

IN THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL

No. 12 of 1976

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA HOLDEN
AT KUALA LUMPUR

B E T W E E N :

AMERICAN LEAF BLENDING CO. SDN. BHD. Appellant

- and -

DIRECTOR-GENERAL OF INLAND REVENUE Respondent

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CASE FOR THE APPELLANT

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1. This is an Appeal brought pursuant to final leave to the Appellant company to appeal to His Majesty the Yang di-Pertuan Agong granted by the Federal Court of Malaysia holden at Kuala Lumpur (Suffian L.P., Lee Hun Hoe C.J., and Ong Hock Sim, F.J.) by Order dated the 10th November 1975. The Appeal is from an Order of the Federal Court of Malaysia holden at Kuala Lumpur (Gill C.J., H.S. Ong F.J. and Wan Suleiman F.J.) dated the 1st March 1975 allowing an appeal by the above-named Respondent from an Order of the High Court in Malaya at Kuala Lumpur (Hashim Sani J.) dated the 30th May 1974 which dismissed an appeal by the above-named Respondent against so much of a Deciding Order of the Special Commissioners of Income Tax dated the 13th February 1973 as ordered that unabsorbed losses amounting to £399,303.00 should be deducted from certain income of the above-named Appellant company in arriving at the taxable income of the Appellant company for the years of assessment 1968 and 1970.

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2. This Appeal concerns the assessments to income tax of the Appellant company for the years of assessment 1968 and 1970 pursuant to the Income Tax Act 1967 and the question to be decided on this appeal is whether the Special Commissioners were correct in law in their decision that previously unabsorbed losses incurred by the Appellant company in respect of the Appellant company's tobacco business which the Appellant company ceased to carry on in 1964 should be deducted from the company's income from rents received from the granting of licences over its premises in arriving at the total income of the Appellant company for the years of assessment 1968 and 1970. 10

3. The decision of the Special Commissioners and the subsequent proceedings by way of Case Stated also concerned a further question whether unabsorbed capital allowances in respect of the Appellant company's said tobacco business should be deducted from the Appellant's said rental income. The High Court and the Federal Court decided this question against the Appellant company and the Appellant company does not appeal against such decision on this latter question. 20

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4. The facts are fully set out in the Case Stated by the Special Commissioners and may be summarised as follows:-

- (a) The Appellant company was incorporated on 2nd September 1960 with the object, inter alia, of carrying on a tobacco business. For this purpose the company purchased land in Petaling Jaya and built a factory to house cigarette machinery and a bonded warehouse for stocks of cigarettes and tobacco. 30
- (b) The Appellant company commenced its business on 14th February 1961, and was initially concerned with cutting and blending tobacco leaves and to bring them to a condition suitable to be rolled into cigarettes.
- (c) The company subsequently found that it was not profitable to carry on with its tobacco business and it ceased to operate its machinery in November 1961, only about nine months after commencement. It also ceased trading in tobacco in 1964 and had no sale of tobacco in 1965. Eventually, in 1967, the plant and machinery were sold and removed from the factory. 40
- (d) From April 1964 the Appellant company started granting licences to various companies for the

use and occupation of its premises in return for a monthly rental. At first it let out only a part of its premises, but with effect from October 1968 the company granted a licence to Gammon South East Asia Berhad for the use and occupation of all its land and buildings erected thereon. Under paragraph 3(1) of the Appellant company's Memorandum of Association the company was empowered to lease or grant licences over its property. The said paragraph 3(1) read as follows:-

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"3. (1) To sell, lease, mortgage, grant licences, easements and other rights over or otherwise dispose of and generally deal in the land rights and other property, assets or undertaking of the Company or any part thereof both moveable and immoveable for such consideration as the Company may think fit, and in particular for shares, stock, debentures, or other securities of any other company whether or not having objects altogether or in part similar to those of the Company."

(e) The financial year of the Appellant company ended on the 30th September. In the tax computation of the Appellant company for the years of assessment 1963-1970, prepared by the Department of Inland Revenue, dated 22nd August 1970 a loss of \$399,303.00 and a capital allowance of \$82,662.00 are shown for the year of assessment 1965 and subsequent years of assessment. Both these sums remain unabsorbed at the bottom of the computation which ends with the year of assessment 1970.

(f) For the years of assessment 1968 and 1970 the Appellant company was assessed to income tax on the sum of \$7,040.00 and \$33,234.00, respectively, as income in respect of rents under Section 4(d) of the Income Tax Act 1967. The Appellant company's claim to have the unabsorbed losses amounting to \$399,303.00 and the unabsorbed capital allowances amounting to \$82,662.00 to be set off against the rental income was disallowed by the Director General of Inland Revenue for both the years of assessment 1968 and 1970.

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5. The Appellant company appealed against the said assessments to income tax for the years of assessment 1968 and 1970 on the grounds that the said unabsorbed losses and unabsorbed capital allowances should have been set off against the rental income

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comprised in the said assessments.

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6. At the hearing of the said appeal by the Special Commissioners it was contended on behalf of the Respondent:

- (a) that after the Appellant company had ceased its tobacco business in 1964 the company was no more doing a trade or business;
- (b) that the main object of the Appellant company was to carry on a tobacco business and not that of letting out its property; 10
- (c) that although one of the objects in the Memorandum of Association of the Appellant company allowed it to lease out its property, yet after its cessation in tobacco business the company cannot be said to be carrying on a business of letting out its property;
- (d) that for the years of assessment 1968 and 1970 the Appellant company had been properly assessed to income tax under Section 4(d) of the Income Tax Act 1967 as income in respect of rents and, therefore, the company cannot claim any deductions for unabsorbed losses and unabsorbed capital allowances in respect of its tobacco business which it had ceased to operate in 1964; and 20
- (e) that, therefore, the assessment of income tax for the years of assessment 1968 and 1970 be confirmed.

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7. At the said hearing of the said appeal by the Special Commissioners it was contended on behalf of the Appellant company:-

- (a) that the unabsorbed losses and the unabsorbed capital allowances in respect of the company's tobacco business should be allowed as deductions against the company's income from rents from its premises; 30
- (b) that one of the objects as set out in the Memorandum of Association of the company states that it may lease out its property or other assets and that, therefore, the leasing out of its premises constituted the business of the company, even though the company's initial tobacco business had ceased to operate in 1964; 40
- (c) that all the objects in the Memorandum of Association must be considered as business objects of the

company, and that the letting out of its property being one of the objects in the Memorandum of Association it cannot be said that the company was no more doing business after it had ceased to operate its initial business in tobacco; and

- (d) that, therefore, the unabsorbed losses and the unabsorbed capital allowances should be set off against the business income of the company received by way of rents from its premises.

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8. The Special Commissioners agreed with the said contentions advanced on behalf of the Appellant company and held that the company was carrying on the business for which it was incorporated when it commenced to grant licences over its property after it had ceased its initial tobacco business in 1964. Accordingly the Special Commissioners ordered

(a) that the unabsorbed losses amounting to £82,662 should be taken into account and deducted from the company's income received by way of rents from its premises in arriving at the total income for the company for the years of assessment 1968 and 1970; and

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(b) that the notices of assessment in respect of the Appellant company for the said years of assessment 1968 and 1970 as contained in the notice of additional assessment and the notice of assessment respectively dated the 22nd August 1970 be amended accordingly.

9. By notice dated the 16th February 1973 the Respondent appealed against the said decision of the Special Commissioners by requiring them to state a Case for the opinion of the High Court pursuant to paragraph 34 of Schedule 5 to the Income Tax Act 1967.

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10. The Special Commissioners duly stated a Case on the 27th February 1973 in which, after setting out the above-mentioned facts as admitted and the above-mentioned contentions of each party, they stated their decision in the terms stated in paragraph 8 above and stated that the question of law for the opinion of the High Court was whether on the facts found by the Special Commissioners there was evidence to support their decision and whether their decision was correct in law.

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11. The appeal by Case Stated came on for hearing before Hashim Sani J. on the 21st January 1974. Judgment was given on the 30th May 1974 dismissing the Respondent's appeal and confirming the Special

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- Commissioners' decision in respect of the said unabsorbed losses but allowing the said appeal in respect of the said unabsorbed capital allowances.
- p. 7
- p. 9 12. Hashim Sani J. in his judgment said that the following legal points were argued before him, namely:-
- (1) It was contended by the Respondent that the sources of income specified in Section 4 of the Income Tax Act 1967 are "mutually exclusive" and therefore rents cannot be a part of business income for the purpose of taxation. 10
- p. 9 (2) It was contended by the Respondent that the Memorandum of Association of the Appellant company alone is insufficient for the Special Commissioners to draw a conclusion that the Appellant company was "conducting a business" and that the problem before the Court was whether, as a matter of law, the Commissioners could properly on certain findings of primary fact draw or infer such conclusion.
- p. 10 13. The learned Judge dealt first with the second argument above-mentioned, which he said could be disposed of easily. He said that the Special Commissioners made a finding in clear terms that "the Appellant Company was carrying on the business for which it was incorporated when it commenced to grant licences over its property after it had ceased its initial tobacco business in 1964". The learned Judge said that the Commissioners came to this finding obviously on the ground that all the objects in the Appellant's Memorandum of Association must be considered as business objects of the company and one of such objects is that the Appellant company may lease out its property or other assets and as such the leasing out of its premises constituted a business of the Appellant company. In the view of the learned Judge such finding of the Commissioners was clearly a finding of fact which he should not disturb. He said that the Commissioners found as a fact that the Appellant was doing business of renting its premises when it commenced to grant licences, and said that the law on such a question is succinctly stated in the Jamaican case of Commissioners of Income Tax v. Hanover Agencies Limited [1967] 1 All E.R. 954 at p. 956 where it was said that:- 20 30 40

" The word "business" is of wide import and must be given its ordinary meaning unless the context otherwise requires. The respondents'

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10 objects include inter alia, acquiring of freehold property and the leasing of all or any of the company's property. If a company's objects are business objects and are in fact carried out, it carries on business (Inland Revenue Commissioners v. Westleigh Estate Co., per Pollock M.R.). The respondents are engaged in negotiating leases and collecting rents from their properties. This would prima facie indicate that they were carrying on business so as to bring them within the terms of Section 8(o)."

14. Hashim Sani J. then dealt with the Respondent's argument that the sources of income specified in Section 4 of the Income Tax Act 1967 are "mutually exclusive" and that therefore rents cannot be a part of business income for the purposes of taxation. He said that the validity of this argument depended on the scheme of the Income Tax Act 1967. The decision of the Court of Appeal in Salisbury House Estate Ltd. v. Fry 15 T.C. 266 that the sources of income in United Kingdom law are "mutually exclusive" was based on the scheme of the United Kingdom Act. The learned judge concluded after an examination of the relevant sections of the Malaysian Income Tax Act 1967 that from the Scheme of that Act it can be seen that although Section 4 of the Act provides for separate paragraphs relating to separate sources of income all the specified categories would appear to be joined up in arriving at the aggregate income of a person. He pointed out that this is also clearly expressed in Section 43(1) of the 1967 Act which requires the aggregation of all the sources that make up a business, and concluded that the "mutually exclusive" decision in Salisbury House Estate v. Fry (15 T.C. 266) cannot simply be applied to the Malaysian Income Tax Act, and that the decision of the Privy Council in Commissioners of Income Tax v. Hanover Agencies Ltd. [1967] 1 All E.R. 954 that the decision in the Salisbury House Case had no bearing on the construction of the Income Tax Law of Jamaica applied equally to the Malaysian Income Tax Act. Whether rents are gains or profits from a business depends on whether they are derived from a business.
14. The Learned Judge also relied on the fact that under Section 43 of the Income Tax Act 1967 the statutory incomes of each of the sources of a business are aggregated and it is from such aggregate sum that unabsorbed losses are deducted for his decision that the decision of the Commissioners to take into account the unabsorbed losses in question should not be

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disturbed.

- p. 15 15. Hashim Sani J. then proceeded to deal with the question of capital allowances which he decided the Special Commissioners had wrongly allowed as a deduction from the relevant income.
- p. 18 16. Accordingly by Order made by Hashim Sani J. on the 30th May 1974 it was ordered that the Respondent's appeal should be allowed only in respect of the unabsorbed capital allowances amounting to \$82,662.00, that the Deciding Order of the Special Commissioners be amended accordingly and that there be no order as to costs. 10
- p. 20 17. By Notice of Appeal dated the 25th June 1974 the Respondent appealed to the Federal Court against such part of the decision of the High Court as decided that the unabsorbed losses amounting to \$399,303 could be taken into account in computing the income of the Appellant company.
- p. 23 18. By Notice of Cross-Appeal dated the 9th August 1974 the Appellant company gave notice that it would contend that the decision of Hashim Sani J. in respect of costs be varied and that the Appellant company be awarded the costs on the ground that as the learned judge upheld the decision of the Special Commissioners allowing the Appellant company's objections to the assessments for the years 1968 and 1970 there was no reason connected with the case that could deprive the Appellant company of costs. 20
19. The said appeal and cross-appeal came on for hearing before the Federal Court (Gill C.J., H.S. Ong F.J. and Wan Suleiman F.J.) on the 26th November 1974 and the Federal Court gave judgment on the 1st March 1975. 30
- p. 24 The leading judgment was delivered by Gill C.J.
- p. 26 The learned Chief Justice said that in allowing the Appellant company's appeal for their unabsorbed losses in respect of their tobacco business to be deducted from their rental incomes, the Special Commissioners made a finding that by granting licences over its property the Appellant company was carrying on a business for which it was incorporated, which finding Hashim Sani J. felt he should not disturb. 40
- p. 27 19. The learned Chief Justice rightly rejected the argument that had been put forward by the Respondent to the effect that, as the sources of income in Section

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10 4 of the Malaysian Income Tax Act 1967 are mutually exclusive, rents cannot be a part of business income for the purpose of taxation. In this respect the learned Chief Justice held Section 4 of the Malaysian Act to be basically similar to Section 5 of the Jamaican Income Tax Law 1954 considered in Commissioners of Income Tax v. Hanover Agencies Limited [1967] 1 All E.R. 954. However, the learned Chief Justice went on to say that for "rents, royalties or premiums" as specified in Section 4(d) of the Income Tax Act 1967 to be brought under Section 4(a) of the Act as "gains or profits" from a business, it must be shown that they are derived from a business as such. He said that in granting leases over its premises after its tobacco business ceased the Appellant company was merely receiving income from rents, and that the collection of rents was entirely divorced from the business which it had previously carried on. The question, he said, always is not what business the taxpayer professes to carry on but what business it actually carries on.

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20. The learned Chief Justice went on to hold (a) that the Special Commissioners misdirected themselves in law when they said that the Appellant company was carrying on the business for which it was incorporated when it commenced to grant licences over its property after it had ceased its initial tobacco business in 1964 and (b) that on the facts of this case it seemed clear that the only business which the Appellant company carried on was its tobacco business, so that it was quite impossible to say that it was carrying on a business of renting its premises. The learned Chief Justice agreed with the conclusion of Hashim Sani J. that under Section 43 of the Income Tax Act 1967 the statutory incomes of "each of the sources of a business" are aggregated and that it is this aggregated sum from which unabsorbed losses are deducted, but in view of his conclusions summarised above could not agree that the decision of the Special Commissioners to take into account the unabsorbed losses amounting to \$399,303 should, not be disturbed. He said he would therefore allow the Respondent's appeal and would dismiss the Appellant company's cross-appeal but make no order as to costs.

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21. Ong Hock Sim F.J. and Wan Suleiman F.J. concurred in the judgment of Gill C.J. and accordingly by the said Order of the Federal Court dated the 1st March 1975 it was ordered that the appeal of the

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Respondent be allowed, that the cross-appeal of the Appellant company be dismissed, that the assessment of the Appellant company's income tax for the years of assessment 1968 and 1970 be restored and that there be no order as to costs.

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22. By Order dated the 10th November 1975 the Federal Court gave final leave to the Appellant company to appeal to His Majesty the Yang di-Pertuan Agong against the judgment and order of the Federal Court given on the 1st March 1975.

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23. The Appellant company accepts and indeed relies on the conclusion of the Federal Court that under the provisions of the Income Tax Act 1967 it is from the aggregate income from all business sources of a taxpayer that unabsorbed losses fall to be deducted. The Appellant company respectfully submits, however, that the Federal Court was wrong in its conclusion that the Special Commissioners misdirected themselves in law in concluding that the Appellant company was in the years in question carrying on a business of granting licences over its premises.

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24. The Appellant company submits that the question whether it was carrying on a business in letting out its premises is a question of fact on which the finding of the Special Commissioners should not have been disturbed, since there was evidence before them in the form of (inter alia) the Statement of Facts being exhibit A.1 to the Case Stated and the Memorandum of Association of the Appellant company on which the Special Commissioners could properly have made such a finding. Moreover the Appellant company submits that on the facts admitted before or found by the Special Commissioners as recorded in the Case Stated the only conclusion to which the Special Commissioners could properly have come was that the Appellant company was carrying on a business in letting out its premises with the result that income produced by such business was income from which the said unabsorbed losses were properly deductible in accordance with the Income Tax Act 1967.

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25. In particular the Appellant company will submit that the Federal Court was wrong in relying for its decision on dicta of their Lordships in Fry v. Salisbury House Estate Ltd. /1930/ A.C. 432. For such dicta concerned the question whether the individual taxpayer concerned in that case who let his land was

carrying on a trade, which is a wholly different question from whether a company letting its land is thereby carrying on a business.

10 26. The Appellant company submits that the decision of the Federal Court should be reversed insofar as it allowed the appeal of the Respondent and that the Order of the High Court dated the 30th May 1974 should be restored and that the Respondent should be ordered to pay to the Appellant company its costs of this Appeal and of the proceedings in the Federal Court and in the High Court for the following amongst other

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20 (1) Hashim Sani J. was right in holding that the Special Commissioners' finding that "the Appellant company was carrying on the business for which it was incorporated when it commenced to grant licences over its property after it had ceased its initial tobacco business in 1964" was a finding of fact that the Court should not disturb.

(2) Alternatively the only correct inference from the facts admitted or proved before the Special Commissioners is that the Appellant company, in granting licences over its premises and collecting rents in respect thereof, was carrying on a business against the income from which the said unabsorbed losses of \$399,303 were properly deductible pursuant to the Income Tax Act 1967.

30 (3) The Federal Court erred in disturbing the said finding of the Special Commissioners and in holding on the basis of the said facts that the Appellant company, in letting its premises for profit, was not carrying on a business.

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B E T W E E N :-

AMERICAN LEAF BLENDING CO.
SDN. BHD.

Appellant

- and -

DIRECTOR-GENERAL OF INLAND
REVENUE

Respondent

CASE FOR THE APPELLANT

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