

IN THE PRIVY COUNCIL

NO. 14 OF 1964

ON APPEAL
FROM THE COURT OF APPEAL FOR EASTERN AFRICA

BETWEEN:

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
15 MAR 1968
25 RUSSELL SQUARE
LONDON, W.C.1.

RATTAN SINGH S/O NAGINA SINGH
Appellant

--and --

THE COMMISSIONER OF INCOME TAX
Respondent

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C A S E FOR THE RESPONDENT

1. This is an appeal brought by leave from the judgment and order of the Court of Appeal for Eastern Africa at Nairobi, Kenya, dated the 24th August, 1963, which substantially dismissed the Appellant's appeal against the judgment and order of the Supreme Court of Kenya dated the 31st July, 1961, dismissing eight appeals against assessments to income tax for the years of income 1946 to 1953 inclusive.

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2. The assessments to income tax were additional assessments of an "estimated" nature arising out of an investigation of the Appellant's affairs by the Respondent. Various questions of fact and of law were involved in the case. The Provisions of the East African Income Tax (Management) Act, 1952 and the East African Income Tax (Management) Act, 1958, (hereinafter referred to as "the 1952 Act" and "the 1958 Act" respectively) were referred to.

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The assessments appealed against were as follows:-

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<u>Record</u>	<u>Year of Income.</u>	<u>Asst. No.</u>	<u>Amended Total Income.</u>	<u>Normal Tax.</u>	<u>Additional Tax.</u>	<u>Total.</u>
			£	Sh	Sh	Sh
	1946	B.90011	3,385	13,058	15,634	28,692
	1947	B.90012	8,135	65,397	78,300	143,697
	1948	B.90013	6,053	39,275	47,024	86,299
	1949	B.90014	7,449	56,959	68,197	125,156
	1950	B.90015	8,100	64,116	76,766	140,882
	1951	B.90017	5,424	32,440	58,261	90,701
	1952	B.90016	14,566	146,611	263,307	409,918
	1953	B.90018	<u>10,914</u>	<u>98,233</u>	<u>176,422</u>	<u>274,655</u>
			64,026	516,089	783,911	1,300,000

or £65,000

3. The facts of the case are set out in detail in the Record and may be summarised as follows:-

(i) The Appellant since 1946 carried on the business of a builder in Nairobi, in the name of his deceased father.

(ii) In the relevant period, he made returns showing an aggregate income of £14,015.

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(iii) In 1956, the Respondent began an investigation of the Appellant's affairs over this period. An accountant acting for the Appellant, Mr. Thian, produced a report for the purposes of the investigation in November, 1956, covering the years 1948 to 1953. At the request of the Respondent's accountant and investigating officer, Mr. Easterbrook, he produced a second report in October, 1957, covering the years 1940 to 1953. The reports were made up from an attempted reconstruction of accounts for the years in question, from meagre records existing and from information obtained from the Appellant and his book-keepers. The second report showed an aggregate income for the years 1946 to 1953 in excess of £35,000.

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(iv) As a result of the second report and his own investigations, Mr. Easterbrook calculated that the additional assessable income was some £64,000 and additional assessments were accordingly issued on 21st May, 1958. On the

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30th September, 1958, the Appellant gave notice of objection to the assessments, on the 4th December, 1958, the Respondent issued notice of refusal and confirmed the assessments and on 31st January, 1959, the Appellant gave notice of his intention to appeal to a judge against the assessments.

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10 4. Parts X to XVII of the 1958 Act (which include sections 101 and 105 thereof) took effect from the 30th December, 1958, the date of publication in the Gazette of the 1958 Act, by virtue of section 1 (1) thereof and paragraph (1) of the Fifth Schedule. Section 1 (1) provides that the Act, should be deemed to have come into operation on the 1st January, 1958, subject to the provisions of the Fifth Schedule, paragraph 1 whereof provides inter alia -

20 "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:

30 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 -

(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;"

40 5. The question arose in both the Supreme Court and the Court of Appeal whether the 1952 Act or the 1958 Act was applicable to the appeals. The point still has significance in the following respects -

(i) The 1952 Act, unlike the 1958 Act, confers upon the Court, as well as upon the Commissioner, the power to reduce

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additional tax imposed upon the omission of income from a return, in certain circumstances;

(ii) While under the 1952 Act, the Commissioner shall remit all or part of additional tax imposed if satisfied that the default, failure or omission was not due to "fraud or gross or wilful neglect", the equivalent words in the 1958 Act are "fraud or gross neglect".

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6. The following are the relevant provisions of both Acts -

(i) The 1952 Act:

"40. (1) Any person who -

(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

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

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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 "

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"or 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.

10 72. 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
20 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 apply to such assessment or additional
assessment and to the tax charged thereunder:

Provided that -

(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
30 that person at any time:

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, may appeal against the assessment to a judge

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

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

(ii) The 1958 Act:

101. (1) Any person who -

(a) 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 year of income; or

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(b) omits from his return of income for any year of income any amount which should have been included therein or claims any personal allowance to which he is not entitled, where such omission or claim 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;

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

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(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.

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

"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, claim, 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, claim, default or omission was not so due, then the whole of the additional tax so charged shall be remitted.

(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.

105. (1) An assessment may be made under section 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:

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

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

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

7. In the Supreme Court, the appeals were argued on the basis that the applicability of the 1952

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Act or the 1958 Act was governed by the question whether the case fell or not within the provisions of paragraph (a) of the proviso to paragraph 1 of the Fifth Schedule to the 1958 Act.

8. In the Court of Appeal, however, the Respondent conceded that as Parts X to XV of the 1958 Act took effect only from the 30th December, 1958, an additional assessment imposed earlier than that date must be based on the law then existing, that is, upon section 72 of the 1952 Act, with the result that the onus lay upon the Respondent to show the assessments were not time-barred by virtue of "Fraud or wilful default". The concession did not extend to the power of the court to remit additional tax, being a matter arising after the 30th December, 1958, so that this question remained in issue in the Court of Appeal.

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9. In both the Supreme Court and the Court of Appeal, the question was argued whether at the date of publication of the 1958 Act, the 30th December, 1958, "legal proceedings by or against the Commissioner.....(were) pending". The Appellant contended that on the date of refusal of the Appellant's objection (4th December, 1958) at the latest, proceedings against the Commissioner were pending, the assessments, objections, and refusal of objections all being steps in the due process of law, a process of determination of legal rights, and that the context of the two Acts required such a construction of the words "legal proceedings". The Respondent argued that in their ordinary, natural meaning, the words referred to judicial or quasi-judicial proceedings, that the Commissioner's duty of assessing and deciding upon objections is administrative and not quasi-judicial, and that legal proceedings had not been commenced by the Appellant until he gave notice of appeal to a judge, which was one day after publication of the Act.

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10. In the Supreme Court, Mayers J. held that there were no legal proceedings pending at the date of publication of the 1958 Act, for the reasons -

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(a) that the legal proceedings must be by or against the Commissioner who cannot be a judge in his own cause, so that the objection cannot be a proceeding against him; and

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(b) that it could hardly be said that in the case of every assessment, legal proceedings are pending until the time for objection has expired.

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11. In the Court of Appeal, the Appellant relied on Smith v. Williams [1922] 1. K.B. 158 but Gould Ag. P. thought the case held no analogy, as the same point had not been argued in that case. The Appellant also cited Runciman v. Smyth & Co. [1904] 20 T.L.R. 624, which Gould Ag. P.

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considered had little applicability to the present case being concerned with the words "legal proceedings" in the context of the Merchant Shipping Act, 1894. However, the learned Acting President commented that the case dealt with the concept of enforceability, pointing to proceedings against the Commissioner which comprise a process of law whereby a right claimed against him can be enforced. This would include, His Lordship thought, a right to have an assessment set aside or reduced, but not preliminary arguments, negotiations or procedure incidental to the fixing of the tax liability. As to the meaning of the word "pending", the Respondent contended that legal proceedings were pending when commenced. Counsel referred to the distinction between proceedings that are "pending" and "imminent" in the Administration of Justice Act, 1960, and between proceedings that are "pending" and "anticipated" in the (English) Evidence Act, 1938.

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12. Gould Ag. P. agreed with the first reason of Mayers J. and thought the second was a logical consequence of it. He held that the normal meaning of the phrase "legal proceedings", apart from context, is court proceedings. He could not accept that legal proceedings commence when the

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amount of tax liability is put in issue by objection and a notice of rejection, and that these steps were not proceedings but in the nature of negotiation, and merely make final the assessment. His Lordship considered that the only proceedings that could be brought "against" the Commissioner are those brought before some other person or tribunal legally empowered to interfere and settle the issue between the Commissioner and the taxpayer, and that the proviso to paragraph 1 of the Fifth Schedule does contemplate interference with existing rights and liabilities in some circumstances. Gould Ag. P. held, then, that Mayers J. was correct and had no power to remit or mitigate the additional tax, although he could decide under section 101(5) of the 1958 Act whether the failure, default or omission was due to fraud or gross neglect.

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13. Ground 8 of the Memorandum of Appeal to the Court of Appeal contains the contention that Mayers J. did not draw the correct inferences from the evidence before him. At the hearing in the Supreme Court, the Appellant adduced evidence including that of Mr. Blackhall, an accountant, who produced a new report on the Appellant's affairs, estimating his income to be substantially less than Mr. Thian had. Mr. Blackhall had used what is known as the "capital worth" system commonly used in back duty-cases, in making up the report. This system consists of deducting the value of assets at the opening date of the period from the value of assets at the closing date, and after deducting capital items, adding personal drawings and other non-deductible expenditure, and making other necessary adjustments, attributing the net accretion of assets over the period to income from unspecified sources. If the period extends over more than one year, the income must be apportioned among the years involved. In the Supreme Court, Mayers J. agreed, as did the Respondent, that the capital worth system had great merit, but considered that it was of little assistance in this case because it depends upon the accuracy and completeness of the investigation, the existence of records of a satisfactory nature and the reliability of information extracted. These factors were not present and Mr. Blackhall did not impress

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10 Mayers J. as a person likely to conduct such an examination with thoroughness or efficiency. From the evidence of the Appellant himself, Mayers J. considered it unlikely that even the most thorough of accountants could easily obtain from him an accurate assessment of his personal expenditure. His Lordship relied on a number of matters affecting the Appellant's veracity, in reaching this view. In the Court of Appeal, Gould Ag. P. held that, whether or not the findings of Mayers J. as to the value of the capital worth system in this case and also the report prepared by Mr. Blackhall, were open to review, the Appellant had entirely failed to show that Mayers J. was wrong in any respect.

20 14. In view of the above concession of the Respondent in the Court of Appeal, the right of the Commissioner to assess after seven years fell to be determined by the question whether "fraud or wilful default" had been committed by the Appellant, in terms of section 72 of the 1952 Act. Mayers J. adverted to the burden of proof in this matter and referred to a dictum of Denning L.J. in Bater v. Bater [1950] 2 All E.R. 458, that the degree of proof necessary to establish fraud is higher than the proof in civil cases normally but not as high as the standard in criminal cases. His Lordship also referred to section 113(c) of the 1958 Act, 30 providing that the onus of proving that an assessment is excessive is on the person assessed and said that the degree of proof required is far lower than that required to show fraudulent omission of income. These directions of Mayers J. to himself were not the subject of challenge in the Court of Appeal.

40 15. Although the circumstances in which an assessment may be made later than seven years after the year to which it relates, have been changed from "fraud or wilful default" in the 1952 Act to "any fraud or gross or wilful neglect" in the 1958 Act, neither Mayers J. nor Gould Ag. P. thought there was any significance in the distinction, in this case. Mayers J. considered that the provisions of the 1952 Act or the 1958 Act would apply, if at all, with equal force.

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Gould Ag. P. thought that the circumstances were such that if the Appellant were blameworthy he must be so in high degree. Mayers J. relied on the explanation of the term "wilful default" in In Re Young and Harston's Contract [1885] 31 Ch. D. 168.

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16. In the Supreme Court, Mayers J. found that the Appellant's evidence that he signed income tax return forms in blank and did not verify them after they were completed by another person, that he likewise signed the accounts which accompanied the returns without checking them beyond a simple enquiry as to their accuracy, difficult to believe and "wholly incredible". He

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further found the discrepancies between the income returned by the Appellant's book-keeper, one Nandha, and later figures revealed in Mr. Thian's first report, too great to be attributable to genuine mistake. Mayers J. also held that the claim for an allowance in respect of the maintenance of Gian Singh, (a son of the Appellant) and the declaration that Gian Singh had no income (when rentals omitted from the returns were claimed to be properly the income of Gian Singh) could not be honest. His Lordship did not believe that the Appellant was ignorant of what Nandha was doing on his behalf nor that Nandha would have made fraudulent returns without the complicity of the Appellant. In his view, the Appellant had committed fraud in relation to each of the years in question. But his Lordship considered that, even if he were wrong in disbelieving that the Appellant had wholly entrusted his affairs to Nandha, his failure to check the accuracy of the returns in itself constituted "gross neglect" in relation to income tax, and he pointed out that the necessary fraud or gross or wilful neglect may be committed by a person other than the taxpayer. The claim and declaration in respect of Gian Singh, His Lordship commented, were made by Nandha either upon or without information from the Appellant, in the former case constituting fraud or in the latter, gross negligence. These findings were based upon the applicability of the 1958 Act, but Mayers J. went on to hold that his conclusion would apply with equal force if the 1952 Act properly applied, and that the actions

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of the Appellant amounted to "wilful default". For the foregoing reasons, Mayers J. held that, not merely upon a preponderance of probability, but beyond a reasonable doubt, the Appellant and Nandha committed fraud or gross or wilful neglect or wilful default in relation to each year in which the assessment was claimed to be out of time and that each assessment was therefore made timeously.

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10 17. In the Court of Appeal, Gould Ag. P. considered that in relation to these matters, the judgment should be sustained on the question of the appellant's complicity and that it was unnecessary to go into his responsibility for the actions of Nandha. He referred in addition to the Appellant's certificate of disclosure and the subsequent discovery of two unrevealed bank accounts, to his swearing of a false estate duty affidavit in the estate of his deceased father, to the findings of Mayers J. of the unreliability of the Appellant's version of his personal expenditure and the falsity of his allegation of an advance to the business by his wife. In the Court of Appeal, the only submission of the Appellant in relation to these matters was that because of his lack of knowledge of the English language, the Appellant should have been believed in saying that he was ignorant of these matters and had relied entirely on his bookkeeper. Gould Ag. P. commented that the business was not a large one, that it had been carried on most successfully in spite of any ignorance of the English language, and that Mayers J. had heard a mass of evidence about the business including evidence from the Appellant, whose demeanour he had had a full opportunity of observing. There was no challenge by the Appellant in the Court of Appeal of the evidence upon which Mayers J. based his conclusions of the Appellant's dishonesty and Gould Ag. P. did not find that the general submission urged by the Appellant persuaded him that Mayers J. had erred in any way in these findings. He further pointed out that Mayers J. could have additionally relied upon section 62 of the 1952 Act, or section 100 of the 1958 Act, providing that any person signing a return shall be deemed cognisant of its contents. Although not finding it necessary to deal with the second part of the findings of Mayers J. on this aspect of the case, Gould Ag. P.

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pointed out that the findings of the learned judge were wide enough to cover the wording of section 101(4) of the 1958 Act, under which additional tax is to be remitted if fraud or gross neglect is negatived.

p.1366 18. In the Court of Appeal, the Respondent objected to certain grounds of appeal relating to specific additions made by Mr. Easterbrook to the income of the Appellant as shown by Mr. Thian's second report, upon the ground that section 113(c) of the 1958 Act, prohibits an appeal on findings of fact unless such findings are perverse or unsupported by evidence. Gould Ag. P. however considered that the word "perverse" was too narrow and referred to Edwards v. Bairstow and Harrison [1955] 36 T.C. 207, and cited a passage from the speech of Lord Radcliffe at p.229. His Lordship went on to refer with approval to the judgment of Sinclair v. -P. in the Court of Appeal for Eastern Africa in Sheikh Fazal Ilahi Noordin Charitable Trust v. Commissioner of Income Tax [1957] E.A.L.R. 616, in which he said at P. 624, that a finding of fact could not be interfered with unless there is no evidence to support it or it is unreasonable having regard to the evidence. Although Edwards v. Bairstow and Harrison was not cited to Sinclair V. -P. in that case, Gould Ag. P. considered that Sinclair V. -P. was referring to conclusions as distinct from primary facts, and that this approach was similar to that conveyed by Edward's case. Gould Ag. P. finally quoted Income Tax Law and Practice by Plunkett and Newport (29th Edition) at para. 363, where it is put that the Commissioners' view of the facts should not be interfered with by the High Court unless there was no evidence to support their conclusions or they are wholly inconsistent with the facts as found in evidence. The learned Acting President did not consider that the Appellant was prevented from raising the issues of fact referred to, although he commented that the above principles should be borne in mind in considering the specific matters raised by these grounds of appeal.

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19. The first of these specific matters related to a plot of land purchased by the Appellant in Grogan Road, Nairobi, on part of which he had built a shop and on the remainder, a house and store for himself. He sold the shop and appurtenant land, the Respondent claiming this to be a transaction on revenue account and charging the profit to income tax. In the Supreme Court, Mayers J. held that the Appellant had correctly treated the surplus of the proceeds of the sale over expenditure, as a capital increment, but that, as a consequence thereof, the cost of that part of the plot and of constructing the building, were not moneys expended for the purpose of earning income, were not therefore deductible expenses and must be added back for income tax purposes. There was no cross-appeal by the Respondent against the finding that the sale of the shop and land was a capital transaction. In the Court of Appeal, the Appellant contended that the findings of Mayers J. did not reflect the actualities of the situation. In reviewing the evidence, Gould Ag. P. referred to the evidence of Mr. Easterbrook on the topic, and to the first and second reports of Mr. Thian, saying that the evidence showed that the cost of both buildings was Sh 183,200 but that only the sum of Sh 60,000 had been included in Mr. Thian's first report and that in his second report Mr. Thian had added in a further Sh 127,091, which could be assumed to include this deficiency. The learned Acting President pointed out that had Mr. Easterbrook opened his calculations by including Mr. Thian's amendment, the Appellant would have been correct in claiming that the cost of both buildings had been added to his taxable income. However, he continued, Mr. Easterbrook had used the accounts accompanying the first report as a basis and made his own adjustments. His Lordship found that Mr. Easterbrook had taken the surplus of the agreed value of the Appellant's house over the amount attributed thereto in the first report, had added the legal costs and the whole cost of the land less the deposit allowed for in the report, arriving at an amount of Sh 51,320, the sum added back in 1950. This sum did not include the cost of constructing the shop premises, so that if the profit of Sh 80,000 on its sale should be treated

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as capital, the Sh 100,000 expenditure must be added back to income, which would more than cover the amount of profit charged to income as revenue gains. Gould Ag. P. found that Mayers J. was correct in his ruling on this point.

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20. In the computations of Mr. Easterbrook, appeared a number of amounts under the heading "Round sum creditors unexplained", totalling in all Sh 55,980. (Gould Ag. P. considered that Mayers J. had by inadvertence mentioned this sum in his judgment as Sh 44,000.) Mayers J. said these items were contracts shown in round figures, and without details, in the Appellant's books. On being pressed by Mr. Easterbrook to obtain verification by the other contracting parties as to the amounts said to be due to them, the Appellant stated he would not do so as some were dead and he did not intend paying the others. The Acting President considered that the recording of Mr. Easterbrook's evidence as being that the Appellant had said he did not intend paying those who had died, was an inaccuracy. Mayers J. held that the professed intention of the Appellant not to pay those debts would in itself deprive them of their character as deductible expenses and that, in any event, by the failure of the Appellant to justify them the preponderance of probability was that the liabilities to which they purported to relate, had never existed and that they were fictitious entries in the books. In the Court of Appeal, Gould Ag. P. held that Mayers J. was wrong in law in finding that such intention not to pay the creditors destroyed the character of the items as deductible expenses. The Respondent did not contend to the contrary but claimed that the finding should be supported for the second reason. As Mayers J. had referred to it as a "conclusion" Gould Ag. P. was satisfied that the learned judge intended it to be a firm finding and that the Appellant had not shown any reason for interference with it. It would have been sufficient, His Lordship considered, to deal with the matter on the basis that in failing to verify the items, the Appellant had not discharged the onus upon him.

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21. In the Supreme Court, the learned judge considered an advocate's bill of costs, that

had been produced at a late stage in the negotiations, in an endeavour to support the Appellant's claim to the deduction of Sh 36,506 as legal expenses. Mayers J. considered that some of the items in the bill did relate to deductible expenses and others might or might not. He was unable to say what amount ought to have been allowed and did not allow the appeal in this respect. The Appellant urged in the Court of Appeal that any items appearing to Mayers J. to be revenue expenses should have been allowed by him. Gould Ag. P. said that it is insufficient for an appellant to produce a bill extending over a number of years, asking the Court to read it and make a guess, and pointed out that, even at that stage, the Appellant had tendered no list of items which would speak for themselves. He mentioned that in evidence Mr. Easterbrook had conceded the validity of a few small items as deductions, each under Sh 20, and said that the maxim de minimis non curat lex applied to them, the Appellant's onus not having been discharged in the case of all the others.

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22. The Appellant challenged, both in the Supreme Court and in the Court of Appeal, the estimates of Mr. Easterbrook as to the stock-in-trade of the Appellant's business. In the Supreme Court, the Appellant had also contested the figures for work in progress, but abandoned this on further appeal. In his first report, Mr. Thian had retained throughout the years dealt with, a figure of Sh 20,000 representing stock-in-trade. Mr. Easterbrook added an arbitrary amount of Sh 11,000 in each of the said years, resulting in an aggregate increase over the whole period of Sh 55,000. However, the Respondent accepted a factual valuation of stock as at 31st December, 1957, of Sh 13,631. In the Court of Appeal, the Appellant contended that Mayers J. should have been persuaded by this fact that the Respondent had taken an exaggerated estimate of the stock, and should have reduced the assessments accordingly. Mr. Easterbrook had in evidence said that no stock records had been kept but that he had based his estimate upon figures for comparable businesses, taking a figure of 6% of turnover for the year 1953 and spreading the resultant increase of Sh 55,000

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back over five years to give a more advantageous result for the taxpayer. Mayers J. considered that the amount added back was excessive but declined to interfere with the assessment for that reason, because in his view, it was not sufficient for the taxpayer in such a case to show that any particular item or items had been wrongly included by the Commissioner but that he must show what his true total income for the years in question was, in order to discharge his onus of showing the assessment complained of to be excessive. Mayers J. was not satisfied that the Appellant had done so and that he did not in fact have other undisclosed sources of income not yet revealed. He would not therefore allow the appeal in respect of this matter, saying that he was not confident that Mr. Easterbrook's estimate was vastly excessive and that he had no material before him by which he could determine how excessive it was in relation to any particular year. Gould Ag. P. held that Mayers J. misdirected himself in taking into account the possibility of other undisclosed sources of income, mentioning that no authority was cited, or known to him, in support of such a proposition, and that the learned judge should have made a reduction for any item he considered to be excessive. The learned Acting President therefore allowed the appeals, on this point, reducing the amount added back, arbitrarily, from Sh 55,000 to Sh 27,500, spread over five years, in amounts to Sh 5,500 each. As the additional tax, amounting to approximately 150% was well below the maximum the reductions did not render any part of the additional tax beyond the Commissioner's jurisdiction. The learned Acting President did not consider that Section 101 (5) of the 1958 Act conferred any power upon the court to order a proportionate reduction in the additional tax, although subsection (6) empowered the Commissioner to do so and His Lordship anticipated that he would do so.

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23. The Learned Acting President added that in case his opinion that the 1958 Act applied to the appeal were wrong, it was not a case where he would interfere generally with

the penalty imposed by the Respondent, commenting that a consideration of the Appellant's lack of English may well have been taken into account, as the maximum penalty had not been imposed. Mayers J. considered the Appellant to be thoroughly dishonest and Gould Ag. P. found no reason to differ from that view.

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10 24. Save that he ordered the assessments for the years of income 1949 to 1953 inclusive to be reduced by the sum of Shs. 5,500 each, the learned Acting President dismissed the appeal.

25. Crawshaw Ag. V-P. and Edmonds J. both agreed. p.1378

26. An order granting final Leave to the Appellant to appeal to Her Majesty in Council was made on the 10th February, 1964. p.1382

27. It is submitted that this appeal raises three issues:-

20 (a) Whether Mayers J. made any error in law in holding that the assessments for 1946 to 1950 (being assessments made more than seven years after the expiration of the years of income to which they related) were validly made.

(b) Whether Mayers J. made any error in law in holding that the Appellant had failed to prove that any of the assessments were excessive. (The adjustment ordered to be made by the Court of Appeal in respect of trading stock is accepted).

30 (c) Whether Mayers J. made any error in law in holding that he had no power to remit the additional tax charged.

28. The Respondent humbly submits that the decision of the Court of Appeal for Eastern Africa is right and should be affirmed with costs for the following amongst other

R E A S O N S

1. BECAUSE on the facts proved in evidence Mayers J. could properly find that fraud or

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wilful default had been committed by or on behalf of the Appellant in connexion with or in relation to tax for each of the years of income 1946 to 1950 and accordingly made no error in law in holding that the assessments for those years were not out of time.

2. BECAUSE the onus of proving that the assessments were excessive was on the Appellant and (subject to the adjustment ordered to be made by the Court of Appeal in respect of trading stock) Mayers J. made no error in law or on a question of mixed law and fact in holding that the Appellant had failed to discharge the onus. 10
3. BECAUSE the decision of Mayers J. in relation to (i) the Grogan Road property, (ii) the unexplained round sum creditors and (iii) the legal expenses was a decision on questions of fact and raises no question of law or of mixed law and fact. 20
4. BECAUSE in the alternative the decision of Mayers J. in relation to each of the specific matters referred to was correct in law.
5. BECAUSE the decision of Mayers J. in relation to the additional tax charged was properly made with reference to the 1958 Act and correctly confined to the question as to whether or not the failure, default or omission which gave rise to the charge was due to any fraud or to any gross neglect. 30
6. BECAUSE on the facts proved in evidence Mayers J. could properly find that such failure, default or omission was due to fraud or gross neglect and accordingly made no error in law in holding that the additional tax charged was validly assessed and could not be remitted by him. 40

7. BECAUSE even if the 1952 Act authorised the remission of additional tax charged, the view expressed by Gould Ag. P. should be followed that this is not a case where any discretion should be exercised in the Appellant's favour.
8. BECAUSE in the circumstances of this case the additional tax charged does not fall to be reduced merely because the assessments have been reduced.
9. FOR the reasons given in the judgment of Mayers J. in the Supreme Court of Kenya (subject only to the assessments being reduced as directed by the Court of Appeal).
10. FOR the reasons given in the judgment of Gould Ag. P. in the Court of Appeal for Eastern Africa.

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H.H. MONROE.

P.J. TREADWELL.

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 RESPONDENT

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