this country to be as follows :-

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<u>Year of Assessment</u>	<u>Estimated Profits of Export of Gold, Currency and other valuables</u>
1959	\$ 500,000.00
1960	500,000.00
1961	1,000,000.00

In the High Court No.1	<u>Year of . Assessment</u>	<u>Estimated Profits of Export of Gold, Currency and other valuables</u>	
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	1963	500,000.00	
31st December 1975	1964	500,000.00	
(continued)	1965	500,000.00	
	1966	500,000.00	
	1967	750,000.00	10
	1968	500,000.00	
	1969	200,000.00	
	1970	300,000.00	
	1971	200,000.00	
	1972	200,000.00	

(xxvii) Revenue also discovered that the Appellant had omitted to declare as income in his returns interests which he had received from some of the sub-purchasers of fragmented portions of the rubber and other plantations which he had sub-divided and sold. Instances of such interest having been received and recorded in the Appellant's books which were seized from him but not declared in his income tax returns can be seen in extracts of books produced (marked exhibits R134, R134T, R162 and R162T). After investigations an estimate was therefore made of such omitted interests income by Revenue as follows :-

<u>Year of Assessment</u>	<u>Estimate of Interests Income Omitted</u>	
1960	\$10,000.00	
1961	20,000.00	
1962	20,000.00	
1963	20,000.00	
1964	20,000.00	40
1965	20,000.00	

<u>Year of Assessment</u>	<u>Estimate of Interests Income Omitted</u>	In the High Court
1966	\$20,000.00	No.1
1967	20,000.00	Case Stated and annexure thereto
1968	10,000.00	
1969	10,000.00	31st December 1975
1970	10,000.00	
1971	10,000.00	(continued)
1972	10,000.00	

10 (xxviii) For the years of assessment 1962 and 1963, the Appellant paid the Penang Rubber Estate Company Ltd., the Vendor company of Trans-Krian Estate, a sum of \$72,857.00 and \$30,000.00 respectively as penalty payments. He could not pay the instalments in respect of the purchase price on the due date but claimed that penalty payments as deductible expenses for income tax purposes. However, during investigations, Encik Sadasivam came across evidence to show that the money which had been collected by the Appellant from sub-purchasers were remitted by him to India and that was why he was not able to meet his commitment to pay the instalments on the due dates. He had sufficient funds to pay the instalments due to the vendor company but chose to remit those funds to India, and the penalty payments were therefore not wholly and exclusively incurred in connection with his fragmentation business. Those penalty payments were therefore disallowed by Revenue.

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40 (xxix) Juru Estate which had an area of 1989 acres was purchased by the Appellant in 1955 for \$805,050.00 and the major portion of that plantation was re-sold during that year, leaving a portion comprising 627 acres. He continued subsequently to sell portions of that plantation and in some years he claimed losses and for other years he declared a

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profit. During the year of assessment 1970 the Appellant sold the major portion of his stock of Juru Estate and his profit was \$327,064.00. The sales were made in the same manner as the other sales in his fragmentation business, and the proceeds were not received by him from a single transaction but were spread over a period of eight months. The Appellant had claimed that that sum represented capital profits but Revenue assessed the said sum of \$327,064.00 as income of the Appellant from his fragmentation business. During the hearing the Appellant did not pursue with his objections on this issue.

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(xxx) The Appellant published in Malaysia a daily newspaper called the Tamil Malar. He also established a branch office in the State of Singapore to sell that daily and to manage its affairs there. The branch office was a separate establishment and its day to day management was carried on in the State of Singapore. Under the Double Taxation Agreement concluded between the Government of Malaysia and the Government of the Republic of Singapore in 1968, the Singapore establishment is a 'permanent establishment' within the meaning of Article II(m) (ii) therein. The profits of that branch would be assessed in the State of Singapore and any losses would be allowed from the profits of that branch. Therefore, Revenue has correctly disallowed the Appellant's claim to deduct a sum of \$80,896.00 incurred as losses by that branch during the year of assessment 1972.

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(xxxi) During the year of assessment 1972 the Appellant wrote-off in his books two amounts totalling \$675,707.00 standing to the debit of Malayan Times Limited and one V.M. Sundaram. As regards the amount paid to Malayan Times Limited, the Appellant

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had no separate share investment account although he admitted in cross-examination that he had subscribed about \$250,000.00 for shares of that Company and had debited that amount in his books to the account of Malayan Times Limited. A sum of \$260,535.20 was shown as due from the said Malayan Times Limited which is in the hands of a receiver appointed by a bank. In the case of Malayan Times Limited, the amount in question was not a debt but was an investment written-off, whilst the other amount due from V.M. Sundaram was an interest-free loan, which was not in any way connected with the Appellant's planting, fragmentation or money-lending business. Moreover, no legal steps were taken by the Appellant to recover the debt from V.M. Sundaram. In the circumstances, the said two amounts were correctly considered by Revenue as sums not allowable as deductions for income tax purposes.

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(xxxii) There were no appeals for the years of assessment 1963, 1964 and 1965 but the computation of income and tax underassessed for the years of assessment 1953 and 1957 to 1972 prepared by Revenue (exhibit R233) showed that there were no unabsorbed losses for those years to be carried forward to the year of assessment 1966. The Appellant has not shown that the Respondent's said computation to be excessive or erroneous, and has also failed to discharge the onus on him of proving that the assessments raised for the relevant years of assessment against which he has lodged appeals to be excessive or erroneous.

9. The Appellant stated 'inter alia' in evidence that :-

(i) As regards fragmentation profits,

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the price stated in the English agreement was always, except in the case of Glugor Estate, less than that stated in the Tamil 'receipt' by about 5%. But he admitted, after production by his own Counsel of the plan of a fragmented lot of Jawi Krian Estate (exhibits A12, A13 and A14) that the acreage, after survey, of that lot was greater and that he would have received more under the English agreement than under the corresponding Tamil receipt in that case. Another reason for the difference in the price was because the sub-purchasers knew that he had to pay the principal vendor within a stipulated time and they therefore always tried to bring down the agreed price. 10 20

(ii) All sales of fragmented lots have been recorded in his books of accounts maintained by him in his office. Entries were recorded in Tamil by experienced clerks who were supervised by a Manager. The clerks who recorded his books have retired to India and one Somasundaram s/o Karrupiah Pillai and others who held powers of attorney from him previously were also no longer in Malaysia. 30

(iii) Between the years 1952 to 1972 he has had several employees hired on terms of service fixed by his Managers. Most of them have returned to India.. He paid salaries and bonuses as stated in all his returns and they were incurred by him in the production of his income. A summary of salaries and bonuses and wages paid to his staff from 1957 to 1962 can be seen in the statement (exhibit A28) prepared by his Accountants on his instructions. 40

(iv) He did not carry on a business of exporting gold, diamonds, currencies and other valuables because he did not have any licence and did not know how to conduct such business, nor has he assisted friends to 50

conduct such a business because he did not have the time to do so. Sometimes he has taken M\$20.00 to M\$30.00 only to India when he travelled there by air. He has purchased gold and diamonds for the use of his family only. The gold and diamonds which he has taken to India were for his family use and he has also bought a little gold and diamonds for his relatives and friends in India. Neither his forefathers nor his children have ever carried on such a business. Details of jewellery purchased by him during the period 1952 to 1972 can be seen in a statement marked exhibit A31.

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(v) After his hereditary or ancestral properties in India have been transferred to his children's names, he did not pay any Indian income tax. When he was in India his children paid all his expenses and he never spent a single cent of his whenever he was in India.

(vi) He has never dealt in currency, that is, by giving people Malaysian currency here and collecting Indian currency in India although he did not know whether any of his clerks had carried on such business. He has also never exported any other kinds of valuables such as cars, radios, transistors, etc. and has never made any profits from any export business.

(vii) It was not possible for him to have drawn any funds from his bank accounts and to have used them for remittances without having charged to his drawings account.

(viii) For the years of assessment 1962 and 1963 he paid penalty payments of \$72,857.00 and \$30,000.00 respectively to the Penang Rubber Estate Company Limited because he needed extension of time to complete the purchase of Trans-Krian Estate. Those payments were incidental to his fragmentation business and were

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necessary in order to avoid a
larger loss in respect of forfei-
ture of his deposit.

- (ix) In 1971 he had two bad debts totalling
\$675,707.00. One of them was in
respect of a loan of \$415,181.31 to
one V.M. Sundaram which was given in
the course of his business. V.M.
Sundaram gave him post-dated cheques
and interest was chargeable on the 10
loan; but he waived the interest
because the debtor could not pay
back the loan. He has taken steps
to recover that loan as he had tried
to ask the debtor for return of the
money. He has also sent his Manager
there but without any success. He
did not commence any civil proceed-
ings against Sundaram because he 20
would have to spend more money to
recover the debt. He was one of the
seven persons who were guarantors
for Malayan Times Limited for
\$800,000.00 and a sum of \$260,535.20
was part of the sum guaranteed.
- (x) In the case of Juru Estate, he bought
it in 1955/1956. Over the years he
sold part of the plantation and
retained a portion for 13 years after 30
which he sold it because there was
pressure from the United Commercial
Bank Limited for repayment of his
overdraft and outstanding interest.
- (xi) He has paid interest to banks and
a statement (exhibit A29) prepared
by his Accountant shows the amount
of such interest paid by him. The
interest should be deductible from
income for tax purposes as it was 40
incurred in the course of business.
- (xii) All the assessments and additional
assessments of income tax were
excessive and erroneous. His returns
and accounts for the years in question
were correct as the figures therein
were extracted from his books. He
believed his capital statement
(exhibit A3) were also prepared from
his books and his former Accountant,
the late Encik Chari, had told him 50

that they were correct.

We did not accept the above evidence of the Appellant on those points.

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10. (i) The evidence of Encik Sadasivam, the Assistant Director of Inland Revenue (Investigations) was accepted by us. During his cross-examination, Counsel for the Appellant, Encik Lim Ewe Hock, put to him an agreement (exhibit R238) relating to the sale to a sub-purchaser of certain lots of a plantation which the Appellant's wife had bought from an European company. Encik Sadasivam was also referred to a document (exhibit R122) found by Revenue and he confirmed that the figures in ink on the photostat copy of that document (exhibit R123) were written by Revenue officers. Those documents confirm that the sum of \$219,120.00 referred to lot No. 310 of the plantation which was a realistic price for 164 acres. He also confirmed that he had seen many agreements similar to the one produced which did not show the actual sale price of fragmented lots sold by the Appellant to sub-purchasers. He disagreed with a suggestion of Counsel that differences in the prices were due to differences in the area of the lots after survey and considered that his estimates of the Appellant's profits from his fragmentation business, where no records were available, were not rough estimates but were worked out by him after consideration of recorded sales and the Appellant's 'modus operandi' in under-stating his profits from fragmentation. He also disagreed with another suggestion of Counsel that the differences in the sale prices declared and those shown in the books seized by Revenue represented commissions paid to sub-purchasers. He said that he found no evidence to support that suggestion of Counsel and believed that the actual sale prices of fragmented lots

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sold were those shown in the books seized by Revenue officers and examined by him during his investigations into the Appellant's tax affairs.

- (ii) On the question of interests paid to banks, the Assistant Director of Inland Revenue (Investigations) referred to the question of 'interest allocation' as set out in the Appellant's return for the year of assessments 1972 (exhibit R214), and he explained that it was not a fair allocation because it did not take into consideration the fact that most of the money concerned was borrowed from the banks before 1967. The period prior to 1967 must be taken into consideration because it was that period that most of the money was borrowed and was not used in the production of income. He stated that his computation in the statements prepared by him (exhibit R230) regarding interests disallowed was fair because the over-draft interest was paid annually by the Appellant on accumulated balance of money borrowed by him from the banks and not used for the production of income. He stated categorically that his investigations revealed that the Appellant had used funds from his overdrafts for remittances to India and for purposes other than the production of income. He pointed out that the overdrafts were not sources of income and therefore interests on the borrowed money cannot be allowed as a tax deduction. 10
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- (iii) He admitted that his figures for wages and other expenses inflated in exhibit R233 were estimates but explained that he had a basis for arriving at those figures. For instance, for the year of assessment 1958, a sum of \$60,020.00 was withdrawn from the bank and paid to one Arunasalam but the payment was not shown in the cash book or the drawings account of the Appellant. He also found similar items of fictitious 50

10 entries as well as other items which could not be identified in some of the subsequent years, excluding 1960, 1964, 1965, 1971 and 1972 and he therefore examined all items of wages and other expenses which were claimed by the Appellant as tax deductions. After investigations he considered that the figures shown in exhibit R233 were fair estimates of the amounts which should be disallowed. The said sum of \$60,020.00 was claimed during a year when the Appellant's expenditure was not yet very high and he therefore used it as a basis figure for estimates for subsequent years which he considered were reasonable in the circumstances. The Appellant's expenditure had not reached its peak in the year of assessment 1958 and he considered that \$100,000.00 and \$200,000.00 were reasonable estimates of inflated amounts for wages and other items of expenditure in subsequent years when the Appellant's accounts showed that his expenditure for each of the subsequent years had increased until the year of assessment 1972.

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(iv) On his estimates of profits made by the Appellant on export of gold, currency etc., he explained under cross-examination that his estimates were based principally on his study of the copies of letters and other documents seized from the Appellant's premises. He considered that as the Appellant had been frequently sending his plantation labourers and even priests back to India with large quantities of jewellery, articles of gold, radios, cameras, wrist watches and other items of valuable goods, he himself, and members of his family, who had been travelling to India two to four times a year, would have themselves taken at least \$50,000.00 worth of such goods to India on each trip. All the goods taken to India could

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fetch 200% to 300% profit there during the relevant years. On that basis, therefore, he estimated the Appellant's profits from his activities, which amounted to an export trade. He admitted that in the case of the Appellant his estimates was an assumption, but in the case of the Appellant's wife and children there was ample evidence to show that they have taken jewellery, gold articles and other valuable goods to India periodically. The remittance of currency by the Appellant to India was through unauthorised channels. The import of gold and valuable articles such as cameras, films etc. into India was prohibited, but according to the letters seized from the Appellant's premises, the Appellant and his agents somehow managed to get away with most of the imports through the Indian Customs. His estimates of the profits made by the Appellant were based on the facts available and he considered them reasonable and realistic in the circumstances.

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(v) He admitted that there was only evidence to show that the Appellant's Manager, Suppiah Pillai, was not paid his bonus and his driver Ayavoo had not been paid his salary and bonus, but he concluded, after considering the list of sundry creditors shown in exhibit R215, that the other employees had also not been paid bonus during the year of assessment 1958. He also disallowed bonus payment claimed as deduction for all subsequent years, and disagreed with Counsel's suggestion that the normal Indian practice was to pay their employees small salaries and a big bonus each.

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(vi) Finally, he denied a suggestion by Counsel that it was impossible for a person like the Appellant to have a taxable income of \$18,000,000.00 over a period of 17 years.

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11. On the question of fraud or wilful default it was contended on behalf of the Appellant :-

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(i) that fraud or wilful default must be proved for every year which is time-barred, and a high standard of proof is required;

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(ii) that documents tendered must be strictly proved; and

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10 (iii) at the close of the Respondent's case, there was no evidence of fraud or wilful default.

12. It was contended by Counsel for Revenue that :

(i) it was for the Appellant to show that the Director General was erroneous in raising assessments based on fraud or wilful default for the relevant statute-barred years;

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(ii) for the relevant statute-barred years, i.e., for the years of assessment 1953, 1957, 1958 and 1959, there was evidence of fraud based on the Appellant's false returns of income as well as on all those documents found and seized in his premises.

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13. We gave our decision on 24th July, 1975 in the following terms: We found on the evidence adduced, both documentary as well as oral, that there was fraud or wilful default within the meaning of section 69 of the Income Tax Ordinance, 1947, and that the Director General has correctly raised additional assessments on the Appellant for the years of assessment 1953, 1957, 1958 and 1959.

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We also said on that day that as Revenue had discharged its onus of satisfying us that fraud or wilful default had been committed by the Appellant in relation to income tax for the relevant statute-barred years, the Appellant could for those years reply as a matter of right to show that the assessments for the relevant statute-

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barred years were excessive or erroneous. For the other years we repeated our ruling on 22nd July, 1975 that the Appellant could only give evidence in rebuttel if taken by surprise.

14. During cross-examination of the Appellant, Counsel for Revenue did put to him certain documents, i.e. those documents produced by Revenue before exhibit R111 was produced and marked. At the end of the cross-examination of the Appellant, Counsel for Revenue indicated that there were many other documents to be produced but as he did not wish to cross-examine the Appellant on those documents, he would not produce them yet until he called his witness. When Revenue's witness was called to give evidence in chief, Counsel for Revenue then sought to produce the remaining documents which were marked exhibits R111 onwards. The Counsel for Appellant objected to the production and admission of those documents on the ground that they had not been put to the Appellant first during his cross-examination. It was at that stage on 22nd July, 1975 that we over-ruled Counsel for Appellant's objections and admitted all the documents produced by Revenue from exhibits R111 onwards. 10 20

Counsel for Appellant contended that his client had been taken by surprise on all those documents which had not been shown to him during his cross-examination by Counsel for Revenue. He asked for our ruling on that day, i.e. 22.7.1975, as to whether he would be entitled as of right to lead evidence in rebuttal. Counsel for Revenue argued that there was no element of surprise as the documents tendered, apart from those prepared by Revenue, were documents taken from the Appellant himself. We considered the matter and ruled at that stage that the Appellant had, as a matter of law, the right to lead evidence in rebuttal but that the Court would have to be satisfied that, before evidence was adduced on any fact, the Appellant had been taken by surprise on that fact. However, on 31st July, 1975, after the close of the case for the Respondent and after the Court's ruling on the question of fraud or wilful default, Counsel for Appellant informed us that the Appellant had elected not to call any 30 40 50

further evidence in reply to show that the statute-barrèd years of assessments were excessive or erroneous, nor to give any evidence in rebuttal on any fact in relation to assessments for the other years. At that stage we adjourned hearing to 7th August, 1975 to enable Counsel on both sides to prepare their final submissions.

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15. The following cases were cited to us :-

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Halsbury's Statutes Vol.34 at page
1281.

Hillenbrand v. Inland Revenue Commis-
sioners 1966 42 Tax Cases 617.

Staples on Back Duty 8th Edition
pages 85 & 89.

Income Tax Ordinance 1947 S.69.

Income Tax Act 1967 S.91(3)

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The People of the State of New York v.
Heirs of the late John M.Phillips
(1939) 3 A.E.R. at page 955 P.C.

Narayanan Chettiar & Anor. v. Official
Assignee, Rangoon, A.I.R. 1941 P.C.93
at page 95.

Hornal v. Neuberger Products Ltd.
(1957) 1 Q.B. 247 (C.A.) at pp.258,
264, 266-7.

Nederlandsche Handel - Maatschappij
N.V. v. Kok Kim Guan (1959) M.L.J.173
at page 174-5.

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Re Dellow's Will Trust (1964) 1 A.E.R.
771 at page 773.

Tan Chye Chew & Anor. v. Eastern Mining
& Metals Co.Ltd. (1965) 1 M.L.J. 201 (F.C.)
at page 202.

Post Office v. Estuary Radio Ltd. (1967)
1 W.L.R. 1396 (C.A.) at page 1408.

Simon's Income Tax (2nd Ed.) Vol. 1
page 238.

Derry v. Peak (1889) 14 A.C. 337.

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Lord Advocate & McLaren 5 T.C.110

In Re Young & Harston's Contract
(1885) 31 Ch.D.168.

Halsbury's Laws of England 3rd Ed.
Vol. 20 at page 672.

Halsbury's Statutes Vol.34 page
1281 & 1283.

Commissioners of Inland Revenue v.
Hinchy 38 T.C. 625.

Simon's Income Tax (2nd Ed.) Vol.II
pages 22 & 28.

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Amis v. Colls 39 T.C. 148.

C.E.C. v. Comptroller of Income Tax
(1971) 2 M.L.J. 43.

Federal Commissioner of Taxation v.
Clarke 40 C.L.R. 246, 251.

Hudson v. Humbles 42 T.C. 380.

Trautwein v. Federal Commissioner of
Taxation 56 C.L.R. 87.

A.B.C. v. The Comptroller of Income
Tax (1959) 25 M.L.J. 162.

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George v. Federal Commissioner of
Taxation 86 C.L.R. 183.

Guillain v. Commissioner of Income Tax,
Ceylon Tax Cases Vol. 1 361.

Gamini Bus Co.Ltd. v. C.I.T. (1952)
A.C. 571.

Commissioner of Income Tax United and
Central Provinces v. Badridas Ramrai
Shop 64 Indian Appeals 102 @ pages
114 & 115.

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Argosy Co.Ltd. v. Inland Revenue
Commissioner (1971) W.L.R. 514 @ pg.
516.

I.R.C. v. Europa Oil Ltd. (1971) 2
W.L.R. 55 @ pg. 63.

Rosette Franks (King Street) Ltd. v. Dick (H.M. Inspector of Taxes) 36 T.C. 100 @ pg. 108.

In the High Court
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Ganga Ram Balmokandu v. The Commissioner of Income Tax - Punjab II Reports of Income Tax Cases 10.

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Oglive v. Barron 11 T.C. 503, 508.

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Smith Barry v. Cordy (Inspector of Taxes) (1946) 28 T.C. 250 @ page 258.

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I.R.C. v. Incorporated Council of Law Reporting 3 T.C. 105 @ page 133.

J & R. O'Kane & Co. v. I.R.C. (1922) 12 T.C. 303 @ page 347.

Mann v. Nash (H.M. Inspector of Taxes) 16 T.C. 523.

J.P. Harrison (Watford) Ltd. v. Griffiths 40 T.C. 281 @ page 304.

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Commissioners of Inland Revenue v. Livingstone and Others 11 T.C. 538 @ page 542.

I.R.C. v. Fraser 24 T.C. 498 @ page 502.

Pickford v. Quirke (Inspector of Taxes) 13 T.C. 251 @ page 263.

16. It was contended on behalf of the Appellant :-

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(i) that where no notices of additional assessments had been issued for any particular year of assessment, and consequently where there were no notices of appeal to the Special Commissioners, they have no jurisdiction to hear or power to determine any questions relating to the computation of additional income tax for those years, i.e. in this case, for the years of assessment 1963, 1964 and 1965 as shown in exhibit R233;

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(ii) that on the question of fraud or wilful default, the English

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authorities clearly show that the onus is on the Crown. Counsel for Revenue's contention that it was only necessary for Revenue to show a 'prima facie' case of fraud or wilful default should not be accepted and it was wrong and erroneous to find fraud or wilful default before all the evidence was given. The wrong procedure was followed and there was therefore no question of asking Counsel for submissions in the middle of the hearing and then making a final decision whether there was fraud or wilful default. In this case Revenue held back certain documents relating to the statute-barred years until the Assistant Director of Inland Revenue (Investigations) gave evidence and those documents were not put to the Appellant first. The failure to comply with rules of evidence has prejudiced the Appellant who has not had a fair hearing. The Appellant was taken by surprise, especially in the case of documents marked as exhibits R111 onwards and should be allowed to adduce evidence in rebuttal;

- (iii) that some of the appeals were concerned with statute-barred years whilst the other appeals were not statute-barred. The hearing should not have been divided into and treated as two sets of appeals. The procedure followed by the Court was wrong as the Appellant was asked to lead evidence on appeals which were not time-barred and Revenue was asked to give evidence on statute-barred appeals. Subject to Schedule 5 to the Income Tax Act, 1967, the rules of evidence still apply to proceedings before the Special Commissioners. The Court should have considered on whom the substantive onus lay and Revenue should have been asked first to lead evidence;
- (iv) that a high degree of proof was required for fraud, and the standard of proof was not on a balance of

probabilities. The Special Commissioners would have to be satisfied either beyond any reasonable doubt or on a higher degree of probabilities that there was fraud or wilful default;

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- 10 (v) that where fraud is concerned there must be an intention to deceive. As regards wilful default, it is also a question of intention, that is, wilful default means deliberate failure to do something which one has to do;
- 20 (vi) that the proviso to section 69(1) of the Income Tax Ordinance, 1947, is different from the said section itself regarding the question of the method of assessment. For statute-barred years every instance of fraud or wilful default must be proved before the amount of tax lost which was attributable to the fraud or wilful default can be assessed for any particular statute-barred year;
- 30 (vii) that the words 'accruing in or derived from the States of Malaya or received in the States of Malaya' in section 10(1) of the Income Tax Ordinance, 1947, and the words of sections 3 and 4 of the Income Tax Act, 1967, show that Revenue must prove that the Appellant had a chargeable income from the profit of the export of gold, diamonds, etc. Revenue has not submitted evidence of a 'business' or 'trade'. There was no evidence of profit-making, or any scheme for profit or an organisation for buying and selling. The Appellant might have sent funds in the form of gold and diamonds, etc. to India for the purposes of avoiding income accruing here. Gold and diamonds were also not declared in the Indian capital statement because the Appellant wanted to avoid Indian income tax. Even assuming that the Appellant had such a 'trade' or 'business' in India the
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control of such 'trade or 'business'
was in India and the profits were
not assessable to tax here in
Malaysia;

- (viii) that various exhibits from exhibits R111 onwards were tendered by Revenue before they had been put to the Appellant during cross-examination. Although paragraph 19(f) of Schedule 5 to the Income Tax Act, 1967, allows the Special Commissioners to admit or reject any evidence, that is, even to admit documents without proof yet it does not dispense with the rules of evidence, which must be complied with. But then what would be the evidential value of those documents when they have not been put to the Appellant to say whether they belonged to him or not? Revenue's case of fraud was therefore based on documents which have not been admitted by the Appellant. The documents concerned might have been found in the Appellant's premises, but there was no evidence to show that they belonged to the Appellant; 10 20
- (ix) that for the period which is not statute-barred, the onus on the Appellant is merely to show on the balance of probabilities that the assessments were either erroneous or excessive. Even if he has not discharged the onus on him, the Court need not accept Revenue's computation. The meaning of the words 'according to his judgement' in section 69 of the Income Tax Ordinance, 1947, and the words 'according to the best of his judgement' in section 91(1) of the Income Act 1967, did not mean 'capriciously', 'vindictively' or 'dishonestly'. The evidence that had been led on the question of profit on export of gold, diamonds, etc. consists of various letters, some of which were put to him whereas others were not. There was no evidence where the documents were found, and there was no attempt by Revenue to find out what kind of 30 40 50

gold chains were sent to India. Although there was evidence that gold and diamonds have been sent to India, there was no evidence of their actual value. There was also no evidence to show that the Appellant's wife, children and employees took gold or diamonds to India. Encik Sadasivam could not even work out the amount of gold which had been exported. Therefore, the figures for the profit on the export of gold, diamonds, etc. are excessive and highly inflated. No outgoings too were taken into consideration;

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- (x) that the figures estimated for wages and other expenses are also excessive and capricious and should be reduced except that for the year of assessment 1958. It all depends on whether the Court accepted the credibility of Encik Sadasivam and it is for the Court to decide whether it would accept Revenue's evidence.

17. It was contended on behalf of the Director General of Inland Revenue that :-

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- (i) paragraph 13 of Schedule 5 to the Income Tax Act, 1967, provides that the onus was on the Appellant to prove that an assessment is excessive or erroneous. Once an assessment has been made there arises a rebuttable presumption that the assessment was regularly made and the onus of displacing that presumption lies on the assessee. In this case, additional assessments have been raised beyond the twelve year period under the proviso to section 69(1) of the Income Tax Ordinance, 1947. The onus was still on the Appellant to show that the assessments are excessive or erroneous and never shifts to Revenue even for those statute-barred years of assessment. If the Legislature had intended the onus to shift to Revenue for the statute-barred years of assessment,

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it would not have included the said paragraph 13 of Schedule 5 to the Income Tax Act, 1967. There was therefore no need to resort to the English authorities as the law in Malaysia on this point is clear. The Director-General was empowered under the said Section 69 to raise additional assessments where it appeared to him from evidence discovered that the accounts submitted by a taxpayer were inaccurate or false. It was sufficient for Revenue to discover just one omission to entitle the Director General to raise additional assessments for all the years concerned. It was enough if there was a 'prima facie' case of fraud or wilful default, but in these appeals Revenue has shown not just one but many omissions. In fact there was no need for the Special Commissioners to consider whether there was fraud or wilful default for it must be presumed that the Director General, as a person holding public office, has acted in good faith and on good and valid grounds; rather it was for the Appellant to show that he has not committed any fraud or wilful default;

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(ii) the Appellant must show not only that the assessments were excessive or erroneous but he must also show positively what must be done to correct them. It was not sufficient for the Appellant to conveniently lose his memory or his books or to fail to keep or produce proper books and he must therefore accept the consequences;

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(iii) all the documents tendered, except those prepared by Revenue, have been seized from the Appellant's premises in Bukit Mertajam or Penang. A list of his documents seized had also been supplied to him. His lawyers and accountants have also visited the Income Tax Department many times before the hearing and copies of the relevant documents tendered have been supplied to them.

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There are no provisions in Schedule 5 of the Income Tax Act, 1967, to say that documents taken from the Appellant's premises must be shown to him either before or during the hearing. In the case of Gamini Bus Company v. Income Tax Commissioner, Colombo (1952) A.C. 517, 519 the Privy Council has held that when a document was tendered containing figures to illustrate and confirm the ratio of profits to expenditure on petrol and oil of other bus companies (though they could not be scrutinised before hand and checked by the Appellant company) there was no breach of the principles of fair play and natural justice. In this case, however, Revenue, apart from documents prepared by the Income Tax Department, has only produced the Appellant's own documents which were seized from his premises. The Appellant should therefore not be allowed to lead evidence in rebuttal;

(iv) during examination-in-chief the Appellant has stated that his books and returns were correct, but during his cross-examination he gradually contradicted himself and his capital statement and admitted that his accounts were incorrect. The Court has observed his demeanour and conduct during cross-examination and have seen how the Appellant always avoided giving straight answers. The Appellant was not a witness of truth and his evidence should be treated with suspicion and disregarded especially in view of the contradictions. In tax matters, a taxpayer alone knows his own affairs best, but Appellant, when he claimed that he had no knowledge of his own tax affairs, was lying. When it was advantageous to him he could remember his affairs, but otherwise he would simply say he could not remember anything. A good example was when he could remember the toys presented to him in 1953 when he left Malaysia on a visit to India, but he denied that he could

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remember the purchase of about
\$90,000.00 worth of jewellery in
1960. Again, the Appellant appeared
not interested in answering questions
seriously at times. Thus when asked
under cross-examination what the
words 'twenty-eight' in a telegram
(exhibit R66), which was seized from
his premises, stood for, he non-
chalantly replied that they meant
'twenty-eight rupees' which was less
than the cost of the telegram itself!
With his evidence disregarded and
rejected the Appellant has failed to
discharge the onus on him of proving
that any or all of the assessments
were either excessive or erroneous;

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- (v) the Director General is empowered
under section 69 of the Income Tax
Ordinance, 1947 to raise assessment
'according to his judgment' or under
section 91 of the Income Tax Act,
1967, to make an assessment or
additional assessment 'according to
the best of the Director General's
judgment'. Those words meant that he
must not act dishonestly or vindic-
tively or capriciously, because he
must exercise judgment in the matter.
He must make what he honestly believed
to be a fair estimate of the proper
figure of assessment. Even if there
were no books available and Revenue
could not find any basis to raise
assessment, the Director General
could still raise additional assess-
ment against the taxpayer. In this
case, some of the Appellant's books
could be found and were seized from
his premises but where no books or
insufficient records were found
Revenue could of necessity only make
estimates of the Appellant's income
after an intelligent analysis of the
information available. Revenue in
this case has shown the Appellant's
books kept for Income tax purposes
were false and inaccurate and that
only some of the genuine records
were recovered. In the case of
profit on export of gold, currency,
etc., Revenue could find no records

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except for the evidence in the numerous letters found and seized to show that large amounts of gold, diamonds and other valuable goods had been taken to India. In view of the frequency of the transactions, the estimated figures appeared realistic. Moreover, the profit figures from his fragmentation business showed how much liquid funds the Appellant had to purchase those articles for export to India. The goods in India fetched about 200 to 300 per cent profit and the Assistant Director of Inland Revenue (Investigations) adopted comparatively conservative figures for his estimate. The Special Commissioners have no powers to reduce Revenue's estimates, unless there were other and better evidence for their consideration. But the Appellant has made no attempt to produce evidence to show that the figures in the assessments were excessive or erroneous. The authorities such as the cases of Rosette Franks (King Street Limited) v. Dick (Inspector of Taxes) 36 T.C. 100, 108 and Ganga Ram Balmokandu v. C.I.T. Punjab II Reports of Income Tax Cases 10 showed that from one proved or admitted incident of suppression or omission of income Revenue is entitled to infer that there were other similar incidents. It might appear that the Appellant would suffer hardship, but if he chose not to submit accurate accounts or failed to make a true and full disclosure or endeavoured by fraud or wilful default to escape liability because his income cannot be determined due to the lack of records, then he cannot complain if the law takes its course and estimated assessments have been made on him by Revenue;

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- (vi) the penalty payment of \$72,857.00 to the vendor company of Trans-Krian Estate during the year of assessment 1962 was disallowed as a tax deduction because investigations by Revenue have revealed that money collected from sub-purchasers of fragmented lots of that plantation had been remitted by

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the Appellant to India through a money-lender. That was why he did not have enough money to pay the vendor company. When a taxpayer has sufficient funds but chose to remit those funds out of the country then in those circumstances any penalty paid to him for failures to carry out a contractual business obligation here should not be allowed as a deductible tax allowance; 10

(vii) even the large amounts of tax deductions claimed as interests paid to banks should be disallowed because the Appellant's business did not generate any surplus and he borrowed large sums of money from the banks for purposes other than for the production of income. Large sums of money were in fact remitted to India and equally large sums of money were given as gifts to his children, relatives and even to his friends. Money was also used for purchase of jewellery, gold articles and other valuable goods which did not produce any income for the Appellant's business in this country. The Assistant Director of Inland Revenue (Investigations) has shown in exhibit R230 the amount of money borrowed from banks which was not employed by the Appellant as capital for the production of income during the years of assessment 1957 to 1971. Counsel for the Appellant never cross-examined Revenue's witness on exhibit R230 and his evidence on this has been accepted without challenge; 20 30

(viii) although there were no appeals for the years of assessment 1963, 1964 and 1965 the profits of the Appellant from short-term money lending for those years should be taken into account in considering whether the Appellant had a chargeable income for the years of assessment 1966. It will be noticed from exhibit R233 that the Appellant had originally claimed to have suffered losses during those years as well as during the year of 40 50

assessment 1966;

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10 (ix) the Singapore Tamil Malar newspaper enterprise was registered in Singapore and it was carried out as a separate business there in a branch office. In the course of hearing no further evidence was adduced by the Appellant on this item. The losses were incurred in the year of assessment 1972 when our Income Tax Act, 1967, provided for taxation of income from wherever derived. But the Double Taxation Agreement concluded between the Government of Malaysia and the Government of the Republic of Singapore in 1968 provided that the branch there is a 'permanent establishment' within the meaning of Article II(m)(ii) therein. The profits of that branch would be taxed in Singapore and any losses would be allowed as deductions from the profits of that branch;

20 (x) the Appellant has claimed that a sum of \$675,707.00 should be written-off as bad debts for the year of assessment 1972. The said sum related to a payment of \$415,171.81 to Malayan Times Limited and another payment of \$260,535.20 to one V.M. Sundaram. Both payments have been disallowed as tax deductions as they were not bad debts. The said payment to Malayan Times Limited was an investment in the capital of Malayan Times Limited and there was no evidence to show that it was a loan related to the Appellant's business. The payment to V.M.Sundaram was an interest-free loan which did not appear in the Appellant's books. No steps were taken to recover it and there was no evidence to show that it was a debt within the meaning of section 34(2) of the Income Tax Act, 1967;

30 40 50 (xi) (a) the word 'business' is not defined in the Income Tax Ordinance 1947, but the Income Tax Act, 1967, defines it to include trade and every manufacture, adventure or

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concern in the nature of trade,
.....". The word 'trade' is not
defined in either the said Ordinance
or the said Act and therefore the
ordinary meaning of the word should
be adopted. It is a question of
fact in each case for the Court to
decide whether there was a trade
carried on by the taxpayer. It has
been decided that intention to make 10
a profit was one element to be
considered for the question as to
whether or not there was a trade. The
test of trading is an objective one,
and although Revenue has considered
that the Appellant's activities
regarding the export of gold, currency,
diamonds and other valuables to India
were illegal, yet the profits of such
activities, which amounted to trading, 20
were taxable. It has been held that
the frequency of the transactions was
to be considered to decide whether
there was a trade and the profits
therefrom therefore taxable. In this
case there was more than sufficient
evidence as well as the Appellant's
own admissions to indicate that he
had been buying gold articles and
diamonds and had also been remitting 30
money out of this country to India,
not only through the banks but also
through unauthorised currency dealers.
The Appellant cannot therefore rebut
the obvious inference that he had
been exporting gold, diamonds and
other valuable goods to India and had
also indulged in unauthorised dealings
in currencies. A person who has sent
money to India through channels other 40
than the banks would have benefitted
tremendously from such illegal trans-
actions because of the very favourable
rate of exchange in the 'black market';

(b) as regards the evidence of the
Appellant's activities concerning
gold, diamonds and other valuables,
there was, for instance, his purchase
of 800 pieces of diamonds for about
\$90,000.00. The Appellant had 50
admitted buying 200 sovereign weight
of gold costing fifty to sixty thousand
dollars, but his Indian capital

statement (exhibit A3) did not show that he has retained most of those articles sent by him to India. From whatever evidence which is available to Revenue and to the Court, there is no doubt that the amount of gold articles, diamonds and other valuable goods such as motor cars, radios, watches, refrigerators, cameras, etc. taken to India was unbelievably high and the obvious inference was that the Appellant never intended to keep them. There was in fact a letter (exhibit R223) which refers to settlement of accounts with someone. All the goods taken to India were prohibited goods there and could have been easily sold for profits of 200% to 300% in that country;

(c) evidence has been adduced to show that large sums of money have been remitted to India. Those remittances were not recorded in the Appellant's books which he kept for income tax purposes. He has admitted that he had maintained a book called 'Remittances Book', but denied that entries in the middle portion of that book were records of his own remittances. An example of one of his remittances recorded in his day to day cash transaction book, which was found and seized in his premises, can be seen in the extract of the books produced (marked exhibit R189). The Assistant Director of Inland Revenue (Investigations) has stated on oath that his investigations revealed that 'Shahul Hamid' referred to in that exhibit was a money-lender (exhibit R196). In exhibit R188, there is an entry dated 15.8.1964 to show that 50,000 rupees had been remitted through one Salam. In exhibit R193, there is recorded a sum of 12,500 rupees paid to one client Klang S.O. Arjunan for remittances and in exhibit R192 there is an entry of 15,000 rupees having been remitted through one Klang Subbiah Chettiar. Another good example of remittances is seen in the telegram marked exhibit R66 which reads

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"Received Twenty-Eight Nobody
Contacted Stop Advise Urgently
Senthamil". When cross-examined
about the meaning of the words 'twenty-
eight' the Appellant gave a ridiculous
answer that the words meant 'twenty-
eight rupees' which was less than the
cost of the telegram itself. The
'twenty-eight' would refer to 28
lakhs; otherwise why should the sender 10
of the telegram sound so panicky and
asked for advice urgently? The amount
borrowed during the year of assess-
ment 1964 was \$2,098,909.00 but the
amount which the Appellant apparently
used for purposes other than in the
production of income in this country
was only \$398,914.00. If the latter
amount was deducted from the former,
the balance would be \$1,699,995.00 20
which was approximately 28 lakhs
converted at the 'black market' rate
of exchange prevailing at that time.
The Appellant was asked to show that
sum in his books but was unable to do
so. There were frequent remittance to
India through illegal channels and
this fact was apparent from the
Appellant's letters which were seized
from his premises. There was, for 30
instance, evidence in a letter dated
8.3.1961 (exhibit R221T) to show that
money was also given to someone in
Malaysia and rupees was collected from
him in India. The Appellant did not
adduce evidence to show how much Indian
rupees were collected, but he or his
agents would have collected a sum in
India which exceeded that allowed at
the official rate of exchange. There 40
was also evidence to show that US
dollars were remitted abroad on behalf
of an Indian resident called Karunakar
who paid the Appellant with rupees
in India. 'Black market' operations
in currencies were risky and yet the
Appellant indulged in them for a long
time at the risk of being prosecuted
because of the handsome profits to be
made from such operations. The profits 50
of his illegal trade was nevertheless
chargeable to income tax in Malaysia
because all the arrangements were made
here and the money and other valuable

goods were also all exported by him from this country;

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- (xii) the 'modus operandi' used by the Appellant in his fragmentation business can be gathered from the evidence adduced. The evidence showed that the amounts he collected from the sub-purchasers always far exceeded the amounts which he paid for the plantations. In some cases the Appellant totally omitted to declare his profits and in other cases he underdeclared his profits. A good example where the Appellant has totally omitted to declare his profits was the case of the purchase and re-sale of Wellesley Estate in 1953. When asked why he had not declared the profits, he said 'inter alia' that he need not disclose them to Revenue because the plantation had been bought and re-sold by his wife whilst he was still a declared bankrupt. The Appellant's argument was without foundation because of section 47 of the Income Tax Ordinance, 1947, and although the Appellant's wife used to visit India frequently there was absolutely no evidence to show that she was not living with the Appellant. In his evidence, the Assistant Director of Inland Revenue (Investigations) stated that he discovered that the Appellant had been maintaining two to three sets of books, one of which was kept for income tax purposes. Revenue has shown that the Appellant's books were false and his returns which were based on those books were also false. There was therefore a basis for the Director General to raise the additional assessments for the statute-barred years;
- (xiii) the word 'attributable' in the proviso to section 69 of the Income Tax Ordinance, 1947, is not defined and its ordinary dictionary meaning should be accepted. According to the Oxford dictionary, it means 'refers to' and it does not mean 'calculable' and is not a word to denote a mathematical calculation. Therefore it is not necessary for the Director General to calculate the actual

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amount of tax lost due to fraud or wilful default. All that the proviso means is that as long as there was fraud or wilful default having been committed by the Appellant, the Director General may raise additional assessments for tax lost which were attributable to that fraud or wilful default.

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18. We, the Special Commissioners who heard appeals, gave our decision in a Deciding Order on 27th September, 1975, a copy of which is attached herewith and marked Annexure 'A', and in accordance with paragraph 37(a) of Schedule 5 of the Income Tax Act, 1967, which requires us to give the grounds of our decision, would state as follows :- 10

(i) We have examined all the facts and the evidence carefully in the light of the legal meaning of the words 'fraud' which has been attached to the word for income tax purposes, as shown in the case of Lord Advocate v. McLaren (1905) 5 T.C. 110 and in the other cases cited to us by Counsel. Although Counsel for Revenue had indicated that he was relying on fraud alone to show that the Director General was entitled to raise assessments for the time-barred years, yet we also considered whether 'wilful default' had been committed too. In ascertaining the meaning of 'wilful default', we were guided by the following dictum of Lord Justice Bowen in In re York and Harston's Contract (1885) 31 Ch.D. 168 where he said: 20

"default is a purely relative term, which is like negligence. It means nothing more, nothing less than in doing what is reasonable under the circumstances - not doing something which you ought to do having regard to the relations which you occupy towards the other persons interested in the transactions". 40

His Lordship went on to say that

'wilful' generally implies nothing blameable,

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"but merely that the person, of whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will".

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We considered that the action of the Appellant in submitting false returns to the Income Tax authorities, which had either failed entirely to disclose profits from his fragmentation business, as in the case of Wellesley Estate for the year of assessment 1953 or had under-stated profits as in the case of those estates fragmented and sold in the years of assessment 1953, 1957,

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1959 and 1960 were acts which were certainly not reasonable under the circumstances and in not filing true and correct returns to the Income Tax authorities, which he ought to have done, the Appellant has not only committed wilful default but has also committed fraud within the meaning of section 69(1) of the Income Tax Ordinance, 1947, for each of the time-barred years of assessment which were the subject of appeals before us. In addition to the false returns, there was also evidence that the Appellant had maintained more than one set of books for recording his business transactions. The accounts submitted with his returns to Income Tax Department were prepared from one set of books whilst the

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other books were maintained for the Appellant's own use and information and were only discovered and seized when his premises in Bukit Mertajam and Penang were raided by Inland Revenue authorities. In the books kept for income tax purposes, there were many omissions and under-statements of income received and failures to record drawings for personal and private purposes resulting in over-statements of his business expenses. The set of books with false accounts

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kept for income tax purposes and the false returns showed that the Appellant had the intention to deceive and we therefore found on the evidence that fraud and wilful default had been committed, that Revenue had established its case and that the Director General had validly raised additional assessments on the Appellant for the time-barred years of assessment 1953, 1957, 1958 and 1959. They were assessments validly raised on the Appellant for the purpose of making good the loss of tax attributable to fraud or wilful default and were therefore assessments that could be made at any time beyond the statutory period.

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- (ii) On the question of the onus of proof where time-barred assessments have been raised on the grounds of fraud or wilful default, we are aware of the facts in the case of Amis v. Colls 39 T.C. 148 where the U.K. Inspector of Taxes had accepted that in the circumstances it was for him to satisfy the Commissioners that fraud or wilful default had been committed by or on behalf of the Appellant in relation to income tax for the statute-barred years in question. We were also aware of the following dictum of Cross J. in that case where he indicated the procedure that could be adopted and said :

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"It is clear that the onus of establishing that a case falls within the meaning of that proviso (to section 47 of the U.K. Income Tax Act, 1952) lies on the Crown, and the Inspector representing the Crown on the appeal could have taken one of two courses. He could, if he had liked, have opened his whole case on all the years, calling all his evidence as though the onus was on him to support all the additional assessments. Alternatively, he could first call such evidence as he though fit to establish fraud or

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wilful default which he was alleging in connection with the first five years, and could then ask the Commissioners to decide whether he had made out his case on that point. If they decided that point against him then those years could be struck out altogether and the matter would proceed on the other years....".

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In this case Counsel for Revenue did not choose either of the two possible courses indicated in the above-quoted English case. We have stated in paragraph 2 above the stand taken by both Counsel and that after hearing arguments and considering the matter and bearing in mind the words of Lord Widgery C.J. in Reg. v. Special Commissioners (ex-parte Martin) 48 T.C. 1, at page 7 where he said :

"It is very important that the procedure before the Commissioners should be kept flexible to deal with widely varying types of cases which come before them, and Cross J. in Amis v. Colls (1960) 39 T.C. 148 has given useful guidance as to various alternative ways in which the procedure can be adopted to suit a particular case." ,

we decided that paragraph 22 of Schedule 5 of the Income Tax Act, 1967, in the absence of any rules made under section 154 (1)(d) of the said Act, empowered us to regulate the procedure of the hearing. We therefore ruled that as the substantive onus of proving that the assessments for the years of assessment 1960 to 1972 were either excessive or erroneous was on the Appellant, he should begin and lead evidence first. When Revenue adduced evidence in reply it should then in the circumstances also discharge its onus of proving fraud or wilful default in respect of the statute-barred years of

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assessment, i.e., for years of
assessment 1953, 1957, 1958 and
1959 before the Appellant could be
called upon to discharge the onus
of proving that those statute-barred
assessments were excessive or
erroneous. However, when the Appell-
ant began, he adduced evidence not
only in respect of the years of
assessment 1960 to 1972, but he
also gave evidence in respect of the
statute-barred assessments. 10

(iii) As regards the standard of proof,
we were aware of the contention of
the Counsel for the Appellant
taxpayer in the said case of Anis v.
Colls 39 T.C. 148, 163, that the
proper standard was not satisfaction
on the balance of probabilities, as 20
is the normal test in civil proceed-
ings, but satisfaction beyond reason-
able doubt, the test in criminal
cases. We respectfully followed Cross
J. in that case and accepted that we
had to be satisfied beyond reasonable
doubt that fraud or wilful default
had been committed by the Appellant
before he could be asked to discharge
the onus of proving the statute-barred
assessments to be excessive or 30
erroneous. On the evidence adduced
before us, we, after hearing arguments
of Counsel at the end of Revenue's
case, were satisfied beyond reasonable
doubt that the Appellant had committed
fraud or wilful default during the
relevant statute-barred years of
assessment and therefore asked him to
discharge his onus of proving that
those statute-barred assessments were 40
excessive or erroneous. As we have
stated in paragraph 14 above, the
Appellant elected not to call any
further evidence in answer to the
statute-barred assessments and we
therefore found in the circumstances
that the Appellant had failed to
discharge the onus on him of proving
that the statute-barred assessments
raised for the years of assessment 50
1953, 1957, 1958 and 1959 were exces-
sive or erroneous after Revenue had

discharged its onus of proving fraud or wilful default for those years of assessment in question.

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(iv) Another point raised by Counsel for Appellant was the question of the method of assessment for the time-barred years of assessment. He referred to the wording of section 69(1) of the Income Tax Ordinance, 1947, as well as to its proviso and submitted that because of the difference in the words used by the Legislature, therefore, in the case of time-barred assessments, Revenue must prove fraud or wilful default in every case and that the words 'attributable to' meant that the actual amount of tax lost as a result of such fraud or wilful default must be proved. We rejected that contention of Counsel and respectfully guided ourselves with the following dictum of Stamp L.J. in the U.K. Court of Appeal case of Knight v. Commissioner of Inland Revenue 49 T.C. 179 at page 213 where His Lordship said in reference to the words 'loss of tax attributable to fraud or wilful default' appearing in the proviso to section 229(3) of the U.K. Income Tax Act, 1952,

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"What is spoken of is assessments.....for the purposes of making good to the Crown any loss of tax attributable, etc., and we accepted Mr. Medd's submission that this means that the assessment may be made for the purpose of assessing to tax the income which had not been taxed as the result of the taxpayer having failed in his duty to make a return or a correct return and being tax which would have been assessed and become payable if he had made the returns he should have made.",

and we were therefore of the view that

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for the statute-barred assessments,
so long as Revenue could satisfy
us beyond reasonable doubt that
fraud or wilful default had been
committed during the relevant years
then the Director General could
proceed to assess the tax lost due
to fraud or wilful default according
to his best judgment without having
to prove mathematically the exact
amount of tax which was lost.

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- (v) Bearing in mind that there was no
onus on Revenue to prove that the
assessments were not excessive or
erroneous (see C.E.C. v. Commis-
sioner of Income Tax (1971) 2 M.L.J.
43; F.C.T. v. Clarks (1927) 40 C.L.R.
246), and that the documents concerned
were seized in the Appellant's
premises, we did not agree with
Counsel for Appellant's objections
that all the documents marked
exhibit R111 onwards which had not
been put to the Appellant during his
cross-examination by Counsel for the
Revenue were not admissible. We
noted his contention that documents
must be proved, but also bearing in
mind the agreement of both parties
and their Counsel at the commencement
of hearing that in order to save time
copies of documents with only
relevant portions translated into
English, where necessary, could be
produced without strict proof, we
considered that all those documents
from exhibit R111 onwards could be
admitted as evidence. We, however,
accepted Counsel for Appellant's
contention that we should consider
whether those documents marked exhibit
R111 onwards, which had not been put
to the Appellant during his cross-
examination should, in spite of
paragraph 19(f) of Schedule 5 to the
Income Tax Act, 1967, be given less
weight than those documents which
the Appellant had admitted under
cross-examination to be his documents.
- (vi) We also accepted Counsel's contention
that the onus on the Appellant was
merely to show on the balance of

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probabilities that the assessments were excessive or erroneous and that even if he has failed to discharge that onus, we need not necessarily accept Revenue's computation of the Appellant's income and tax payable by him as shown in exhibit R233. We did not think that there could be any arguments or doubts, on the authorities, that the words 'according to his judgment' mean that the Director General in raising assessments must not act capriciously, vindictively or dishonestly. However, we were satisfied after hearing the explanation of Encik Sadasivam that Revenue had in the circumstances of the case used a reasonable and conservative basis for estimates in assessing the Appellant's taxable income. We were satisfied that where records were available, Revenue had used the actual figures recorded in the Appellant's genuine books which were found and seized in his premises. Where records were not available, Revenue had, as it was legally entitled to do so, made estimates of the Appellant's income after studying and analysing relevant available records of the Appellant for the years of assessment in question. Encik Sadasivam denied under cross-examination that the estimates were dishonest or highly-inflated and we had no good and satisfactory reasons to think that or to reduce Revenue's estimates as shown in exhibit R233, which the Appellant on whom the onus lies, had failed to show were excessive or erroneous. The Appellant had also not shown positively what must be done to justify us in amending or correcting the figures of Revenue's estimates of his income and tax payable as shown in the said exhibit R233 (see Trautwein v. F.C.T. 56 C.L.R. 63; Haythornthwaite and Sons Limited v. Kelly (1927) 11 T.C. 657, 667; Guillain v. Commissioner of Income Tax (1949) Ceylon Tax Cases 361).

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- (vii) After listening to the Appellant for five days in examination-in-chief and another five days under cross-examination and after observing his demeanour throughout the hearing we had no difficulty in finding that he was not a witness of truth. There were far too many instances when he contradicted himself and had been shown to be untruthful and we considered that we need only refer to a few of the flagrant examples of lying by the Appellant. Thus :
- (a) Under cross-examination by Counsel for Revenue, the Appellant stated that he had never sent diamonds and jewellery to India through other people. But the extracts of letters dated 19.12.1959, 30.12.1959 and 21.2.1960 from the Appellant to his wife which are mentioned in exhibits R219 and R219T showed that he had in fact sent such articles to his wife, who was then in India, through various people. 20
- (b) The Appellant, in answer to a question by one of the Special Commissioners, told us on 2.7.1975 that he was not a taxpayer in India in his individual capacity. Even when Counsel for Revenue put to him a letter dated 18.9.1967 (exhibit R58) from the Income Tax Office, Karakudi, India, to him about payment of his income tax there he still maintained that the tax referred to in that letter was not his income tax. However, on 9.7.1975, he admitted that he was a taxpayer in India and stated during his re-examination that he had appealed against the assessment referred to in exhibit R58 and that as a result of the appeal various amendments were made to the said assessment on the grounds that he was not a resident in India. He produced 40 50

the judgment of the Indian Appellant Assistant Commissioner (exhibit A108) which confirmed that he was a taxpayer in India for the years 1960, 1961 and 1962.

In the High Court

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Case Stated and annexure thereto

31st December 1975

(continued)

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(c) When a statement of account in Tamil (exhibits R42 and R42T) was put to him and he was asked whether, amongst other people mentioned therein, he knew one Salam, the Appellant denied that he knew such a man. But a scrutiny of exhibit R42 as well as an extract from his genuine day to day cash book (exhibit R203) clearly showed that he had often remitted money abroad through that person.

20

(d) When he produced a statement of jewellery purchased by him during the years 1952 to 1972 (exhibit A31) he told us that that was all the jewellery he had purchased during the relevant period. But later on when confronted with the invoices referred to in paragraph 8 (xxiii) above, he admitted having purchased the jewellery referred to therein, and those jewellery have not been included in his said statement.

30

(viii) There were also numerous examples of omissions and under-statements of income in the Appellant's books kept for income tax purposes and apart from those stated previously we think we need only give a few examples here to show why we found that those books did not disclose a full and accurate account of the Appellant's income liable to income tax in Malaysia, thus :

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(a) when the Appellant went to India by ship in September, 1952 he took with him two bundles and five cases of goods all occupying 120.2 cubic feet of space as shown

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High Court

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(continued)

in exhibit R36. A statement of account marked exhibit R37 found by Revenue when they raided the Appellant's premises in August, 1972 showed that voyage expenses and cost of goods amounted to \$11,877.91 and this amount was not shown in his drawings account in the books kept for income tax purposes;10

- (b) on 12th January, 1952, the Appellant drew a sum of \$40,000.00 from Messrs. Lim, Lim & Oon, Advocates & Solicitors as shown in exhibit R40 which is a copy of the Appellant's clients account with the said lawyers. This withdrawal was however not recorded in the Appellant's books kept for income tax purposes; 20
- (c) an amount of \$4,800.00 paid by the Appellant and acknowledged by M/s. Flinter, Grinberg & Co. Ltd., vide their receipt No.3884 dated 28.11.1959 (exhibit R71) was not shown in his books kept for income tax purposes. Similarly, an amount of \$1,600.00 paid by him to the same company (exhibit R72) was also not shown in the said books; 30
- (d) the Appellant admitted that he had bought \$42,832.00 worth of diamonds (exhibit R83), but this purchase was however also not recorded in the account books kept for income tax purposes;
- (e) the Appellant sold part of Merah Estate to one Ung Ui Long for \$44,800.00 as shown by the copy of a receipt issued by the former (exhibit R112). The Appellant showed an amount of \$23,800.00 only in his accounts submitted to Revenue as the sale price of the relevant portion of the said estate. There was therefore an understatement of income by \$21,000.00. 40

(ix) From the facts found and stated by us in paragraph 8 (iii) to paragraph 8 (xii), it was obvious that the Appellant had throughout the relevant years of assessment under-stated and/or omitted to declare his profits from his fragmentation business. There were many cases where Revenue found sufficient genuine records, which after comparison with his other records kept for income tax purposes, enabled them to calculate the amount of under-stated or omitted profits. But where no genuine records or insufficient genuine records could be found, Revenue has, after studying and analysing available records, estimated the amount of omitted or under-stated profits, and the Appellant has not shown that Revenue's estimates were excessive or erroneous. We therefore saw no reason to amend the relevant figures shown in the Revenue's computation marked as exhibit R233.

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(continued)

(x) The facts found concerning the item on bonus and salaries have been stated in paragraph 8 (xiii) and paragraph 8(xiv) above. Encik Sadasivam, after investigations, therefore, decided that those claims should be disallowed not only for the year of assessment 1958 but also for the years of assessment 1959, 1960, 1961 and 1962. The Appellant has not satisfied us that Revenue's decision was wrong on this matter.

(xi) We agreed with Counsel for Revenue that the penalty payment of \$72,857.00 by the Appellant to Penang Rubber Estate Company Limited, the vendor company of Trans-Krian Estate was not an expense wholly and exclusively incurred by the Appellant in his fragmentation business because there was evidence to show that he had collected funds from sub-purchasers of fragmented lots of that plantation but had remitted those funds to India instead of using the money to pay the vendor company for that plantation within

In the
High Court

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1975

(continued)

the stipulated time. We also agreed with Revenue's contention that interest paid to banks for money borrowed on overdraft during the relevant years should be disallowed as tax deductions because the interest was also not an expense wholly and exclusively incurred in the production of the Appellant's income but was incurred because he had utilised the money for purposes other than in the production of income, such as remittances to India, donations to unapproved charities, payments of life insurance premia, acquisition of non-income producing properties, renovations to his private residence at No.216-B McAlister Road, purchase of jewellery and gold articles and for loans which were not made in the course of his business. 10 20

(xii) It was clear from the evidence that the Appellant had drawn monies for his private and personal purposes which were not debited to his drawings account and wages and other expenses had therefore to be inflated to the extent of those drawings so as to balance his account books kept for income tax purposes. An example of such a drawing has already been stated in paragraph 8(xxii) above. The Assistant Director of Inland Revenue (Investigations) stated that he found there were similar withdrawals for private and personal purposes during subsequent years and he had therefore estimated the amount of wages and other expenses inflated as shown in exhibit R233. Apart from Counsel for Appellant's contention that the figures estimated were excessive and should be reduced, the Appellant has not led an iota of evidence to show that the figures were excessive nor could he give any good reasons as to why the Special Commissioners should reduce Revenue's figures. 30 40

(xiii) As regards the profits on export of gold, etc., we were satisfied from the evidence that the Appellant had 50

sent or taken large quantities of gold, jewellery and other valuable goods to India frequently from this country during the years in question and had sold them there. His Indian capital statement (exhibit A3) did not show that he has retained them in India and the irresistible inference was that he had sold them in India. We did not accept Counsel's contention that one should draw the conclusion that the reason why they were not declared in the Indian capital statement was because the Appellant wanted to avoid payment of Indian income tax. It was clear that he had organised himself sufficiently to be able to export all those gold, jewellery and other valuable goods from this country and to arrange for them to be taken into India where most of those goods were prohibited goods which could be sold at profits of 200% to 300%. In view of these activities of the Appellant we found that he had carried on a trade or business and that the profit therefrom were chargeable to income tax. Even his currency dealings which were involved mainly in either remittances from this country through unauthorised currency dealers at black market rates or payment of Malaysian currency in this country for Indian and foreign currency were such that the gains or profits therefrom were derived from Malaysia and were therefore chargeable to income tax in this country under section 10 of the Income Tax Ordinance, 1947, or sections 3 and 4 of the Income Tax Act, 1967, as the case may be.

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(continued)

(xiv) It cannot be disputed nor did the Appellant dispute the fact that interests charged on instalments due from purchasers of fragmented lots of plantations which had not been declared in the Appellant's tax returns as found and stated in paragraph 8 (xxvii) above was omitted

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income chargeable to tax. Revenue has made estimates of such omitted interest income during the relevant years of assessment and there was no evidence nor any serious challenge on the part of the Appellant to show that the figures of Revenue's estimates on this item were excessive or erroneous.

(continued)

- (xv) The item concerning Juru Estate fragmentation profits was initially objected to by the Appellant, but during the hearing he did not pursue with that objection and on the facts found and stated in paragraph 8 (xxix) above we agreed with Revenue's contention that the sum of \$327,064.00 represented fragmentation profits which was chargeable to tax during the year of assessment 1970. 10
- (xvi) As regards the losses incurred by the Appellant in the Republic of Singapore in respect of his daily newspaper, the Tamil Malar, it was clear that the branch office he had established in the said Republic is a separate establishment and under the provisions of the Double Taxation Agreement concluded between the Government of Malaysia and the Govern- 30
ment of the Republic of Singapore in 1968, the profits of that branch would be taxed there as a 'permanent establishment' and any losses too would be allowed as deductions from the profits of that branch. We therefore agreed with Revenue's contention that this claim of the Appellant should be disallowed.
- (xvii) The sum of \$675,707.00 which the Appel- 40
lant claimed should be written-off as bad debt for the year of assessment 1972 consisted of a loan of \$415,171.81 to one V.M.Sundaram, who apparently had given the Appellant post-dated cheques. Apart from that there were no other documents to evidence the loan and the Appellant never charged any interest nor was any accrued interest on that loan 50
shown in his tax returns. The

Appellant never took any legal steps to recover the loan which was not in any way connected with any of his businesses. As the loan was not a debt within the meaning of section 34(3) of the Income Tax Act, 1967, we agreed with Revenue that no deduction should be allowed for it when the loan was written-off by the Appellant. Investigations by Revenue showed that the other sum of \$260,535.20 was a payment to Malayan Times Limited towards shares in that Company although the Appellant had no separate share investment account for it. He, however, admitted that his share capital was about \$250,000.00 but that he had debited that amount in his books to the account of Malayan Times Limited. We agreed with Revenue that in the circumstances the said sum of \$260,535.20 should not be allowed as a tax deduction for a bad debt written-off but should be added back as shown in exhibit R233 as the said sum represented loss of capital.

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High Court
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(continued)

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(xviii) At the end of the case for the Respondent we ruled that Revenue had discharged its onus of satisfying us that fraud or wilful default had been committed by the Appellant in relation to income tax for the statute-barred years of assessment 1953, 1957, 1958 and 1959 and that the Appellant could for those years of assessment reply as a matter of right to show that the assessment for those time-barred years were either excessive or erroneous. But we were informed by Counsel for Appellant that he had elected not to call any further evidence in reply. In the circumstances, we found that the Appellant had not shown that the Respondent's computation of his income and tax under-assessed for the years of assessment 1953, 1957 to 1962 and

In the
High Court

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1975

(continued)

1966 to 1972 as shown in exhibit R233 to be excessive or erroneous. We also found that the Appellant had failed to discharge the onus on him of proving that the assessments raised for the relevant years of assessment against which he had lodged appeals were excessive or erroneous. We therefore directed the Director General of Inland Revenue 10 to amend the relevant assessments and additional assessments referred to in paragraph 1 above to give effect to our decision.

19. The Appellant immediately after determination of the appeals declared to us his dissatisfaction therewith as being erroneous in point of law and on 14th October, 1975 requested us in writing to state a Case for the High Court pursuant to paragraphs 34 and 35 of Schedule 5 of the Income Tax Act, 1967, which Case we have stated and have signed accordingly. 20

20. The question for the opinion of the High Court is whether on the facts found and stated by us above, our decision was correct in law.

Dated this 31st day of December, 1975.

Sd: Gunn Chit Tuan
(GUNN CHIT TUAN)
Chairman,
Special Commissioners of 30
Income Tax

Sd: Tan Sri Hj.Wan Hamzah
b. Hj. W.Mohd.
(TAN SRI HJ. WAN HAMZAH B.
HJ. W. MOHD.)
Special Commissioners of
Income Tax

Sd: T.Saravanamuthu
(T. SARAVANAMUTHU)
Special Commissioners of 40
Income Tax

Annexure 'A'

In the
High Court

MALAYSIA

No.1

THE SPECIAL COMMISSIONERS OF INCOME TAX

Case Stated
and annexure
thereto

APPEAL NO. P.K.R. 199

31st December
1975

Between

N.T.S. Arumugam Pillai Appellant

(continued)

And

Director General of
Inland Revenue Respondent

10

DECIDING ORDER

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

(a) the Appellant resided at No.216-B MacAlister Road, Penang and at No. 46, Jalan Arumugam Pillai, Bukit Mertajam, Province Wellesley. He carried on, inter alia, the business of purchasing plantations for re-sale in fragmented lots (hereinafter referred to as 'fragmentation business'), moneylending, printing and publishing;

20

(b) the Appellant appealed to us in respect of the following notices of assessment:

<u>Year of Assess- ment</u>	<u>Date of Issue</u>	<u>Original/ Additional</u>	<u>Tax \$</u>
1953	17. 3.73	additional	58,188.00
1957	1.12.72	-do-	40,000.00
1958	6. 4.74	-do-	11,606.00
1959	1.12.72	-do-	800,000.00
1960	27.10.72	-do-	360,000.00
1961	27.10.72	-do-	1,800,000.00
1962	27.10.72	original	901,158.85
1966	23. 2.74	-do-	12,844.40

30

In the High Court No.1	<u>Year of Assessment</u>	<u>Date of Issue</u>	<u>Original/Additional</u>	<u>Tax</u> \$	
Case Stated and annexure thereto	1967	23. 2.74	original	101,710.00	
	1968	23. 2.74	-do-	1,391,050.25	
31st December 1975	1969	23. 2.74	-do-	244,540.60	
	1970	23. 2.74	-do-	517,565.00	
(continued)	1971	3. 7.71	-do-	150,687.50	
	1971	31. 7.71	additional	670,665.90	
	1972	2. 9.72	original	1,085,825.00	10
			Total:	<u>\$8,145,841.50</u>	

(c) the Appellant objected to the said assessments on the grounds :

(i) that the income assessed was in excess of the income admitted in the returns and supporting statements of accounts lodged, and

(ii) that the additional assessments for the years of assessment 1953, 1957, 1958 and 1959 were time-barred under section 69 of the Income Tax Ordinance, 1947 and that the Respondent could not raise the said additional assessments in the absence of fraud or wilful default; 20

(d) the Respondent recomputed the Appellant's income for the years of assessment 1953, 1957 to 1962 and 1966 to 1972 as shown in Exhibit R233. The revised income tax thereon and the tax under-assessed and payable are as follows :- 30

<u>Year of assessment</u>	<u>Revised total income</u>	<u>Tax thereon</u>	<u>Tax previously assessed</u>	<u>Tax under-assessed and payable</u>
1953 \$	580,546.00	\$166,068.80	\$ 5,006.00	\$161,062.80
1957	363,608.00	132,338.20	18,900.20	113,438.00

<u>Year of</u>	<u>Revised total income</u>	<u>Tax Thereon</u>	<u>Tax pre-viously assessed</u>	<u>Tax under-assessed and payable</u>	In the High Court No.1
1958	\$ 285,190.00	\$ 100,477.40	\$ 63,386.20	\$ 37,091.20	Case Stated and annexure thereto 31st December 1975 (continued)
1959	2,015,609.00	792,645.00	123,145.00	669,500.00	
1960	1,553,763.00	683,655.85	68,080.60	615,575.25	
1961	5,172,768.00	2,312,433.10	524,680.30	1,787,752.80	
1962	2,279,520.00	1,010,921.50	NIL	1,010,921.50	
1966	1,062,716.00	517,183.00	NIL	517,183.00	
10 1967	1,173,275.00	631,126.25	NIL	631,126.25	
1968	3,248,763.00	1,772,644.65	NIL	1,772,644.65	
1969	751,897.00	399,368.35	NIL	399,368.35	
1970	1,405,706.00	758,963.30	NIL	758,963.30	
1971	2,037,789.00	1,106,608.95	NIL	1,106,608.95	
1972	1,374,854.00	741,994.70	NIL	741,994.70	
TOTAL	\$23,306,004.00	\$11,126,429.05	\$803,198.30	\$10,323,230.75	

20 The assessments against which the Appellant has appealed amount to \$8,145,841.50, and the Respondent has requested us to increase the said assessment by \$2,177,389.25 to \$10,323,230.75 as shown in the last column above;

(e) the Appellant disputed the following items in Exhibit R233:

- (i) Fragmentation profits understated
- (ii) Bonus and salaries
- (iii) Interest paid to banks
- (iv) Wages and other expenses inflated
- 30 (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

In the
High Court
No.1
Case Stated
and annexure
thereto
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1975
(continued)

- (x) Bad debts written-off;
- (f) the Appellant maintained more than one set of books for recording his business transactions. The accounts submitted with his income tax returns to the Inland Revenue Department were prepared from one set of books whilst the other books were maintained for Appellant's own use and information. Those other books were seized by officers of the Inland Revenue Department when they searched the Appellant's business premises and residence at No.132, Penang Street, Penang, No.46, Jalan Arumugam Pillai, Bukit Mertajam and No.216-B MacAlister Road, Penang on 16.8.1972. In the books from which the accounts for income tax returns were prepared (hereinafter referred to as 'account books kept for income tax purposes'), there were many omissions and understatements of income received, and failures to record drawings for personal and private purposes resulting in over-statement of his business expenses. The accounts prepared from the account books kept for income tax purposes therefore did not disclose the full and correct account of the Appellant's income liable to income tax in Malaysia;
- (g) (i) fragmentation profits understated :
- there were many instances of understatement and omission of profits from Appellant's fragmentation business. In cases where records other than account books kept for income tax purposes were found the Respondent has calculated the amount of profits understated or omitted, and where there were no records found the Respondent has estimated the amount omitted;
- (ii) bonus and salaries:

In the
High Court
No.1
Case Stated
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thereto
31st December
1975
(continued)

10 bonus payments to an employee
named Suppiah Pillai were claimed
as deductions in the accounts
submitted with the returns of
income for the year of assessment
1958 and subsequent years but such
bonus payments had not in fact been
paid to him. A salary of \$500.00
and a bonus of \$1,000.00 charged in
the accounts for the year of assess-
ment 1958 to another employee named
Ayyavoo were also not paid. The
Respondent has disallowed the claims
for payment of bonuses and the salary
of \$500.00 to Ayyavoo for the year
of assessment 1958 as well as all
claims for bonus payments in the
years of assessment 1959, 1960, 1961
and 1962;

20 (iii) interest paid to banks:

30 money borrowed on overdraft from
banks was utilised for purposes
other than in the production of
income, such as remittances to
India, donations to a temple in
Penang, payments of life insurance
premia, acquisition of non-income
producing investments, renovations
to his residence at No.216-B,
MacAlister Road, purchases of
jewellery and gold articles and
loans not made in the course of
business. Therefore, the money
borrowed from banks was not wholly
and exclusively employed in the
production of income;

(iv) wages and other expenses inflated:

40 many drawings for private and per-
sonal purposes were not debited
to the Appellant's drawing account,
and wages and other expenses were
inflated to the extent of those
drawings so as to balance the
account books kept for income tax
purposes. The Respondent has
therefore estimated the amount of
such inflated expenses;

50 (v) profits on export of gold, currency,
diamonds and other valuables:

In the
High Court
No.1
Case Stated
and annexure
thereto
31st December
1975
(continued)

jewellery, gold articles, electrical goods, radios, watches, cameras, films and other valuable goods were sent at frequent intervals to India through members of the Appellant's family, his employees and others. The Appellant and members of his family also travelled frequently between Malaysia and India. The cost of those jewellery and other valuable goods sent to India which was not recorded in the account books kept for income tax purposes was not shown in the statement of assets and liabilities in India lodged by the Appellant (Exhibit A3). There were also many remittance of money from Malaysia through unauthorised dealers and those remittances were not recorded in his books kept for income tax purposes. The Appellant was carrying on a business of dealing in foreign exchange and of exporting jewellery, gold articles and other valuable goods from Malaysia and the Respondent has therefore estimated the profits derived therefrom;

(vi) interest income omitted :

the Appellant charged interest on instalments which were overdue from purchasers of fragmented lots of plantations. Such interest was not declared in his income tax returns and the Respondent estimated the income therefrom;

(vii) penalty payments :

a sum of \$72,857.00 was paid as penalty by the Appellant to the Penang Rubber Estates Company Ltd., for failing to meet instalment payments of the purchase price of Trans-Krian Estate which he had bought for his fragmentation business. The money collected by the Appellant from sub-purchasers of that plantation was enough to meet the instalment payments but he utilised the money collected from the sub-purchasers for making remittances to India. As such, the Respondent has disallowed

the penalty payment for income tax purposes;

In the High Court

No.1

(viii) Juru Estate fragmentation profits:

Case Stated and annexure thereto

although the Appellant initially objected to the inclusion of the item 'Juru Estate fragmentation profits' amounting to \$327,064.00 for the year of assessment 1970, on the ground that it represented capital profit, he did not pursue that objection later on;

31st December 1975

(continued)

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(ix) Singapore Tamil Malar losses :

the Appellant published a daily newspaper called Tamil Malar. He established a branch office in the State of Singapore to manage his affairs there. The branch office was a separate establishment and its day-to-day management was carried on in the State of Singapore. Under the Double Taxation Agreement concluded between the Government of Malaysia and the Government of the Republic of Singapore in 1968, the Singapore establishment is a 'permanent establishment' within the meaning of Article II (m)(ii) therein. The profits of that branch would be assessed in the State of Singapore and any losses would be allowed from the profits of that branch. Therefore, the Respondent has disallowed the claim for the losses incurred by that branch;

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(x) bad debts written-off :

the bad debts written-off related to a loan of \$415,171.81 to one V.M.Sundaram and a payment of \$260,535.20 to Malayan Times Ltd., which company is now defunct and is in the hands of a receiver. In the case of the loan to V.M. Sundaram, who gave the Appellant post-dated cheques, there were no other documents to evidence the loan, no interest was charged and no accrued interest on the loan was

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In the
High Court
No.1
Case Stated
and annexure
thereto
31st December
1975
(continued)

shown in the Appellant's income tax returns. Legal action was not taken by the Appellant to recover the loan which was not connected with his fragmentation or money-lending business. No deduction was given by the Respondent when that loan was written-off. The Appellant had no separate share investment account for the said payment to Malayan Times Ltd., which was money subscribed for shares of that company. The Appellant admitted that his share capital was about \$250,000.00, but he had debited that amount in his books to the account of Malayan Times Ltd. The Respondent has therefore added back the said sum of \$260,535.20 in the computation in Exhibit R233 on the ground that the said sum represented loss of capital;

- (h) as regards the time-barred additional assessments for the years of assessment 1953, 1957, 1958 and 1959, after hearing the arguments of both counsel, we ruled that on the evidence adduced, both documentary as well as oral, there was fraud or wilful default within the meaning of section 69 of the Income Tax Ordinance, 1947, and the Director General of Inland Revenue had validly raised additional assessments on the Appellant for the said years of assessment 1953, 1957, 1958 and 1959;
- (i) the Appellant has not shown that the Respondent's computation of his income and tax under-assessed for years of assessment 1953, 1957 to 1962 and 1966 to 1972 as in Exhibit R233 to be excessive or erroneous;
- (j) he has also failed to discharge the onus on him of proving that the assessments raised for the relevant years against which he has lodged appeals were excessive or erroneous.

2. We therefore direct the Director General of Inland Revenue to amend the notices of assessment and additional assessment referred to in paragraph 1(b) above to tax payable of

10 \$10,323,230.75 as shown in paragraph 1(d) above.

In the High Court

No.1

Dated this 27th day of September, 1975.

Case Stated and annexure thereto

31st December 1975

(continued)

Sgd: (Gunn Chit Tuan)
Chairman,
Special Commissioners of
Income Tax

10 Sgd: (Tan Sri Hj.Wan
Hamzah b.Hj.W.Mohd.)
Special Commissioners of
Income Tax

Sgd: (T.Saravanamuthu)
Special Commissioners of
Income Tax

M A L A Y S I A
BEFORE THE SPECIAL COMMISSIONERS
OF INCOME TAX
APPEAL NO: PER 199

Between

20 N.T.S. Arumugam Pillai Appellant

And

Director General of Inland
Revenue Malaysia Respondent

NOTICE OF APPEAL

30 Take Notice that the Appellant above-named,
being dissatisfied with the whole of the
decision of the Special Commissioners of
Income Tax contained in the Deciding Order
dated the 27th of September, 1975, hereby
gives Notice of Appeal on questions of law
against the said Deciding Order and hereby
requires the Special Commissioners of Income
Tax to state a case for the opinion of the
High Court pursuant to paragraph 34 of

In the
High Court

No.1

Case Stated
and annexure
thereto

31st December
1975

(continued)

Schedule 5 of the Income Tax Act, 1967.

Dated this 14th day of October, 1975.

Sd: Dato S.P.Seenivasagam
& Co.

Solicitors for the Appellant

Sd: N.T.S.Arumugam
Pillai

Appellant

To:

1. The Clerk to the Special Commissioners
of Income Tax,
Pejabat Pesuruhjaya Khas Cukai Pendapatan,
Tingkat 3, 10
Bangunan Syarikat Polis,
Kuala Lumpur.
2. Director General of Inland Revenue,
Malaysia,
c/o Peguam Kanan Persekutuan,
Jabatan Hasil Dalam Negeri,
Kuala Lumpur.

The address for service of the Solicitors
for the Appellant is Dato S.P. Seenivasagam
& Co., No.8, Jalan Klyne, (4th Floor), 20
Kuala Lumpur.

No. 2
JUDGMENT

In the
High Court

No.2

IN THE HIGH COURT IN MALAYA AT PENANG
ORIGINATING MOTION NO. 1 of 1976

Judgment

13th September
1976

Between

N.T.S.Arumugam Pillai Appellant

And

Director-General of
Inland Revenue Respondent

10

J U D G M E N T

20

The Appellant, after "a back-duty investigation" by Revenue as to his tax liabilities, was assessed to tax in the sum of \$8,145,841.50. This sum represented in part additional assessments for the years of assessment 1953, 1957 to 1961 inclusive and also 1971. The balance consisted of original assessments for the years of assessment 1962, 1966 to 1972, inclusive, in respect of which years no tax had previously been computed; in other words for those years, returns were made by the Appellant, showing no income chargeable to tax..

30

He appealed to the Special Commissioners. The hearing before them occupied a total of 30 days spread over nine months from December 3, 1974 to September 2, 1975. Oral evidence was taken from the Appellant himself, and on behalf of Revenue from Mr. Sadasivam, an Assistant Director of Inland Revenue (Investigation) who was in charge of this back-duty investigation and who was himself a Chartered Accountant. Both witnesses were examined and cross-examined at length. A total of 240 exhibits were also introduced and considered. Finally on September 27, 1975, the Special Commissioners made an unanimous deciding order, assessing the Appellant's tax liabilities for these years at a total of \$10,323,230.75. They have therefore made an increase of \$2,177,389.25 from the additional and other

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assessments by Revenue.

From that order, he now appeals to this Court.

At this stage, a comparative table will be instructive.

	<u>Column A</u>	<u>Column B</u>	<u>Column C</u>	
<u>Year of assess-ment</u>	<u>Tax assessed previously</u>	<u>Tax as assessed & demanded by Revenue</u>	<u>Tax assessed in Deciding Order</u>	
1953	₤ 5,006.00	₤ 58,188.00	₤ 161,062.80	10
1957	18,900.20	40,000.00	113,438.00	
1958	63,386.20	11,606.00	37,091.20	
1959	123,145.00	800,000.00	669,500.00	
1960	68,080.60	360,000.00	615,575.25	
1961	524,680.30	1,800,000.00	1,787,752.80	
1962	Nil	901,158.85	1,010,921.50	
1966	Nil	12,844.40	517,183.00	
1967	Nil	101,710.00	631,126.25	
1968	Nil	1,391,050.25	1,772,644.65	
1969	Nil	244,540.60	399,368.35	20
1970	Nil	517,565.00	758,963.30	
1971	Nil	150,687.50	(1,106,608.95	
1971	-	670,665.90	{	
1972	Nil	1,085,825.00	741,944.70	
	<u>₤803,198.30</u>	<u>₤8,145,841.50</u>	<u>₤10,323,230.75</u>	

The years covered the operation of the Income Tax Ordinance 1947 and after 1966, the Income Tax Act 1967. Fortunately, nothing turns on any differences in the provisions of the two ordinances. It is common to both that the period of limitation is 12 years. Claims for the years of assessment 1953, 1957 to 1959 inclusive are statute-barred unless there was fraud or wilful default on the part of the taxpayer: S.69(1) Income Tax Ordinance 1947 and S.91(3) Income Tax Act 1967. Claims for the other years are well within the period of limitation and under both statutes, the onus of

30

proving that they were excessive or erroneous lay on the taxpayer: S.76(3) Income Tax Ordinance 1947 and paragraph 13 of Schedule 5 to the Income Tax Act, 1967.

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PART ONE

1. The Appellant and Inland Revenue

10 The Appellant was a man with many irons in the fire. He was engaged in money-lending, printing and publishing and in fragmentation of estates. The Special Commissioners found that he was adjudged a bankrupt in 1948 and that "before his discharge sometime in 1952 he had however started fragmentation business in his wife's name" with a capital of \$10,000.00. Fragmentation, as it has been called, is the buying of large rubber estates and selling them in small lots.

20 On August 16, 1972, Mr.Sadasivam called the Appellant for an interview. At that interview, the Appellant maintained the correctness of his past income tax returns. Later the same day, Mr. Sadasivam went with the Appellant to the latter's office at No.132, Penang Street and residence at No.216 B MacAlister Road, both in Penang. Another party of Inland Revenue officials went to his other office premise at No. 46, Jalan Arumulyan Pellai, Bukit Mertajam, P.W. Both
30 parties took possession of certain books and documents.

40 From these account books and documents, it was discovered that the Appellant had maintained "more than one set of books for recording his business transaction". His income tax returns were compiled from one set, referred to by the Special Commissioners as the account books kept for income tax purposes, or ABIT. The other books were maintained for his own use and information, which I will now refer to as personal account books or PAB.

These accounts though relating to the same transactions do not tally. Invariably PAB disclose more information and show sales especially of his business in fragmentation at higher prices than are disclosed or shown in ABIT.

From them, Revenue was able to work out

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his "modus operandi" in fragmentation. His first receipt to a buyer of a fragmented lot or a lot under fragmentation was a "Tamil receipt". Subsequently after survey, the agreement was embodied in a legal document in English drawn up by Solicitors and attested. Invariably the English documents stated a lower purchase price.

Since the profits of the Appellant from his fragmentation business came from the excess of the selling price over his purchase price, recording the former at a lower figure must inevitably mean that the profits shown in ABIT were less. The difference between actual profits and recorded profits would be even greater if some of the transactions went unrecorded. 10

From PAB as compared with ABIT, Revenue was able or claimed to be able to extract facts and figures of what actually transpired in the Appellant's fragmentation business, or at least a good part of it. Sometimes interviews with actual purchasers and brokers provided the missing evidence. At other times, where no records were found, based on the system adopted by the Appellant and his usual margin of profits, Revenue endeavoured to reconstruct the transaction. This process of compilation did not appear to be too difficult for a chartered accountant and Mr. Sadasivam produced figures which he claimed represented as nearly as he could make it the actual transaction in fragmentation. 20 30

As is to be expected, in the course of investigating into the fragmentation business, dealings of other natures were discovered and Revenue made further assessments from the information uncovered.

2. Unusual features

This case however had certain unusual features which were the cause, or were made to be the cause of procedural and evidential difficulties and arguments. It is therefore necessary that I deal with them since the same objections are made to me. In the first place it is clear that the statute-barred years could only be re-opened if there was fraud or wilful default. The question then was on whom lay the onus of proving these charges. If it 40

lay on the tax-payer, then the onus lay on him throughout of proving that the additional assessments were excessive or erroneous. There would then be no difficulty. He must begin and Revenue could, if it so desired, call evidence in reply. But if it lay on Revenue then obviously, if the whole case was heard in one session, difficulties would arise. The question would be the effect on the taxpayer's case if he began on the statute-barred years, in respect of which the onus did not lie on him.

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Secondly, numerous documentary exhibits had been introduced in evidence. The Appellant himself introduced some 34 documentary exhibits. In his cross-examination, Revenue put in another 76 exhibits, without as far as I can gather, any protest from the Appellant. At this point Revenue indicated that it would end its cross-examination and further that there were many other documents to be produced. It did not desire to cross-examine the Appellant on these documents which were mainly seized from the Appellant, but would introduce them when it led evidence.

2. (i) Onus of proof

The hearing before the Special Commissioners therefore opened with a ploy in the form of an argument whether the onus of proving fraud or wilful default lay on Revenue or whether the tax-payer had to prove that there was no fraud or wilful default on his part. Each side contended quite seriously that the onus lay on the other side.

2. (ii) Documentary evidence

In accordance with the advice it had given the Special Commissioners in closing the cross-examination of the Appellant, Revenue sought to introduce the other documentary exhibits at the time it led evidence. Counsel for the Appellant objected on the ground that they should first have been put to the Appellant during his cross-examination, and claimed that the Appellant had been taken by surprise. Over this objection, Revenue introduced as many as 130 exhibits.

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3. Objection of Appellant

It is now contended before me with great vigour that the result of the ruling of the Special Commissioners, in spite of laying the onus of proving fraud and wilful default on Revenue that the Appellant was nevertheless to begin and allowing introduction of documentary exhibits by Revenue without first requiring Revenue to put them to the Appellant was a denial of natural justice. It is said that as a consequence of the Appellant being asked to begin on fraud though it was to be proved by Revenue, he was prevented from calling his witnesses. He also alleges to have been prevented from rebutting the case for Revenue on this issue. With regard to the documentary exhibits, it is submitted that they should be put to the Appellant and he be given a chance to admit or deny any of them and further that he should be allowed to call evidence to explain the documents.

4. The law of procedure and evidence in hearing before the Special Commissioners

The law is contained in Schedule 5 to the Income Tax Act 1967. The relevant paragraphs are :-

10. One of the Special Commissioners may order

(a) two or more appeals by the same person or 30

(b)

to be heard together.

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. 40

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

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

10 Now, Section 142(5)(i) and Section 154 (1)(d) of the Act are not of relevance in this connection. The former preserves the effect of the provisions in the Evidence Act 1950 relating to witnesses, while sub-sub-section (ii) removes the cloak of privilege from a tax-payer's documents and communications. The latter provides that the Minister of Finance may make rules regulating the practice and procedure in appeals to the Special Commissioners and the Special Commissioners' own procedure.

20 So far as I can discover, no rules have been made and the matter stands to be considered in the light of the above.

30 On this, it is apparent that the Special Commissioners may largely regulate the procedure at the hearing before them, subject always to the important consideration that the Appellant must be given a full and adequate hearing or reasonable opportunity to be heard. The Special Commissioners were aware of their right to regulate procedure and also of the great advantage in not being hide-bound to a rigid code of procedure. They relied on Reg. v. Special Commissioners (ex parte Martin) 48 T.C. 1 where Lord Widgery at p.7 said,

40 "It is very important that the procedure before the Commissioners should be kept as flexible to deal with widely varying types of cases which came before them."

It is, with respect, a most apt quotation.

5. Ruling of the Special Commissioners on (i) onus

The Special Commissioners found in Amis v. Colts 39 T.C. 148 a case similar to

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the one they were dealing with. In that case the U.K. Inspector of Taxes had accepted that it was for him to satisfy the Commissioners on fraud and wilful default on the part of the tax-payer in respect of the statute-barred years. Cross J. indicated the procedure that could be adopted and said :-

" It is clear that the onus of establishing that a case fully within the meaning of that proviso (to section 47 of the U.K. Income Tax Act 1952) lies on the Crown and the Inspector representing the Crown on the appeal could have taken one of two courses. He could, if he had liked, have opened his whole case on all the years, calling all his evidence as though the onus was on him to support all the additional assessments. Alternatively, he could first call such evidence as he thought fit to establish fraud or wilful default which he was alleging in connection with the first five years and could then ask the Commissioners to decide whether he had made out his case on that point. If they decided that point against him, then those years could be struck out altogether and the matter would proceed on the other years"

This suggestion was approved by Lord Widgery C.J. in Martin's case, supra.

In the event, neither Revenue nor the Special Commissioners took either of the courses suggested. After hearing arguments, the Special Commissioners ruled that the onus of proving that the assessments for the years of assessment 1960 to 1972 inclusive were excessive and erroneous was on the Appellant who should begin and lead evidence first relating to those years of assessment. They also ruled that the onus of proving the fraud or wilful default of the Appellant in respect of the years of assessment 1953 and 1957 to 1959 inclusive was on the Revenue and that the time for doing so was when it adduced evidence in reply to the Appellant's case. If it succeeded in proving fraud or wilful default, then the

onus of proving the assessment excessive or erroneous shifted to the Appellant.

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This ruling was given on the first day of the hearing on 3rd December, 1974 and the hearing before the Special Commissioners was conducted on the basis of it. On this ruling the Appellant began and it was expected that in accordance with this ruling he would open his appeal with attempting to discharge the onus that lay upon him to prove that the additional assessments for the years of assessment 1960-1972 (inclusive) were excessive or erroneous and that the question of fraud or wilful default in respect of the years of assessment that were statute-barred would be left for cross-examination by Revenue since it was not his duty to open on this issue. He would have the right to call evidence in rebuttal of Revenue's contention in this matter.

20

The Special Commissioners also ruled that Revenue was to prove fraud and wilful default beyond reasonable doubt but the burden on the Appellant to rebut the case against him was on a balance of probabilities.

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I would at this stage refer to the ruling of the Special Commissioners that the onus of proving fraud or wilful default is on Revenue. Before them, Revenue contended that the onus lay not with it but on the Appellant. Revenue's contention was rejected. Before me, Counsel for Revenue again attempted to submit that the Special Commissioners were wrong on this. With the greatest of respect, the decision of the Special Commissioners was, in my view, so eminently correct that I made it quite clear that it would be a waste of time for Revenue to contend otherwise before me, and I also pointed out that, in any event, Revenue had not preferred any appeal from that ruling.

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5. (ii) Admission of Documents by Revenue

The Special Commissioners ruled on July 22, 1975, after hearing a substantial objection, that Revenue could introduce all

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the documents it sought to put in after R.111, through its witness. To that ruling, they attached a rider, that the Appellant had, as a matter of law, the right to lead evidence in rebuttal but before evidence was adduced on any fact, the Court would have to be satisfied that the Appellant had been taken by surprise on that fact. The documents were in accordance with the ruling admitted. The last document was numbered R.240. 10

It was obvious that the Special Commissioners considered but over-ruled the objection because it found that almost all the documents from R.112 to R.240 were documents seized by Revenue from the Appellant. The Special Commissioners also considered that in the events that happened, the Appellant had been given adequate opportunities and he did exercise the right to take copies of and cross-examine all those documents of his which had been seized by Revenue. In these circumstances, they made the ruling with the attached rider. In other words, the Special Commissioners left the issue open so that at the close of the case by Revenue the Appellant had two courses open to him (1) he could lead evidence as a matter of right in rebuttal of fraud or wilful default with which he was charged in respect of the statute-barred years; and (2) if he could satisfy the Special Commissioners that he had been taken by surprise in respect of any fact in the years of assessment that were not statute-barred, he would then be given the right to lead evidence in rebuttal. 20 30

6. Election by the Appellant

But without attempting to take both these courses the Appellant through his Counsel informed the Special Commissioners that he elected not to call any further evidence in reply to show that the assessments for the statute-barred years were excessive and erroneous or to give any evidence in rebuttal on any fact in relation to the assessments for the other years. This was, as I see it, a deliberate choice on the part of the Appellant and if this was so, then he cannot now be heard to 40 50

1C contend that he was never heard or to submit that he was denied any opportunity of being heard. I would also observe that if the statement is correct that, in so far as the statute-barred years were concerned, the Appellant elected not to contend that they were excessive or erroneous, it must mean as a necessary inference that he did not any longer contend that there was no fraud or no wilful default on his part so as to prevent Revenue from re-opening the assessments of those years.

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7. Fraud and Wilful Default

It is perhaps convenient at this stage to deal with the Special Commissioners' finding of fraud and wilful default.

20 It was shown to them that the Appellant had maintained two if not three sets of books and that in ABIT there were many omissions and under-statements of receipts of moneys and there was the admission by the Appellant during cross-examination that his accounts were incorrect. In his evidence as the Special Commissioners observed and instanced, the Appellant contradicted himself and he was evasive and sometimes flippant. On this and other evidence, the Special Commissioners came to a finding that there was not only fraud, 30 on which Revenue relied, but also wilful default as defined by Bowen L.J. in In re York & Harston's Contract (1885) 31 Ch.D. 168, on the part of the Appellant in respect of the statute-barred years.

40 The Special Commissioners also found that Revenue had proved fraud and wilful default to their satisfaction beyond reasonable doubt, which they accepted as the proper standard, as laid down in Amis v Colts 39 T.C. 148 at 163.

With respect, I cannot see how they are wrong. On the primary fact that the Appellant had submitted returns of his income from figures in a special set of books kept for income tax purposes, which not only demonstrably but on his own admission were inaccurate, apart from other evidence, the only possible inference must

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be that he was in fraud of Revenue and he had shown wilful, not merely negligent, default in the discharge of his duties to render accurate returns. That inference must in the circumstances become an established finding of fact.

On the finding of fraud and wilful default, the onus then shifts to the Appellant to prove that the additional assessments for the statute-barred years of assessment lies on the Appellant. 10

8. Additional assessments

The provision for additional assessments where 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 is in S.69 of the Income Tax Ordinance 1947 and in S.91 of the Income Tax Act 1967. It will be apparent that in such circumstances, the Comptroller or his successor in office, the Director-General cannot act on precise and exact information, which is known only to or is within the special knowledge of the taxpayer. The law then, while empowering him to make such additional assessments, requires him to act "according to the best of his judgment". It must be noted that he is required to act not on the information available to him which will make the tax law ludicrous but Revenue must be reasonable. However Revenue must not act "capriciously, vindictively or dishonestly" in the words of the Special Commissioners. 20 30

The additional assessments were made known to the Appellant in the statutory notices of demand. The demands for the various years appear in Column B in the comparative table I have set out above. It is true that no details were shown, but there is no requirement at law on the part of Revenue to particularise and set out the details for the various sources of income. However, when it came to adduce evidence, Revenue compiled figures which it said represented a fair estimation of the income of the Appellant from his various activities and transactions. These figures were set down conveniently in the sheet 40

called a Compilation of Income and Tax understated for the years of Assessment 1953 and from 1962 to 1972. It was marked R.233 and a copy of it was given to the Appellant.

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An explanation was afforded by Mr. Sadasivam, Revenue witness, for this compilation. The view of the Special Commissioners of this explanation is expressed in these words,

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" However we were satisfied after hearing the explanation of Encik Sadasivam that Revenue had in the circumstances of the case used a reasonable and conservative basis for estimates in assessing the Appellant's taxable income".

and that was because

" We were satisfied that where records were available, Revenue had used the actual figures recorded in the Appellant's genuine books which were found and seized in his premises. Where records were not available, Revenue had, as it was legally entitled to do so, made estimates of the Appellant's income after studying and analysing relevant available records of the Appellant for the years of assessment in question. Encik Sadasivam denied under cross-examination that the estimates were dishonest or highly-inflated and we had no good and satisfactory reasons to think that or to reduce Revenue's estimates as shown in R233, which the Appellant on whom the onus lies, had failed to show were excessive or erroneous. The Appellant has also not shown positively what must be done to justify us in amending or correcting the figures of Revenue's estimates of his income and tax payable as shown in the said exhibit."

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To my mind, ex facie the statement of the case, this view of the Special Commissioners is completely justified. It is in fact not attacked by Counsel for the Appellant. Perhaps he means to keep the attack in reserve

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as the point he makes is that the exhibit R233, with others, should have been supplied to the Appellant long before the hearing, so that the Appellant could produce the evidence to disprove it. This failure of early service is said to be a denial of natural justice. With respect, this contention ignores the explanation of Mr. Sadasivam that the figures were partly the Appellant's who must be taken to know them. It also 10 begs the question that in respect of these figures and of the other figures which are estimates, the onus lies on the Appellant to prove that they are excessive or erroneous. It could not challenge that the Director-General had not acted in his best judgment.

It may not be out of place to note that R.233 which generally contended that the additional assessments by the Director-General even then erred on the side of 20 leniency, nevertheless in at least two years of assessment reduced the estimated assessments of the Director-General. For 1959, the assessment was reduced from \$800,000.00 to \$669,500.00 and for 1961, from \$1,800,000.00 to \$1,787,752.80. The reductions especially in the later year may not amount to much but I should have thought that they offer proof at least that Revenue was not acting maliciously, vindictively 30 or dishonestly.

Nevertheless the Appellant argues that he has been denied natural justice.

9. Natural justice

Natural justice requires that the Appellant be given a full and adequate hearing, and opportunity to give evidence on behalf of himself if he so desires and to call such witnesses as he considers necessary for his case. It is said however 40 that the ruling of the Special Commissioners is a denial of justice, because, as I understand the submission, it means that the Appellant began on the issue of fraud and wilful default and he was prevented from calling his witnesses, or to rebut the case for Revenue. With respect, I do not think that merely reversing the role by asking him to avail himself for cross-examination

on this issue before Revenue led evidence on it, is to deny him his basic right to have the case on this issue proved against him beyond reasonable doubt, so long as he was accorded the right of reply. The fact is, he was and his willingness to lead evidence on this point in examination in chief and his deliberate election to call no evidence in rebuttal did not detract from his right to being heard. So long as he was given the opportunity, he would not be denied natural justice whether or however he availed himself of that opportunity.

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The Special Commissioners have of course the alternative of deciding to hear the appeal to them in two parts. On the issue of fraud and wilful default, Revenue could open and the Appellant reply. On the non statute-barred years where the onus lies on the Appellant, he should open and Revenue could challenge his evidence either under cross-examination or by adducing its own evidence. Perhaps in hind-sight, the Special Commissioners should have adopted this course. But quite frankly and with every respect, I cannot see how this course can be any more advantageous or fairer to the Appellant than the course adopted by the Special Commissioners which I would repeat is well within their province to adopt. To split the hearing into two sessions when the financial affairs of the Appellant are continuous and closely interwoven would, on the other hand, appear to lead to more confusion. Neither can I, with respect, see any advantage over another course which is for Revenue to begin on the statute-barred years. If the course adopted by Revenue had been strictly followed, this course would have been the result, the evidence of the Appellant in rebuttal would be his defence to the charges of fraud and wilful default.

The complaint of a denial of natural justice is made in regard also to the documentary exhibits, from R112 to R340, which Revenue did not put to the Appellant but which Revenue introduced when it came to give evidence. It might of course be better if they had been put to the Appellant

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for him to identify and admit when he was being cross-examined. Other documents had been put to him. But, on the other hand, the documents complained of were almost entirely seized from the Appellant. If the Appellant wanted to challenge any of them, either in regard to their genuineness or their accuracy, he could have done so during the cross-examination of Revenue's witness, or if he was taken by surprise, he could have asked for an adjournment. Several adjournments were given him and he was also given the opportunity of taking copies of the documents which had been seized by Revenue from him. Having regard to these circumstances, he could not be said to have been taken by surprise and he had every opportunity to challenge the contents of the documents in cross-examination by such questions such as "Could not this document also mean this and not what you say it meant?" He also had the opportunity of calling evidence in rebuttal which he failed to exercise. 10 20

Be that as it may, every argument by the Appellant was made to turn on the denial of an adequate opportunity to meet the case against him from the ruling of the Special Commissioners. But each and every argument by the Appellant ignores the right given to him to call evidence in rebuttal of fraud and wilful default and the conditional right to call other evidence and to his deliberate election not to call any evidence of either kind. And I have not heard one word in explanation for this election nor have I been in any way given any cogent reason how it can be said the Appellant had been denied the opportunity of being heard or of meeting the case against him. 30 40

Natural justice is not something which any one of us can define in our own terms. It is basic. In the words of Finnemore J. in Semtex v. Gladstone (1954) 2 All E.R. 206 at p.212 :

" I hope the law of this country and natural justice will approximate as closely as possible, but all claims and legal defences have to be grounded in law and not according to somebody's 50

idea of natural justice, not even that of the Judge who may hear the case."

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For myself, I am with respect not persuaded that there has been a denial of natural justice or that the Appellant has not been heard or has been in any way prevented from or hindered in meeting the case against him.

10 10. Application for the Notes of Evidence

An application for a part of the notes of evidence taken by the Special Commissioners was made before the hearing of the case stated to my brother Arulanandom J. According to the minute made by him, it was only for the evidence relating to (a) the export of gold, currency, diamonds and other valuables, in item (v) and (b) bonus and salaries in item (ii) at page 3 of the Deciding Order. On further consideration, Arulanandom J. dismissed the application. I am advised that an appeal has been lodged from his decision to the Federal Court. Before me, this application is repeated and I am asked to adjourn the hearing until the notes are supplied. The appeal is also made a ground for an adjournment. It is said that the evidence is necessary for the argument of the appeal, but before me, the evidence required is stated to be the evidence relating to the export of jewellery and the interests charged and alleged to have been received by the Appellant and not accounted for. There has been between the two hearings a change in the request regarding bonus and salaries to one regarding interests. I do not know whether this change is intentional or whether there is any significance in it. But it is quite clear that the statement of a case does not ordinarily include the evidence, and certainly not the notes of evidence recorded verbatim. By definition, it states the facts as found by the trial officers. Paragraph 37 of Schedule 5 to the Income Tax Act 1967 provides that:

A case stated under paragraph 34

(a) shall set forth the facts as found

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by the Special Commissioners,
the deciding order and the grounds
of their decisions; and

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(b) shall be signed by the Special
Commissioners who heard the appeal.

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There is therefore no justification
for the inclusion of the notes of oral
evidence taken before the Special Commis-
sioners.

But a tax-payer in the position of the 10
Appellant is not without safeguards as to
the sufficiency of the statement of the case
for the purposes of his appeal. The procedure
as laid down in Simon's Income Tax (1964-65
Edition) Vol. 1, paragraph 749, page 304,
has since been made a direction by the
Federal Court in the case of E v. C.G.I.R.
(1970) 2 M.L.J. 117. The Special Commis-
sioners are now required, before finalising 20
the statement of the case, to seek the
views of both Revenue and the tax-payer.
If they have done so, and the parties have
agreed, if necessary, after amendments,
to the final form of the case stated, then
neither party can afterwards take objection
either to the form or to any alleged
insufficiency of the statement.

I therefore sought advice from Counsel
for the Appellant and for Revenue whether 30
this admirable practice direction had been
followed. Revenue advised that the practice
was followed and would refer to a letter
from the Solicitors for the Appellant that
they approved the draft which had been sent
to them and they had no amendment to make or
addition to ask for. Counsel for the
Appellant, after consulting the solicitors,
confirmed that this was so.

In the scheme as envisaged in Income 40
Tax legislation, the time and place for
adducing evidence and for coming to findings
of fact on it were before the Special
Commissioners. The High Court on an appeal
from their Deciding Order is bound to decide
the validity or otherwise of their Order
on the facts as found by them and the
reasonable inferences to be drawn from them.
There have been many decisions which say
that the High Court is not entitled to differ

from the Special Commissioners on the facts as found by them; but of course, in the case of inferences, the High Court may consider if they are rightly drawn from the facts found.

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(continued)

10 The following statement on the procedure of a hearing in the High Court on a case stated by the Special Commissioners is lifted bodily from Simon's Taxes (3rd Edn.) Vol.A, at p.672-3; and in view of the application, I make no excuse for so doing: The High Court only considers appeals on questions of law, and will not disturb a finding of pure fact by the General or Special Commissioners, unless there is no evidence to justify the finding, or where incorrect reasons of law prompt their conclusions of fact, or where the Commissioners have taken an erroneous view as to
20 the nature and effect of a document, or have applied erroneous tests in arriving at their conclusion, or have otherwise misdirected themselves in law, or drawn a wrong inference from the facts. The Court has sometimes treated what is described in the case stated as a question of law as one of fact; it decides on the case what the nature of the problem is, and will not decide a question of fact
30 merely because the case says that it is one of law, etc. contra. The Court will give effect to any point of law arising on the facts stated in the case, but where it is sought to raise a question which was not raised before the tribunal below and this depends upon further evidence being taken, the Court will refuse to give effect to the point so sought to be raised.

40 The principles have been stated by Lord Radcliffe in Edwards v. Bairstow and Harrison (1956) A.C. 14 at p.35 ;

50 " I think that the true position of the Court in all these cases can be shortly stated. If a party to a hearing before Commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a Case and in the body of it to set out the facts that they have found as

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well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. When the Case comes before the Court, it is its duty to examine the determination having regard to its knowledge of the relevant law. If the Case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the Court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves and only to take their colour from the combination of circumstances in which they are found to occur."

In the instant case, while the evidence before the Special Commissioners was not reproduced verbatim, the statement of the case filled up 100 full pages. In an exhaustive and very well written statement, the Special Commissioners have gone out of

10 their way to reproduce as much of the
evidence as in their opinion was relevant.
They have stated this evidence fully but
in concise form. They have also noted
the source of the evidence, and I repeat,
they have shown that the evidence of Revenue
to prove fraud or wilful default and under-
statements of chargeable income came from
the Appellant's own books. They have also
the reconstructed unrecorded dealings and
finding them to conform to the Appellant's
general practice and margins they have
accepted them as representing the truth.
The Appellant has or ought to have the
means to prove that the entries in the
PAB were wrong. He did not use them.
He had not even shown or said one word
in explanation why he kept two divergent
sets of books for his transactions and
dealings. And I repeat the onus was at
20 all times on him.

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In all the circumstances, it seems
to me, without, of course, purporting to
sit on appeal from the decision of
Arulanandom J., there there is no reason
or no sufficient reason for granting an
adjournment of the hearing on this ground.

11. Further application for adjournment

30 A further application for adjournment
was made at the end of Appellant's Counsel's
submission on natural justice on the first
day. It was founded on personal grounds.
It was with some regret that having regard
to the costs of the hearing, I felt that I
could not grant a long adjournment and that
the only justifiable adjournment I could
grant was to the next day.

40 I need only say how relieved I was the
next day to be supplied with a written
submission and to hear an oral submission
from Appellant's Counsel which was full and
comprehensive and covered all points raised
in the appeal in such a way as frankly to
arouse my wholesome admiration, and therefore
to find that I had caused no injustice to
the Appellant.

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PART TWO

VALIDITY OF THE DECIDING ORDER

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1. The facts found by the Special Commissioners

The facts found by the Special Commissioners in summary form and under particular headings are as follows :-

(i) Rubber-estates fragmentation business: sales

An amount of \$7,419,106.00 as in the following table :- 10

<u>Year of Assessment</u>	<u>Amount of Fragmentation Profits Omitted and/or Understated</u>	
1953	\$ 542,916.00	
1957	283,595.00	
1959	1,003,013.00	
1960	680,482.00	
1961	2,569,226.00	
1962	914,598.00	20
1963	20,606.00	
1964	178,162.00	
1965	23,518.00	
1966	68,388.00	
1967	581,770.00	
1968	198,162.00	
1969	8,000.00	
1970	149,170.00	
1971	197,500.00	
	<u>\$ 7,419,106.00</u>	30

has not been accounted for by the Appellant either by understatements or by omissions.

(ii) Rubber-estates fragmentation business: Interests received from sub-purchasers

The amount estimated by Revenue at

\$10,000.00 for each of the years 1960 and 1968 to 1972 and at \$20,000.00 for each of the years 1961 to 1967 was upheld by the Special Commissioners.

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(iii) Rubber-estates fragmentation profits (Juru Estate).

10

The Appellant sold a part of Juru Estate of an area of 627 acres which he had held in his own name for some time for \$327,064.00, and claimed that this sum represented capital accretion. The Special Commissioners rejected this contention and treated it as income from the fragmentation business chargeable to tax.

(iv) Rubber fragmentation business: penalties paid to Vendors

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In respect of Trans-Krian Estate, the Appellant paid two penalties of \$72,857.00 and \$30,000.00 for the years of assessment 1962 and 1963 respectively for the delay in completion but the delay in each case was occasioned by the fact that the Appellant had remitted to India moneys which he had collected from the sub-purchasers. Had he retained the collections, he would not have incurred the penalties.

(v) Interests paid to banks

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From 1958 to 1972, the interests paid by the Appellant to various banks aggregated \$511,069.00 which were disallowed as deductions since the borrowings were in respect of (vii) below or of matters unconnected with his businesses and in the production of income.

(vi) Bonuses to employees (a) Suppiah and (b) Ayavoo

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Claims for \$15,000.00 bonus paid to Suppiah whose ordinary salary was \$95.00 per month and for \$1,000.00 bonus paid to Ayavoo, a driver whose salary was \$500.00 per month, were found to have not been paid.

(vii) "Business out-go"

The various sums claimed by the Appellant

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by way of "business out-go" as deductible expenses in his businesses were found to be remittance to India not connected with any such business, gifts to relatives in cash or in the form of jewellery, payment of life insurance premia on the lives of others, donations to unapproved charities, purchases of shares, repairs to and expenses in connection with his residence and the purchase of a property in Market Street, Penang which had nothing to do with his business. The Special Commissioners found the term "business out-go" misleading and held that all the above items under this heading were not properly allowable as deductions. 10

(viii) The Appellant's activities concerning currency, jewellery, gold articles and other valuables

The Special Commissioners found from the numerous remittance other than through official channels of currency to India exchanged at inflated black-market rates and purchases and despatches of jewellery, gold, diamond and goods in short supply or under prohibition in India, that the Appellant had been carrying on a business of dealing in foreign exchange and of export; and assessed him to tax on sums computed by them as representing his profits. The sums totalled \$7,150,000.00. 20 30

(ix) Losses incurred by a newspaper Tamil Malar published by the Appellant in Malaysia

A sum of \$80,896.00 claimed for loss sustained was in fact incurred by the Singapore Branch and not in Malaysia.

(x) Loans to the Malayan Times and one V.M.Sundram

The loans totalled \$675,707.00 and were not a trading debt but an investment written off when Malayan Times folded and an interest-free loan to V.M.Sundram. 40

On the facts as found by the Special Commissioners the arguments not surprisingly before them and in this Court on the

chargeability of the Appellant did not turn much on law, and such submissions as there were pertinent to the case, apart from the procedural arguments, were basically addressed to the question whether the Appellant had been correctly assessed to tax, save possibly in one matter to which I shall allude later. There could be no question as to his chargeability on the income derived from the Appellant's fragmentation activities. They had all the marks of and were consistent enough to constitute a business within the statutory definition of business. The difference between the Appellant and Revenue concerned the amounts of the profits accruing or derived from the business. This normally would be a matter of accounting and the relevant figures could be extracted from the account books of the business. It was a matter essentially for the Special Commissioners to determine. The side issues, if I may so call them, are the deductible expenses and in the context of this case would include the penalties paid to the vendors, the interests paid to the banks on the overdrafts taken by the Appellant, the bonuses to employees and the so-called "business out-go". On the plus side, they are the interests received from the various sub-purchasers and the sale of a part of Juru Estate which was retained for some time by the Appellant after the rest of it had been fragmented and sold.

There are three other heads of revenue, which I shall deal with in their turn.

2. In a hearing before judicial officers or persons exercising judicial functions involving the findings of facts and the determination of law, the question of the credibility of a person as a witness very often arises. A litigant or a witness on his own behalf should have regard to his interests and he can best safeguard them either by producing evidence which is irrefutable or giving evidence in such a manner as to convince or at least persuade the tribunal of the probability of his case. But if his evidence is demonstrably contradictory or false, then

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the question of his demeanour or the manner in which he gave his evidence loses much though perhaps not all of its significance. It is therefore necessary to see how the Appellant appeared as a witness to the Special Commissioners.

He testified before the Special Commissioners for a total of 10 days, **equally** divided between his examination-in-chief and cross-examination. The Special Commissioners had ample opportunities of hearing and observing him. They had no difficulty in arriving at the conclusion that he was not a witness of truth. They found he had contradicted himself and was lying. They noted several instances of such contradictions and untruths.

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The Special Commissioners also regarded the fact that the Appellant kept several sets of account books and found many instances where the amounts of moneys received as recorded in his ABIT differed from the entries in his PAB. They noted the examples. It was not merely a case of under-statements. It was also a case of omissions, so that his account books taken together did not disclose a full or accurate account of his income. From the absence of any reference to it in the statement of the case, the Special Commissioners also did not appear to have received any explanation why several sets of account books had been kept or any proof of the real transactions undertaken by the Appellant. They could therefore give no real credence to the account books, but obviously the account books must be a starting point in the discovery of the Appellant's tax liabilities.

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From Mr. Sadasivam, the Special Commissioners obtained a method of approach, or rather they obtained an explanation of how Revenue arrived at the revised computation of the Appellant's income as summarised in Exhibit R.233. Mr. Sadasivam explained that where records were available in the Appellant's PAB, he used the actual figures recorded. Where they were not, he made estimates of the Appellant's income after studying and analysing his available records.

50

This method was attacked by the Appellant, not because it was wrong but because it was said to produce or to be used to produce assessments that were "dishonest or highly inflated." How it did did not appear to have been explained to the Special Commissioners. It has certainly not been to me.

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10 The Special Commissioners held that Revenue was legally entitled to do so. I agree. For myself, I am unable to see how applying the ascertained pattern from the Appellant's known transactions to the unrecorded ones and using the same margins is inherently wrong or dishonest. On the other hand, I consider this a fair yardstick. Revenue could possibly use a bigger margin of profit, e.g. in fragmentation during the years when to its know-
20 ledge, fragmentation was the popular means to become rubber plantation owners. It did not. It used the same margin.

And as submitted by Revenue, there is good authority for this approach. This is apart from sound common sense. Cases such as Rosette Franks (King Street) Ltd. v. Dick (Inspector of Taxes) 36 T.C. 100 and Ganga Ram Balmokandu v. C.I.T., Punjab II Reports of Income Tax Cases 10 which it relied on,
30 establish that from one proved or admitted incident of suppression or omission of income, Revenue is entitled to infer that there are other similar incidents. In my view, Revenue had throughout acted correctly according to its judgment, S.69 Income Tax Ordinance 1947 or to the best of its judgment, S.91 Income Tax Act 1967.

40 In any event, the onus is on the Appellant to prove Revenue wrong and the assessments erroneous or excessive and he cannot obviously be said to have discharged this onus by merely saying Revenue was wrong without showing how it was wrong and without pointing to facts and figures, which it should have been possible for him to do, if he had kept consistent books of accounts which he was required to do: see Section 63 Income Tax Ordinance 1947 and Section 82 Income Tax Act 1967, or if he had been more
50 frank with the Special Commissioners.

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Bearing all these in mind, in particular the onus that lies on the Appellant, I now deal with the various heads of assessment.

(i) Rubber-estates fragmentation business: sales

The figure of \$7,419,106.00 of omitted or under-stated profits was not challenged. There was even an admission by the Appellant that his accounts and consequently his returns were incorrect.

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No objection is also taken before me. There would appear to be no appeal on this item. In any event, if there is, the Appellant has not shown to the Special Commissioners or to me how this figure erred in principle and in quantum.

(ii) Interests received from sub-purchasers

Instances of the receipts of such interests were found in the Appellant's books of account. They were not declared in his returns. Revenue was not confident that what were recorded were all the interests received. It therefore made estimates of the omitted interests.

20

Interests received from sub-purchasers which enhanced the purchase price because of some temporary default on their part must add to the Appellant's profits and it is never disputed that they were chargeable to tax. As for the amount, it was for the Appellant to persuade the Special Commissioners that Revenue's estimates were excessive. It was not for him to query the Special Commissioners or me whether the estimates were correct, as he sought to do.

30

(iii) Juru Estate

It was conceded and the concession is repeated to me that the sum of \$324,064.00 realised from the sale of a part of Juru Estate which the Appellant had retained for some time after the rest of the estate had been fragmented and sold, was not capital accretion but a profit from his fragmentation business. I am sure Appellant is, in this

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instance, correct.

(iv) Penalties paid to Vendors in 1962 and 1963

They were paid when the Appellant failed to complete within the time stipulated and to obtain an extension of time for completion. They would ordinarily have qualified for deductions as expenses, but in the context of the evidence uncovered by Revenue that they needed not to have been paid and that the Appellant was in a position to complete within time, had he not remitted large sums of money to India for his own purposes wholly unconnected with his fragmentation business from moneys received from his sub-purchasers which should have gone in the first place towards buying the estates concerned, Revenue disallowed the claim for deduction and the Special Commissioners, in my view entirely correctly, upheld the disallowance. To qualify for deductions under S.14 Income Tax Ordinance, 1947, they must be "expenses wholly and exclusively incurred.....in the production of the income," and it cannot be said by any stretch of the imagination that these penalties were of this description.

But the Appellant does not appear to resist this decision.

(v) Interests paid to Banks on overdrafts

The Appellant claimed that such interests should be allowed as deductions. The Special Commissioners in their Grounds of Decision accepted the contention of Revenue that the amounts of the overdrafts were not utilised as capital and that they were in fact used for purposes other than in the production of income.

The contention of the Appellant before this Court is that the sums were used partly for personal and partly for business purposes. Therefore there should be an apportionment of the interests. But before the Special Commissioners, he claimed that the interests paid over the years were deductible in full, which was a very different argument.

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In any event, it is for the Appellant to show that the interests paid were paid on "any money borrowed by (him) where the Comptroller is satisfied that the interest was payable on capital employed in acquiring the income," S.14(1) (a) Income Tax Ordinance 1947, or "upon any money borrowed by (him) and employed in that period in the production of the gross income from that source," S.33(1)(a) Income Tax Act 1967. It does appear to me that not only had the Appellant failed to satisfy the Special Commissioners that the interests came within the scope of the permissible deductions but also that the contention of Revenue which the Special Commissioners accepted must mean that there is no question of apportionment.

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(vi) Bonuses to employees

From the contradictory evidence in the Appellant's books as to the payment of bonus to Suppiah Pillai an employee, and from the information advanced by Ayavoo, a driver, that he was not paid his bonus, Revenue disallowed all bonus payments claimed in the Appellant's returns up to the year of assessment 1962. It would however appear from R.233, that the claims for the years of assessment 1963 and 1964 were also disallowed.

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30

This is a question of fact and not law. If the bonuses had been in fact paid, they were deductible. On the issue whether they were in fact paid, the Special Commissioners found in favour of Revenue that they were not paid and so any claim for deduction would be fictitious. It is however submitted that there was no evidence to support the finding of the Special Commissioners but it is at the same time conceded that the Appellant did not produce the relevant witnesses, though it could have asked for their attendance. But with respect, it is the application of the rule, if I may so call it, of Rosette Franks Ltd. v. Dick, supra and S.69 and S.91 of the respective ordinances and so long as it cannot be or has not been shown that the judgment of the Comptroller was incorrect or that the Director-General had not acted to the best of his judgment, as to which, I repeat if

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somewhat monotonously, the onus lies on the Appellant, then the only course left to this Court would be to uphold the assessments.

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(vii) Business out-go

10 From the description of the nature of the expenditure under this head in the facts found, it is clear and beyond argument that they did not qualify as expenses properly deductible under the tax laws, not being wholly and exclusively incurred in the production of the income.

Under this head were included the inflated wages alleged to have been paid to his employees which were in fact not paid.

20 Not surprisingly therefore, the Appellant does not attempt to dispute the correctness of the decision to disallow such deductions.

(viii) Trading in gold, foreign exchange and valuables

30 Revenue alleged and adduced evidence of the many activities carried out by the Appellant in sending gold articles and other valuables to India, as well as dealings in foreign exchange. The evidence revealed many such dealings and the Special Commissioners went to some pains to set out this evidence. On this evidence the Special Commissioners found as a fact that the Appellant was carrying on a trade or a business in gold and valuables as well as on foreign exchange. It is contended and by far the greater part of the appeal is taken up with this contention, that the finding was wrong in law and in fact.

40 From the extent of the dealings, the Special Commissioners considered the export of the gold to be more than was reasonably required for the Appellant's family in India, even having regard to the status of the Appellant. The Special Commissioners rejected the contention that they were all of a private nature and not for profit. The Special Commissioners noted that in the

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circumstances then prevailing, the export of gold and valuables in short supply in India and the provision of foreign exchange made for enormous profits or at least provided great opportunities for such profits which must be tempting to anyone interested in money. The finding is one that is entirely within the competence of the Special Commissioners to make. There is evidence even in the summary form in which it appears in the statement of the case to support such a finding. The Special Commissioners it seems to me, have applied the test to the facts of the case which is expressed by Lord Guest in J.P.Harrison (Watford) Ltd. v. Griffiths 40 T.C. 281 in these words:

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" No doubt if it is established that a transaction is entered into with the evident intention of making a profit, that may be a strong indication that the Company was trading. But the corollary by no means follows that the absence of an intention to make a profit or the intention to make a loss, negatives trading. The test is an objective one. The question to be asked is not, quo animo was the transaction entered into, but what in fact was done by the Company."

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30

If it is contended that this was an inference and not a finding of fact, then, with respect, it is nevertheless such an inference that is capable of becoming of being itself a finding of fact, within the dictum of Lord Radcliffe in that part of his judgment in Edwards v. Bairstow & Harrison, supra, which I have earlier quoted.

It will be completely unjustified on my part, in the absence of any conclusive argument or facts pointing to the contrary, to differ. I must, with respect, accept this finding of fact as being firmly established.

40

But on one point the Special Commissioners were, with respect, in error. They treated the incomes assessed by Revenue and accepted by them as being reasonably to be assessed on this trading in gold and valuables and foreign exchange as if caught

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throughout by the provisions of S.10 of the Income Tax Ordinance 1947 for the levying of income tax on the income of any person "accruing in or derived from the States of Malaya or received in the States of Malaya from outside the States of Malaya." The last year of operation of the Ordinance was 1967. For the year of assessment 1968 and thereafter, the provisions of the Income Tax Act 1967 applied. And for the years of assessment 1968 to 1972, income tax was by S.3 of the Income Tax Act 1967 charged in the case of a person ordinarily resident in Malaya, as the Appellant was, upon his income wherever derived. It is true that after 1973, this world derivation scope was changed back to the previous provisions, but the years concerning this appeal straddled S.10 Income Tax Ordinance 1947 and S.3 Income Tax Act 1967, as unamended. Effect will have therefore to be given to the provision for world derivation scope.

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All it means of course is that for the years of assessment 1968 to 1972 inclusive, the profits assessed as income from the Appellant's trade in gold, etc. whether derived in India or in Malaysia are caught and chargeable to tax and no question whether the income accrues in or is derived from Malaya arises. But this question does arise in relation to the previous years of assessment and it is this question on which I ask for counsel's special assistance. For the profits to be chargeable to tax, they would have to be accrued in or derived from Malaya or received in Malaya from outside Malaya.

On the facts found by the Special Commissioners it is undeniable however that the gold and other valuables were purchased from moneys in Malaya. The purchases were made in this country. In India these articles were not disclosed in his Indian Capital Statement. The Appellant advanced the suggestion that it was for evasion of Indian Tax. The Special Commissioners rejected this suggestion and inferred that they had been sold for the large profits to be derived from the sale. Counsel for Revenue suggests that the proper inference from the absence in the Capital Statement

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must be that the money was remitted back to Malaya. This suggestion was not previously advanced, though there was evidence that in 1961 a sum of \$1,255,126.00 was brought back from India. The derivation of this sum has however not been determined. The Appellant's foreign exchange dealings presented a clearer picture. The Special Commissioners found remittances from Malaya to India through unauthorised currency dealers at black market rates or payments of Malaysian currency in this country for Indian and foreign currency. The foreign exchange dealings were in the view of the Special Commissioners derived from Malaya, whether or not the profits were brought back to Malaya. The Special Commissioners did not however enlarge on this point and it becomes necessary for me to consider whether their conclusion is correct on the law. 10 20

I could have done with a more detailed submission from each side than I actually received and I could have wished for rather better facilities in the way of books than have been available to me.

In regard to the provisions in Malaysia of Malaysian currency in this country against payments of Indian currency in India, I do not think that any difficulty arises. The income from such dealings is clearly derived in Malaysia and is squarely caught by section 10, Income Tax Ordinance. At the very least, it could be said that the business from which the profits were derived was carried on in this country. But with regard to the remittances to India and the export of gold, the position was perhaps not as clear cut. Different considerations arose. If on the whole I come to the conclusion that the income from such dealings was not derived in this country within the ambit of section 10, then I would be compelled to remit this part of the case to the Special Commissioners for them to split up their findings of fact into two categories. 30 40

The decision must be determined by the proper construction of the word "derive". But the dictionary meaning is not of any great assistance and in any event their Lordships of the Privy Council in construing 50

income "derived from lands of the Crown" under S.15(iii) of the Land and Income Tax Assessment Act of 1895 of New South Wales, "attach no special meaning to the word 'derived' which they treat as synonymous with 'arising or accruing': Commissioners of Taxation v. Kirk (1900) A.C. 588 at p.592.

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10 The case of Kirk is of some topical interest and in my view, also of great guidance. The question that arose was whether income from the ore mined from lands of the Crown in Broken Hill in the Colony of New South Wales caught for taxation included the sales of the refined ore sold in Melbourne, Colony of Victoria. Their Lordships held that the profits were chargeable.

20 Following the process adopted in Kirk's case, there appear to be four stages in the earning or production of the income from the export of gold and the currency dealings in India - (1) the furnishing of the capital; (2) the use of this capital to purchase the gold or for the exchange of currency; (3) the sale of the merchantable product; and (4) the receipt of the moneys arising from the sale. Even if it is contended, as I must anticipate if the attention of the Appellant is drawn to this moot point, that stages (3) and (4) were carried out in India and this fact might possibly support a submission that the income was not derived in this country, stages (1) and (2) remain to be considered. And Kirk's case decided clearly that it would be a fallacy "in leaving out of sight the initial stages and fastening (their) attention exclusively on the final stage in the production of the income". On the facts of the case under review it could not be denied that the initial stages were carried out in Malaysia, so that if I am right in following and applying the ratio decidendi of Kirk's case, I must come to the conclusion that this source of income is chargeable to tax.

40 In the result, I therefore confirm the Special Commissioners' assessment of income tax on an estimated profit of \$7,150,000.00 for the years in question.

50 (ix) Losses re "Tamil Malar."

Though the Tamil Malar was published

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in Malaya, the Special Commissioners found that the Appellant had established a branch office in Singapore, and that this branch office was a separate establishment.

This finding of fact disposes of any claim for the deduction of the losses sustained by the Singapore Branch, as this Court is bound by the decision of the Federal Court in Hock Heng Co. Sdn. Bhd. v. D.G.I.R., Federal Court Civil Appeal No.102 of 1975, as yet unreported, that losses sustained by a Singapore branch which is a separate establishment cannot be brought in as a deduction in assessing the chargeable income of a tax-payer in Malaysia. That judgment was only delivered on 19 January 1976, after the Special Commissioners had made their Deciding Order, and wholly supports it. See also U.N. Finance Bhd. v. D.G.I.R. (1975) 2. M.L.J. 224.

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(x) Loans

It has not been shown to the Special Commissioners or to me that the personal interest-free loan to V.M.Sundram was connected with either his fragmentation or his money-lending businesses, or that the amounts subscribed to the Malayan Times Ltd., now in the hands of receivers, were anything more than investment write-offs. Neither could properly qualify as deductions within those permitted in the tax law.

30

Judgment

In all the circumstances of the case, it has not been shown to me nor am I for myself able to ascertain that the Deciding Order of the Special Commissioners erred in any way.

I therefore confirm the Deciding Order.

Dated at Penang this 13th day of
September, 1976.

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Datuk Chang Min Tat

(DATUK CHANG MIN TAT)
JUDGE,
HIGH COURT, MALAYA.

Mr. A. Jayadeva of Messrs. Jayadeva & Zahir
(Sankey, Ratnam and Chandra with him)
for Appellant.

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Encik Mokhtar bin Haji Sidin, Senior Federal
Council (Rashid, F.C. with him) for
Respondent.

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Certified true copy

Sd: Illegible

Secretary to Judge
Kuala Lumpur.

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20/9/76.

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ORDER - 13th
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No.3
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IN THE HIGH COURT IN MALAYA AT PENANG
ORIGINATING MOTION NO. 1 OF 1976

Between

N.T.S. Arumugam Pillai Appellant

And

The Director-General of
Inland Revenue Respondent

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BEFORE THE HONOURABLE MR. JUSTICE CHANG MIN
TAT

THIS 13TH DAY OF SEPTEMBER, 1976 IN OPEN COURT

O R D E R

WHEREAS pursuant to paragraphs 34 and
35 of Schedule 5 to the Income Tax Act, 1967,
a case had been stated at the request of the
Appellant by the Special Commissioners of

In the
High Court

No.3

Order

13th September
1976

(continued)

Income Tax for the opinion of this Court:

AND WHEREAS the said case came on for hearing on the 20th, 21st and 22nd days of July, 1976:

AND UPON READING the Case Stated AND UPON HEARING Mr. A. Jayadeva (Messrs. H.R. Sankey, S.M.Ratnam and K.Chandra with him) of Counsel for the Appellant and Encik Mokhtar bin Haji Sidin, Senior Federal Counsel (Encik Abdul Rashid bin Abdul Manaf, Federal Counsel, with him), for the Respondent IT WAS ORDERED that this case do stand adjourned for Judgment AND the same coming on for judgment this 13th day of September, 1976 in the presence of Mr. A. Jayadeva (Mr. K.Chandra with him) of Counsel for the Appellant and Encik Mokhtar bin Haji Sidin, Senior Federal Counsel (Encik Abdul Rashid bin Abdul Manaf with him), for the Respondent: 10 20

THIS COURT IS OF OPINION that the determination of the said Special Commissioners of Income Tax is correct AND IT IS ORDERED that the Appeal be and is hereby dismissed with costs and the Deciding Order of the Special Commissioners of Income Tax dated the 27th day of September, 1975 be and is hereby confirmed.

GIVEN under my hand and the seal of the Court this 13th day of September, 1976. 30

.....
SENIOR ASSISTANT REGISTRAR,
HIGH COURT,
PENANG.

No. 4

NOTICE OF APPEAL
21st September 1976

In the
Federal Court
No.4

Notice of
Appeal
21st September
1976

IN THE FEDERAL COURT IN MALAYSIA
(APPELLATE JURISDICTION)

CIVIL APPEAL NO.: OF 1976

Between

N.T.S. Arumugam Pillai
No.132, Penang Street,
Penang

Appellant

And

Director-General of
Inland Revenue

Respondent

(In the Matter of Originating Motion
No.1 of 1976 in the High Court in Malaya,
Penang

Between

N.T.S. Arumugam Pillai

Appellant

And

Director-General of
Inland Revenue

Respondent)

NOTICE OF APPEAL

Take Notice that N.T.S. Arumugam Pillai
the Appellant herein being dissatisfied with
the decision of the Honourable Mr. Justice
Datuk Chang Min Tat given at Penang on the
13th day of September, 1976 appeals to the
Federal Court against the whole of the said
decision.

Dated this 21st day of September, 1976.

Sd: N.T.S. Arumugam
Pillai
Appellant

Sd: K. Chandra & Co.
Solicitors for the
Appellant

In the
Federal Court
No.4
Notice of
Appeal
21st September
1976
(continued)

To:

1. The Senior Assistant Registrar,
High Court,
Penang.
2. The Respondent,
The Director General of Inland Revenue,
Suleiman Building,
Kuala Lumpur.
3. The Chief Registrar,
Federal Court,
Malaysia,
Kuala Lumpur.

10

This Notice of Appeal was filed on behalf of the Appellant by Messrs. K. Chandra & Co., Solicitors for the Appellant whose address for service is No.8, Jalan Klyne (4th Floor), Kuala Lumpur.

Received this day of
1976 deposit of \$500.00 lodged in Court this
. day of , 1976.
Entered in the list of Civil Appeal this
. day of , 1976.

20

.....
Senior Assistant Registrar,
High Court, Malaya,
Penang.

In the
Federal Court

No.5

Memorandum
of Appeal

30th October
1976

(continued)

The Appeal to the Board was against the assessments made by the Director-General of Inland Revenue. The Additional assessments made for the years 1953 to 1959 were statute barred under Section 69(1) of the Income Tax Ordinance, 1947 unless the Revenue can show fraud or wilful default on the part of the Taxpayer in which case the Revenue may at any time assess or impose additional assessments on the Taxpayer for the purpose of making good any loss of tax attributable to fraud or wilful default.

10

The onus of proving fraud and wilful default is on the Revenue.

Prima facie as the additional assessments have been made in respect of the years:

1953 on 17. 3.1973
1957 on 1.12.1972
1958 on 1. 4.1974
1959 on 1.12.1972

20

the same is statute barred.

If the Revenue wants to impose additional tax, the Appellant can stand mute and ask the Revenue to prove the exception i.e. that there was fraud or wilful default. The procedure for appeals to the Board of Review is laid down - see p.162 - Procedure Regulations 1949 now repealed by 1967 Act but under Schedule 9 Transitional and Saving Provision Section 3(1) - the repealed laws shall remain in force for all purposesto previous years of assessments under that law.

30

At the commencement of the proceedings before the Special Commissioner - Counsel for the Appellant submitted that the Revenue ought to begin the case.

The Chairman rules as follows :-

- (1) the onus of proving that the assessments for years 1960 to 1972 were excessive and erroneous was on the Appellant who should begin the lead evidence first relating to these years of assessments.

40

(2) when the Revenue adduced evidence in reply it should also discharge its onus of satisfying the Board that fraud and wilful default had been committed by or on behalf of the Appellant in relation to the statute barred years.

In the
Federal Court
No.5

Memorandum
of Appeal

30th October
1976

(continued)

10 (3) the Appellant was then to prove that the additional assessment in respect of the statute barred years were excessive and erroneous. (At p.85 of the Record) the Board reiterated their ruling and stated that - Under Section 22 of the Schedule 5 of the Act 1967 the Board had the power to regulate the procedure at the hearing. The Board ruled :-

20 (1) the substantive onus of proving that the Assessments for the years of assessment 1960 to 1972 were either excessive or erroneous was on the Appellant and he should begin and lead the evidence first.

30 (2) when Revenue adduced evidence in reply it should then in the circumstances also discharge its onus of proving fraud or wilful default in respect of the statute barred years of assessments.

(3) the Appellant could be called upon to discharge the onus of proving that those statute barred assessments were excessive or erroneous.

40 The Board assumed that when the Appellant gave evidence, he adduced evidence not only in respect of the years 1960 - 1972 but also gave evidence in respect of the statute barred years of assessments.

2. The learned Judge of the High Court erred in law holding that there has been no breach of the Rules of Natural Justice and that the Appellant has been heard and he has not been in any way prevented from or hindered in meeting the case against him.

In the
Federal Court
No.5
Memorandum
of Appeal
30th October
1976
(continued)

Counsel for the Appellant before the Board asked for further ruling at the close of the Appellant's case whether he would be entitled as of right to lead evidence in rebuttal. The Board after hearing Counsel for Revenue ruled that the Appellant had, as a matter of law, the right to lead evidence in rebuttal but that the Court (Board) would have to be satisfied that before evidence was adduced on any fact, the Appellant had been taken by surprise.

10

Under Section 19(f) of the Procedure Rules the Special Commissioners shall have powers to admit or reject any evidence adduced 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 i.e. the Evidence Act 1950.

20

Though by Section 19(f) of the Procedure rules the Board has power to admit or reject inadmissible documentary evidence but they ought to act judicially and documentary evidence ought not to be admitted without giving the Appellant a chance to admit or deny the genuineness of the documents or to explain the nature of documents.

The Board has been in breach of the rules of Natural Justice in that by ruling that the Appellant could only give evidence in reply to discharge the onus of proving that the statute barred assessments were excessive or erroneous.

30

The evidence of the Assistant Director-General (Investigations) was that the Appellant had been guilty of fraud throughout the years 1953 to 1972. But the Appellant was not given a chance to reply to the charges of fraud made against him. The Appellant therefore declined to give evidence in reply.

40

3. The Appellant was cross-examined on the documents R35 to R111 but the other documents R112 to 233 were not put to the Applicant. The document R233 related to computation of increased assessments over and above the Assessments appealed against i.e. in the course of the hearing the

50

Revenue was cross-appealing to the Board to increase the Assessments from \$8,145,841.50 to \$10,323,230.75cts.

In the
Federal Court
No.5

10 Although the Board has powers to increase the assessments (see S.96(2) of the Act and Schedule 5 of the Act and Section 26 and Section 76(10) the Ordinance, 1947 but as these increases were made on the ground of fraud or wilful default, the rules of natural justice requires that the Appellant ought to be given an opportunity to rebut the allegations of fraud and wilful default.

Memorandum
of Appeal
30th October
1976
(continued)

The reversal of the onus and depriving the Appellant of his right to defend himself against the charges of fraud had caused a miscarriage of justice.

20 4. In the course of the hearing Counsel for the Appellant raised an objection that the Appellant was taken by surprise when Counsel for Revenue sought to produce the remaining documents which was marked exhibits R111 onwards through their witness the Assistant Director-General (Investigation). Counsel for the Appellant objected to the production and admission of those documents on the ground that they had not been put to the Appellant first during his cross-examination.

30 At this stage on 22.7.1975 the Board over-ruled Counsel's objection and admitted all the documents produced by Revenue from Exhibits R111 onwards through their said witness though they were not put to the Appellant in cross-examination or formally proved as documents connected with the Appellant's business.

40 The learned Judge of the High Court erred in law in holding that if the Appellant wanted to challenge any of the documents either in regard to their genuineness or their accuracy, the Appellant could have done so during the cross-examination of Revenue's witness.

5. The Special Commissioners were not bound by the rules of procedure laid down for the Courts. They had powers to regulate their own procedure at the hearing of Income Tax Appeals. The Special Commissioners were

In the
Federal Court
No.5
Memorandum
of Appeal
30th October
1976
(continued)

also not bound by the provisions of the Evidence Act and admit or reject any evidence oral or documents and whether admissible or inadmissible under the Evidence Act. That being so they ought to have given the Appellant unconditional right to give evidence on his own behalf and to call witnesses to rebut the charges of fraud and wilful default and to explain the documents produced by Revenue.

10

The Special Commissioners erred in law in not releasing the procedure and the rules of evidence in favour of the Appellant but instead restricting his evidence to discharging the onus on him to prove that the assessments for the Statute-barred years were excessive.

6. The learned Judge of the High Court erred in holding that the decision of the Special Commissioners was made on a question of fact and not on law. The learned Judge erred in rejecting the contention of the Appellant that there was no evidence to support the finding of the Special Commissioners on the following matters :-

20

(1) The Respondent's additional assessments for the year 1953 was based :-

(a) on an estimated omission of profits amounting to \$274,900/- on the fragmentation and sale of Wellesley Estate (see p.21-22 of the Case Stated)

30

(b) under-stated profits on fragmentation and sale of Maren Estate, Lunus Estate and Gordon Estate (see p.21 of the Case Stated).

On both items profits amounted to the total sum of \$542,916/-. The Revenue contends that the accounts submitted by the Appellant for the years of assessment 1953 were not only inaccurate but false (see p.22 of the Case Stated).

40

(2) For the year 1957 the Revenue made additional assessments on the ground that the Appellant submitted false accounts of the sale of Juru Estate, Batu Kawan Estate,

Breith Estate, Nagarajan Estate. That no records were produced to show the price at which Juru Estate was fragmented and sold. The Respondent computed the omitted profits on the sale of Juru Estate to be \$283,595/-.

In the
Federal Court

No.5

Memorandum
of Appeal

30th October
1976

(continued)

(3) For the year 1959 the Revenue estimated the profits to be :-

	(a) from Paya Besar Estate omitted profits	\$67,440.00
10	(b) from Alor Pongsu Estate omitted profits	\$14,300.00
	(c) from Padang Estate omitted profits	\$541,036.00
	(d) from Sempah Penanti Estate omitted profits	\$330,237.00
	(e) Jawi Krian Estate no records traced estimated profits	\$50,000.00
20		<u>\$1,003,013.00</u>

(see page 25 of the Case Stated)

(4) For the year 1960 omitted profits from the sale of Selambau Estate, Sungei Batu Estate \$362,888.00

Total omitted profits amounted to \$680,482.00

(see p.27 of the Case Stated)

(5) For the year 1961 the total understated profits \$2,569,226.00

30 (see p.28 of the Record)

(6) For the year 1962 understated profits were :-

(i)	Kuala Dingin Estate	\$527,650.00
(ii)	Trans Krian Estate	<u>\$396,948.00</u>
	Total:	<u>\$914,598.00</u>

(see p.28 of the Case Stated).

In the Federal
Court

No. 5

Memorandum
of Appeal

30th October
1976

(continued)

- (7) For year 1962 omitted profits
\$20,606.00
(see p.28 of the Record).
- (8) For the year 1964 omitted
profits on Bawali Estate, Bertama Estate
and Gemas Estate \$178,162.00
(see p.29 of the Case Stated)
- (9) For the year 1965 omitted
profits \$ 23,518.00
- (10) for the year 1966 omitted profits 10
on Juru Estate and Paya Besar Estate
\$ 68,388.00
- (11) For year 1967 omitted profits
from :-
- (1) Sungei Lalang Estate
 - (2) Bukit Genting Estate
 - (3) Lubok Kiah Estate
 - (4) Paya Besar Estate
- Total: \$581,770.00
- (12) For year 1968 omitted profits 20
from :-
- (1) Jitra Estate
 - (2) Glugor Estate
- Total: \$198,162.00
- (13) For year 1969 omitted profits
\$ 8,000.00
- (14) For year 1970 omitted profits
from :-
- (1) Juru Estate
 - (2) Bertam Estate
- Total: \$149,170.00
- (15) For year 1971 omitted profits
from :-
- (1) Kuala Dingin Estate
 - (2) Glugor Estate
- Total: \$197,500.00

(see p.30 of the Case Stated)

(16) For years 1972 estimated under-statement of profits of 40% to 80%.

Total omitted profits \$7,419,108.00
(see p.32 of Case Stated).

10 (17) Appellant's activities concerning currency jewellery, and gold articles or other valuables sold at profits of 200% to 300% is a business of dealing in foreign exchange and of exporting jewellery, gold articles and other valuable goods like radios, cameras, watches to India (see p.40 of the Case Stated).

(18) Interest received not declared (see p.44 of Case Stated).

20 7. The learned Judge of the High Court and the Special Commissioners erred in law and the facts stated that the Appellant was carrying on the business of export of gold, diamonds and other valuable goods and dealing in foreign exchange between India and Malaysia.

30 8. At the hearing of the appeal before the High Court Counsel for the Appellant applied for leave to refer to the documentary exhibits produced in order to support the Appellant's contention that he was not carrying on the business of export of gold, diamonds and other valuable or dealing in foreign exchange but the learned Judge declined to hear Counsel on the exhibits produced.

40 9. No inference can be drawn from the facts stated that the gold, diamonds and other valuables were exported to India by the Appellant and sold; and that the profits therefrom were remitted back to Malaysia.

10. No inference can be drawn from the facts stated that the monies remitted to India through sources other than Banks were for the purposes of dealing in foreign exchange. Revenue failed to adduce any evidence that any person had

In the Federal Court

No.5

Memorandum of Appeal

30th October 1976

(continued)

In the
Federal Court

No.5

Memorandum
of Appeal

30th October
1976

(continued)

negotiated with the Appellant to exchange either Malaysian or Indian currency. The only inference that could be drawn on the illegal remittance of monies to India is that the Appellant was transferring his capital monies in order to get a favourable exchange rate.

11. The estimated profits of \$7,150,000/- from the purported export business and dealing in foreign exchange assessed by Revenue is highly exaggerated and vindictive. 10

12. The estimate interest income purported to have been omitted by the Appellant for the years 1960 to 1972 is highly exaggerated and Revenue has made the estimate on statements made by the persons not called as witnesses.

13. The learned Judge of the High Court erred in confirming the deciding order relating to the disallowance of salaries and bonus paid by the Appellant merely on the statements made to Revenue By Suppiah Pillai and Ayavoo, ex-employees of the Appellant. 20

14. The estimated profits from the fragmentation for the years 1953 to 1971 is highly exaggerated and vindictive and the Director-General had not assessed the additional assessment in his best judgment.

Dated this 30th day of October, 1976 30

Sgd:

K. CHANDRA & CO.,
Solicitors for the
Appellant

To: (1) The Chief Registrar,
Federal Court of Malaysia
Kuala Lumpur.

(2) Director-General of Inland Revenue,
The Department of Inland Revenue,
Suleiman Building,
Kuala Lumpur. 40

No. 6

NOTICE OF MOTION FOR
LEAVE TO ADDUCE FURTHER
EVIDENCE - 21st January 1977

In the
Federal Court
No.6

Notice of
Motion for
leave to
adduce
further
evidence

21st January
1977

IN THE FEDERAL COURT AT MALAYSIA
(APPELLATE JURISDICTION)

CIVIL APPEAL NO.: 127 OF 1976

Between

N.T.S.Arumugam Pillai Appellant

And

The Director-General of
Inland Revenue Respondent

10

(In the Matter of the High Court at
Penang Originating Motion 1 of 1973

Between

N.T.S. Arumugam Pillai Appellant

And

The Director-General of
Inland Revenue Respondent)

20

NOTICE OF MOTION

TAKE NOTICE that on Wednesday the 26th day of January, 1977 at 9.30 o'clock in the forenoon, or as soon thereafter as he can be heard by Mr. A.Jayadeva of Counsel for the abovenamed Appellant will move the Court for the following orders :-

1. For leave to adduce further evidence on the above appeal inter alia :

30

- (1) the Affidavit of the Appellant abovenamed dated the 21st day of January, 1977;
- (2) the letter dated the 20th day of January, 1977 from the United Asian Bank Berhad to the Appellant;
- (3) the photostate copy of the cheque

In the
Federal Court

No.6

Notice of
Motion for
leave to
adduce
further
evidence

21st January
1977

(continued)

No.PF 146165 dated the 10th
April, 1957 drawn by the Appellant
on the United Commercial Bank
Limited, Penang for the sum of
\$421,570.50 to the account payee
of Messrs. Presgrave & Matthews,
Penang.

(4) the original plan of the land
known as Padang Estate;

2. For such further or other order as the 10
Court deems fit and proper.

Signed

.....

Solicitors for Appellant

Dated at Penang this day of 1977.

.....

R E G I S T R A R

To:

Department of Inland Revenue,
Suleiman Buildings,
Kuala Lumpur.

20

This Notice of Motion is filed by
Messrs. Chandra & Co., Advocates & Solicitors
of No.8, Jalan Klyne, Kuala Lumpur,
Solicitors for the Appellant abovenamed.

No. 7

AFFIDAVIT OF APPELLANT
AND EXHIBITS THERETO -
21st January 1977

In the
Federal Court

No.7

Affidavit of
Appellant and
exhibits
thereto

21st January
1977

IN THE FEDERAL COURT AT MALAYSIA
(APPELLATE JURISDICTION)

CIVIL APPEAL NO: 127 OF 1976

Between

N.T.S.Arumugam Pillai Appellant

10

And

The Director-General of
Inland Revenue Respondent

(In the Matter of the High Court at
Penang - Originating Motion No.1 of 1976

Between

N.T.S. Arumugam Pillai Appellant

And

The Director-General of
Inland Revenue Respondent)

20

A F F I D A V I T

I, N. Arumugam Pillai @ N.T.S.Arumugam
Pillai of full age holder of NRIC No:2050502
residing at 132, Penang Street, Penang hereby
affirm and state as follows :-

1. I am the Appellant abovenamed. I do not
read, write or speak the English language
and do not understand the English Language
except for a few words.

30

2. The contents and nature of the Deciding
Order have been read over and explained
to me after the decision of the Special
Commissioners was made. I am completely
surprised by the colossal income that
have been sustained and brought to
assessment in the Deciding Order.

In the
Federal Court
No.7
Affidavit of
Appellant and
exhibits
thereto
21st January
1977
(continued)

3. I state that I have not been given an adequate opportunity to present my case, particularly because I was not informed of the case against me in respect of each of the years of assessment.
4. I was also prejudiced and unable to meet the burden cast on me by the assessments and by the procedure adopted which involved : 10
- (a) the joinder and clubing of all the appeals which relate to dealings extending over 20 years;
 - (b) the procedure laid down in Clauses 10 and 11 of the 5th Schedule to the Income Tax Act;
 - (c) the documents put to me in the course of cross-examination by Revenue without notice and without giving an opportunity for me to explain the contents of the documents and without giving me an opportunity to refer to other relevant documents, books, persons who were involved in the transactions, and who wrote up the books and documents; 20
 - (d) and for further reason that such documents were sometimes in the English Language and often over fifteen (15) years old. 30
5. I also wish to bring to the notice of the Court that by subsequent analysis of the records and documents produced in the appeal by competent persons, the following errors in the face of the exhibits and inferences have been discovered:
- (a) the findings with regard to withdrawals of \$421,570.50 (Exhibit R206 and R207). I have now obtained a photostat copy of the original Cheque No. PF 146165 drawn by me on the United Commercial Bank Limited. The letter from the said Bank together with the 40

photostate copy of the said cheque is now produced and shown to me marked Exhibit "A1" and "A2" respectively

In the
Federal Court
No.7

Affidavit of
Appellant and
exhibits
thereto

21st January
1977

(continued)

10

(b) The said cheque shows that it was drawn by me on the 10th day of April, 1957 to the payee account of Messrs. Presgrave & Matthews, Advocates & Solicitors, Penang and which shows that the said cheque had been collected by and credited to Messrs. Presgrave & Matthews. This completely vitiates the finding and inference of the Special Commissioners as to the use of the money both in regard to its use for non-business purposes and remittance to India. What I have been able to show now in this regard, I could have showed then if I had been given an adequate opportunity to meet the case against me.

20

(c) the finding that Wellesley Estate had not been disclosed by me.

(d) the finding that the 3 Estates - Batu Kawan Estate, Brieh Estate and Nagarajan Estate had not been declared in my return for 1957. Reference is made to the Exhibit R124.

30

(e) the inclusion of a sum of \$541,036/- in respect of the Sale of Padang Estate for the year 1959 which involves an estimate and the addition of the sum of \$306,790.63 in respect of the extent of the land transferred to the nominees of Lim Boon Chit at the price of \$3,000/-. It is clear from R142 that the transfer was for a price of \$3,000/-. The translation of the Exhibit R142 is not complete and exact. The correct translation of R142 is now produced and shown to me marked Exhibit "A3".

40

(f) If this issue was put to me and in time with an adequate opportunity to meet this point, I could have shown the correct position which will be shown by my Counsel in this appeal. The original plan of the land known as Padang Estate showing the extent of

In the
Federal Court

No.7

Affidavit of
Appellant and
exhibits
thereto

21st January
1977

(continued)

lots transferred to the nominees
of Lim Boon Chit is now produced
and shown to me marked Exhibit
"A4".

(g) The said plan shows that the
several balance lots transferred
to the nominees of the said Lim
Boon Chit for \$3,000/- were swamp
lands and for a labour line.

6. I also refer to the telegram (Exhibit R66). It is explained to me that the finding that I had given evidence under cross-examination that the figure 28 referred to Rupees 28. The suggestion given by Counsel for Revenue at the hearing of the Appeal that it referred to Rupees 2,800,000/- was roughly equivalent to \$1,699,995/- by the difference between the \$2,089,000/- withdrawn from the Bank and \$398,000/- used in that year as alleged by him in non-business expenditures. Reference Exhibit R230 is rendered completely untenable when reference is made to the disbursements in the cash flow statement (Exhibit A1). This will be further explained by my Counsel in this appeal. What will now be shown in respect of this by my Counsel would have been shown by me if I had an adequate opportunity to meet the case. 10
20
30
7. In respect of the year of assessment 1957, the omitted sales for Batu Kawan Estate had been estimated at \$137,500/- (Exhibit R231). This notwithstanding R124 which clearly shows that there had been no sale of Batu Kawan Estate either in whole or by fragmentation. What will be shown in this regard by my Counsel could have been shown by me if I had been told of the case against me and I had been given an adequate opportunity to meet it. I state categorically that I had not been given that opportunity. 40
8. I further state that in regard to the several matters raised in the Deciding Order and the income stated therein I was for the first time only told of the

source of income and the quantum of the increase when the record of the Case Stated was explained to me by my Solicitors. That questions were raised in respect of the source of such income in the cross-examination of myself or the examination of the Special Investigation Officer of the Department of Income Tax did not indicate to me the nature, and extent and reason for the assessment and therefore I had no adequate opportunity to meet the case against me.

In the Federal Court
No.7
Affidavit of Appellant and exhibits thereto
21st January 1977
(continued)

10

9. I also state that the mode, speed and conduct of the procedure adopted in the appeal herein particularly :-

(a) the failure and refusal to give particulars of the assessment (which is the case against me);

20

(b) the over ruling of the objection taken by my Counsel with regard to Exhibits R111 to R240;

(c) the specific ruling that evidence in rebuttal for the years of assessment 1962 to 1972 will not be allowed unless I was taken by surprise coupled with the earlier ruling that I was not taken by surprise, did not give me an adequate opportunity to meet the case against me;

30

(d) the other defects, irregularities and errors in the proceeding and in the Deciding Order will be set out by way of submission by my Counsel.

AFFIRMED by the said N. ARUMUGAM PILLAI @ N.T.S. ARUMUGAM PILLAI this 21st day of January, 1977 at 11.15 a.m.) Signed.

40

Before me,
Signed.
AV. NADESON
(Commissioner for Oaths)

In the
Federal Court

C E R T I F I C A T E

No.7
Affidavit of
Appellant and
exhibits
thereto
21st January
1977
(continued)

I hereby certify that the above
written affidavit was read translated and
explained in my presence by Mr. AV.Nadeson
a Sworn Interpreter of the Court to the
deponent who seemed perfectly to understand
it declared to me that he did understand it
and made his signature thereto in my presence.

Signed Signed.....
Sworn Interpreter Commissioner for Oaths 10

UNITED ASIAN BANK BERHAD

AG.

20th January, 1977

Mr. N.T.S.Arumugam Pillai,
132 Penang Street,
Penang.

Dear Sir,

Re: Cheque No.PF.146165 dated
10.4.57 20

We hereby confirm that the above
cheque drawn by you for \$421,570.50 in
favour of M/s. Presgrave & Matthews,
was paid by us on 11-4-1957 to Hongkong
& Shanghai Banking Corpn. Penang.

Yours faithfully,

Sgd.

PG/o.

No. of 19

This is the exhibit marked A-1 referred 30
to in the Affidavit of N.Arumugam Pillai
affirmed on the 21st day of January 1977.

Sd. AV.NADESON
Commissioner for Oaths

No.PF 146165

PENANG 10-4-1957

Stamp Duty
Paid

In the
Federal Court

No.7

THE UNITED COMMERCIAL BANK LTD.

PENANG

Affidavit of
Appellant and
exhibits
thereto

21st January
1977

(continued)

PAY PRESGRAVE AND MATTHEWS or
Dollards Four hundred and twenty-one thousand
and five hundred and seventy and cents fifty
only

10 \$421,570/⁵⁰/₁₀₀

Sgd.

N.T.A.ARUMUGAM PILLAI

No. of 19

This is the Exhibit marked A-2 referred to
in the Affidavit of N.Arumugam Pillai
affirmed on the 21st day of January 1977

Sd.

AV.NADESON
Commissioner for Oaths
Judicial Department
Malaysia

20

TRANSLATION

LIM BOON CHIT

EXHIBIT R.142

Said the proprietor. The proprietor will
say that he has not told like this. This can
be settled later. He has not come to any
conclusion.

Padang Estate :-

Total amount due as per previous
Sales \$306,790.63

30 Amount paid to us and amount
received direct from parties \$324,414.19

After setting off the amount of \$306,790.63

In the
Federal Court
No.7

Affidavit of
Appellant and
exhibits
thereto

21st January
1977

(continued)

due to us the balance is \$17,623.56.
This has to be adjusted against the Kota
Dingin Estate account. Lim Boon Chit
asked for a typed Statement of the amount
received from parties. List has not yet
been given. We have already given to him
the Labour Line at Padang Estate as Gift.
A price value has to be put while trans-
ferring the Labour Lines Grants. We have
not credited this sales in our accounts.
Although the brother of Lim Boon Chit,
Ah Toh told me to put \$3,000/- or less.
If the sum of \$3,000/- is to be put, we
have to record this the credit in sales
account. If it is credited 50% has to be
paid as tax by us. Hence he has to pay
us \$1,500/-. Ah Toh told me that he
will consult his brother (Lim Boon Chit).
Till this time it is not known whether
the grant has been transferred or not.
The grant sold through Ah Poh to Bengali
Sadit Singh has not yet been transferred.
The grant has to be transferred to
Bengali, after consulting Ah Toh. If
there is any arrears of land Tax, the same
has to be collected.

10

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No. of 19

This is the Exhibit marked "A-3" referred
to in the Affidavit of N. Arumugam Pillai
affirmed on the 21st day of January 1977

30

Sd.

AV. NADESON
Commissioner for Oaths
Judicial Department
Malaysia

No. 8
JUDGMENT
15th March 1977

In the
Federal Court
No.8
Judgment
15th March
1977

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT
KUALA LUMPUR

(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO: 127 OF 1976

Between

N.T.S. Arumugam Pillai Appellant

10

And

The Director General of
Inland Revenue Respondent

(In the matter of the High Court at Penang -
Originating Motion No. 1 of 1976

Between

N.T.S. Arumugam Pillai Appellant

And

The Director General of
Inland Revenue Respondent)

20

Coram: Suffian, L.P.
Ong Hock Sim, F.J.
Wan Suleiman, F.J.

JUDGMENT OF THE COURT

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This Appeal was preceded by a Motion for leave to adduce further evidence which we rejected particularly as we can find no ground for acceding thereto. It raised substantially the reasons for the Appellant's dissatisfaction with the Deciding Order of the Special Commissioners and the Judgment of the High Court upon the Case Stated thereafter. We note that the Appellant was not without legal advice and the new evidence was not such as has been uncovered after the case. We then heard the Appeal.

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Federal Court
No.8

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1977
(continued)

Before us, Counsel for the Appellant elected to base his appeal entirely on two issues, namely :-

- (1) Whether the procedure followed by the Special Commissioners in arriving at their Deciding Order was correct?
- (2) Whether the Appellant had opportunity to present his case, in other words, whether the principles of natural justice had been observed? 10

With respect to learned Counsel, who assiduously pursued the arguments put forward both before the Special Commissioners and the High Court Judge on the Case Stated, we do not, as did the Commissioners and the High Court Judge, find any merit or substance in them. We were referred to various provisions of the Income Tax Act, 1967 (the 5th Schedule). Having regard to the large amount of tax assessed, we had some sympathy with the Appellant, but we can find no ground for criticising the rulings by both the same object and the learned Judge upon the same objections taken before us. We think that the law is adequately set out in Halsbury's Laws of England (3rd Edition) Volume 20, paragraphs 1352 et seq (pp.684-686). 20 30

We need only refer to that portion of the case Stated on this point as to the onus of proof. This appears at pages 149-153 of the Record. It reads :-

" On the question of the onus of proof where time-barred assessments have been raised on the grounds of fraud or wilful default, we were aware of the facts in the case of Amis v. Colls 39 T.C. 148 where the U.K. Inspector of Taxes had accepted that in the circumstances it was for him to satisfy the Commissioners that fraud or wilful default had been committed by or on behalf of the Appellant in relation to income Tax for the statute-barred years in question. 40

We were also aware of the following dictum of Cross J. in that case where he indicated the procedure that could be adopted and said :

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(continued)

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'It is clear that the onus of establishing that a case falls within the meaning of that proviso (to section 47 of the U.K. Income Tax Act, 1952) lies on the Crown, and the Inspector representing the Crown on the appeal could have taken one of two courses. He could, if he had liked, have opened his whole case on all the years, calling all his evidence as though the onus was on him to support all the additional assessments. Alternatively, he could first call such evidence as he thought fit to establish fraud or wilful default which he was alleging in connection with the first five years, and could then ask the Commissioners to decide whether he had made out his case on that point. If they decided that point against him then those years could be struck out altogether and the matter would proceed on the other years'

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In this case Counsel for Revenue did not choose either of the two possible courses indicated in the above-quoted English case. We have stated in paragraph 2 above the stand taken by both Counsel and that after hearing arguments and considering the matter and bearing in mind the words of Lord Widgery C.J. in Reg. v. Special Commissioners (ex-parte Martin) 48 T.C. 1, at page 7 where he said :-

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'It is very important that the procedure before the Commissioners should be kept flexible to deal with widely varying types of cases which come before them, and Cross J. in Amis v. Colls (1960) 39 T.C. 148 has given useful guidance as to various alternative ways in which the procedure can be adopted to suit a particular case.'

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In the
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No.8
Judgment
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1977
(continued)

we decided that paragraph 22 of Schedule 5 of the Income Tax Act, 1967, in the absence of any rules made under section 154(1)(d) of the said Act, empowered us to regulate the procedure of the hearing. We therefore ruled that as the substantive onus of proving that the assessments for the years of assessments 1960 to 1972 were either excessive or erroneous was on the Appellant, he should begin and lead evidence first. When Revenue adduced evidence in reply it should then in the circumstances also discharge its onus of proving fraud or wilful default in respect of the statute-barred years of assessment, i.e. for years of assessment 1953, 1957, 1958 and 1959 before the Appellant could be called upon to discharge the onus of proving that those statute-barred assessments were excessive or erroneous. However, when the Appellant began, he adduced evidence not only in 1960 to 1972, but he also gave evidence in respect of the statute-barred assessments."

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Before the High Court the learned Judge heard arguments whether the Special Commissioners were correct with regard to the procedure. A detailed and considered ruling on that was given by the learned Judge at pages 290-296 of the Record which we now reproduce :-

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"4. The law of procedure and evidence in hearing before the Special Commissioners

The law is contained in Schedule 5 to the Income Tax Act 1967. The relevant paragraphs are :-

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10. One of the Special Commissioners may order

(a) two or more appeals by the same person or

(b)

to be heard together.

19. The Special Commissioners shall have.....

In the
Federal Court

No.8

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15th March
1977

(continued)

(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.

10

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

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

Now, Section 142(5)(i) and Section 154(1)(d) of the Act are not of relevance in this connection. The former preserves the effect of the provisions in the Evidence Act 1950 relating to witnesses, while sub-sub-section (ii) removes the cloak of privilege from a tax-payer's documents and communications. The latter provides that the Minister of Finance may make rules regulating the practice and procedure in appeals to the Special Commissioners and the Special Commissioners' own procedure.

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So far as I can discover, no rules have been made and the matter stands to be considered in the light of the above.

On this, it is apparent that the Special Commissioners may largely regulate the procedure at the hearing from them, subject always to the important consideration that the Appellant must be given a full and adequate hearing or reasonable opportunity to be heard. The Special Commissioners were aware of their right to regulate procedure and also of the great advantage in not being hide-bound to a rigid code of procedure. They relied on Reg. v. Special Commissioners (ex parte Martin) 48 T.C. 1 where Lord Widgery at p.7 said :-

40

'It is very important that the procedure before the Commissioners

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15th March
1977

(continued)

should be kept as flexible to
deal with widely varying types
of cases which came before them.'

It is, with respect a most apt
quotation.

5. Ruling of the Special Commissioners
on (i) onus. "

Here the learned Judge repeated what
the Special Commissioners said at pages 149-
153 of the record for coming to their ruling 10
on the onus of proof but he went on to
observe :-

" This ruling was given on the first
day of the hearing on 3rd December,
1974 and the hearing before the
Special Commissioners was conducted
on the basis of it. On this ruling
the Appellant began and it was expected
that in accordance with this ruling
he would open his appeal with attempt- 20
ing to discharge the onus that lay
upon him to prove that the additional
assessments for the years of assessment
1960 - 1972 (inclusive) were excessive
or erroneous and that the question of
fraud or wilful default in respect of
the years of assessment that were
statute-barred would be left for
cross-examination by Revenue since it
was not his duty to open on this issue. 30
He would have the right to call
evidence in rebuttal of Revenue's
contention in this matter.

The Special Commissioner also
ruled that Revenue was to prove fraud
and wilful default beyond reasonable
doubt but the burden on the Appellant
to rebut the case against him was on
a balance of probabilities.

I would at this stage refer to the 40
ruling of the Special Commissioners
that the onus of proving fraud or
wilful default is on Revenue. Before
them, Revenue contended that the onus
lay not with it but on the Appellant.
Revenue's contention was rejected.
Before me, Counsel for Revenue again
attempted to submit that the Special
Commissioners were wrong on this.

With the greatest of respect, the decision of the Special Commissioners was, in my view, so eminently correct that I made it quite clear that it would be a waste of time for Revenue to contend otherwise before me, and I also pointed out that, in any event, Revenue had not preferred any appeal from that ruling."

In the
Federal Court
No.8
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1977
(continued)

10 We heard no substantive arguments for rejecting the conclusions of the learned Judge, respecting which we find no valid legal objections can be sustained.

The next objections was that the Appellant has been denied an opportunity to reply to the assessments made particularly to the exhibits after R111 to R240. We have looked at and scrutinized the Record. We have first to mention what happened
20 before the Special Commissioners as appears in the Case Stated - which was settled by the Revenue in consultation with, or with the approval of the Appellant's solicitors. That reads :-

" During cross-examination of the Appellant, Counsel for Revenue did put to him certain documents, i.e. those documents produced by Revenue before exhibit R111 was produced and
30 marked. At the end of the cross-examination of the Appellant, Counsel for Revenue indicated that there were many other documents to be produced but as he did not wish to cross-examine the Appellant on those documents, he would not produce them yet until he called his witness. When Revenue's witness was called to give evidence in chief, Counsel for
40 Revenue then sought to produce the exhibits R111 onwards. The Counsel for Appellant objected to the production and admission of those documents on the ground that they had not been put to the Appellant first during his cross-examination. It was at that stage on 22nd July, 1975 that we over-ruled Counsel for Appellant's objections and admitted all the
50 documents produced by Revenue from exhibits R111 onwards.

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1977
(continued)

Counssl for Appellant contended that his client had been taken by surprise on all those documents which had not been shown to him during his cross-examination by Counsel for Revenue. He asked for our ruling on that day, i.e. 22.7.1975, as to whether he would be entitled as of right to lead evidence in rebuttal. Counsel for Revenue argued that there was no element or surprise as the documents tendered, apart from those prepared by Revenue, were documents taken from the Appellant himself. We considered the matter and ruled at that stage that the Appellant had, as a matter of law, the right to lead evidence in rebuttal but that the Court would have to be satisfied that, before evidence was adduced on any fact, the Appellant had been taken by surprise on that fact. However, on 31st July, 1975, after the close of the case for the Respondent and after the Court's ruling on the question of fraud or wilful default, Counsel for Appellant informed us that the Appellant had elected not to call any further evidence in reply to show that the statute-barred years of assessments were excessive or erroneous, nor to give any evidence in rebuttal on any fact in relation to assessments for the other years....."

(Underlining is ours).

Before the High Court the same objection to the assessments was heard, particularly with regard to Exhibits after R.111 to R.240 and denial of opportunity to rebut and explain those exhibits. The Judge's notes as to this appears at pages 296, 297 and 298 now set out :-

"5.(ii) Admission of Documents by Revenue

The Special Commissioners ruled on July 22, 1975, after hearing a substantial objection, that Revenue could introduce all the documents it sought to put in after R.111, through its witness. To that ruling, they attached a rider, that the Appellant had, as a matter of law, the right to lead evidence 50

in rebuttal but before evidence was adduced on any fact, the Court would have to be satisfied that the Appellant had been taken by surprise on that fact. The documents were in accordance with the ruling admitted. The last document was numbered R.240.

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(continued)

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It was obvious that the Special Commissioners considered but over-ruled the objection because it found that almost all the documents from R.112 to R.240 were documents seized by Revenue from the Appellant. The Special

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Commissioners also considered that in the events that happened, the Appellant had been given adequate opportunities and he did exercise the right to take copies of and cross-examine on all those documents of his which had been seized by Revenue. In these circumstances, they made the ruling with the attached rider. In other words, the Special Commissioners left the

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issue open so that at the close of the case by Revenue the Appellant had two courses open to him (1) he could lead evidence as a matter of right in rebuttal of fraud or wilful default with which he was charged in respect of the statute-barred years; and (2) if he could satisfy the Special Commissioners that he had been taken by surprise in respect of any fact in the years of assessment that were not statute-barred, he would then be given the right to lead evidence in rebuttal.

6. Election by the Appellant

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But without attempting to take both these courses the Appellant through his Counsel informed the Special Commissioners that he elected not to call any further evidence in reply to show that the assessments for the statute-barred years were excessive and erroneous or to give any evidence in rebuttal on any fact in relation to the assessments for the other years. This was, as I see it, a deliberate choice on the part of the Appellant and if this was so then he cannot now be heard to contend that he

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Federal Court

No.8

Judgment

15th March
1977

(continued)

was never heard or to submit that he was denied any opportunity of being heard. I would also observe that if the statement is correct that, in so far as the statute-barred years were concerned, the Appellant elected not to contend that they were excessive or erroneous, it must mean as a necessary inference that he did not any longer contend that there was no fraud or no wilful default on his part so as to prevent Revenue from re-opening the assessments of those years."

10

What then is the function of this Court on this present appeal? The questions of fact found by the Special Commissioners were upheld on Case Stated as not being erroneous in law. The learned Judge agreed that upon the facts set out in the Case Stated, there was no error in law nor wrong inference drawn. We considered this appeal but find no merit on any ground upon which we can come to a decision contrary to that of the Special Commissioners and the learned Judge. We do not think having regard to the very detailed and considered decisions arrived at, both as to the law and the facts, that this case is one where we are justified in intervening on behalf of the Appellant. We are of the view that in the limited scope for appeals of this nature there are no merits in this appeal which we accordingly dismiss with costs.

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Deposit to Respondent to account of taxed costs.

Signed.
(TAN SRI DATUK ONG HOCK SIM)
JUDGE,
FEDERAL COURT,
MALAYSIA.

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Kuala Lumpur,
Dated this 15th day of March, 1977.

Counsel: Mr. A.Jayadeva with Mr.K.Chandra
for Appellant
Solicitors: Messrs. K.Chandra & Co.

Encik Abdul Rashid with Encik Jaafar
Md. Saman for Respondent.

No. 9
ORDER - 15th March
1977

In the
Federal Court
No.9

Order

15th March
1977

IN THE FEDERAL COURT AT MALAYSIA HOLDEN AT
KUALA LUMPUR

(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO:127 OF 1976

BETWEEN

N.T.A. Arumugam Pillai Appellant

10

AND

The Director-General of
Inland Revenue Respondent

(In the Matter of the High Court at
Penang - Originating Motion No.1 of 1976)

Between

N.T.A. Arumugam Pillai Appellant

And

The Director-General of
Inland Revenue Respondent

20 CORAM: SUFFIAN, LORD PRESIDENT, FEDERAL COURT,
MALAYSIA;
ONG HOCK SIM, JUDGE, FEDERAL COURT,
MALAYSIA;
WAN SULEIMAN, JUDGE, FEDERAL COURT,
MALAYSIA

IN OPEN COURT

THIS 15TH DAY OF MARCH, 1977

O R D E R

30 THIS APPEAL coming on for hearing on the
26th and 27th days of January, 1977 in the
presence of Encik A. Jayadeva (Encik K.
Chandra with him) of Counsel for the Appellant
and Encik Abdul Rashid bin Abdul Manaf,
(Encik Jaafar bin Mat Sawan) Federal Counsel
for the Respondent AND UPON READING the
Record of Appeal herein AND UPON HEARING

In the
Federal Court
No.9
Order
15th March
1977
(continued)

Counsel for the Appellant and the Federal
Counsel as aforesaid IT WAS ORDERED that
this Appeal do stand adjourned for Judgment
AND the same coming on for Judgment this
day in the presence of Encik A. Jayadeva
(Encik K. Chandra with him) of Counsel for
the Appellant and Encik Abdul Rashid bin
Abdul Manaf, Federal Counsel for the
Respondent IT IS ORDERED that this appeal be
is hereby dismissed with costs AND IT IS 10
LASTLY ORDERED that the sum of RM500/-
(Ringgit Five Hundred only) paid into Court
by the Appellant as security for costs of
this Appeal be paid to the Respondent
towards taxed costs.

Given under my hand and the seal of
the Court this 15th day of March, 1977.

Signed

.....
ACTING CHIEF REGISTRAR, 20
FEDERAL COURT, MALAYSIA.

This Order was filed by Messrs. K.Chandra
& Co., Solicitors for the Appellant whose
address for service is No.8, Jalan Klyne
(4th Floor), Kuala Lumpur.

No. 10

ORDER GRANTING FINAL LEAVE
TO APPEAL TO HIS MAJESTY
THE YANG DI-PERTUAN AGONG
16th July 1977

In the
Federal Court

No.10

Order granting
final leave to
appeal to
His Majesty
the Yang di-
Pertuan Agong
16th July 1977

IN THE FEDERAL COURT IN MALAYSIA HOLDEN AT
JOHORE BAHRU

(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO:127 OF 1976

10

BETWEEN

N.T.S. Arumugam Pillai Appellant

AND

The Director-General of Inland Revenue Respondent

(In the matter of Penang High Court
Originating Motion No.1 of 1976

Between

N.T.S.Arumugam Pillai Appellant

And

20

The Director-General of Inland Revenue Respondent)

CORAM: GILL, CHIEF JUSTICE, HIGH COURT IN
MALAYA;
ONG HOCK SIM, JUDGE, FEDERAL COURT,
MALAYSIA;
RAJA AZLAN SHAH, JUDGE, FEDERAL COURT,
MALAYSIA

IN OPEN COURT

THIS 16th DAY OF JULY, 1977

30

O R D E R

UPON MOTION made unto Court this day by
Mr. K.Chandra of Counsel for the Appellant in
the presence of Encik Jaafar bin Mat Saman
Federal Counsel for the Respondent AND UPON
READING the Notice of Motion dated the 4th of

In the
Federal Court
No.10
Order granting
final leave to
appeal to
His Majesty
the Yang di-
Pertuan Agong
16th July 1977
(continued)

July, 1977 and the Affidavit of N.
Arumugam Pillai @ N.T.S.Arumugam Pillai
affirmed on the 2nd of July, 1977 and
filed in support of the said Motion
AND UPON HEARING Counsel as aforesaid
IT IS ORDERED that final leave be and is
hereby granted to the Appellant to appeal
to His Majesty the Yang di-Pertuan Agong
against the decision of this Court given
on the 15th day of March, 1977 AND IT IS
LASTLY ORDERED that the costs of this
application be costs in the cause.

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GIVEN under my hand and the Seal of
the Court this 16th day of July, 1977.

Signed.

.....
CHIEF REGISTRAR,
FEDERAL COURT,
MALAYSIA.

This Order is filed by Messrs. K.
Chandra & Co., Solicitors for the Appellant
whose address for service is No.8, Jalan
Klyne (4th Floor), Kuala Lumpur.

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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

- and -

THE DIRECTOR GENERAL OF
INLAND REVENUE

Respondent

RECORD OF PROCEEDINGS

COWARD CHANCE,
Royex House,
Aldermanbury Square,
London, EC2V 7LD

Solicitors for the
Appellant

STEPHENSON HARWOOD,
Saddlers' Hall,
Gutter Lane,
London, EC2V 6BS

Solicitors for the
Respondent