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1967/2

IN THE PRIVY COUNCIL

No. 14 of 1964

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA



B E T W E E N:

RATTAN SINGH
s/o Nagina Singh Appellant

- and -

THE COMMISSIONER
OF INCOME TAX Respondent

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C A S E FOR THE APPELLANT

Record

1. This is an appeal from an Order of the Court of Appeal for Eastern Africa (Gould, Ag. P., Crawshaw, Ag. V-P. and Edmonds. J.,) dated the 24th August, 1963, whereby an appeal against a Decree of the Supreme Court of Kenya Nairobi (Mayers. J.,) dated the 31st July, 1961, dismissing with costs eight appeals (consolidated by Order of the Court on the 6th June, 1960) against decisions by the Respondent under Sections 77 and 78 of the East African Income Tax (Management) Act, 1952, refusing to amend additional assessments made upon the Appellant for the years of income 1946-1953 (both inclusive) was dismissed and it was ordered that the assessments be reduced by the sum of shs. 5,500/00, in each of the last five years of the period.

p.1380-1

p.1304-5

p.67, 11.9-10

p.1-14

p.8 of 1952

p.1547-54

p.1381

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2. Particulars of the said additional assessments (taken to the nearest pound) with penalties imposed by the Respondent are as follows:-

<u>Record</u>	<u>YEAR</u>	<u>ADDITIONAL INCOME</u>	<u>TAX</u>	<u>PENALTY</u>	<u>TOTAL ADDITIONAL TAX AND PENALTY,</u>
1547	1946	£2247	£ 653	£ 781	£1434
1548	1947	£7290	£3270	£3915	£7185
1549	1948	£5274	£1964	£2351	£4315
1550	1949	£7132	£2848	£3410	£6258
1551	1950	£6478	£3206	£3838	£7044
1552	1951	£10,813	£7331	£13,165	£20,496
1553	1952	£4674	£1622	£2913	£4535
1554	1953	£7496	£4912	£8821	£13,733
		<u>£51,404</u>	<u>£25,806</u>	<u>£39,194</u>	<u>£65,000</u>

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pp.1547-
1554

N.B. The income originally assessed for the years 1946 to 1953, inclusive, was £12,622: (tax £1,574).

3. The issues which arise in this appeal therefore concern first, the validity of the additional assessments in so far as they must depend upon the commission of fraud or wilful default by or on behalf of the Appellant. Second, the validity of the additional tax charged by way of penalty upon the said assessments, having regard to the power of the Supreme Court to reduce or remit the same under the East African (Income Tax Management) Act, 1952. Third, the method by which the Appellant's income was computed for the purpose of arriving at the amount of the said assessments.

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4. The background of facts and the course which the proceedings took may briefly be described as follows:-

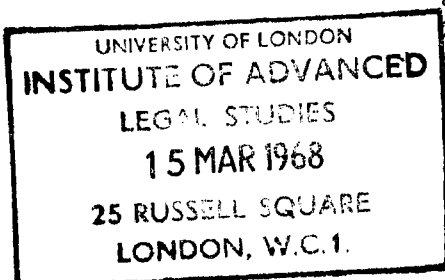
(a) The Appellant's father Nagina Singh, with some assistance from the Appellant from 1940 onwards carried on trade as a builder in Nairobi for many years until his death on the 11th January 1946. The Appellant, who was then about 32 years old, thereupon took over the business and carried it on alone until 1st September, 1954, as from which date he took three of his sons into partnership.

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p.1256

(b) The Appellant spoke very little English and, being unversed in accountancy matters, relied in relation thereto on one R.M. Nanda, a Practising Accountant, who audited the

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accounts and filled in the tax returns for all years up to and including 1953.

Record

10 (c) On the 28th February, 1956, officials of the Eastern African Income Tax Department questioned the accuracy of the Appellant's tax returns and, it being found that the said Nanda had failed to include certain rents, the Appellant instructed Messrs. Thian and Bellman, Incorporated Accountants of Nairobi, to undertake a full investigation into his affairs for the years 1940 to 1953 inclusive. The investigation was in fact conducted by Mr. Thian of that firm and a Report dated the 15th November, 1956, was duly forwarded to the Respondent. This Report did not deal adequately with the first 8 years and a further and fuller Report was made dated 7th October, 1957. Both Reports indicate that the Appellant was fully cooperative.

p.1414
p.1453:11.37-42
p.1434:11.24-7

20 (d) Mr. Thian did not adopt the method normally in use by Accountants for computing income in cases where records are incomplete namely the "capital worth" method.

30 (e) Nor did Mr. Easterbrook, who conducted the investigation on behalf of the Respondent, adopt the capital worth method but employed one which involved the making of substantial additions, sometimes of an arbitrary nature, to the figures of income as computed by Mr. Thian. This method, it appeared, progressed in the view that any item which the taxpayer could not explain and vouch fell to be treated as taxable (if a receipt) or disallowable (if a payment) irrespective of the date of the relevant transaction.

p.855.11-856.29

The additional assessments raised were on the footing of income as thus computed.

40 (f) On the 6th June, 1960 Messrs. Cook, Sutton & Co., Chartered Accountants, practising in England and Kenya prepared a "capital worth" statement which was adduced on behalf of the Appellant, at the hearing before the learned Judge. Certain adjustments were made in the course of

p.1534-45

Record
p.1514-20

the hearing to the figures so shown and, the taxable income thus arrived at for the period, amounted to some £28,670, with which is to be compared the total assessed of £64,026 arrived at by Mr. Easterbrook by the method referred to in sub-paragraph (e) above.

p.1537.34-
1538.29

(g) Mr. Blackhall, a partner in Messrs. Cook, Sutton & Co., who prepared the figures for the "capital worth" calculations, referred to in the immediately preceding sub-paragraph gave evidence regarding his computation in the course of the hearing, in particular in reference to the "weighting" applied in the appropriation of trading profits over the period of eight years in question.

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No.10 of 1958

5. Both the learned Judge and the Court of Appeal held that the provisions of the East African Income Tax (Management) Act, 1958 (hereinafter called "the 1958 Act") governed this matter and not, as was contended by or on behalf of the Appellant, the East African Income Tax (Management) Act, 1952 (hereinafter called "the 1952 Act"). There are vital distinctions between the two Statutes, the main, from the viewpoint of the Appellant, being the power under the 1952 Act for the Court to reduce or remit any penalty exigible which was removed by the 1958 Act.

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No.8 of 1952

The remaining distinctions of principle are:-

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No.8 of 1952

(a) under Section 40(1) of the "1952 Act" a taxpayer who omits income from his return is prima facie chargeable with triple the tax involved by way of additional tax. Section 101(1)(b) of the 1958 Act, provides, on the other hand, that double the tax involved is to be charged where an omission is due to "any fraud or wilful default".

(b) Under Section 40(2) of the 1952 Act the Commissioner of Income Tax must remit the triple tax if satisfied that the omission was not due to any "fraud, or gross or wilful neglect"; in other cases, he may remit it in whole or in part. The Court

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also may remit under Section 78(6). By virtue of Section 101(6) of the 1958 Act the Commissioner is given power at any time to remit the additional tax in whole or in part but - as was remarked - the Court's only power (and its duty) is to remit the entire sum if it decides that the omission was not due to "any fraud or to any gross neglect" - see Section 101(5).

10 (c) The Commissioner's power to raise assessments under the 1952 Act outside the normal period - within seven years after the expiration of the year of income in question - is exercisable when "any fraud or wilful default has been committed by or on behalf of a person in connexion with or in relation to tax for any year for the purpose of making good any loss of tax attributable to the fraud or wilful default" -
20 see Section 72(a). Section 105(1) of the 1958 Act merely provides that in such circumstances an assessment may be made at any time.

6. Paragraph 1 of the Fifth Schedule to the 1958 Act contains the following transitional provisions:-

30 1. 'Subject to this Schedule, the repealed enactment shall, notwithstanding its repeal, continue to apply to income tax chargeable, leviable, and collectable, under such enactment in respect of the years of income up to and including the year of income 1957, as if such enactment had not been repealed:

Provided that, as from the date of the publication of this Act in the Gazette, the provisions contained in Parts X to XVII inclusive of this Act shall apply as if such provisions had been contained in the repealed enactment, so, however -

40 (a) that no party to any legal proceedings by or against the Commissioner which are pending on the date of such publication shall be prejudicially affected by this paragraph;

(b) that Part XIII of the repealed

Record

enactment shall, in relation to any act or omission which took place before the date of such publication, continue to have effect to the exclusion of Part XV, other than section 135, of this Act."

7. The issue of which of the two Acts is operative, and to what extent, depends upon the true construction of the foregoing provisions in relation to the following facts:-

- pp.1549-54 (a) The assessments are all dated the 21st May, 1958 and were made under the provisions of the 1952 Act. 10
- (b) Objection was duly made to the said assessments under Section 74(2) of the 1952 Act.
- pp.1-13 (c) On the 4th December, 1958, the Respondent issued written notices under Sections 77 and 78 of the 1952 Act confirming the said Assessments and stating that he was not prepared to amend them in accordance with the Appellant's objections. 20
- p.1353,1.3. (d) On the 30th December, 1958, the 1958 Act was published in the Gazette.
- p.1353,1.6 (e) Notice of appeal against the Respondent's said decisions was filed on the 31st December, 1958, and received by the Respondent on the 3rd January, 1959.
- p.27,11.43-5

8. The provisions of the 1952 Act which are relevant are the following:

Section 40(1): "any person who - 30

(a) makes default in furnishing a return, or fails to give notice to the Commissioner as required by the provisions of Section 59, in respect of any years of income shall be chargeable for such year of income with treble the amount of tax for which he is liable for that year under the provisions of Sections 36 to 39 inclusive; or

(b) omits from his return for any year of income any amount which should have been 40

10 included therein shall be chargeable with an amount of tax equal to treble the difference between the tax as calculated in respect of the total income returned by him and the tax properly chargeable in respect of his total income as determined after including the amounts omitted, and shall be required to pay such amount of tax in addition to the tax properly chargeable in respect of his true total income.

(2) If the Commissioner is satisfied that the default in rendering the return of any such omission was not due to any fraud, or gross or wilful neglect, he shall remit the whole of the said treble tax and in any other case may remit such part or all of the said treble tax as he may think fit.

(3)

(4)

20 (5) Any person who, in his return for any year of income, deducts or sets off any amount the deduction or set-off whereof is not allowed under the provisions of this Act, or shows as an expenditure or loss any amount which he has not in fact expended or lost, shall be deemed for the purposes of subsection (1) to have omitted such amount from his return.

(6)

(7)

30 Section 72.6 Where it appears to the Commissioner that any person liable to tax has not been assessed or has been assessed at a less amount than that which ought to have been charged, the Commissioner may, within the year of income or within seven years after the expiration thereof, assess such person at such amount or additional amount as, according to his judgment, ought to have been charged, and the provisions of this Act as to notice of assessment, appeal and other proceedings under this Act shall
 40 apply to such assessment or additional assessment and to the tax charged thereunder: PROVIDED THAT -

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(a) where any fraud or wilful default has been committed by or on behalf of any person in connexion with or in relation to tax for any year of income, the Commissioner may, for the purpose of making good to the Revenue of the Territories any loss of tax attributable to the fraud or wilful default, assess that person at any time;

(b) an objection to the making of such assessment or additional assessment on the ground that the time limited for the making thereof has expired shall only be made on objection or appeal as provided for under the provisions of this Act. 10

Section 74. (1) The Commissioner shall cause to be served personally on, or sent by registered post to, each person assessed a notice addressed to him at his usual place of abode or business stating the amount of his income and the amount of tax payable by him and informing him of his rights under the next sub-section. 20

(2) If any person dispute the assessment he may apply to the Commissioner, by notice of objection in writing, to review and to revise the assessment made upon him. Such application shall state precisely the grounds of his objection to the assessment and shall be made within thirty days from the date of the service of the notice of assessment:

Provided that the Commissioner, upon being satisfied that owing to absence from the Territories, sickness or other reasonable cause, the person disputing the assessment was prevented from making the application within such period, may extend such period. 30

(3) On receipt of the notice of objection referred to in sub-section (2), the Commissioner may require the person giving the notice of objection to furnish such particulars as the Commissioner may deem necessary with respect to the income of the person assessed and to produce all books or other documents in his custody or under his control relating to income, and may, in accordance with the provisions of sub-section (1) of Section 61, by notice require any person 40

who he thinks is able to give evidence respecting the assessment to attend before him for examination, on oath or otherwise, in relation thereto.

10 (4) In the event of any person assessed, who has objected to an assessment made upon him, agreeing with the Commissioner as to the amount at which he is liable to be assessed, or where any such person does not agree the amount and the Commissioner considers the assessment should be amended, the assessment shall be amended accordingly, and notice of such amended assessment shall be served personally on or sent by registered post to such person:

20 Provided always that in the event of any person who, under sub-section (2), has applied to the Commissioner for a revision of the assessment made upon him failing to agree with the Commissioner as to the amount at which he is liable to be assessed, the Commissioner shall, unless he has amended the assessment, cause to be served personally on or sent by registered post to such person a notice of refusal to amend the assessment, and the right of appeal under the provisions of this Act against the assessment made upon such person shall remain unimpaired.

30 Section 78, (1) Any person who, being aggrieved by an assessment made upon him, has failed to agree with the Commissioner in the manner provided in sub-section (4) of Section 77, or having appealed to a local committee, is aggrieved by the decision of such committee, may appeal against the assessment to a judge upon giving notice in writing to the Commissioner within sixty days after the date of service upon him of the notice of an amended assessment or the notice of the refusal of the Commissioner to amend the assessment as desired, or within sixty days after the date of the decision of the local committee, as the case may be:

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Provided that, notwithstanding the lapse of such period of sixty days, any person may appeal against such assessment if he shows to the satisfaction of the judge that, owing to absence from the Territories, sickness, or other reasonable cause, he was prevented from giving notice of

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appeal within such period and that there has been no unreasonable delay on his part.

(2)

(3)

(4)

(5) The onus of proving that the assessment complained of is excessive shall be on the person assessed.

(6) The judge may confirm, reduce, increase, or annul, the assessment or make such order thereon as to him may seem fit.

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(7)

(8) All appeals shall be heard in camera, unless the judge, on the application of the person assessed, otherwise directs; but where, in the opinion of the judge, any appeal heard in camera should be reported, the judge may authorize publication of the facts of the appeal, the arguments and the decision without disclosing the name of the taxpayer concerned.

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(9)

(10) No appeal shall lie from the decision of a judge except on a question of law or of mixed law and fact."

(11)

9. The remaining provisions of the 1958 Act which are relevant are as follows:-

Section 101, (1) "Any person who -

(a) fails to furnish or makes default in furnishing a return of income or fails to give notice to the Commissioner as required by sub-section (3) of section 81, in respect of any year of income shall, where such failure or default was due to any fraud or to any gross neglect, be charged for such year of income with double the normal tax chargeable for such

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year of income; or

Record

10 (b) omits from his return of income for any year of income any amount which should have been included therein shall, where such omission was due to any fraud or to any gross neglect, be charged for such year of income with an amount of tax equal to double the difference between the normal tax chargeable in respect of the income returned by him and the normal tax chargeable in respect of his total income;

and such person shall be required to pay such additional tax in addition to the normal tax chargeable in respect of his total income.

20 (2) Any person who, in his return of income for any year of income, deducts or sets off any amount the deduction or set-off whereof is not allowed under this Act, or shows as an expenditure or loss any amount which he has not in fact expended or lost, shall be deemed for the purposes of paragraph (b) of sub-section (1) to have omitted such amount from his return of income.

(3) Where any failure, default or omission has been made in connexion with a return of income required under this Act to be furnished by any person on behalf of another person, such other person shall be liable for any additional tax charged under this section.

30 (4) The additional tax charged under this section shall be charged -

(a) in any assessment made under this Act; and

(b) whether or not any proceedings are commenced for any offence against this Act arising out of the same facts;

and such additional tax shall be levied and collected as if it were normal tax:

Provided that

40 (5) Notwithstanding anything in Part XIII, where in any appeal against any assessment which

Record

includes additional tax one of the grounds of appeal relates to the charge of such additional tax, then the decision of the local committee or judge in relation to such ground of appeal shall be confined to the question as to whether or not the failure, default, or omission which gave rise to the charge under sub-section (1) was due to any fraud or to any gross neglect; and where it is decided that such failure, default or omission was not so due, then the whole of the additional tax so charged shall be remitted. 10

(6) The Commissioner may in his discretion, whether or not there is any appeal against an assessment which includes additional tax and whether before or after any such appeal, remit the whole or part of such additional tax, and, subject to sub-section (5), no appeal shall lie against the decision of the Commissioner.

(7) In this section "normal tax" means tax charged under this Act apart from this section and "additional tax" means tax charged under this section in addition to the normal tax. 20

Section 105, . . . An assessment may be made under sections 102, 103, or 104 at any time prior to the expiry of seven years after the year of income to which the assessment relates:

Provided that -

(a) where any fraud or any gross or wilful neglect has been committed by or on behalf of any person in connexion with or in relation to tax for any year of income, an assessment in relation to such year of income may be made at any time: 30

(b)

(c)

(d)

(2) The question whether an assessment has been made after the time set out in this section for the making thereof shall be raised only on an objection made under section 109 and on any appeal consequent thereon. 40

Section 109.

(1) Any person who disputes an assessment made upon him under this Act may, by notice in writing to the Commissioner, object to the assessment; and no such notice shall be valid unless it states precisely the grounds of objection to the assessment and is received by the Commissioner within 30 days after the date of service of the notice of assessment:

Record

Provided that

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(2)

Section 110.

Where a valid notice of objection has been received, the Commissioner may -

(a)

(b)

(c) refuse to amend the assessment.

(2)

(3) Where the Commissioner -

(a)

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(b) refuses to amend the assessment, he shall cause a notice confirming the assessment to be served, either personally or by registered post, on such person.

Section 111.

(1) Any person who has given a valid notice of objection to an assessment and, consequent thereon, has been served with a notice under sub-section (3) of section 110 may appeal -

(a)

(b) to a judge.

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upon giving notice of appeal in writing to the Commissioner within 45 days after the date of service upon him of the notice under such sub-section (3).

(2)

(3)

14.

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(4)

Section 113,

In every appeal to a judge under section 111 the following provisions shall apply -

(a)

(b) the appeal shall be heard in camera unless the judge on the application of the person assessed otherwise directs; but any appeal so heard in camera may be reported in any publication of law reports so, however, that any such report shall not, unless there is a subsequent appeal from the decision of the judge, disclose the name of the person assessed;

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(c) the onus of proving that the assessment objected to is excessive shall be on the person assessed;

(d) the judge may confirm, reduce, increase or annul the assessment or make such order thereon as he may think fit;

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(e)

(f)

(g)

(h) no appeal shall lie from the decision of a judge except on a question of law or of mixed law and fact."

p.66
p.67

10. The appeal was heard in Her Majesty's Supreme Court of Kenya at Nairobi (Mayers, J.,) on the 6th June, 1960, and continued on the 7th, 8th, 9th, 10th, 13th, 14th, 15th, and 16th June 1960. The hearings were resumed in the following year, namely, on the 13th March 1961, and continued on the 14th, 15th, 16th, 17th, 20th, 21st, 22nd, 23rd and 24th March 1961. Reserved judgment was delivered by Mayers, J., on the 31st July, 1961.

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p.67

11. At the commencement of the hearing on the 6th June, 1960 application was made and granted for the appeals to be consolidated.

12. The following witnesses were called on behalf of the Appellant: Record

	The Appellant.	pp.108,555
	Gian Singh, son of the Appellant.	p.171
	John Francis Bellman, Chartered Accountant.	p.185
	Goodman Tolfourd-Cook, Chartered Accountant.	p.214
	Anthony Marcus Blackhall, Chartered Accountant.	p.267
	Gordon Cecil Wentworth Ogilvie, Architect.	p.526
	Haran Das.	p.566
10	R.M. Nanda	p.571

One witness was called for the Respondent, Horace Frederick Easterbrook of the Eastern African Inland Revenue Department. pp.614-1049

13. The Court was addressed on the 6th and 7th June 1960 by Counsel for the Appellant and on the 15th June 1960 by Counsel for the Respondent. pp.66-108
pp.572-613

The closing speech for the Respondent was delivered on the 21st, 22nd, and 23rd March, 1961, and for the Appellant on the 23rd and 24th March, 1961. pp.1050-1137
pp.1137-1253

14. In the course of his judgment on the 31st July, 1961, Mayers, J., reached various conclusions on questions of fact including the following:-

(1) The Appellant who lived with his father under the joint family system until the latter's death on the 11th January, 1946, was given small sums from time to time; p.1254

(2) The Appellant was his father's sole heir; the estate duty affidavit sworn by him underestimated the true net value of the estate. p.1254,1.32-
p.1255,1.4

(3) For the years of income 1946 to 1953 the Appellant returned income totalling £14,015.

(4) It was by no means impossible that the Appellant's lack of knowledge of English resulted in his placing far greater reliance on his Accountant and paying far less attention to the financial side of his business than would otherwise have been the case; this should be borne in mind in relation to the Appellant's claim that he had no personal knowledge of his income tax returns, it p.1255,1.34-
p.1256,1.12.

Record

being his practice to sign them in blank and hand them to his auditor Mr. Nanda who filled them in and forwarded them to the income tax authorities.

- p.1256,11.13
-20 (5) Early in 1956, the investigation department became interested in the Appellant's tax affairs and after a number of interviews, Mr. Thian of Messrs. Thian & Bellman, Chartered Accountants, was instructed to make a report. A report was submitted by Mr. Thian on the 15th November, 1956, showing an excess of income over income returned for the years 1946 to 1953 of £8,000. 10
- p.1256,11.31
-43 (6) During the subsequent discussions, the Appellant signed a certificate of full disclosure but omitted to mention that he had a bank account at Mombasa and another in India.
- p.1256,1.44-
p.1257,1.20 (7) Mr. Thian thereafter produced a further report dated the 7th October 1957 dealing with the Appellant's income for the years 1940 to 1953 and calculating the aggregate income for the period 1946 to 1953 at £35,000. 20
- p.1257,11.21-
44 (8) Mr. Easterbrook of the Income Tax department added items which he thought not deductible and other figures which he thought appropriate and with certain exceptions these were agreed to by Mr. Thian.
- p.1269,1.11-
p.1270,1.14 (9) It was wholly incredible that the Appellant never cross-questioned Nanda about the business profits or the figures put in the tax returns.
- p.1270,1.15-
p.1271,1.3 (10) The discrepancies were too great to be attributable to genuine mistakes. The claim to an allowance for Gian Singh could not have been honest. Consequently, the learned judge did not believe that the Appellant did not know what Nanda was doing on his behalf, nor that Nanda would have made fraudulent returns without the Appellant's complicity. 30
- p.1271,11.4-
10 (11) If the Appellant should be believed on this point he was nevertheless guilty of gross neglect.
- p.1272,11.2-
10, &11,31-45 (12) The learned Judge's conclusions with regard to fraud would apply equally if the 1952 Act were 40

- opposite; there was also wilful default on the part both of the Appellant and Nanda. Record
- (13) The Respondent had established fraud or gross or wilful neglect or wilful default on the part of the Appellant and Nanda and each assessment was made timeously. p.1273,11.1-13
- (14) No reliance could be placed on the conclusions of Mr. Blackhall, the Accountant who prepared statements of capital worth. p.1288,11.10-26
- 10 (15) It was not unreasonable for Mr. Thian to assume that where business books revealed the existence of drawings or expenditure but not their purpose, the drawings were of a personal nature and the expenditure was not deductible; an Accountant making an investigation with a view to full disclosure must proceed on the basis that in the absence of proof to the contrary expenditure is likely to be treated as personal expenditure. pp.1288,1.42-
p.1289,1.38
- 20 (16) The Respondent was correct in his treatment of the following specific items:-
- (a) Gian Singh's rents were, or should in the circumstances be treated as, the income of the taxpayer. p.1289,1.39-
p.1291,1.24
- (b) The profit on the sale of the Grogan Road building was of a capital nature but the cost must be added back. p.1291,1.25-
p.1294,1.15
- (c) There were undisclosed rents of not less than 8,000 shs. p.1294,1.16-
p.1295,1.38
- 30 (d) The house in Imtiazali Road was probably demolished because it was dangerous or because it was desired to use the plot for a more lucrative purpose. p.1295,1.39-
p.1296,1.12
- (e) No doubt some African wages were paid during the period when there were no muster rolls but the amount had not been established. p.1296,11.13-
32
- (f) The fact that medical expenses had been incurred for African workers was not proved. p.1296,1.33-
p.1297,1.10

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p.1297,1.11-
p.1298,1.10
- (g) The Appellant had failed to establish the deductibility of the shs. 44,000 for "lump sum contracts".
- p.1298,1.11-
47
- (h) The claim that the Appellant's wife had lent him 30,000 shs. was rejected.
- p.1299,1.1-
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- (i) The disallowance of £100 for private motoring could not be said to be wrong.
- p.1299,1.31-
p.1300,1.34
- (j) The sums added by Easterbrook for work in progress though excessive were not vastly excessive. 10
- p.1300,1.35-
p.1301,1.21
- (k) Part of the 36,000 shs. claimed as legal expenses would almost certainly be deductible but how much had not been substantiated.
- p.1301,1.22-
29
- (l) Mr. Easterbrook's error with regard to the Moshi retention money was wholly trivial.
- pp.1301,1.30-
p.1303,1.22
- (m) The Appellant had failed to establish in relation to any year that the assessment was excessive. 20

15. In the course of his judgment the learned judge expressed views on questions of law as follows:-

- p.1261,1.44-
p.1262,1.14
- (1) Even if the objections to the assessments made to the Commissioner were "proceedings", and he inclined to the view that they were not, they were not proceedings by or against the Commissioner since the Commissioner could not be a judge in his own cause.
- p.1262,1.38-
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- (2) Proceedings were therefore not pending until the issue of the notice of appeal on the 31st December, 1958, and it followed that the relevant law applicable was that contained in the 1958 Act which "engrafted" certain provisions on to the 1952 Act and not, as the Appellant contended, that contained in the 1952 Act. 30
- p.1262,1.45-
p.1263,1.3
- (3) It also followed that the Court had no power to remit any additional tax properly exigible.

- (4) It further followed that the circumstances in which and the extent to which an additional assessment could be raised and additional tax became exigible depended upon the provisions of the 1958 Act. Record
p.1263,1.4-14
- (5) Had the 1952 Act applied alone (contrary to his view) additional assessments could only have been raised for years before 1953, and additional tax charged, in respect of the amounts understated by reason of fraud or wilful default and not the whole of the amounts understated. p.1265,11.11-
22
- 10 (6) Had the 1952 Act alone applied additional tax could have been charged as well as normal tax in respect of all years in cases where income was omitted by reason of fraud or wilful default. p.1265,1.23-
p.1266,1.6
- (7) While the burden of proving that the assessments were excessive was on the Appellant, it was for the Respondent to prove that they were valid in so far as they depended on fraud or gross or wilful neglect. p.1268,11.29-
31
- 20 (8) In income tax appeals, the requisite standard of proof is that of a preponderance of probability, they being civil proceedings. The degree of probability requisite to establish fraud is higher than this though not so high as it would be in criminal proceedings. p.1268,11.32-
42
- (9) In determining whether an assessment is excessive the Court must have regard to all sums which could have been included but have been omitted by reason of a compromise with the Revenue and also, in some cases at least, to the possibility of there being other undisclosed income of which the tax authorities know nothing. p.1274,1.41-
p.1275,1.21
- 30 (10) The learned Judge was not satisfied that medical expenses incurred on African employees would be deductible for tax purposes. p.1297,11.1-
10
- (11) The intention not to pay a creditor deprives the sum of its character as a deductible expense. p.1297,1.45-
p.1298,1.4
- 40

16. On the 31st July, 1961, the Honourable Mr.

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p.1304

Justice Mayers ordered and decreed that the eight consolidated appeals be dismissed, that the assessments be confirmed and that the Appellant pay to the Respondent the taxed costs of the said appeals.

17. The main criticisms of the learned Judge's judgment are:-

(1) That he failed to consider the question of fraud or gross or wilful default in relation to each year of assessment as the relevant statute required;

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(2) that in wholly rejecting the "capital worth" method of computation he failed to pay any, or any sufficient, regard to the burden of proving fraud or wilful default which lay with the Respondent;

(3) that in accepting the assessable income was as set out in the assessments and in wholly rejecting the calculations based on the "capital worth method" his conclusions were contrary to the weight of evidence; and,

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(4) that having wrongly construed the provisions of the 1958 Act he failed to exercise the judicial discretion committed to him to reduce or remit the penalty element in the tax additionally charged by the Respondent.

p.1308

18. On the 20th February, 1962, the Appellant appealed to the Court of Appeal for Eastern Africa at Nairobi against the whole of the Supreme Court's Judgment and Decree.

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19. The appeal was heard by the Court of Appeal for Eastern Africa (Gould, Ag. P., Crawshaw, Ag. V-P. and Edmonds, J.) on the 15th, 16th, and 17th July, 1963: and on the 24th August 1963, judgment, with which Crawshaw, Ag. V-P., and Edmonds J., agreed, was given by Gould, Ag.P.

p.1351-1353,
1.11

20. After a brief review of the facts, the learned Acting President dealt with the Appellant's contention that the 1958 Act did not apply to the appeals. He compared the wording of the two Acts and decided that the

p.1355.11.8-9

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- 10 phrase "fraud or any gross or wilful neglect" in Section 105 of the 1958 Act may be slightly wider than the phrase "fraud or wilful default" in proviso (a) to Section 72 of the 1952 Act. He pointed out that the second relevant difference between the Acts is the limitation placed by the later Act on the Court's power to remit additional tax. The Respondent now conceded that he had to show fraud or wilful default to justify assessments which were otherwise out of time, i.e. that the 1952 Act applied for this purpose, but he maintained that the 1958 Act applied to limit the Court's power to remit tax. p.1355.1.28-
p.1356.1.7
- 20 21. The learned Acting President said that the issue depended on whether legal proceedings by or against the Commissioner were pending at the time the Act was published, and he agreed with the Supreme Court that they were not; the consideration given to a taxpayer's objections merely finalises the assessment and cannot amount to proceedings against the Respondent because he himself is the judge. Appeal proceedings commence with the notice of appeal; until then they may be anticipated but are not pending. He was consequently of the opinion that the learned Judge was correct in deciding that he had no power to remit any part of the additional tax though he could, of course, decide whether an omission was due to fraud or gross neglect. p.1356.1.8-
p.1359.1.9
p.1359,11.
21-28
- 30 22. The learned Acting President detailed various reasons given by Mayers, J., for not accepting the "capital worth" system and said that the Appellant had entirely failed to show he was wrong. p.1359.1.29-
p.1361.1.6.
- 40 23. With regard to whether there was "fraud or wilful default" in relation to assessments otherwise out of date Gould, Ag.P., pointed out that the learned Judge's directions to himself with regard to onus of proof had not been challenged. p.1361.11.7-
29
24. He agreed with the learned Judge that nothing turned on the difference in wording between the two Acts since if the Appellant was blameworthy he must be so to a high degree. He thought that Mayers, J., had two main factors in p.1361.1.30-
pp.1362.1.43

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- p.1362.1.44-
p.1363.1.10 mind when concluding that there was fraud or gross or wilful neglect or wilful default on the part both of the Appellant and Nanda in respect of each of the years otherwise out of time. The first and the more important factor was the major discrepancies between the income returned over the relevant years and the true income. Even, the learned Acting President said, if one takes the figure shown in Mr. Thian's second report as the true income the amount returned over the relevant period is only 40% of what it should have been. He referred to the Appellant's explanation that Nanda had filled in the returns after he had signed them, and pointed out that while Nanda had left the country, Shaffie was available and had not been called. He went on to mention various reasons given by the learned Judge for considering the Appellant as unworthy of credit. 10
- p.1363.11.11-
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- p.1363.11.22-
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- p.1364.11.1-
21 25. The second factor which he thought weighed with the learned Judge was the Appellant's claim that certain rentals belonged to his son Gian Singh notwithstanding that he had claimed an allowance in his returns on the ground that Gian Singh had no income. For these reasons the learned Judge had formed the belief that the Appellant knew what Nanda was doing on his behalf and that Nanda would not have made fraudulent returns without the Appellant's complicity. 20
- p.1364.1.22-
p.1365.1.30 26. Gould, Ag. P., did not think the learned Judge could be said to have erred on this point merely because of the submissions made on behalf of the Appellant. Besides, the learned Judge might have relied on Section 100 of the 1958 Act. 30
- p.1365.1.31-
p.1367.1.29 27. The learned Acting President next dealt with specific criticisms of Mr. Easterbrook's additions to Thian's figures beginning with a consideration of the extent to which the Supreme Court's findings could be reviewed:- 40
- p.1367.1.30-
p.1372.1.25 (a) The Grogan Road property. The learned Acting President reviewed references to this property in the oral and documentary evidence and reached the conclusion that the learned Judge's decision was correct.

(b) Round sum creditors. Gould, Ag. P., stated that notwithstanding an error of law by the learned Judge he gave other grounds for his decision which could be supported.

Record
p.1372.1.26-
p.1374.1.17

(c) Legal expenses. In the view of the learned Acting President, the Appellant had not discharged the onus of proof lying upon him except in relation to a few items which must be disregarded as being de minimis.

p.1374.1.18-
p.1375.1.2

10 (d) Stock-in-trade. Gould, Ag. P., pointed out that Mayers, J., thought the stock figure added by Easterbrook might be excessive and considered he was wrong in giving as a reason for making no adjustment the possibility that there were other undisclosed sources of income. He also saw no reason why Easterbrook should have taxed his estimate on 6% of turnover rather than 3%, and considered that the amounts of Shs. 11,000 added back in the five years 1949 to 1953
20 inclusive should be halved. The Court had no power to make a corresponding reduction in the additional tax but the Commissioner had, and would presumably use it. If the Court had had the power he would not have interfered generally with the penalty imposed.

p.1375.1.3-
p.1377.1.17

28. In the result, he would dismiss the appeal (except for the reductions mentioned above) with costs.

p.1377.11.18-
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30 29. Crawshaw Ag. V-P, and Edmonds, J., delivered concurring judgments.

p.1378-9.

30. The criticisms of the judgment of the Court of Appeal are that in sustaining the learned Judge the Court repeated and affirmed the errors of fact and law set out in paragraph 17 above.

31. Final leave to Appeal to the Judicial Committee of the Privy Council was duly given on the 10th February, 1964.

pp.1382-3.

40 32. The Appellant humbly submits that the Order of the Court of Appeal for Eastern Africa should be set aside, except in so far as it directed that the assessments be reduced, and that the matter should be remitted to the Supreme Court

p.1380

for the following among other

R E A S O N S

1. BECAUSE the primary question was whether the Appellant had omitted income in making his return of income for each of the years of assessment under appeal;
2. BECAUSE the learned Judge did not direct himself adequately to this question; and,
3. BECAUSE the learned Judge's decision in this behalf was contrary to the weight of evidence; 10
4. BECAUSE the learned Judge failed to appreciate that the assessments were based on excessive figures; and/or,
5. BECAUSE the learned Judge misdirected himself with regard to the tests to apply in considering the evidence;
6. BECAUSE the question whether assessments for years prior to 1951 could validly be made on the Appellant fell to be decided under the East African Income Tax (Management) Act 1952 and the learned Judge was wrong in holding to the contrary; 20
7. BECAUSE in any event the assessments having been made (as was conceded) under the East African Income Tax (Management) Act, 1952 no additions of tax, by way of penalty, could validly be made for any year prior to 1951.
8. BECAUSE the question whether the Appellant had committed fraud or wilful default in making his return of income for each of the relevant years was one of fact and the evidence as found by the learned Judge did not support his conclusion; 30
9. BECAUSE the learned Judge having held as he did that the East African Income Tax (Management) Act 1952 did not apply, failed properly (or at all) to exercise the

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discretion committed to him by that Act
whether or not to reduce or remit pursuant
to Section 78,

10. BECAUSE the Court of Appeal in so far as
they affirmed the learned Judge were wrong
in law.

DESMOND MILLER.

PETER ROWLAND.

BASIL WEBB.

No. 14 of 1964

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE COURT OF APPEAL
FOR EASTERN AFRICA

BETWEEN:

RATTAN SINGH
s/o Nagina Singh Appellant

- and -

THE COMMISSIONER
OF INCOME TAX Respondent

C A S E
FOR THE APPELLANT

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