

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

MAMOR SENDIRAN BERHAD Appellant

- and -

THE DIRECTOR-GENERAL OF INLAND REVENUE Respondent

CASE FOR THE RESPONDENT

RECORD

10

1. In these proceedings the above named company (incorporated under the Companies Act 1965 as a private limited company) Mamor Sendiran Berhad (hereinafter called "the Appellant") appeals with leave against the decision of the Federal Court of Malaysia (Wan Suleiman acting C.J. Malaya, Syed Othman F.J. and Abdul Hamad F.J.) given on 14th May 1982. The Federal Court exercising its appellate jurisdiction thereby allowed an appeal by the above-named respondent The Director-General of

p.47

20

Inland Revenue (hereinafter called "the Respondent") from the decision of the High Court in Malaya (Annuar, Judicial Commissioner) given on 29th November 1979, which in turn allowed the appeal of the Appellant made by way of Case Stated (pursuant to Paragraphs 34 and 35 of Schedule 5 to the Income Tax Act 1967) from the decision of the Special Commissioners given on 28th December 1976. The Special Commissioners, after a hearing lasting four days, and consideration of evidence, decided, in

p.31

30

favour of the Respondent, that a profit made by the Appellant on clearing timber from virgin jungle land constituted "income in respect of...gains or profits from a business.." within the meaning of Section 4(a) of the Income Tax Act 1967, so as to be chargeable to income tax, timber profits tax, and development tax.

p.1

40

2. The Appellant having acquired virgin jungle land, and having felled and sold some trees as timber, in order to clear the land and develop it as an oil palm plantation, the question in issue is whether the Special Commissioners erred in law in holding:-

RECORD

(i) that the activities of the Appellant in selling and disposing of the timber, and developing an oil palm plantation were two different activities and

(ii) that the Appellant was trading as a timber operator in exploiting and selling the timber with the result that the profit made on the timber was not from disposal of a capital asset but was income in respect of gains or profits from a business, and consequently chargeable to tax. 10

p. 4-30A  
p. 47-55

3. The facts are fully set out in the Case Stated, and are well summarised in the judgment of the Federal Court and, briefly are as follows:

(i) On 30th November 1968 notice was given to the Appellant that the Legislative Council of the Government of the State of Johore had agreed to allot to the Appellant an area of 7,000 acres of virgin jungle land for development into an oil palm plantation, subject to various conditions including a condition that the Appellant would have the right to extract timber, and be required to enter into an agreement with the State Government with regard to the extraction of timber, the Appellant paying a premium for the land, which premium included a sum for the extraction of the timber. 20

(ii) On 1st June 1969 the Appellant made an agreement with the State Government relating to the development of the oil palm plantation, which agreement also provided for a royalty to be paid on all timber cut, with a provision that the Appellant would sell and remove all trees of a certain measurement. The following day the 7,000 acres were transferred to the Appellant. 30

(iii) On 3rd January 1970 the Appellant made an agreement with a contractor, who undertook to extract all marketable timber, and stock-pile it, a fee being payable by the Appellant to the said contractor. 40

(iv) Consequently, logging of timber started on 20th July 1970 and continued thereafter for some years. Timber was stock-piled and the Appellant, having appointed as its agents the Pan-Singapore Timber Enterprise Company of Singapore, sold timber, receiving the agreed sale price, and paying a sales commission to the said company.

(v) The "working and profit and loss accounts" of the Appellant recorded the gross sale proceeds and expenses relating to timber (a typical account is that for the calendar year 1970).

p. 145

10 4. Assessments were raised on the Appellant for the years of assessment 1971, 1972, and 1973, covering periods when profits were realised from the exploitation of timber. As appears from the Case Stated, the Special Commissioners who heard the appeal of the Appellant accepted the contentions of Counsel for the Respondents that:

(i) There were two different activities, viz the extraction and sale of timber from the said land and the development of the said land into an oil palm plantation and

p. 27

(ii) In extracting and selling the said timber the Appellant was commercially exploiting the said timber.

20 Consequently the Special Commissioners concluded that the Appellant was trading as a timber operator and was embarking on a trade when it exploited and sold the timber. Consequently, the extraction and sale of timber constituted the carrying on of a business (of timber operators) under Section 4(a) of the Income Tax Act 1967; the sums received therefrom were therefore, for the basis periods relating to the years of assessment under appeal, income chargeable to income tax, development tax, and timber profits tax.

p. 29

30 5. Development tax and timber profits tax depend on the same principles as income tax. Under the Income Tax Act 1967, the decision of the Special Commissioners is final, subject only to the provisions which allow an appeal by way of Case Stated to the High Court, to determine any question of law arising on the Case Stated. There is no appeal on any question of fact. Under the law of Malaysia, a finding of fact may therefore be upset in the Courts only if the Special Commissioners arrived at a conclusion of fact that contradicts the true and only conclusion from the primary facts found by them. The authority of the House of Lords on appeal from England in Edwards v. Bairstow & Harrison [1956] A.C. 14 has been approved in the Federal Court of Malaysia in UGH v. Director General of Inland Revenue [1974] 1 MLJ 33; see also River Estates Sendiran Berhad v. Director General of Inland Revenue [1984] 5 TC 60.

50

6. It is submitted that the two findings of the Special Commissioners hereinbefore mentioned were

RECORD

findings of fact, and thus not open to review on appeal, save under the Edwards v. Bairstow principle. It is further submitted that the Appellant is unable to demonstrate that, either by reference to that principle or otherwise, the Special Commissioners erred in law in arriving at their decision.

p. 42 7. The Appellant having appealed to the High Court, Annuar J allowed the appeal, not considering the Case Stated by reference to the test in Edwards v. Bairstow, but, wrongly, considering the facts as found by the Special Commissioners, and drawing inferences of fact therefrom. 10

p. 54 8. The respondent having appealed to the Federal Court of Malaysia, that Court on the 14th May 1982 allowed the appeal with costs, setting aside the findings of the Judicial Commissioner, and restoring the decision of the Special Commissioners. It is submitted that the judgment of the Federal Court is correct in its conclusion and its reasoning. In particular:- 20

p. 50 (i) The Court correctly stated the question for the Court as being "whether, given the facts as stated, the Special Commissioners were justified in law in reaching the conclusions they did reach (the test in Edwards v. Bairstow & Harrison)".

p. 50 (ii) The Court emphasised that the findings of primary facts by the Special Commissioners are unassailable: no appellant tribunal can overrule or supplement those findings.

p. 52 (iii) An isolated transaction is capable of constituting a trade (and thus a business). 30  
Indeed, in this case the clearing of the timber was hardly an isolated transaction, because the extraction and sale of the timber took place over a long period.

p. 52 (iv) There was ample evidence, as the Court held, for the Special Commissioners to consider, and whether or not the Court on that evidence would have come to the same decision is irrelevant; the Court must treat the decision of the Special Commissioners as final. 40

9. Some help can be gained from the judgment of the Privy Council in the appeal from the Federal Court in Malaysia, River Estates Sendirian Berhad v. Director General of Inland Revenue [1984] STC 60. The present appeal is not materially distinguishable on the question, whether there was one or more than one business; and there, as here, a timber logging business was held to be separate from plantations, albeit much of the timber logging was a pre-requisite to the creation of the plantation. Indeed, whether or not the timber 50

logging was separate from the plantations, it is surely clear beyond any reasonable doubt that a person who buys land on which there is standing timber, and fells and sells the timber, is thereby making an income profit from a business carried on on the land. Timber is a crop and all crops are capable of recurrence. The land is of course a capital asset, and while the timber, or any crop, is attached to the land, it is also capital. But by no stretch of the imagination does an agricultural owner who cuts and disposes of a crop come within the category of a disposal or part disposal of a capital asset. The conclusion is surely irresistible that he is making a profit from the business of owning and farming land; and all such profit is income in character, and answers the description in Section 4(a) of "gains or profits from a business, for whatever period of time carried on".

9. The Respondent therefore humbly submits that the decision of the Federal Court should be confirmed, and the appeal of the Appellant should be dismissed with costs for the following (among other)

R E A S O N S

1. BECAUSE from the primary facts recorded in the Case Stated the Special Commissioners could, and did, reasonably reach the conclusion that the Appellant was engaged in a trade or exploitation of timber.
2. BECAUSE it follows from that conclusion that the Appellant is properly charged to income tax, timber profits tax and development tax for the years in the amounts and in the manner determined by the Special Commissioners.
3. BECAUSE the Appellant is unable to demonstrate any error of law in the Case Stated.
4. BECAUSE the judgment of the Federal Court is correct in its reasoning and in its conclusion.

D. C. POTTER

IN THE PRIVY COUNCIL

---

---

O N A P P E A L  
FROM THE FEDERAL COURT OF MALAYSIA

---

---

B E T W E E N :

MAMOR SENDIRAN BERHAD Appellant

- and -

THE DIRECTOR-GENERAL OF  
INLAND REVENUE Respondent

---

---

CASE FOR THE RESPONDENT

---

---

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

Tel: 01-606 7733

Ref: 35/20

Solicitors for the Respondent