

No. 22 of 1964

IN THE PRIVY COUNCIL

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O N A P P E A L  
FROM THE SUPREME COURT OF HONG KONG

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B E T W E E N :

JOSEPH EDWARD HOTUNG                                  Appellant  
- and -  
THE COLLECTOR OF STAMP REVENUE                      Respondent

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CASE FOR THE APPELLANT

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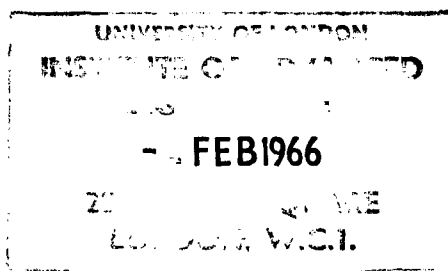
Record

10 1. This is an appeal from a Judgment and Order of  
the Supreme Court of Hong Kong (Appellate Jurisdiction)  
dated the 25th January, 1964, dismissing an appeal  
from a Judgment of the District Court of Hong Kong  
dated the 25th July, 1963, upon a Case Stated,  
whereby an assessment of the Stamp Duty chargeable  
upon a certain Deed of Assignment, made by the  
Respondent on the 1st November, 1962, was confirmed.

p.46.

p.18.  
p. 1.  
p. 3.

20 2. In the said Deed, the consideration is stated  
to be a sum of money payable by specified instalments,  
and the question which arises for determination on  
this appeal is whether the stamp duty with which the  
same is chargeable is to be calculated on the sum so  
stated, or on a lesser sum, viz. one which (taking  
into account the fact that payment is to be by instal-  
ments) represents the real amount or value of the  
consideration on the day of the date of the Deed.  
This question depends upon the proper construction of  
Head 21 in the Schedule to the Stamp Ordinance,  
chapter 117, the relevant part of which reads as  
30 follows:-



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"21. CONVEYANCE ON SALE, the duty to be calculated on the amount or value of the consideration on the day of the date of the instrument."

It is not disputed that the Deed is a "Conveyance on Sale" within the meaning of Head 21. The duty chargeable is therefore to be calculated in accordance with the provisions of that Head, properly construed.

p. 6. 3. By an Agreement in writing dated the 27th August, 1962, made between one Mary Ketterer (therein, and hereinafter, called the Vendor) and the Appellant (therein called the Purchaser) the Vendor agreed to sell to the Appellant all her right, title and interest of and in certain freehold leasehold properties therein specified for the sum of Hong Kong \$ 10,800,000.00 (therein called the purchase price).

4. The said Agreement made provision for the payment of the said sum, and interest thereon, in terms as follows:- 20

p. 7, 1.30. "3. The purchase price shall be paid in manner following: as to Hong Kong DOLLARS FOUR HUNDRED AND FIFTY THOUSAND (HK\$ 450,000.00) thereof upon the completion of the Assignment to the Purchaser of the Vendor's right title and interest in the properties and as to the balance thereof by twenty three (23) equal consecutive annual instalments of Hong Kong DOLLARS FOUR HUNDRED AND FIFTY THOUSAND (HK\$ 450,000.00) each commencing on the 27th day of October 1963 and on the said 27th day of October in each succeeding year PROVIDED that no security of any nature whatsoever shall be afforded or given by the Purchaser to the Vendor to secure the said annual instalments and PROVIDED also that the Purchaser shall be entitled to discharge the balance of the purchase price earlier than by the aforesaid instalments if he shall so desire. 30 40

4. The Purchaser will pay to the Vendor interest on the balance of the purchase price for the time being outstanding at the rate of 1 per cent per annum such interest to be paid

quarterly on the 31st day of March, the 30th day of June, the 30th day of September and the 31st day of December in each year the first of such payments shall be such proportion of one such quarterly payments as the number of days remaining in that quarter bears to the total number of days in that quarter.

10 5. Should the Purchaser default in the payment of any part of the purchase price or interest thereon as herein provided the Vendor would be entitled forthwith to declare all the sums payable by the Purchaser as herein provided become immediately due and payable and the exercise of this right shall not be a bar to action by the Vendor against the Purchaser on this Agreement."

20 5. By a Deed of Assignment dated the 1st November, 1962, made between the Trustee of the said properties of the first part, the Vendor of the second part, and the Appellant of the third part, the Vendor's said right, title and interest of and in the said properties were conveyed to the Appellant, in pursuance of the said Agreement and in consideration of the said sum of \$10,800,000.00 agreed to be paid by the Appellant to the Vendor in accordance with the said Agreement. (This is the Deed referred to in paragraphs 1 and 2 above.)

p. 10.  
pp. 14-15.  
p. 13, 1.48.

30 6. On the 28th November, 1962, the said Deed of Assignment was submitted to the Respondent for assessment of stamp duty. The Respondent was of the opinion that the duty with which the Deed was chargeable under Head 21 in the Schedule to the Stamp Ordinance, ought to be calculated on the said sum of \$10,800,000.00, and upon that basis he assessed the duty at \$540,000.00.

p. 3, 1.16.  
p. 3, 1.21.

40 7. On the 30th November, 1962, the Appellant paid the duty so assessed, and gave notice of his intention to appeal. In due course, after a formal adjudication, the Respondent was requested by the Appellant to state a case for the opinion of the District Court.

p. 3, 1.33.  
p. 3, 1.39.  
p. 4, 1.2.

8. The Respondent by his Case Stated, dated the 9th May, 1963, after narrating the relevant facts, set out the rival contentions, and the question to be determined, in terms as follows:-

p. 1.

Record

pp. 4-5.

"7. The Appellant contends that:-

- (i) Under the Assignment as drawn, the consideration is not the sum of ₱10,800,000.00 simpliciter but is expressed to be the sum of "₱10,800,000.00 agreed to be paid by the assignee to the Vendor in accordance with the said Agreement." The Agreement makes provisions for ₱450,000.00 to be paid upon completion of the assignment and it is not disputed that the 5% ad valorem duty is payable on that amount. Paragraph 3 of the Agreement, however, makes provisions for the balance to be paid over a period of 23 years. For the purpose of Stamp duty under Head 21 of the Schedule to the Stamp Ordinance, Cap. 117 the amount or value of the consideration must be reckoned on the day of the date of the Assignment. The balance of the consideration must, therefore, be discounted in order to arrive at the value of the consideration as at the time of execution; and 10
- (ii) the consideration over a period of 24 years is ₱10,800,000.00 together with interest at the rate of 1% per annum on the outstanding amount. Therefore, the consideration at the time of execution must be far less than ₱10,800,000.00 and this lesser sum is the proper sum on which the stamp duty ought to be calculated in that that is the value of the consideration as on the day of the date of the instrument. 30

8. The Collector (i.e. the Respondent) contends that:-

- (i) the amount of the consideration for the sale of the various properties is clearly expressed to be the sum of ₱10,800,000.00. Moreover, this sum does not include any element of interest since separate provisions are made under Clause 4 of the Agreement 40

dated 27th August 1962 whereby the Purchaser agrees to pay interest on the balance of the purchase price for the time being outstanding at the rate of 1 per cent per annum. The instalments of the purchase price to be paid over a period of 23 years must form part of the consideration for sale as at the date of the instrument as provided by Section 36 of the Stamp Ordinance Cap. 117, and

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(ii) the stamp duty with which the Deed of Assignment dated 1st November 1962 is chargeable has been correctly assessed as set out in paragraph 4 hereof.

9. The Question submitted for the opinion of the Court is whether or not stamp duty is properly chargeable on the sum of \$10,800,000.00 appearing in the Deed of Assignment dated 1st November, 1962. If this sum is not the amount or value of the consideration for which stamp duty is chargeable under Head 21 of the Schedule to the Stamp Ordinance Cap. 117, what is the amount or value of the consideration as on the day of the date of the assignment."

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(Section 36 of the Stamp Ordinance, referred to in the Respondent's contentions, is set out in the Annexure hereto.)

9. Prior to the hearing of the appeal to the District Court, the parties agreed that the capital sum necessary to purchase an annuity of \$450,000 for 23 years is \$4,250,000, and therefore it is upon that sum, plus the initial down payment of \$450,000, making a total of \$4,700,000, that the duty in this case is to be calculated, if the Appellant's contention is right.

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p.19, l.45.  
p.28, l.48.

10. In the District Court, the learned Judge (McMullin D.J.) by his Judgment dated the 25th July, 1963, accepted the contention of the Respondent, confirmed the assessment and dismissed the appeal with costs. In so doing, the learned Judge appeared to take the view that the words "on the day of the date of the instrument" appearing in Head 21 apply only to the word "value" and not to the word "amount", and held:-

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p.18.  
p.25, l.33.

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p.25, 1.20.

(a) that the words "or value" in the phrase "amount or value of the consideration on the day of the date of the instrument" are apt to provide a method of calculation solely in relation to considerations other than money consideration; and -

p.25, 1.26.

(b) that where a consideration is expressed as a sum of money ascertainable as to its amount, whether it is payable immediately or over a period, it is the amount of such consideration on which the duty must fall, and in this case that amount is the stated sum of \$10,800,000.

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The Appellant submits that the learned Judge misconstrued the provisions of Head 21, that the words "on the day of the date of the instrument" apply to the word "amount" as well as to the word "value", and that the real amount or value of the consideration as at the relevant date must be ascertained, and the duty calculated thereon.

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11. In the course of his Judgment, the learned District Judge gave some consideration to the question whether the wording of Head 21 in the Schedule to the Stamp Ordinance contained any ambiguity. He appeared to decide that there is some ambiguity therein, but drew a distinction between ambiguity "of style" and ambiguity "of intention":-

p.22, 1.4.

"Mr. Litton (i.e. Counsel for the Appellant) has certainly put his finger on what appears to be, at any rate, a weakness in the local legislation, and, notwithstanding that both sides claim that the local formula is unambiguous, it cannot be denied that the provisions relating to consideration on conveyance or sale are less unambiguously framed than are the corresponding provisions of the English Act. Framed as they are, they are at least susceptible of the interpretation which Mr. Litton seeks to give them. If one has regard to those principles of taxing law, which he has, with a most persuasive eloquence, urged upon me and which relate to the parity before the law of the Crown and of its subjects, and to the propriety of favouring the latter in case of ambiguity, he would, I think, be entitled to this Court's decision if this peculiarity of the Ordinance to which I have

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referred as a weakness could also be regarded as an ambiguity, not merely of style, but of intention."

It is submitted that the learned Judge, in drawing that distinction, erred in law, and that if Head 21 contains any ambiguity or there is any doubt as to its meaning, the construction properly to be applied is that which is the most favourable to the tax-payer, and which tends to reason, equity and justice.

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12. In the Supreme Court (Sir Michael Hogan, C.J., President, and Rigby J.) the learned President was disposed to reverse the decision of the learned District Judge, but Rigby J. took the contrary view, and accordingly the appeal was dismissed, by Order dated the 25th January, 1954. p.27. p.40, 1.28. p.45, 1.42. p.46.

13. The Judgment of the learned President included the following passages:- p.27.

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"...it seems to me that in seeking an answer to the question of how the broad terms of item 21 should be applied to an instrument which is not readily related to the general language used, the true nature of the transaction should be kept in mind." p.37, 1.16.

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"...in the context of the Ordinance, I think the words "on the day of the date of the instrument" should be construed as applying not only to the word "value" but also to the word "amount"."

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.....  
"...I would be disposed to reverse the decision of the judge in the court below and to accept the contention of the appellant in the present case that either the consideration should be valued or the amount measured in the manner he suggests. In such valuation or measurement, however, I would include the interest expressed to be payable, as part of the sale price."

The Judgment of Rigby J. expressed agreement with the reasoning of the learned District Judge. p.41. p.43, 1.13.

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p.48. 14. Leave to appeal to Her Majesty in Council was granted on the 15th day of April, 1964.

15. The Appellant humbly submits that this appeal should be allowed with Costs, and that it should be ordered and directed that the stamp duty chargeable upon the said Deed of Assignment is to be calculated on the said agreed sum of \$4,700,000, and that the Appellant should recover his Costs in both the Courts below, for the following, amongst other -

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R E A S O N S

- (1) BECAUSE the words "on the day of the date of the instrument" in Head 21 in the Schedule to the Stamp Ordinance Chapter 117 apply to and govern the word "amount" as well as the word "value".
- (2) BECAUSE on the proper construction of the said Head 21, and, in particular, by reason of the words "on the day of the date of the instrument" therein, the real amount or value of the consideration as at the date of the instrument must be ascertained, and the stamp duty calculated thereon. 20
- (3) BECAUSE the real amount or value of the consideration as at the relevant date in the present case is, alternatively is to be taken as being, the agreed sum of Hong Kong \$4,700,000, and therefore that is the sum upon which the stamp duty under the said Head 21 ought to be calculated. 30
- (4) BECAUSE (alternatively) there is ambiguity in the wording of the said Head 21, and a doubt as to the meaning thereof, and therefore the proper construction thereof is that which is the most favourable to the Appellant tax-payer, namely, the construction contended for in Reason No.(2) above.
- (5) BECAUSE the construction for which the Appellant contends is reasonable, equitable and just, whereas that for which the Respondent contends is unreasonable and 40



inequitable and tends to cause hardship and result in injustice.

- (6) BECAUSE for the reasons advanced on behalf of the Appellant in the Courts below, the assessment and adjudication of the Respondent, and the Judgment of the District Court, and the Judgment and Order of the Supreme Court, are wrong.

ALAN ORR

RALPH MILLNER.

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A N N E X U R E

Stamp Ordinance, Chapter 117.

Section 36.

10 " 36. Where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or shares, whether being or constituting a charge or incumbrance upon the property or not, the debt, money or shares are to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with ad valorem duty. "

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CASE FOR THE APPELLANT

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